



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CLAIM NO. CACT2021CR00148

BETWEEN REGINA CROWN
AND ANDREA GORDON DEFENDANT

Mrs. Andrea Martin-Swaby Deputy Director of Public Prosecution for the Crown

Mr Vincent Wellesley for the Defendant

Sentence: Plea – Guilty – Larceny as a servant (3 counts) – Breaches of Section 4(1) of the Cybercrimes Act (3) counts –Breaches of the Proceeds of Crimes Act (7) counts

Heard: 29th of April and 31st of May 2021.

Shelly Williams, J

Background

[1] The defendant was employed to the National Commercial Bank (the bank) as a manager at the Operations Branch. She had been employed to the bank for thirty years. In her capacity as an employee and a manager of the bank she was issued with a unique access code which she used when undertaking transactions. Enquires were made by Mr Richard Hines, who is the manager of the Fraud Unit of the bank, as to the use of the defendant's code in relation to a

number of transactions where funds were withdrawn from the bank's internal account.

[2] Pursuant to these enquires, Mr Richard Hines visited the office of the defendant to speak to her about transactions that were of concern to him. The defendant started to cry and indicated to him that she had indeed misappropriated sums from the bank's internal account. The matter was reported to the police and the defendant was arrested and charged.

[3] The defendant pleaded guilty to an indictment containing thirteen counts. The defendant pleaded guilty to the following offences: -

- a) Three counts of Larceny as a Servant contrary to the Larceny Act. In count one she was indicted for stealing \$24,522,217.47 from the bank, in count two she is indicted for stealing \$202,152 from the bank and in count three she is indicted for stealing \$7,076,082.36 from the said bank.
- b) Three counts of access with intent to commit an offence to wit, Larceny by a Servant contrary to the Cybercrime Act 2015. These counts are related to the method by which the defendant transferred funds from the bank's internal account i.e. through the bank's computer system.
- c) Seven counts of engaging in a transaction that involves Criminal Property contrary to the Proceeds of Crime Act i.e., -
 - i. In count seven a transaction where the defendant purchased clothing and accessories through Purple Couriers Limited valued at \$83,000.00 knowing that this property was derived from the offence of larceny as a Servant.

- ii. In count eight a transaction where \$70,000.00 was transferred to a third party for repairs to a home at Nightingale Drive, Bushy Park knowing that this property was derived from the offence of Larceny as a Servant.
- iii. In count nine a transaction where the defendant deposited \$81,500 into an account for the purchase of clothing knowing that this property was derived from the offence of Larceny as a Servant.
- iv. In count ten a transaction where the defendant deposited \$12,000 into an account at the bank for the purchase of Gibson Relay tickets which was derived from the offence as Larceny as a Servant.
- v. In count eleven a transaction where the defendant transferred of \$24,000 into an account of two individuals knowing that this property was derived from the offence as Larceny as a Servant.
- vi. In count twelve a transaction where the defendant facilitated cheques drawn on an account in the sum of \$8,900,000.00 knowing that this was property derived from the offence of Larceny as a Servant.
- vii. In count thirteen on diverse days between January 1st 2017 and 30th of May 2020 the defendant facilitated the preparation of cheques drawn on an account to be paid to various business places knowing that this property was derived from the offence of Larceny as a Servant.

[4] On the 29th of April 2021 the defendant pleaded guilty to the abovementioned offences. A Social Enquiry Report and an antecedent report were requested.

[5] In approaching sentencing I took into consideration the relevant Statutes, the Sentencing Guidelines launched in January 2018 as well as case law.

The Statutes

[6] There are three statutes that are relevant in relation to offences that the defendant pleaded guilty to. They are the Larceny Act, the Access to Information Act and the Cybercrime Act 2015.

The Larceny Act

[7] The defendant was indicted for three counts of Larceny as a servant which is contrary to Section 22 of the Larceny Act. Section 22 of the Larceny Act states that: -

Every person who-

(1) being a clerk or servant or person employed in the capacity of a clerk or servant –

(a) steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer; or shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding ten years.

Access with intent to commit an offence.

Cybercrimes Act 2015

[8] The defendant is charged with three counts of Access with intent to Commit an Offence, which is contrary to Section 4(1) of the Cybercrime Act. On conviction for an offence under this act the possible penalties for these offences as detailed in Section 4(4) of the said act are –

- (i) a fine or imprisonment for a term not exceeding five years or to both such fine or imprisonment: or
- (ii) if any damage is caused as a result of the commission of the offence, a fine or imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

Proceeds of Crime Act

[9] The defendant is also charged for seven counts of Engaging in a Transaction that involves Criminal Property which is contrary to Section 92(1) of the Proceeds of Crime Act.

[10] On conviction for this offence the possible penalties are detailed in Section 98 of the said Act are: -

- (i) in the case if an individual, to a fine or imprisonment for a term not exceeding twenty years or to both such fine and imprisonment;
- (ii) in the case of a body corporate, to a fine.

Discount

[11] The defendant pleaded guilty to these offences and as such may be entitled to a discount. Section 42(D) of the Amendment to the Criminal Justice Administration Act sets out a tiered system of the possible discounts that may be granted to this defendant. These include: -

- a. Up to a fifty per cent discount if the defendant pleads guilty at the first relevant date.
- b. Up to a thirty-five per cent discount if the defendant pleads guilty, not at the first relevant date, but before the start of the trial.
- c. Up to a fifteen per cent discount if the defendant pleads guilty after the start of the trial.

[12] In granting these discounts, the court should have regard to certain considerations that are detailed in Section 42 (H) of the said act. These considerations are: -

- a) *Whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;*
- b) *The circumstances of the offence including its impact on the victims;*
- c) *Any factors that are relevant to the defendant;*
- d) *The circumstances surrounding the plea;*
- e) *Where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;*

The defendant did enter a guilty plea at the earliest date in the Circuit Court and as such will be awarded a discount in this case.

The Sentencing Guidelines

[13] The Sentencing Guidelines that were launched in January 2018 do not directly assist in relation to the sentencing of these offences. There is some reference to the Larceny Act in the Guidelines but there is no specific reference to the offence of Larceny as a Servant. There are two other offences under the Larceny Act that carry a similar maximum penalty of ten years which are Larceny from the dwelling and Embezzlement by officer of the post office. For these offences the suggested starting point is four years and the suggested range is between three and eight years. I appreciate that these are different offences but I will give some consideration as to their suggested range and starting point. I take into consideration that these offences carry similar penalties and may be viewed as being similarly serious.

- [14] The Cybercrime Act is not mentioned in the Sentencing Guidelines so will not assist in relation to the sentencing in this case.
- [15] The offences under the Proceeds of Crime Act are not detailed in the Sentencing Guidelines either. The maximum penalty for this offence is twenty years so the legislators consider this to be a serious offence. The only assistance given is by means of other offences that carry similar penalties such as Sections 3 and 4 of the Law Reform Fraudulent Provisions Transaction Act. For these offences the maximum penalty is 20 years. The starting point for those offences is seven years with the range being between 5 to eight years. I will give some consideration to the suggested range and starting point of these offences.

Case Law

- [16] A central issue in this case is the fact that the defendant, who was employed to the bank utilised the bank code provided to her to access the internal account of the bank to remove funds. This was a breach of trust. In sentencing the defendant, I take into consideration the decided cases on breach of trust and the approach adopted in them. The case of **R v John Barrick** 1985 Crim App R 78 is quite helpful as to the approach to be taken in this case.
- [17] In that case, John Barrick who was 41 years old at the time was convicted on four counts of false accounting, four counts of obtaining by deception and two counts of theft. He was sentenced to two years imprisonment on each count to run concurrently. He appealed against sentenced by leave of the single judge. The Chief Justice in delivering the Judgment stated: -

the type of case with which we are concerned is where a person in a position of trust, for example, accountant, solicitor, bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain,

again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that means in shape of disgrace for himself and hardship for himself and also his family.

[18] The Chief Justice went on to opine that: -

In general, a term of imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £ 10,000 or thereabouts, terms of imprisonment ranging from the very short up to about eighteen months are appropriate (see for example WESTON (1980) 2 Cr. App. R.(S)391). Cases involving sums of between about £10,000 will merit a term of about two to three years' imprisonment. Where greater sums are involved for example those over £ 100,000, then a term of three and half years to four and a half years would be justified (see for example the case of STRUBELL (1982) 4 Cr. App. R.(S)300). In that case, the defendant was employed as an accountant. He pleaded guilty to offences involving – seems over £ 150,000. A sentence of three years' imprisonment was substituted for the five years imposed at trial.

[19] The learned Chief Justice gave some guidance as what is to be taken into consideration *when handing down sentences in these cases.*

The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the proper level of

sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which money or property dishonestly taken was put;(iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners (vii) the effect on the offender himself; (viii) his own history: (ix) those matters of mitigation special to himself such as illness; being placed" under a great strain by excessive responsibility or the like where, as sometimes happens, there has been a long delay say over two years between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally any help given by him to the police.

Time spent in custody

[20] It is now a settled position that the defendant must be given full credit for the time spent in custody. This was stated in the case of **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P, writing on behalf of the court, at paragraph [34] of the judgment, stated the following:

...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

I will reduce the sentence of the defendant by the time spent in custody.

Aggravating circumstances

[21] In sentencing the defendant, I have to give consideration to the aggravating circumstances which include: -

- a. The defendant was in a position of trust.

- b. The sums in question are quite substantial i.e. over \$34 million dollars.
- c. The defendant took the funds over an extended period of time.
- d. The funds were used for personal gain.
- e. The elaborate nature of the attempt to conceal the source of the funds.
- f. This offence may result in the integrity of the bank being undermined as well as loss of confidence in the bank.

Mitigating circumstances

[22] I have also considered the mitigating circumstances relating to the defendant that include: -

- a. The defendant has no previous conviction.
- b. The defendant has a good Social Enquiry Report.
- c. That the defendant pleaded guilty.

The sentence

Counts one to three

[23] After considering the type of offence, the plea in mitigation, my starting point for this offence is 6 years. Due to the aggravating circumstances listed above I will add three years that would increase the sentence to nine years.

[24] Taking into account the mitigating circumstances, I will reduce the sentence by one year for a good Social Enquiry Report and one year due to her good antecedent report which brings the sentence down to seven years.

[25] The Defendant did enter a guilty plea and as such I will grant a discount in this matter. I however have to take into consideration that the evidence against the defendant was overwhelming as: -

- a. She confessed to the withdrawal of the funds to the Manager of the Fraud Unit of the bank.
- b. The unique code that was assigned to her by the bank was utilized in the transactions.

[26] In light of the forgoing, I would only give a twenty percent reduction for her guilty plea. This would reduce her sentence by one year and six and a half months. For ease of calculation I will round it up to one year and seven months, which reduces the sentence to five years and five months.

[27] The sentence is further reduced, taking into account the time she spent in custody which is one month. On count one the defendant is sentenced to five years and four months. She is sentenced to the same time on counts two and three as well.

Counts four to six

[28] The starting point is 3 years. Due to the aggravating circumstances it is increased by three years i.e. to six years.

[29] It is reduced by one year for good Social Enquiry Report and another year for good antecedent report. The sentence is reduced by two years to four years.

[30] The defendant pleaded guilty and she is given a twenty percent reduction that reduces the sentence by one year to three years. The sentence is reduced for the period of time the defendant was in custody which is one month. The defendant is sentenced to two years and eleven months on counts four to six of the indictment.

Counts seven to thirteen

- [31] The starting point in this matter will be 8 years. Due to the aggravating circumstances I will increase the sentence by three years to eleven years.
- [32] I will reduce the sentence by one year for the good antecedent report and once years for good Social Enquiry Report which would reduce the sentence to nine years.
- [33] I will give her twenty percent discount that would reduce the sentence by sixteen months to seven years and six and half months which I will round up to seven years and seven months. Her sentence would be further reduced by her time in custody which is one month. The defendant is sentenced to seven years and six months on counts seven to thirteen.

Conclusion

- [34] The defendant is sentenced to: -

Count One to five years and four months.

Count Two to five years and four months.

Count Three to five years and four months.

Count Four to two years and eleven months.

Count Five to two years and eleven months.

Count Six to two years and eleven months.

Count Seven to seven years and six months.

Count Eight to seven years and six months.

Count Nine to seven years and six months.

Count Ten to seven years and six months.

Count Eleven to seven years and six months.

Count Twelve to seven years and six months.

Count Thirteen to seven years and six months.

The sentences are to run concurrently.