

CITATION: *Police v O'Meally* [2008] NTMC 033

PARTIES: ANDREW LITTMAN

v

SIMONE O'MEALLY

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20703515

DELIVERED ON: 15 May 2008

DELIVERED AT: Darwin

HEARING DATE(s): 13 May 2008

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Sentencing – factors considered – Breach of Trust – Actual term of imprisonment.

R v Bird 56 NTR 17

Jettner v Peach JA 45 of 2002 Northern Territory Supreme Court per Angel J

Rosita Alieta Aoina v O'Brien [1993] Northern Territory Supreme Court per Mildren J

Evans v Davis JA 79 of 2002 Northern Territory Supreme Court per Thomas J

Neilsen v Brennan [2006] NTSC 78

REPRESENTATION:

Counsel:

Crown: Mr Walsh

Defendant: Mr Elliot

Solicitors:

Crown: Director Public Prosecutions

Defendant: Peter Elliot

Judgment category classification: C

Judgment ID number: [2008] NTMC 033

Number of paragraphs: 33

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20703515

[2008] NTMC 033

BETWEEN:

ANDREW LITTMAN
Plaintiff

AND:

SIMONE O'MEALLY
Defendant

REASONS FOR DECISION

(Delivered 15 May 2008)

Ms FONG LIM RSM:

1. The Defendant has pleaded guilty to 7 charges of stealing and 6 charges of falsifying financial records for gain in breach of sections 210 and 233(a) of the Criminal Code. Each offence carries a maximum of 7 years imprisonment as penalty.
2. **Facts** – The Defendant was employed by Crisis Accommodation Gove Inc (CAG) in Nhulunbuy from 17th March 2003 to 1st December 2006. CAG is a not for profit organisation which provides refuge for women and children in the Gove area escaping domestic violence situations. The charter of the organisation is to provide crisis accommodation, emergency relief financial assistance, counselling and court support. CAG is governed by a committee of volunteers and employs a co-ordinator, children's worker and 10 full time and part time support workers. The Defendant was employed as the co – ordinator of the operations of CAG and as part of her duties was responsible for the financial management of the operations. While the Defendant was required to account for all of her spending to the committee she had access

to the organisations credit card and was solely responsible for the production of supporting documentation of expenditure to the committee.

3. The Defendant commenced her offending in August of 2005 when she arranged for a courier to pick up a mobile phone (property of CAG) and some chicken feed (her own goods) and deliver them to Nhulunbuy. Apparently the Defendant didn't understand that there would be an extra charge to pick up the feed however when she received the invoice she realised that there was an extra charge she then formed the intention to get CAG to pay the whole invoice through falsifying records. Later in that month the Defendant used CAG's credit card to purchase a mattress for her own personal use and documented that as a purchase of a mattress for the organisation.
4. In April of 2005 the Defendant made a purchase on CAG's credit card of a personal organiser for use in her employment and then later on that year in December 2005 she gave that organiser to another person who had done some shopping for her as a quid pro quo for the \$400 that friend had spent.
5. On the 1st of September 2006 CAG's system for emergency relief funding was changed requiring the Treasurer to countersign all payments for emergency relief funding. From that day until about the 22nd of November 2006 the defendant got the benefit of amounts of cash and goods out of CAG funds by deceiving the treasurer that they were for legitimate purposes and to cover her crimes she created documentation for non- existent clients. The stories she told the Treasurer to support these claims for emergency relief funding became more elaborate as time passed.
6. The Defendant resigned her position with CAG on the 26th of September 2006 citing ill health and her resignation was to take effect as of the 1st of December. The Defendant offended 6 times between 26th September 2006 and the 1st of December 2006.

7. **Sentencing considerations** - I remind myself the purposes of the sentencing an offender as set out in section 5 of the Sentencing Act and they are to punish the offender, assist the offender in rehabilitation, discourage the offender and others from committing the same or similar offence, make it clear that the community does not approve of the offender's conduct and to protect the community from the offender. Sentencing an offender is an exercise of balancing these considerations against each other and coming out with the appropriate sentence for that offender.
8. The court is also bound to take into account any maximum or minimum penalty prescribed, nature and seriousness of the offence, culpability of the offender, harm or damage caused by the offending, the offenders character, age and intellectual capacity, presence of aggravating or mitigating factors, prevalence of offence, assistance given to law enforcement agencies, pleas of guilt, and time spent in custody. There are other factors set out in section 5 (2) however none of those are relevant in this case.
9. **Nature and Seriousness of the offence and culpability of the offender** – The Defendant has been found guilty of crimes of deception and breach of trust. She has stolen from a charitable organisation of limited funding which provides a much needed service to the community of Gove. Her deception regarding the obtaining of cash and goods for her own personal gain was planned and organised, she had to carefully falsify documents to deceive committee members, and in particular the Treasurer, of the legitimacy of the expenses while all the while accepting a salary for her work. She was virtually in control of the finances of the organisation and was clearly trusted to operate honestly. An example of the trust the organisation had in the Defendant is the willingness by the Treasurer to accept the Defendant's oral explanations of the need for cash cheques for non existent clients even after the system for the use of those sorts of funds had been tightened. The Victim Impact Statement the upheaval the defendant's offending caused in the organisation and the consequences for the organisation's funding from

the government and the clear sense of betrayal the author of that statement felt about being involved in the Defendant's criminal behaviour.

10. Small charitable organisations are particularly vulnerable to this type of offending and unfortunately fall victim to it too often. Often in these organisations, as is the case in the present case, the operational and financial management falls to one person who can easily steal undetected because of the trust that is placed in them.
11. The dependence that society places on these charitable organisations to provide care for those in need in my view makes this sort of offending in such an organisation more serious than an employee stealing from a business.
12. There is no explanation or excuse given by the Defendant of her offending and there is no suggestion that the Defendant did not know what she was doing. She is wholly culpable for this offending.
13. **Character, age and intellectual capacity of the defendant** - The Defendant is clearly an intelligent person having attained university education and having been university lecturer herself. She is also of previous good character. The Court heard evidence from three character witnesses on behalf of the defendant. Ms Talulani, a co-worker of the defendant at CAG who attested to the Defendant's dedication to her work and her willingness to take a hands on approach to the clients. Ms Curtis a lifetime friend of the Defendant who gave evidence of the generous, caring and well meaning person she had known since they were 12 years old and even though she had never worked with the Defendant also gave evidence of her being professional in her work. Ms Curtis also saw herself as a confidante of the Defendant. Ms Myers a friend of the Defendant, which friendship developed in their time in Nhulunbuy and Kalgoorlie, also gave evidence of a caring generous person who gave her expert advice to Ms Myers on the handling of Ms Myers son who had behaviour problems.

14. I have no doubt as to the loyalty of these character witnesses to the Defendant however it is clear she deceived them as to her criminal activities in 2005-2006. All of the witnesses gave evidence that during that time the Defendant was going through a stressful time in her life with her mother having a serious car accident and the competing demands of wanting to be with her mother and her husband's refusal to leave Nhulunbuy because of his career. One of the witnesses even gave evidence of the Defendant clearly being upset at the time, crying over the phone. One of the contributing factors to her distress at the time could of course have been the fact that she was also engaged in criminal activity.
15. I have doubt that prior to this offending the Defendant was of good character and that she has not offended before. It is quite common that the offenders before the courts on this sort of offending are first offenders however that does not take away from the fact that in this case the defendant deliberately went about her offending in a planned and organised way to the detriment to those in need.
16. **Other factors** – the delay in the laying of the charges to which the Defendant eventually pleaded guilty to and the inability of the prosecution to deliver a brief to defence counsel until close to the final hearing date is something that has to be taken into account. The Defendant was faced with something like 168 charges for about 18 months and that must have taken its toll. The Defendant is also entitled to a discount for her eventual plea of guilty. I must also take into account the Defendant has only spent one day in custody in relation to these charges. It is also clear from the evidence that the Defendant has continued to be a productive member of society being presently employed in NSW as a coordinator for the placement of children in need of care into foster homes with a particular emphasis on the most difficult cases. That employment will not be available to her should she be required to spend a period of time in custody.

17. The personal circumstances of the Defendant are that she is 36 years old, presently separated from her husband and the mother of two children aged 10 and 8.
18. **The Law** - Counsel for the prosecution provided the court with a table of comparative sentences which was instructive but of course not binding on the exercise of my discretion. The oft quoted case of R v Bird 56 NTR 17 was provided to me as were several other authorities. The well known quote from Bird's case of the Court of Criminal Appeal, their honours Asche Kearney and Rice JJ, at page 131

“In general, unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment in such cases. The sentence, and that part of it which is directed to be served, must be sufficiently substantial to indicate to the public the gravity of that particular offence. While the amount of money taken is not the only determinant of the length of sentence it is a useful practical indicator.”

is often quoted as authority for the proposition that imprisonment is the starting point for sentencing in these matters.

19. Counsel for the Defence argues that this does not mean that an actual term of imprisonment must be imposed and that the full range of sentencing options are still available to me. I agree with counsel and the cases of Jettner v Peach JA 45 of 2002 Northern Territory Supreme Court per Angel J and Rosita Alieta Aoina v O'Brien [1993] Northern Territory Supreme Court per Mildren J and Evans v Davis JA 79 of 2002 Northern Territory Supreme Court per Thomas J demonstrate this to be the case.
20. In Jettner's case the defendant was first time offender and convicted of 28 thefts over a period of 7 months amounting to \$2805.60, she had two young children, restitution was made and she was not entitled to a discount for a plea of guilty. The organisation the defendant worked for was the Darwin Toy Library. The defendant was sentenced to 6 months with suspended after

serving two months, the court of criminal appeal upheld that sentence confirming the decision not to fully suspend was not in error.

21. In Aoina's case the defendant was employed in the pay section of the Department of Education and was convicted of 6 counts of stealing and 6 counts of falsifying records. The offending took place over 5 months and the amount was \$2450.00. Restitution was paid and the defendant was a first time offender. The defendant was sentenced to 10 months suspended after serving 3 months at first instance and that sentence was upheld by the Supreme Court. The defendant did not plead guilty and was found to have lied to the court when giving evidence
22. In Evans v Davies the defendant pleaded guilty to the theft of \$27.95 and was his offending was opportunistic. The Defendant was relatively young and the employer a large multinational grocery store. The defendant was sentenced to one month imprisonment immediately suspended for 12 months. That sentence was found by Justice Thomas to be manifestly excessive and was set aside for ad conviction and fine. Her honour considered that general deterrence was served by the imposition of a conviction and fine because of the amount stolen being such as small amount, that there was only one act of dishonesty not a series of defalcations and that imprisonment should be a last resort.
23. A further case referred to me was Neilsen v Brennan [2006] NTSC 78. The defendant in that case was an 18 year old employee of an electronic store who over a period of four months stole goods to the value of \$1054.66. He confessed his crime to the management and made full admissions to the police. This defendant was also a first time offender and had taken steps to rehabilitate himself by going back to school. The magistrate at first instance sentenced the young man to two months imprisonment fully suspended for a period of 18 months. The sentence was upheld by Justice Riley although he regarded it as on the upper end of the available range.

24. All of these cases whilst instructive are clearly distinguishable from the present case for different reasons. Significantly Jettner and Aiona did not plead guilty and Aiona lied on oath. The theft in Evans was of a very small amount of cash and both Evans and Neilsen were relatively young offenders with both defendants' offending being of the opportunistic kind.
25. It is my view that in the present case while the value of goods and cash stolen was similar to some of the above mentioned this Defendant's culpability is not tempered by her youth or personal circumstances and her offending was systematic and sophisticated in her deceit of her employer. The fact that her employer was also small charitable organisation makes the amount of money stolen more significant than a similar amount to a larger organisation or company.
26. The Court must send a clear message to the community that the defalcation of the funds of charitable organisations such as CAG is totally unacceptable and will be viewed seriously. These offences are a breach of trust, are hard to detect and can have serious ramifications for the community organisations such as CAG.
27. I note that the prosecution does not urge the court for a custodial sentence for this defendant and has indicated that a fully suspended sentence would not be in error. I also note that the prosecution agrees with defence that my sentencing discretion is not fettered in anyway.
28. In the circumstances of this case it is my view that a term of imprisonment is warranted and should be expected by the community the only real question is whether that sentence should be suspended in part or in full or if home detention is an appropriate option.
29. It has been accepted by Defence that a home detention order is not an available option to this court as the Defendant lives in NSW and it would be impossible to enforce from the Northern Territory.

30. It also should be noted that it is trite law that a suspended term of imprisonment is still as term of imprisonment and that I should consider all of the sentencing factors again when deciding whether I should suspend all or part of the sentence.
31. I accept the evidence of the Defendant's previous good character and her genuine propensity to help others less fortunate than herself. She has continued on that path in her present employment. I also accept that the Defendant is truly remorseful at what she has done and she has demonstrated that by her plea of guilty, her return to Darwin to finalise the matter, and her payment of restitution of the funds to her former employer. I also take into account that in the 18 months since being arrested for these offences the Defendant has continued to be a productive member of society working in an area which sorely needs people of her skill and in that way has rehabilitated herself. Further the Defendant has not re-offended and that is an important factor in considering specific deterrence. These are all factors in favour of a suspended sentence.
32. However, general deterrence should also be of concern in these matters because as I mentioned before small charitable organisations are particularly vulnerable to this type of offending. Others placed in a position of trust with these organisations must be shown that the community does not accept this type of behaviour and it will be dealt with seriously. In this case convictions on all offences and a sentence of substantial imprisonment should serve the requirement for general deterrence. Given that a criminal record for this type of offending would limit a person's ability to be employed in a similar position of trust.
33. In conclusion taking into account all of those factors the Defendant will be convicted on all charges and sentenced to an aggregate term of imprisonment for 8 months suspended forthwith to be of good behaviour for 12 months from today.

Dated this 15th day of May 2008.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE