

# IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 14 of 1999  
Indictment No. 27 of 1997

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Respondent**

**- and -**

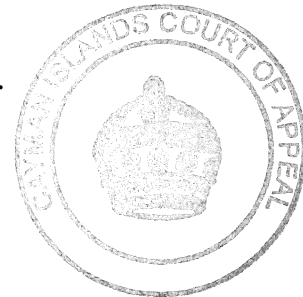
**CHRISTINE ANN PEARSON**

**Appellant**

**BEFORE:** The Rt. Honourable Mr. Justice E. Zacca, President  
The Rt. Honourable Mr. Justice T. Georges, J.A.  
The Honourable Mr. Justice I. Rowe, J.A.

Mr. David McGrath instructed by Quin & Hampson for the Appellant.  
Mr. Anthony Akiwumi for the Respondent Crown.

May 2<sup>nd</sup> 2000



## **REASONS FOR JUDGMENT**

### **ROWE, J.A.**

The Appellant was charged on an indictment with Katrina McLaughlin for conspiracy to steal, contrary to sections 305 and 229 of the Penal Code (1995) Revision. The Particulars of Offence alleged that Pearson and McLaughlin “between the 29<sup>th</sup> day of August 1995 and the 30<sup>th</sup> day of September 1995, in Grand Cayman, together with Margaret “Rita” Nieva Martinez, conspired to steal from CIBC Bank and Trust Company (Cayman) Limited, by dishonestly withdrawing monies

from CIBC clients' accounts and depositing them into accounts owned or controlled by Christine Ann Pearson and/or Katrina McLaughlin”.

Katrina McLaughlin, who was born on August 10<sup>th</sup> 1980, and was just over 15 years when the alleged conspiracy was hatched, had lived with the appellant, her aunt, from the age of 6 weeks and regarded the appellant as her “mother”. Rita Martinez, a Loans Account Assistant employed by CIBC, was a friend of the appellant. Rita Martinez was in financial difficulties. She devised a scheme whereby she would debit the accounts of some CIBC customers and lodge the proceeds in an account at the same bank in a fictitious name closely resembling that of Katrina McLaughlin. She would then obtain drafts from CIBC drawn on the fictitious account. Rita Martinez gave these drafts to the appellant and the appellant lodged them into accounts held at the Cayman National Bank and the British American Bank in the name of Katrina McLaughlin. Rita Martinez also obtained ATM cards from CIBC which both she and the appellant used to withdraw cash from the fictitious account at CIBC. In the period August to September, 1995 in pursuance of the conspiracy, the amount of US\$257,285.71 was siphoned off from clients' accounts at CIBC by Rita Martinez.

At trial Katrina McLaughlin was acquitted. The evidence showed that the appellant had benefited from the conspiracy in a number of ways and that the scheme was only uncovered when the appellant attempted to secure the withdrawal of a large sum of cash from the British American Bank. At the close of the case for prosecution counsel for the appellant made a no case submission. It was over-ruled. That submission has been repeated before us and was the only ground argued as to conviction. There was and could have been little dispute as to the facts. Rita Martinez had pleaded guilty in the Summary Court and she gave evidence for the prosecution at

the trial of the appellant. The evidence for the prosecution was overwhelming that the appellant had facilitated the lodgement of the bank drafts presented to her by Rita Martinez and the jury quite properly rejected her explanation that she thought these sums had been honestly obtained by Rita Martinez.

It was submitted on behalf of the appellant that section 235(1) of the Penal Code (1995) Revision, does not contain all the elements of theft as defined in section 223 of the Penal Code. Theft defined in the Penal Code as dishonestly appropriating property belonging to another. The gravamen of the submissions on behalf of the appellant was that the prosecution had failed to prove that what the appellant and her co-conspirators obtained from CIBC was “property belonging to another”. Counsel for the appellant placed his whole argument on the decision of the House of Lords in Regina v. Preddy (1966) 3 ALL E.R. 481. There it was held that a bank account represents a chose in action and when the account at the bank is debited, that chose in action is reduced or extinguished and a new chose in action is brought into existence representing a debt in a new account. In those circumstances, it could not be said that the defendant who caused the account to be debited had obtained property belonging to another. Mr. McGrath submitted that section 235(1) of the Penal Code is a mirror image of section 15(1) of the Theft Act 1968, of England and Wales, and that as it is not possible to obtain a credit balance by deception, by parity of reasoning, it is not possible to commit theft of a credit balance in a bank. On this submission, the old credit balance was extinguished and was incapable of being “obtained as property of another” and the new credit balance was not property belonging to another.

We do not find that the decision in Preddy is applicable to the facts of this case. In the first place, the statutory provisions in England and Wales on the basis of which Preddy was decided are

different from the statutory provisions in the Cayman Islands and in the second place the charge against the “Property” is defined in Section 3(1) of the Interpretation Law (1995) Revision, to include “choses in action”. The dishonest appropriation of property belonging to another with intent to permanently deprive the other of that property, is the essence of theft. It is a sufficient appropriation of the property of another if the actor destroys that property with the necessary intent. Therefore if a person does an act which has the effect of extinguishing the chose in action of another person, he has appropriated the property of that other within the meaning of section 223 of the Penal Code (1995) Revision. See R. v. Kohn, (1979) 69 Cr App. R. 395.

We are fortified in our view as to the acquisition of the property of another if the property is destroyed at the instant of its acquisition by the decision of the Court of Appeal in R. v. Peter Arnold Hilton [1997] 2 Cr. App. R., where on identical facts as in the instant case, it was held *inter alia*:

“The offence of theft could be committed even though the act of appropriation had the effect of destroying the property which had been stolen. There had been a thing in action which the defendant had appropriated with intention of permanently and dishonestly depriving the owner of it”.

See also the decision of the Court of Appeal of Victoria, Australia, in R. v. Parsons, Appeal No. 131 of 1997, decided on October 24<sup>th</sup> 1997.

In our opinion the learned trial Judge was right to reject the submission of no case made at the conclusion of the prosecution’s case. Therefore the arguments submitted before us on behalf of the appellant on the issue of conviction fail.

The charge in the instant case was one of conspiracy to steal. We have held that there is no merit in the submission that the no case submission ought to have been upheld by the learned trial judge and that is sufficient to dispose of the appeal against conviction. However, having regard to the arguments raised on the authority of Preddy we are prepared to distinguish that case on the basis that the charge as presented, that is to say, conspiracy to steal, all the elements of a conspiracy to do an unlawful act had been pleaded and proved. See R. v. Shivpuri (1987) 1 A.C. 1.

The appellant sought leave to appeal against a sentence of 2 ½ years immediate imprisonment, a compensation order of CI \$3,000.00 in favour of CIBC and CI \$7,000.00 costs.

The prosecution of the perpetrators of this massive fraud followed an unusual pattern. The instigator of the conspiracy, according to the prosecution, was Rita Martinez. She did the paperwork within CIBC, and having obtained the bank drafts passed them to the appellant. Rita Martinez appears to have been the person who had the power to direct how the funds were to be used. Rita Martinez accepted responsibility for her crime at an early stage and she was dealt with in the Summary Court. She received the maximum sentence which that Court could impose and ordered that six months of that sentence be suspended. In addition, Rita Martinez was ordered to pay as compensation to CIBC the amount of CI \$20,427.44 which represented the total unrecovered funds from the criminal enterprise.

The application for leave to appeal against sentence was grounded on the fact that the sentence imposed on the appellant was manifestly excessive having regard to the sentence which had been passed upon Rita Martinez.

It does not appear to us that this is the kind of case which ought to have been dealt with in the Summary Court notwithstanding the acceptance of responsibility by Rita Martinez and her readiness to enter a plea of guilty. The breach of trust perpetrated by Rita Martinez was of an elaborate nature, which, if it had gone unchecked for any extended period of time, could have undermined the efficiency and reputation of the financial institution by which she was employed. It is a crime which should have attracted condign punishment. However, the prosecution adopted a course, which this Court hopes will not be considered a precedent for any future prosecution of a similar offence. That done, the prosecution had set the parameters for which an appropriate sentence could be imposed on the participants in that crime.

We have consistently considered the sentences imposed in England and Wales for roughly similar offences when determining whether a sentence is manifestly excessive. We have advised ourselves that this Court should not tinker with sentences but should only interfere when it can be demonstrated that the sentence imposed is manifestly excessive in the given circumstances. Aggravating and mitigating circumstances of whatever character can affect the sentence in a given case, but the cardinal principle is that the sentence imposed should not be arbitrary and should not leave a defendant with a justifiable sense of grievance due to the disparity of the sentence imposed in any given case.

The appellant elected to take her case to trial. There can be no penalty for that election. She had a fundamental right to seek a trial. At the end of the day, the trial judge assessed costs against her in the amount of CI \$7,000.00. We affirm that assessment.

On any assessment of the respective roles of Rita Martinez and the appellant in the criminal conspiracy upon which they embarked, Rita Martinez was instigator and director. The appellant has been properly described as a facilitator to the scheme. Her role as facilitator was significant and had it not been for the course which the prosecution of these two offenders took, a sentence of thirty months immediate imprisonment for the appellant could not have been attacked as being manifestly excessive.

An immediate sentence of 2 ½ years imprisonment in the instant case was disproportionate to the sentence imposed on Rita Martinez, the instigator of the criminal enterprise. The learned trial judge was aware of the relevant positions of the two defendants but he failed to properly assess the role of each defendant and to properly apply the principles of proportionality and parity in sentencing, when he came to impose the immediate custodial sentence on the appellant. This appellant received an immediate custodial sentence which was 40% higher than that imposed in the Summary Court on Rita Martinez. We found merit in the submissions of Mr. McGrath that the sentence of immediate imprisonment imposed on the Appellant was manifestly excessive and we treated the application for leave to appeal against sentence as the hearing of the appeal and we allowed the appeal by setting aside the sentence of 2 ½ years imprisonment and substituting a sentence of 18 months imprisonment. There was no evidence before the learned trial judge that Rita Martinez had failed to obey the order of the court to fully compensate CIBC nor that any sum was then due to CIBC. In those circumstances, we set aside the order for the payment of \$3,000.00 compensation.

In summary, we affirmed the conviction of the appellant. We varied the sentence of imprisonment by substituting a sentence of 18 months and ordered that the time spent in custody pending appeal

should be treated as part of the sentence. We allowed the appeal against the order for the payment of \$3,000.00 compensation to CIBC and set that order aside. In other respects the conviction and sentence are affirmed.

We announced our decision on May 2, 2000 and as promised then, we now provide our written reasons for the decision.

Zacca, P.

Georges, J. A.

Rowe, J.

