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COURT OF APPEAL FOR ONTARIO

ROSENBERG, ARMSTRONG and BLAIR JJ.A.

B E T W E E N:	)	
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Respondent/ Applicant	)	**Gregory J. Tweney**
Appellant	)	**for the respondent on the**
	)	**conviction appeal and appellant**
	)	**on the sentence appeal**
	)	
	)	
- and -	)	
	)	
	)	**Joseph Di Luca**
DANE CLARKE	)	**for the appellant on the**
	)	**conviction appeal and**
	)	**respondent on the sentence**
	)	**appeal**
	)	
Appellant/ Respondent	)	
	)	**Heard: August 9, 2004**

On appeal from the conviction by Justice Mary Anne Sanderson of the Superior Court of Justice, sitting with a jury, on April 25, 2002. The Crown appeals the sentence imposed by Justice Sanderson dated September 12, 2002.

BY THE COURT:

[1] Dane Clarke appeals from his conviction by a court composed of Sanderson J. and a jury on a charge of fraud. The Crown appeals the sentence of two years less one-day imprisonment to be served on conditions in the community. For convenience, throughout most of these reasons we will refer to Mr. Clarke as the appellant. The charge of fraud

involved the unauthorized redemption by a bank employee of approximately $20 million of customers' mutual funds. The fraud was discovered the day following the redemptions and the bank was able to recover all of the funds. The Crown alleged that the appellant perpetrated the fraud.

[2] At the conclusion of the hearing, we indicated that the appeal from conviction was dismissed for reasons to follow. We reserved our decision on the Crown sentence appeal. For the following reasons, we would allow the sentence appeal. In our view, the trial judge should have imposed a penitentiary sentence of at least three and one-half years. Taking into account the time the appellant has spent serving his conditional sentence, we would impose a further one-year custodial sentence to commence when the appellant surrenders into custody in accordance with these reasons.

THE FACTS

[3] In November 1999, the appellant was employed by CIBC as a telephone agent on the National Support Line. This was a telephone help line that provided assistance to front-line CIBC staff having difficulties with the various CIBC computer programmes. One of the computer systems for which the Support Line provided assistance was the Mutual Fund Electronic Delivery System that allowed front-line employees to sell and redeem mutual funds on behalf of their clients. The front-line employees had confidential representative numbers and passwords to access the Delivery System and they were not to disclose them to Support Line staff. The Crown alleged that in the course of providing assistance to three front-line employees, the appellant gained access to their confidential numbers and passwords. Then on November 18, 1999, the appellant used these numbers to redeem money from thirty-three separate mutual fund accounts. The total amount of the redemptions was approximately $20 million. Other evidence suggested that the appellant was taking steps to transfer this money into investment accounts that he would control. By chance, the next day, one of the customers whose funds had been redeemed discovered the missing funds and notified the bank. The bank was able to reverse the transactions and none of the money was lost.

[4] The Crown made out a formidable circumstantial case against the appellant. It was able to show that his computer had been used to draft letters to be used to transfer the funds and that his computer had been used to make inquiries of the accounts involved in the transactions. The confidential numbers were found on pieces of paper at his workstation. The actual redemptions were performed at a computer in the training area. Records showed that at the relevant times, the appellant was not using his own computer and telephone.

[5] The appellant testified. He denied committing the offences. It was the theory of the defence that some other employee of the Support Line used the appellant's computer

to perform the various transactions. There was some evidence that while the computers are password protected, employees had the habit of sharing their passwords.

THE CONVICTION APPEAL

[6] The appellant advanced two grounds of appeal. He submitted that the trial judge did not adequately direct the jury with respect to circumstantial evidence and misdirected the jury in her recharge. He also submitted that the trial judge erred in failing to exclude certain items seized by the police from the appellant's workstation without a warrant.

[7] The main complaint about the direction respecting circumstantial evidence concerns the trial judge's failure to expressly direct the jury in accordance with *R. v. Cooper* (1977), 34 C.C.C. (2d) 18 (S.C.C.) that where the verdict is based upon circumstantial evidence the jury must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. Counsel for the appellant, Mr. Di Luca, fairly concedes that this court has held in *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 that the *Cooper* instruction is not mandatory and that "so long as the trial judge's charge when read as a whole is clear on the issue of reasonable doubt, no particular form of wording is required where proof of one or more elements of the Crown's case depends upon circumstantial evidence" [*Fleet* at para. 21].

[8] Mr. Di Luca submits that the charge is not clear and he particularly relies upon the further charge to the jury. In response to an objection from Crown counsel, the trial judge charged the jury as follows:

> I have specifically indicated to you that there was no onus on the accused to disprove anything, but I did not instruct you that it is open to you to consider why someone would want to frame Mr. Clarke, what evidence there is of that.

[9] In our view, this comment did not water down the proper instructions given with respect to reasonable doubt. We are satisfied that the jury would have understood the burden of proof remained with the Crown and that the Crown was required to prove its case beyond a reasonable doubt. In the main part of the charge, the trial judge directed the jury in accordance with the principles relating to reasonable doubt and the burden of proof as laid down by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. W. (D.)*, [1991] 1 S.C.R. 742 and repeatedly stressed that the burden of proof was on the Crown. The further charge reminded the jury that the appellant did not have to disprove anything. The comment about the lack of evidence of motive for someone else to frame the appellant was a fair comment given the thrust of the appellant's defence and did not have the effect of shifting the burden of proof to the appellant.

[10] The ground of appeal concerning exclusion of evidence arises out of items seized by the police at the time of the appellant's arrest. Bank investigators called in the police after they discovered the fraud, and the appellant's connection to it. Police officers arrested the appellant in his supervisor's office. He was then questioned in the training centre. An officer then went to the appellant's workstation to retrieve the appellant's jacket and wallet. While he was there, the officer looked at the contents of the appellant's desk and noticed some notes. One of the notes became an important piece of circumstantial evidence since it contained the confidential numbers of the front-line employees. The officer seized the notes but did not otherwise search through the desk. He arranged to have the area sealed off. The police subsequently obtained a search warrant and searched the desk. The trial judge quashed the warrant. She held that the Information to obtain the warrant included materially misleading information and that without this information, the warrant could not have been granted. The trial judge also held that the warrantless seizure of the notes by the officer was an unreasonable search and seizure and a violation of the appellant's rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. However, the trial judge held that the notes should not be excluded under s. 24(2) of the *Charter*. The appellant submits that the trial judge erred in failing to exclude this evidence.

[11] For the purposes of this appeal we will assume that the trial judge properly held that the appellant had a reasonable expectation of privacy in respect to the papers on his desk and that he therefore had standing to allege a violation of his s. 8 rights. We will also assume that the warrantless seizure could not be justified as a search incident to the arrest. We are satisfied that the trial judge could reasonably conclude that the evidence should not be excluded under s. 24(2).

[12] The notes were not conscriptive evidence, whose admission would have affected the fairness of the trial and there were a number of factors that mitigated the seriousness of this violation. The appellant had a greatly diminished expectation of privacy in the papers on the surface of the desk. His desk was in an open area to which other employees and his supervisors had access. The officers had reasonable and probable grounds to believe that a search of the desk would provide evidence of the offence. This was not a fishing expedition or a search based on mere speculation. The appellant had only a possessory interest in the notes, the materials themselves were owned by his employer and it is possible that the Bank could have granted a valid consent to search the desk. The trial judge concluded that the administration of justice would be better served by the admission of the evidence than its exclusion. This finding was reasonably open to her. This evidence while not essential was an important part of the Crown's case in a very serious fraud.

[13] Accordingly, we would not give effect to any of the grounds of appeal from conviction.

THE CROWN SENTENCE APPEAL

[14] The trial judge imposed a two-years less one-day conditional sentence to be followed by three years probation. The Crown submits that the trial judge erred in principle in several respects. Mr. Tweney, for the Crown, submits that the trial judge should have imposed a penitentiary sentence given the seriousness of the offence and that she gave insufficient weight to the objective of general deterrence. We agree with these submissions.

[15] The trial judge correctly observed that this court has held that incarceration should be used with great restraint where the justification is general deterrence. However, this court has also indicated that general deterrence plays an important role in large-scale frauds involving a breach of trust. As was said in *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.) at 38:

> General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those offences that are likely to be affected by a general deterrent effect. *Large-scale, well-planned fraud by persons in positions of trust …would seem to be one of those offences.* Even then, however, I would not want to lay down as a rule that a conditional sentence is never or even rarely available. Each case will have to be determined on its own merits. [Emphasis added.]

[16] In our view, the trial judge unreasonably discounted the importance of general deterrence in this case. This was a huge fraud that could have resulted in almost unprecedented losses to the bank had it not been discovered by chance. Millions of dollars of customers' money were put at risk and other bank employees came under suspicion during the investigation. The offence involved planning on the appellant's part both in its execution and for dispersal of the stolen funds. It was the very type of offence for which general deterrence had to be the paramount consideration, even for a first offender of otherwise good character like this offender. The appellant was in a position of trust, albeit he had not been entrusted with the particular information that allowed him to commit the offence. His moral culpability was high.

[17] Large-scale frauds by persons in positions of trust will almost inevitably attract a significant custodial sentence. See *R. v. Bogart* (2002), 167 C.C.C. (3d) 391 (Ont. C.A.)

at para. 36. This was not an appropriate case for a conditional sentence. Indeed, we agree with Crown counsel that a penitentiary sentence was required, given the magnitude of the fraud. The Crown submits that in this case the range of sentence should be three to five years bearing in mind that there were no actual losses. Had there been actual losses, the sentence should be even higher.

[18] We generally agree with the range of sentence proposed by Crown counsel, although in this case a sentence near the bottom of this range would have been justified. The offence was committed over a very short period of time and was not particularly sophisticated. While the appellant was in a position of trust, he was at the low end of the Bank's hierarchy and, as indicated, was not entrusted with the particular information that allowed him to commit the offence. There were also important mitigating factors. As indicated, the appellant is a first offender of previously good character. He is described as a good and responsible father and comes from a supportive family. He had a good employment record and has been involved in volunteer work in the community.

[19] The trial judge imposed terms including house arrest, except for employment, and 240 hours of community service. This sentence was imposed on September 12, 2002. In the result, the appellant has served virtually the entire conditional sentence. He has also not only completed the 240 hours of community service but an additional thirty hours. He has held down two jobs during this period. The appellant is entitled to credit for this time spent on the conditional sentence and the completion of the community service. The court must also take into consideration the additional hardship to the appellant of incarcerating him at this point so long after the sentence was imposed.[1]

[20] Giving the appellant credit of approximately two and half years for the time spent on the conditional sentence, in our view, the appropriate disposition would be to require that the appellant serve an additional year in custody.

DISPOSITION

[21] Accordingly, the appeal from the conviction is dismissed. The Crown's application for leave to appeal sentence is granted, the appeal is allowed and a jail sentence of twelve months is imposed to begin the day Mr. Clarke surrenders into custody. The probation order is set aside.

Signed: "M. Rosenberg J.A."

"Robert Armstrong J.A."

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[1] We should point out that we are satisfied that the delay in hearing this appeal is not the fault of the Crown. The delay is explained by attempts by the appellant to prosecute the conviction appeal.

“R. A. Blair J.A.”

Released: “MR” August 20, 2004