45 pages

ROYAL COURT
(Superior Number). 74
29th May, 1990

Before: The Bailiff assisted by
Jurats Coutanche, Vint, Blampied,
Myles, Hamon, Gruchy, Le Ruez
and Vibert

The Attorney General

- v -

Stephen Barry Picot

The original judgment contained typographical errors. The attached judgment has been amended and should be substituted for the one originally distributed.

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Sentencing policy - breach of trust cases.

Solicitor General for the Crown,
Advocate D.E. Le Cornu for the accused.

JUDGMENT

BAILIFF: The Court is most indebted to you Mr. Solicitor for your very full resumé and the cases to which you have referred the Court which has enabled us to consider whether or not we ought to change our sentencing policy in relation to criminal offences involving a breach of trust. In the course of your address to us it became clear that you were not asking the Court to change the first principle, that is, that it is only in cases where there are exceptional circumstances that persons convicted of breaches of trust should not receive a custodial sentence, and that being so we do not think it is necessary to apply our minds to whether that first principle should be changed. We do not

think that policy should be changed. We note in passing that although we use the word 'exceptional' in fact in R. v. Barrick (1985) 7 Cr. App. R.(S.)142 Lord Chief Justice Lane uses the words 'very exceptional' and therefore we think that it is right that we should repeat, if it requires repeating, that only in exceptional, or very exceptional, circumstances should a person who commits a breach of trust expect not to receive a prison sentence.

However looking at the cases it appears to us that first of all in the case of A.G. -v- Pagett (1984) J.J. 57 the Court of Appeal declined to interfere with sentences which this Court had been imposing in breach of trust cases and it did so for a number of reasons which I do not think are necessary for me to set out. In that judgment it does not appear that the learnèd Court of Appeal was invited to consider what the practice should be at the lower end of the scale in respect of the less serious offences such as in the case of R -v- Weston (1980) 2 Cr. App. R.(S.)391 to which the Solicitor General drew our attention and to that extent therefore the Court of Appeal was not invited to apply its mind to the question.

In the case of A.G. -v- Preston (7th April, 1986) Jersey Unreported, however, which was decided some two years later by the Court of Appeal there is an indication that the factor of position of trust should not be over emphasized and I cite from the judgment of Mr. Calcutt, Q.C., who was presiding.

> "The second matter which was dealt with by Mr. Renouf which I take my own order, is this: that although he was in a position to take his employer's money, and so, it was said, and rightly said, he was to that extent in a position of trust, it would, in our view, be wrong to over emphasise that factor, because, to a certain extent, anyone who commits this offence must be in that position in order to be able commit the offence itself".

There are, of course, differing degrees of breach of trust and that is all I think that the learnèd President was saying. He was not suggesting that a breach of trust was not normally a very serious offence. The case of Preston was referred to with approval by the Superior Number in the case of A.G. -v- Lloyd which was heard by this Court on the 3rd of July, 1986, and the passage which I have just cited in Preston was in fact referred to by myself as I was presiding on that occasion, and there I said that what the learnèd president was saying

in the Preston case was that one should not over emphasize the breach of trust factor and that this Court as far as it is been aware in the past, and as far as it is aware now, has never over-emphasized this factor but it has placed on it we think a proper degree of seriousness which reflects the gravity of the offence. The Court then, in fact, went through for the first time as far as I am aware the case of R. -v- Barrick (1985) 7 Cr. App. R.(S.) 142 and dealt with a number of the matters in relation to the appropriate length of sentence set out in the Barrick case.

Barrick was again referred to in the Assize Court in the case of A.G. -v- Hamon (8th January, 1990) Jersey Unreported but again what the Court was concerned with there was the length of sentence and not the principle of sentencing a person to imprisonment itself. Again in that case reference was not made in the judgment of the Court to the Weston case (supra) and it is quite true that there had been the fairly recent case of A.G. -v- Prisk on the 5th August, 1988, where the accused had been sentenced to eighteen months' imprisonment by the Inferior Number for two counts of fraudulent conversion and who had been employed in a senior position of trust by a bank and where the Court seems to indicate that it regards breaches of trust of that nature as very serious. The Court I think was probably in that case reflecting the principles enunciated in the Preston case (supra) and trying to evaluate the degree of trust and the relation to the position which the offender occupied. What the Court actually said in Prisk was this:-

> "Against the many mitigating factors that are undoubtedly present and Mr. Mourant put them forward very ably indeed in an excellent address, we have to weigh the special position of responsibility, authority and trust which the accused held. In the same way as a thrift club managers are regarded as holding a special form of trust, so in our view are persons who are in managerial positions in the finance industry. The integrity of the finance industry requires people of the highest probity in managerial positions".

I think it is fair to point out that Prisk was in a managerial position unlike Weston, who held a relatively lowly position, and therefore what you have invited us to do Mr. Solicitor is to express a view as to whether in the lower reaches of offences and in the light of the case of R. -v- Hurren (1990) Cr. App.R.(S.)60 to which you referred us whether we would feel that any right-thinking member of the public

- in this case perhaps we would equate him with a man on the St. Ouen's omnibus - would conclude that an offence (in the case of Hurren causing £650.00 worth of wanton damage) when viewed in its proper context was so serious as to make a non-custodial sentence unjustified. We think that we would be prepared in appropriate cases to adopt that limited degree of flexibility at the lower end of the scale and to that extent and to that extent only we would we would depart slightly from our established and perhaps now fixed principles of sentencing.

Now you have already said what you can in relation to Mr. Picot and you have made your conclusions we now must hear Mr. Le Cornu addressing us in mitigation.

(Advocate le Cornu heard in mitigation)

In this case we have reached the unanimous decision that there were not the exceptional circumstances which entitle us to depart from the usual rule, that is to say exceptional circumstances concerning the commission of the offence; of course, one has to take into account the offender as well. The only thing which saves you Picot from going to prison is your own inadequacy and the report of the Probation Service. Without derogating from the principle which we enunciated earlier we feel that in your particular case because of the circumstances in which you are and the fact that you are under medication these are the things which have saved you from prison, otherwise you certainly would go to prison. Under the circumstances we are going to place you on probation for two years on condition that you complete 180 hours Community Service, such hours of Community Service to be completed within twelve months.

BREACH OF TRUST - SENTENCING

There is evidence to suggest that prior to 1984 the now familiar policy by which criminal offences involving breach of trust are punished by custodial sentences in all but most exceptional circumstances was not so firmly entrenched as it was later to become.

It is the case that between the years 1975 and 1984 some twelve cases involving breach of trust - some of them involving comparatively large sums coupled with comparatively little mitigation - were attended by non-custodial sentences. I attach a tabular summary of those cases.

That is not to say that in cases prior to 1984 breach of trust cases were not severely dealt with - cases like Pemberton (3.5.76) and Taylor (4.2.77).

1984 was a seminal year for present purposes because on 1st May that year the Court of Appeal gave its judgment in Attorney General -v- Kenneth Ernest Pagett. I attach a copy of the Court of Appeal judgment.

For present purposes I refer the Court to page 4. In the passage under reference, the Court of Appeal dilates upon the

difference between Jersey and English sentencing principles; the Court was specifically addressing the argument that on English authorities Pagett would have received considerably less that the two and a half years imprisonment to which he had been sentenced by the Royal Court.

That argument would apply a fortiori today on the authority of Barrick which I deal with later.

In Pagett the Court of Appeal said some important things which are worth setting out in the body of this note:

> "... First, it could not possibly be right for this Court, on the basis of one case, and an examination of a restricted range of decisions for one type of offence, to enter into the broad policy argument as to whether sentencing policy here must follow every change in practice on the mainland. Secondly, it is apparent that there are very important differences in the way sentencing is approached in Jersey and the way it is dealt with on the mainland. We will mention three obvious points.
>
> First, in Jersey, it is the practice for the Crown to move for specific sentences; by long tradition, it is the

accepted role of Crown Counsel to give guidance and help on this matter and to represent the public interest. There is nothing comparable in England. Secondly, the sentence in this case was arrived at by the learned Deputy Bailiff sitting with ten Jurats. To this extent, the sentence reflects a much broader spectrum of judicial opinion that a sentence imposed by a single Judge in England. Thirdly, Jersey has no system of parole for sentenced men. These and many other features indicate that the systems have different traditions and different modalities. Over and beyond this is the point that the Royal Court sitting in Jersey will be aware of current attitudes here to sentencing and will know in particular what sort of crimes are prevalant and for what crimes it is desirable to retain a severe deterrent sentence.

For these reasons, we are not convinced that it would be right to alter a sentence which is right for Jersey but which would, by recent change in policy, be thought wrong for England. Our doubts in this regard are greatly strengthened when we examine the reason for the change in English sentencing practice. There can be little doubt that however this is actually formulated by the Courts, an underlying purpose is to try to relieve the acute pressure

on prison accommodation which has been created by the crime wave. This reason does not apply on this Island where, fortunately, there is no comparable problem.

For these reasons, we reject the argument based on English practice and we would dismiss the appeal."

In promoting a review of policy, I have to meet these points.

The first and second are, self-referring; i.e., it is open to the Crown "to give guidance and help on this matter and to represent the public interest".

It follows that because the Crown is now persuaded that a different and less restrictive sentencing policy will meet the public interest, then it is open to the Crown to say so.

Equally, as to the second point, it is open to the Superior Number to review its sentencing policy.

The third point, about Jersey having no system of parole, seems not to add very much - it simply points out the difference

in length of sentence between England and Jersey because English reported sentences will in fact lead to even shorter actual terms so that the gap between English sentences and Jersey sentences is, as a matter of fact, even greater than appears at first view.

One also has to say that it is an elementary principle of sentencing that no regard can properly be had to the opportunity, or otherwise, of parole.

Point four "that the Royal Court sitting in Jersey will be aware of current attitudes here to sentencing and will know in particular what sort of crimes are prevalent and for what crimes it is desirable to retain a severe deterrent sentence" is again, to a degree, self-referring - it seems to me not to be decisive either way although one is at least bound to acknowledge the view that as a finance centre the public interest could be said to demand higher sentences for breach of trust than would be the case in various English counties where no comparable economic dependence and attendant sensitivity exists.

Finally on Pagett, the prison crowding is mentioned as an obvious reason for disparity between English and Jersey sentences. Naturally the argument has force but is not necessarily a determinant of policy if the will is present to shorten Jersey sentences for other reasons in appropriate cases.

1985 was an active year so far as breach of trust sentencing was concerned.

Firstly, on 30th January, 1985, was the appeal to the Superior Number by Gareth Christopher Gordon Henry against the sentence of two years imposed by the Inferior Number. The case is not, in analysis, especially notable; it appears to be a standard application of the sentencing policy.

There is this interesting observation by the learned Bailiff about half way down the first page of the judgment:

> "We do not consider that there has been any discernable stiffening in the sentencing policy of the Royal Court in or on breach of trust cases since 1979, there has been no evidence called to suggest that there has been ...".

I attach a copy of the Henry case. Henry fraudulently converted, and stole, about £5,000 worth of client funds from the bank where he worked. He was sentenced to twelve months' imprisonment to take account of the delay in prosecution.

On 10th April, 1985 came the case of Attorney General -v- David John Bates which again was an appeal to the Superior Number.

The interest of the case is that it deals with those things which - in the search for exceptional circumstances - don't count.

The point taken on appeal was that the Inferior Number had not had regard to the existence of "special circumstances" in relation to the length of sentence. On page 2 of the judgment there is this extract:

> "To summarise, therefore, this Court has a consistent sentencing policy; it is a policy which has been approved by the Court of Appeal in the Pagett case; of course, it is for the Court to look at the facts of each case to see whether there are exceptional circumstances. There are, of course, in these cases, always mitigating factors such as good character and so on, balanced up, however, by the aggravation of the gross breach of trust which is involved ..."

The Court considered the following aspects and held that they could not be included in the category of "exceptional circumstances":

a) first offender

b) co-operation with the police

c) remorse

d) kept conditions of bail

e) the chance of a new start.

The case of Bates is attached. Bates stole, as a servant, about £4,600 while acting as manager of the Inn on the Park. He was sentenced to 21 months' imprisonment.

On 16th May, 1985 came Attorney General -v- Ralph William Haydn which was the Superior Number sentencing at first instance. The case is interesting for a number of reasons:

(a) "... We think that the sentence of four years asked for is correct in the particular circumstances and in accordance with the change of policy of the Court."

This is a little puzzling because three and a half months earlier in the Henry case, the learned Bailiff had said that there had been no stiffening of the sentencing policy on breach of trust cases since 1979. The only intervening case was that of Bates and it did not mark any noticeable change in policy.

(b) The Bates mitigation points are again said to be not exceptional, and to the list is added the injury to family life which prison inevitably carries with it. That again was said to be not exceptional.

(c) "... We cannot find that the sentence asked for of four years is in any way out of proportion to the normal sentencing policy of this Court, which is regrettable. A person of your age, good character, gets into this position. Unfortunately it does happen and it is the duty of this Court by the sentences to try and make sure that other people will know what will happen to them if they do what you, unfortunately, did."

This is an indication of a classically deterrent intention and will be one of the points which must be very near the centre of the policy review. It will be well to remember that deterrence is always said to be used in two senses - a) deterrent to the individual himself but b) even where individual deterrence is not required because there is no prospect of re-offending, there still remains the requirement for general deterrence so that would-be offenders learn from the example made of others.

> The question reduces to this: "Does the clang of the prison gates work as effectively as longer sentences in the interest of general deterrence?"
>
> The Crown's submission is that there is no reason to believe that it fails to work in breach of trust cases.

On 10th July, 1985 came Hadyn's appeal to the Court of Appeal. The judgments of the Superior Number and of the Court of Appeal are both attached hereto. That of the Court of Appeal sets out the facts in some detail.

The Court of Appeal reduced Hadyn's original four year sentence by one year, thus making a sentence of three years.

That reduction was based on the available mitigation in that case, as the Court of Appeal was careful to point out:-

> "Before parting with the case, this should be said: that the decision is one which relates purely to the particular circumstances raised in it. We say nothing about the levels of tariff or any comparison which might or should or should not be made between levels of sentence in England as

opposed to Jersey. The decision is one which is special to the circumstances of the present case".

Another observation of the Court of Appeal which deserves to be highlighted is this one: -

"... It is undoubtedly of paramount importance that the reputation and integrity of the financial business on this Island should be preserved and its reputation remain untarnished."

On 1st November, 1985 came Attorney General -v- Frederick William Shadbolt. Shadbolt was sentenced by the Inferior Number at first instance to twelve months imprisonment. It was not, perhaps, in the strictest sense, a breach of trust case. It is, though, of interest in relation to the argument that Jersey as a finance centre needs a stiff policy of deterrence in order to safeguard the public interest in the economic well-being of the Island.

Speaking of the possible damage to Jersey's financial reputation, the learned Court said this:

"That is not a reason in our view for increasing sentence or adding to it something to represent that adverse effect,

but it is something we can take into account when we are urged to grant probation in a case of this nature."

The significance of that for present purposes is of course that the finance centre argument goes to add weight to conclusions in favour of a custodial, rather than any other form of, sentence, but it does not militate in favour of an increased sentence, i.e. it does not go to length of sentence (Shadbolt is, of course, a judgment only of the Inferior Number).

In summary, Shadbolt stole a valuable security and laundered it through local banks.

The intervention of the Court of Appeal in Preston (7.4.86) (copy attached) led one briefly to suppose that a milder climate was coming in breach of trust cases, despite the care which the Court took to say that it was not dealing with matters of sentencing principle.

The subsequent cases of Lloyd, Wood-hall, Blackmore and Prisk did not support the supposition to which Preston gave rise.

I attach a copy of the Attorney General -v- Thomas Lionel Prisk judgment, 5th August, 1988, because it shows that the

policy has been followed by the Inferior Number in even those cases which perhaps attract the greatest degree of sympathy and display the greatest degree of mitigation.

The head-note of Prisk really says it all.

On the Jersey authorities over the last decade and a half, it seems not inaccurate to summarise as follows: -

Between 1975 and 1984 there is ample evidence with which to demonstrate that the imposition of a custodial sentence for breach of trust was not as clearly established as it subsequently became.

In 1984 the pronouncements of the Court of Appeal in Pagett gave impetus to the view that when custodial sentences were imposed for breach of trust then the Jersey Courts were free to pursue a line of severity of their own and were not limited by the persuasive authority of the sentencing policies of the English Courts.

Since that time both the Superior Number and the Inferior Number have pursued a policy of lengthy prison sentences for breach of trust cases in all but exceptional circumstances.

This has extended even to the "wrecked life" sort of case, fairly represented by Prisk.

The leading English case is Barrick (1985) 81 Cr.App. R. 143. It appears that this case was first considered by the Royal Court in the prosecution of David Jarman Lloyd in the same year.

The use made of Barrick was, as it were, a checklist of matters to which a Court should have regard so as to give some sort of structure to its consideration of the case.

Specifically, what the Court did not do was to take Barrick as any indication of sentence length.

In other words, the Royal Court has not used Barrick as a guideline case for the length of tariff, which was actually its primary function.

Inadvertently, the process is quite nicely given in the judgment of the Inferior Numbers on 8th January, 1990 when sentencing Stuart Sean Hamon. Having cited from the Barrick judgment the learned Bailiff made this obervation:

> The Lord Chief Justice then goes on to give the figures in relation to England which we do not refer to because we do not necessarily follow that guidance."

I attach the Hamon judgment because it is of further interest as a stereotype of sentencing under the régime of the present sentencing policy - put shortly a young first offender with good mitigation available still found himself serving fifteen months imprisonment.

I attach the Barrick judgment and any commentary by me would I think be superfluous other than to say that it has been used in Jersey only for the limited "structural" approach which it brings to an analysis of particular breach of trust cases.

It has not - thus far - been used in the fulness of its original purpose, namely that of a guideline case as to sentencing tariff.

It is in Pagett itself (on page 6 of the judgment) that the Court of Appeal says this about breach of trust cases:

> "... There is little doubt that five years ago when Thomas wrote the second edition of his book "Principles of Sentencing", this would have been treated as a middle range of case in England, carrying a sentence of up to about three years; a new approach is manifested in the later decision of which Jacob, Milne, Wheel and Johnson were cited to us. It seems to be the position that a sentence

of eighteen months would, in England, now follow for offences of this character."

The four mentioned cases have now been swept up into Barrick but the Full Court has - on my submission - acknowledged that Thomas is out of date and that Current Sentencing Practice is a surer guide.

I therefore attach the pages of Current Sentencing Practice. All are said to be applications of Barrick - or legitimate exceptions.

There is not one word in Barrick about prison overcrowding.

Weston is the classic "clang of the gate" application referred to in Barrick but not applied in Jersey.

The Barrick bottom band is broadly expressed and our own practice is within it - up to about £10,000 = up to about 18 months.

The problem arises because our current sentencing policy is, in the Crown's submission, insufficiently flexible to allow for the Weston category of sentence at the lower extremity of the band.

In the context of the Court's review the case of Attorney General v. Derek George Foster must be briefly mentioned.

Despite what "Private Eye" chooses to print, there were exceptional features present in what was perhaps, the most notorious breach of trust case in recent times.

The case itself was exceptional because, as the Court will recall, the defendant protested his innocence of a long string of allegations contained in the indictment.

With one exception, the entire Board of Directors who gave evidence at the trial failed to come up to proof. The defendant gave evidence and in the course of his cross-examination changed his not guilty plea to one of guilty but only in respect of one of the many allegations against him.

The exceptional features which permitted the Crown to move for and the Full Court to impose a heavy fine instead of a custodial sentence included the delay between the commission of the crime of fraud, the trial, and the defendant's plea of guilty to one but only one, of the allegations.

Another exceptional feature was that the "back-hander" taken by Foster (and of which he was stripped by the fine) did not directly come out of the pockets of his employer bank - so that, the prejudice to the employer, whilst present, was minimal.

In my submission it is not entirely inappropriate, whilst reviewing sentencing policy and therefore sentencing options to note that for over forty years, that is to say between 1896 and 1937, all the courts of this Island had statutory power to suspend a prison sentence for five years and the statute further provided that if the defendant committed no further crime punishable with imprisonment over that period - then the sentence was annulled.

The 1896 Loi sur l'Atténuation des Peines so provided but for reasons which evade me it was entirely repealed by the Loi (1937) sur l'Atténtuation des Peines et sur la Mise en Liberté Surveillée.

In conclusion, the attention of the Full Court should be drawn to a new sentencing principle emerging from the case of David Peter Hurren (appellant) reported in (1990) 90 CR. APP. R. at page 60 which case has been cited with approval by the Inferior Number of the Royal Court.

The new test involves the Court taking a view of any right-thinking member of the public as to whether an offence, when viewed in its proper context is so serious as to make a non-custodial sentence unjustified.

In Jersey we call him "the man on the bus to St. Ouen". Would the man on the bus to St. Ouen in the knowledge of the full facts of the instant case, that is to say of the case involving this defendant, view the imposition of a short "clang of the prison gates" sentence as being unjustified?

Authorities cited

Jersey cases

AG -v- Pagett (1984) JJ 57

AG -v- Henry (30th January, 1985) Jersey Unreported

AG -v- Bates (10th April, 1985) Jersey Unreported

AG -v- Hayden (16th May, 1985) Jersey Unreported

AG -v- Hayden (10th July, 1985) Jersey Unreported

AG -v- Shadbolt (1st November, 1985) Jersey Unreported

AG -v- Preston (13th January, 1986) Jersey Unreported

AG -v- Preston (7th april, 1986) Jersey Unreported

AG -v- Prisk (5th August, 1988) Jersey Unreported

AG -v- Lloyd (3rd July, 1986) Jersey Unreported

AG -v- Hamon (8th January, 1990) Jersey Unreported

AG -v- Foster (22nd December, 1988) Jersey Unreported

English cases

All cases as reported in Current Sentencing Practice (other than R. -v- Barrick which was reproduced in full)

R. -v- Upton (1980) 2 Cr. App. R. (S.) 132

R. -v- Barrick (1985) 7 Cr. App. R. (S.) 142

R. -v- Dhunay and others (1986) 8 Cr. App. R. (S.) xxx

R. -v- Sutton (1984) 6 Cr. App. R. (S.) 70

R. -v- Weston (1980) 2 Cr. App. R. (S.) 391

R. -v- Chatfield (1985) 7 Cr. App. R. (S.) 262

R. -v- Bagnall (1985) 7 Cr. App. R. (S.) 40

R. -v- Colley (1985) 7 Cr. App. R. (S.) 264

R. -v- Berry (1986) 8 Cr. App. R. (S.) xxx

R. -v- Matthews (1986) 8 Cr. App. R. (S.) xxx

R. -v- Brinkley (1986) 8 Cr. App. R. (S.) 105

R. -v- Patel (1986) 8 Cr. App. R. (S.) 67

R. -v- Mason (1986) 8 Cr. App. R. (S.) 226

R. -v- Davies (1986) 8 Cr. App. R. (S.) 25

R. -v- Brown (1987) 9 Cr. App. R. (S.) 266

The Solicitor General produced to the Court a typescript outlining the Crown's submissions in relation to sentencing policy in relation to criminal offences involving a breach of trust. The document headed "Breach of Trust - Sentencing" is reproduced here in full with the permission of the Solicitor General and of Crown Advocate Cyril Whelan who was responsible for researching and drafting the resumé of the sentencing policy of the Jersey Courts in this kind of offence in recent years.