IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

(CRIMINAL JURISDICTION)

CRIMINAL CASE NO. 17 of 2007

THE QUEEN

and

LYRA VANTERPOOL-TODMAN

Appearances: Ms. Tiffany Scatliffe for the Prosecution
Mr. J.S. Archibald Q.C. with Ms. Anthea Smith for the Defendant
Mr. Herbert McKenzie, watching brief for the Bank

2007: October 16th, 23rd

Judgment on Sentencing

(Criminal Law – Sentencing – Guilty Pleas – Theft – False Accounting – Criminal Code 1997 – s. 209(b) and s. 221(1)(a))

[1] Joseph -Olivetti J: - I am called upon to determine what punishment to mete out to the Defendant, Mrs. Lyra Vanterpool-Todman. The Defendant pleaded guilty on Tuesday 16th October 2007 to twelve counts of theft contrary to section 209(b) of the Criminal Code 1997 ("the Code") and eight counts of false accounting contrary to section 221(1)(a) of the Code. A sentencing hearing was held and sentencing was deferred.

THE FACTS

[2] In June 2003 Scotiabank BVI ("the Bank") employed the Defendant as an accounts officer – a very responsible position. In January, 2006 the manager of the Bank reviewed all accounts and through this review she discovered that there were two accounts for which there was no documentation. The accounts were K's Beauty & Manicure Salon and J & S Tire Services which were both dormant accounts. The manager noted that funds had been removed from both accounts. The manager caused an internal investigation to be

launched which was conducted by a senior manager from the Bank of Nova Scotia, Toronto, Canada.

[3] As a result of the internal investigation the Bank discovered that in June 2003 the Defendant increased the overdraft facilities of the account of K's Beauty & Manicure Salon by the amount of US$10,000.00. She did so again on 31st December, 2003 in the sum of US$5,000.00, on the 31st January, 2004 by US$15,000.00, on 29th February, 2004 by US$10,000.00, on 31st March, 2004 by US$10,000.00, on 30th June, 2004 by US$15,000.00, on 28th February, 2005 by US$30,000.00, on 30th April , 2005 by US$25,000.00, on 31st May, 2005 by US$75,000.00, and on 31st July, 2005 by US$55,000.00.

[4] The Bank also discovered that the Defendant had also increased the overdraft facilities of the account of J & S Tire Services on 30th October, 2005 by US$20,000.00 and on 30th November, 2005 by US$30,000.00.

[5] Both overdraft facilities were increased through the use of a password which was assigned to the Defendant and known only to her. It was also discovered that the Defendant was continually withdrawing money from these accounts and increased the overdrafts to conceal this. None of the account holders/signatories had requested additional facilities and they confirmed that at no time did they give anyone permission to use those facilities.

[6] On 11th January, 2006 after the internal investigation the Bank confronted the Defendant with the results of the investigation. The Defendant confessed that she had stolen the money because she was "in a jam", and had intended to pay it back later.

[7] On 13th January, 2006 members of the Royal Virgin Islands Police Force ("the RVIPF") conducted a search of the Defendant's home. They unearthed the following items: a number of processed cheques, cheque stubs and statements including twenty-nine processed cheques and six statements for K's Beauty & Manicure Salon, and two statements for J&S Tire Services.

[8] On 30th January, 2006 members of the RVIPF informed the Defendant of the investigations and allegations by the Bank. The Defendant replied that she was paying back the money. She was subsequently arrested and charged on that same day.

[9] The Bank lost an estimated amount of US$296,262.04. The Defendant at the Bank's request signed a promissory note to repay these funds to the Bank. The Defendant has

not repaid any monies to date as it appears that according o to the defence the Bank considered that payment should await the conclusion of these proceedings. I note that Mr. Herbert Mc Kenzie did not rise to refute this.

Mitigation

[10] The Defendant called no character witnesses as apparently the pastor she had intended to call was not available and her counsel opted to proceed without him. The Defendant said some words on her own behalf. In short she told the court that she stole the money to pay someone, a woman from Guyana/St. Lucia. The woman, Jacqueline Khalil was blackmailing her as she held a secret for the Defendant which she threatened to reveal if not paid. This secret apparently concerned the birth and very existence of a son who the Defendant said was born to her in 1992 in New York, USA. This son was not a child of her marriage and she had told her husband that the child had died. Instead, she paid this woman to rear the child for her and when the woman resorted to blackmail stole the Bank's money to satisfy the blackmailer. The Defendant again acknowledged her guilt and sought the court's mercy and stated that she wanted to be able to make amends to her son.

[11] Learned counsel for the Defendant, Mr. Archibald Q.C. sought to throw some light on this situation. Counsel explained that the Defendant had been married and that she had difficulties conceiving a child. Her husband was abusive and became more so as a result. His mother, in an ill-fated attempt to help, allegedly took the Defendant to "a magic man" somewhere and that it was he who caused her to conceive. The Defendant told no one of her dilemna. Instead, she travelled to the United States of America and gave birth to a son in New York in 1992. She gave him into the keeping of this woman to care for and on her return to the BVI she told her husband and her relatives that the child had died. The child is now 15 years of age, and according to the Defendant he is in trouble and is now in Police custody as he keeps running away as he wants to come to her. She on the other hand now wishes to be allowed to go to him.

[12] The woman, Khalil, resorted to blackmail at some point in time and this led to the Defendant committing these offences. Her counsel said that the RVIP had Western Union documents which evidenced the transfer of money to the blackmailer. He alleged that when the Defendant told the woman that she could get no more money that it was the

woman who called the Bank and reported the Defendant's wrong- doings. There is nothing from the Prosecution to support this and all I have is counsel's submissions and I observe that the Defendant did not tell her story to the RVIPF.

[13] Apparently, at some point in time the Defendant sought the help of a spiritual advisor but that cleric instead of helping allegedly took all the monies she had paid him and used it for his own medical expenses. According to counsel that cleric was not called upon to face the music as his church transferred him from this jurisdiction before he could be taken to task although before doing so the Police raided his manse and seized his computer.

[14] Counsel gave a detailed written history of his client. In brief, the Defendant is 45 years old, intelligent and well-educated. She was married in June 1991 but Counsel stated that the marriage was short-lived due to physical and mental abuse. She now has a daughter, who is 5 years old and she is the sole caretaker of her ailing mother. At present, the Defendant owns and operates a small catering business from which she now earns approximately $70 to $100 per day. In addition, she is seised of valuable real estate some of which are charged to the Bank among others and the Bank has lodged cautions against the properties as a result of the offences to ensure that they are not disposed of without the Defendant first making restitution.

[15] I am told that the Defendant is a talented singer and that presently she is engaged in writing a book and composing songs for a CD. She was in her youth and remains an active member of the Valley Methodist Church and hitherto has been of sterling character.

Crown's Submissions

[16] Ms. Scatliffe learned Crown Counsel, provided very useful cases in particular the English case of R. v. Barrick[1] which lays down sentencing guidelines for theft. In this case, John Barrick aged 41 at the time of the offence, was convicted and sentenced on four counts of false accounting, four counts of obtaining by deception and two counts of theft. He stole the amount of GBP £9,000.00 over a period of 21 months. He was sentenced to two years imprisonment for each count to run concurrently. The Court reviewed the points that must be taken into consideration when assessing an appropriate sentence to be imposed. They

[1] (1985) 81 Cr.App.R. 78

are as follows: the quality and degree of trust reposed in the offender including his rank, the period over which the thefts have been perpetrated, the use to which the money or property dishonestly taken was put, the effect on the victim, the impact of the offence on the public and public confidence, the effect on fellow employees, the effect on the offender, the defendant's history, and other matters of mitigation special to the defendant e.g. illness.

[17] The Court also stated that in such cases immediate imprisonment was inevitable, except in very exceptional circumstances or where the amount of money stolen was small. The court held that the court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The court also provided guidelines for imprisonment based on the amount of money that was taken. If money stolen is less than £10,000 then a sentence of up to eighteen months imprisonment would be appropriate. If the money stolen was between £10,000 and £50,000.00 a sentence of 18 months to three years would be appropriate. Where a greater sum is involved a sentence of three and half years to four and a half years of imprisonment would be appropriate.

[18] Counsel also referred to the local cases of The Queen v. Monique Farrington[2], the Queen v. Elizabeth Ludovicque[3] and the Queen v. Kayann Williams[4].

[19] The Crown submitted in essence that the aggravating factors in this case far outweigh the mitigating factors. Ms. Scatliffe identified the mitigating factors as the guilty plea and the Defendant's prior good character. Counsel enumerated the aggravating factors as follows, the Defendant stole a significant amount of money on several occasions over a period of time, she committed a breach of trust, she has not paid back any of the money she has stole, since her arrest,[5] the Bank has lost public confidence and this type of theft and breach of trust is becoming more commonplace in the BVI.

Defence's Submissions.

[20] In response, Mr. Archibald Q.C. did not take issue with the principles relied on by the Crown. Instead, he sought grace from the court, reminded the court of its extensive

[2] Criminal Case No. 19 of 2002
[3] Criminal Case No. 5 of 2003
[4] Criminal Case No. 37 of 2004
[5] It is already noted that no monies have been paid as the Bank wanted to await the outcome of this case so this is not an aggravating factor.

sentencing powers and drew the courts attention in particular to the local cases of The Honourable Attorney General v. Ludwig Allen Wheatley[6] and Berton Smith v The Queen[7].

[21] Counsel subsequently handed in to the Court on 19th October the child's expired passport and other documents which tend to establish his existence and that he is in trouble with the Police but I harbour no doubt that his mother does not have to be personally present if she wants to assist him..

Court's Consideration

[22] The maximum sentence this Court can impose for theft is ten years imprisonment - section 209(b) of the Code (as amended) and for false accounting, seven years. This in itself is an indication of how seriously such offences are regarded. The authorities relied on by the Crown establish that offences of this sort are viewed as serious and invariably merit a custodial sentence even for a first offender with a prior good character. The principles in Barrick are applicable as no guidelines have been set by our Court of Appeal as far as I have been made aware.

[23] Punishment is always a matter for the court's discretion having regard to the particular circumstances of the case I now have to consider what is a just sentence here. Both the Code (section 209) and the Criminal Justice(Alternative sentencing) Act ('the CJAS Act") (sections 16 – 30) give the Court a wide discretion on sentencing and a wide range of options and the Court, in determining sentence, must have regard to particular matters stipulated by CJAS Act section 4 as are relevant and known to the court. For our purposes these factors are :- (a) the circumstances of the offences; (b) the entire course of conduct as the offences consist of a series of criminal acts of the same or a similar

[6] Criminal Appeal No. 5 of 2004
[7] Criminal Appeal No. 5 of 2003

character, (c) the injury, loss or damage resulting from the offence;(d) the degree to which the defendant has shown contrition for the offence by taking action to make reparation for the loss caused by the offence; (e) the defendant's guilty plea, (f) the deterrent effect any sentence may have on the defendant or other persons; (g) the need to ensure that the defendant is adequately punished for the offence; (h) the character, antecedents, age, means and physical or mental condition of the defendant; and (i) any other matter that the court considers appropriate., namely here the explanation tendered by the Defendant for her conduct.

[25] The Defendant committed these offences in breach of her obligations as a trusted employee. Clearly, this was a well- thought out scheme and required a level head and intelligence. It appears that the Defendant commenced her dishonest activities immediately on taking up her employment. The amounts increased significantly over the period and one can only infer that the Defendant became more confident the longer her dishonesty remained undetected. The Defendant stole approximately US$296,262.04 in the space of about two and one half years. This is a princely sum.

[26] I have had regard to the use to which the Defendant would have us believe she put that money. One cannot know how any person can react under stressful circumstances and one should be loathe to cast moral judgment unless, according to an American Indian saying, one first walks a mile in that other person's moccasins. However, our society expects a certain standard of behaviour despite the pressures of life and certainly the Defendant appears to have had all the advantages of a good upbringing and a sound education - both secular and spiritual. She must have known that what she was doing was wrong and that she could have sought assistance from the BVIPF. No reason for her not doing so was advanced.

[27] One might have being tempted to have some measure of sympathy for the Defendant at first blush but on closer scrutiny I must confess that the seeming weight of her predicament eludes me. Was this secret she was so bent on keeping so heinous that it would force her to steal from her employers to prevent its disclosure? Who was she protecting? I had

thought at first that she was protecting her marriage but her counsel said that she had been divorced.

[28] The divorce proceedings are a matter of public record and the court can take judicial notice of it. I see from the divorce suit, No 189 of 1994, that her husband initiated the action in 1994 and that the fact relied on to establish the breakdown of the marriage was the Defendant's adultery based on the allegation that the Defendant had given birth to a son outside the marriage. There was even a reference to the so–called "Magic Man" which in ordinary parlance is what I take to be an "obeah man". The petition was not defended and it follows that that there were no allegations of abusive conduct on the part of the husband. The petition was granted in 1994 – two years after the birth of the child and nine years before the Defendant embarked on these offences.

[29] Undoubtedly the husband knew of the existence of the child in 1994. Clearly, the Defendant's giving in to the alleged blackmailer was not to protect her marriage as she would have us believe. The obvious conclusion is that the whole truth was not put before this court as to who or what the Defendant was seeking to protect by harbouring her secret. This court, not being prescient, can only act on matters on which it has knowledge. It seems to me, without more that the Defendant was seeking to protect her own image and that cannot be an excuse for her actions.

[30] We do not live in Lady Dedlock's[8] unforgiving 19th Century England neither do we live in certain Muslim dominated countries like Afghanistan where it is reputed that in some states women are still being stoned to death for adultery[9]. Therefore, the Defendant's actions defy all understanding. The only thing that is clear is that by her selfish actions she deprived her unfortunate child of his birthright from the very day of his birth and consigned him to a shadowy world and that he without blame.

[31] Therefore, in my judgment, her explanation does not amount to sufficient mitigation to outweigh the aggravating circumstances identified by the Crown and to avoid a custodial sentence. The only truly mitigating factors are that she pleaded guilty at the earliest opportunity, she has no prior convictions and she has made arrangements to repay the monies. Having regarded to those arrangements I will not make a restitution order as I am

[8] One of Charles Dickens magnificent ,tragic characters in Bleak House

[9] In Afghanistan in the remote state of Badakhshan, Bibi Amena was allegedly stoned to death in April 2005 for adultery.

satisfied that the Bank will be compensated for its monetary losses although not necessarily for the loss of public confidence and has put adequate legal arrangements in place to ensure this.

[32] Crimes of this nature are on the increase in the British Virgin Islands as the Crown has submitted and it is a mistaken belief for an offender to simply say that she is going to pay the victim back so there is no need for the criminal courts to punish her. This seems to be what the Defendant is saying here as she, through her counsel professed surprise that the Bank, after she had signed the promissory note, referred the matter to the Police. Such crimes affect the integrity of institutions in particular financial ones and the court must send a strong message to deter employees from putting their hands in the tills so to speak. This Territory depends for its economic survival to a large extend on the soundness of its financial institutions and the reputation of these institutions must not be jeopardized by employees who perceive themselves to be in need and see it fit to resort to self -help. In the final analysis, no one is entitled to use another's property for his own purposes without the owner's permission.

[33] I have also had regard to the fact that these crimes were committed over a period of time and was cleverly concealed and that the Bank had to get assistance from overseas to ferret out the wrongdoer. The obvious damage to the morale of her co-workers cannot be overlooked either. Clearly, a strong message must be sent which will bring home to the Defendant the gravity of her actions and might serve to deter others.

[34] On consideration of all the circumstances, I am of the view that a custodial sentence is warranted. Accordingly, I hereby sentence, Mrs. Lyra Vanterpool-Todman to three years imprisonment on each count of theft and to two years imprisonment on each count of false accounting. The false accounting was evidently effected to conceal the thefts and thus for these purposes can be regarded as part of the surrounding circumstances of the thefts. Accordingly, the sentences are to run concurrently.

[35] In addition, having regard to the explanation put forward and to the obvious remorse for her actions not least for the harm she publicly acknowledged she did to her child, the court strongly recommends that facilities be afforded to the Defendant during her incarceration to enable her to receive psychological help and that she be well advised to avail herself of this. And it is hoped that in time she will be given the grace and the

wherewithal to try to make some amends to her son as she has expressed herself to be so desirous of doing.

Rita Joseph Olivetti
High Court Judge
British Virgin Islands