The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2016

Between:

THE QUEEN

-v- Appellant

CHAVDAR BACHEV and GEORGI TODOROV

Respondents

Before: **Baker, President**
Bernard, JA
Kawaley, JA (Acting)

Appearances: Mr. Larry Mussenden and Mr. Loxly Ricketts, Department of Public Prosecutions, for the Appellant
Mr. Richard Horseman, Wakefield Quin, for the Respondents

Date of Hearing: **30 May 2016**

Date of Judgment: **14 June 2016**

JUDGMENT

Foreign visitors stealing from ATM machines and laundering proceeds – manifestly inadequate sentence increased to 2 years – aggravating and mitigating factors

PRESIDENT

1. The respondents are Bulgarians. On 29 April 2016 they were each sentenced to four months' imprisonment having earlier pleaded guilty to offences of theft and money laundering contrary to s.337(1) of the Criminal Code Act 1907 and s.43(d) of the Proceeds of Crime Act 1997. The sentences were comprised as follows. Bachev for three offences of theft four months' imprisonment and for two offences of money laundering three months imprisonment concurrent. In Todorov's case there were three offences of theft for which he was likewise sentenced to four

months' imprisonment with three months concurrent for one offence of money laundering.

Facts

2. The offences came to light on 13 February 2016 when HSBC Bank officials found a number of gold bank cards with magnetic strips to the rear in the purge bins of ATM machines at various places across the island. The cards had handwritten numbers on them in black ink. Investigations quickly identified that the cards were counterfeit. The bank identification numbers showed them as assigned to or issued from banks located in the United Kingdom, Italy, Sweden, Belize and several other European countries. Between 12 and 14 February 2014 the cards had been used to extract a total of $4,500 on 18 occasions from 9 ATMs across the island. CCTV footage from the Harbourview Centre identified two males who were apparently responsible. Other banks were notified.
3. Butterfield Bank found that these same counterfeit cards had been used at several of their ATMs between 12 and 14 February 2016 to obtain $4,100. Again two males were identified as responsible on the CCTV footage.
4. Clarien Bank found that between the same dates the cards had been used to obtain $11,300. Again, two males were identified as responsible.
5. The police were informed. The respondents were quickly identified and warrants issued for their arrest. On 16 February 2016 they were arrested in the departure area of the L. F. Wade International Airport. Their baggage was seized and they were searched. Bachev had in his possession BD$8,700 and US$1,693; Todorov BD$9,500. On 12 and 15 February they had twice attended The Money Shop. On the first occasion Bachev by wire transferred BD$900 to Nikola Batchev and on the second occasion each of them wire transferred BD$900 to the same recipient. Those were the three offences of money laundering.
6. On 18 February the respondents were interviewed under caution with the aid of an interpreter. Both told a similar story, that whilst sheltering from the rain at an unidentified bus stop they had found a back pack containing a large amount of cash and the gold cards. Instead of reporting the items they got greedy and used the cards to withdraw money from various ATM machines across the island. They

did, however, give different reasons for trying to leave Bermuda a day before their scheduled departure. Bachev said they became scared, thinking something criminal was going on. Todorov said it was because the weather deteriorated.

Discussion

7. Mr Ricketts for the Director of Public Prosecutions submits that the total sentence of four months' imprisonment is manifestly inadequate. He points out that the maximum penalty for theft is 10 years' imprisonment and for money laundering 20 years' imprisonment. It has been said before, and I repeat it, that offences directed at the financial integrity of Bermuda, of which money laundering is one, are particularly serious and require deterrent sentences.

8. It is argued that the judge went wrong in a number of respects first in treating the offences as "a crime of opportunity", second in treating the respondents' nationality and separation from their families as being mitigating factors and third in failing to have regard to a number of aggravating factors.

9. In the first place the respondents made complete confessions to the offences. Indeed they could do little else. They were seen at the ATM machines, identified making wire transfers and found with quantities of stolen money at the airport. Some difficulty seems to have arisen about the respondents' account of finding the cards. In truth it was an inherently unlikely story but how they came into possession of the cards formed no part of the offences charged. The judge rightly agreed that no *Newton* (*R v Newton* 77 Cr App R 13) hearing was necessary but appears to have been over persuaded by Mr. Horseman for the respondents that these were "crimes of opportunity" rather than crimes of design and planning. She was not obliged to accept the account that the respondents found the cards with the pin numbers written on them in black ink together with a large amount of cash in a holdall abandoned at a bus stop. True it is that the Crown was not in a position to say how the respondents came into possession of the cards but it was irrelevant to the offences charged. However they got the cards, these were offences of some sophistication that required planning and knowledge of what they were doing, not "crimes of opportunity". The judge appears to have been under the impression that the Crown had accepted that the respondents had

found the cards. This was not so but the Crown could and should have corrected the judge's misapprehension.

10. The judge took a starting point of 12 months with no aggravating factors. She then gave a discount of three months for an early guilty plea and an additional two and a half months for previous good character. She then gave further discount for the facts that as foreign nationals the respondents would not benefit from the early release provisions, that there would be a loss of family life and that the stolen money had been repaid, alighting finally on a total sentence of four months' imprisonment. She said, correctly, that the Court was not expected to adhere to a strict mathematical calculation but appears to have gone further down that road than, in my judgment, was appropriate. Sentencing is an art rather than a science and judges should avoid trying to fine tune calculations of discounts for mitigation. Further, in my judgment, the judge fell into error in regarding anything other than the early guilty pleas and previous good character as mitigating factors.

11. The fact that someone chooses to commit crimes whilst visiting Bermuda and is thereby unable to maintain family life whilst serving a prison sentence because their family is abroad is not mitigation. In *Stewart v R* [2012] Bda LR 18 Zacca P said:

> "25 We conclude that there may be special circumstances, such as a medical condition, which require the Court to discount a long sentence. It is for the Court to decide whether such exceptional circumstances arise. There may be other special conditions other than a medical one which might earn a discount.
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> 26 However the remarks made by the learned trial judge in the present case for personal and family difficulties does not fall into the special circumstances discretion. The courts are too often in mitigation of sentences, referred to the age of the appellant, a wife and children to support, the absence of the appellant from the home."

12. Nor are administrative considerations relating to release mitigation however regrettable it may be that foreign prisoners may in practice spend longer in custody.
13. Whilst it is true that the stolen money was recovered, this was not due to any action on the respondents' part. They were found with it at the airport and but for their apprehension it would have left Bermuda with them, never to be seen again by the loser banks. This again is not a mitigating factor.
14. We have not been referred to any cases that are either in point or even close to being in point. Stealing from ATM machines and laundering the proceeds are not to be seen as victimless crimes. They affect everyone in Bermuda. The two respondents arrived on 10 February and were arrested on 16 February. In between they stole just under $20,000 from various cash machines belonging to three banks and laundered $2,700. This cannot be described as an opportunistic crime. It required knowledge, planning and execution. Numerous dishonest transactions were perpetrated with a short timespan with the intention of the two respondents quickly leaving the country with most of the proceeds. These, in my view, are factors that aggravated the offences of theft.
15. Mr. Horseman referred the Court to *R v Barrick* [1985] 7 Cr App R (s) 142 and the level of penalty for breach of trust cases noting that the level of penalty generally relates to the amount stolen submitting that, as updated, this puts the present case in the lowest bracket of a very short sentence up to 21 months, and that before any discount for mitigating factors. He argued that the sentence was not outside the appropriate range and in any event not manifestly inadequate.
16. I find little assistance in the breach of trust cases. The present case in my judgment calls for deterrent sentences because of the serious features that I have outlined above. The two factors of mitigation are the early guilty plea and the respondents' previous good character. This is not a case where the plea signifies remorse. There was in truth no defence. In my judgment the starting point for these offences, bearing in mind that they included money laundering, was in the region of 3 years which I would reduce to 2 years in light of the mitigation and the factor of returning to prison having served the original sentence and lawfully left the country.

17. I am satisfied that the total sentence of 4 months was manifestly inadequate. The question arose whether this was an appropriate case in which to grant leave and allow the Crown's appeal bearing in mind that the respondents have left the country and are on a stop list as regards to re-entry. In my judgment an appropriate sentence should be passed and the authorities can decide whether extradition proceedings are appropriate.

18. I would allow the appeal and replace the sentence of 4 months' imprisonment in each case with one of 2 years' imprisonment concurrent on all the offences.

Baker, P

I agree

Bernard, JA

I agree

Kawaley, JA (Acting)