Neutral Citation Number: [2019] EWCA Crim 2252

Case No: 201903160/A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Aylesbury
HHJ Rochford
T20180215

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2019

Before :

LORD JUSTICE GREEN
MR JUSTICE SOOLE
and
HER HONOUR JUDGE WALDEN-SMITH

- -

Between :

REGINA
- and -
Andre MONTAUT

(Transcript of the Handed Down Judgment.
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Ali Naseem Bajwa QC (instructed by **Macs Legal Services Ltd**) for the **Appellant**

Hearing date: Thursday 12th December 2019

Judgment
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Lord Justice Green :

A. Introduction

1. On 13th February 2019 in the Crown Court at Aylesbury, the applicant changed his plea to one of guilty to a charge of fraud contrary to Section 1 Fraud Act 2006. He was sentenced to a term of imprisonment of 2 years and 1 month. Sentence was imposed on 20th August 2019. The issues arising in this application concerns the approach that should be taken to sentence which a Judge is contemplating which is at or near to the cusp of the exercise of powers of suspension.

B. Facts

2. The facts may be summarised as follows. The applicant worked as a letting agent on behalf of a large number of landlords during the indictment period. He had responsibility for the collection of deposits paid by tenants upon the commencement of their tenancies. Those tenants were, in principle, entitled to the return of the deposits upon the expiry of their tenancy. The responsibility of the applicant included keeping the deposits in a safe and separate manner so that they could be repaid in due course. The applicant was a director of a company called "Barrington Property". He had signed up for a Government-approved scheme called "My Deposits" under which he was obliged to ensure that tenants deposits were kept in a bank account separate from that of the applicant's business. Money held in such accounts was never to be used for business purposes and was never to form a part of an agent's own funds. Evidence was to be produced to the scheme operators evidencing the correct use of such accounts.

3. In this case monies by way of deposit collected by the applicant were not held in accordance with the rules. Deposits were paid into the business account of Barrington Property. Nonetheless the applicant sent documents to My Deposit, signed in his own name, declaring that the funds were held in accordance with the rules. He did this in May 2011 and again in May 2012. In May 2011 he sent a bank statement purporting to be a statement from the client account showing a balance of £128,000 said to reflect amounts collected by way of deposits. Evidence subsequently obtained demonstrated that there was only £19,000 in the appropriate account. In May 2012 a bank statement produced by the applicant recorded that there was £143,000 in the client account whereas in fact there was no more than £135.

4. The applicant was responsible for managing the financial affairs of Barrington Property and evidence given by a secretary was that she had been instructed by the applicant to pay the deposits into the regular business account and not the client account.

5. In November 2012 the applicant ceased involvement in Barrington Property. A new owner discovered that there were no monies in the client account and he was unable to repay deposits to tenants of client landlords. The landlords therefore had to return deposits out of their own funds. The loss to these landlords was circa £70,000.

6. In June 2013 the applicant was arrested and interviewed. He accepted that he had not maintained deposits in separate accounts. He was aware that he should have done so.

In total 26 landlords had been victims of his offending and had to pay money back to tenants out of own funds.

C. **Sentencing remarks**

7. When sentencing, the judge observed that the applicant was 59 years of age. He was a man of previous good character. It was clear from the Pre-Sentence Report that until the present offending the applicant had led a positive and productive life. A loss of approximately £70,000 had been incurred by individual landlords. Though, there was a risk of loss amounting to just over £100,000. The applicant pleaded guilty about one week before the matter was due for trial. The judge recognised that the applicant pleaded guilty to a slightly different charge from that which was initially preferred against him. However, until that point in time the applicant had maintained that his conduct was not dishonest. The judge concluded that in such circumstances the appropriate discount for guilty plea was in the region of 15%.

8. The applicant had been interviewed in relation to these matters in 2013. However, through no fault of his, the Prosecution took a very long time to come to court. The threat of prosecution had been hanging over the applicant and indeed his family for a number of years and represented "*a significant punishment and penalty for you*".

9. In addition, the judge imposed an order disqualifying the applicant from being a Director of a company pursuant to the Company Directors Disqualification Act 1986. The term of disqualification was 5 years. This would have a significant effect upon the ability of the applicant to earn a living when released from prison.

10. In relation to the Sentencing Council Guidelines on Fraud, Bribery and Money Laundering, the judge considered that there was significant breach of trust. The applicant was a professional working for a respected estate agency and both landlords and tenants were entitled to trust agents to act with honesty and propriety as was the deposit company. The offending occurred over a significant period of time and involved 26 landlords, all of whom sustained loss. The judge concluded that this was a "*reasonably sophisticated fraud*". It involved "*hoodwinking*" My Deposit and the production of false bank statements. The judge said this in relation to the forgeries:

> "I recognise that the allegation against you is of signing the document when you knew that what was said in there was false… It is not said against you that personally were involved in forging or tampering with those statements."

11. The judge concluded that the applicant's conduct was for personal gain in the sense that it was to prop up and assist the company that he was involved with. The judge accepted however that this was not a case of a fraudster using the money for "*high living*". The applicant had full awareness of the wrongdoing since he was a director of the company and had responsibility for submitting the document.

12. In these circumstances, the judge concluded that under the Guidelines this was Category A high culpability.

13. With regard to the level of harm, the judge concluded that this was Category 3 i.e. losses falling within the range of £20,000 - £100,000. The Guideline is based upon a

starting point of £50,000. The judge observed that the applicant was "*slightly above that starting point*". So far as risk of loss was concerned, this was higher but the judge recognised that it was only "*risk*". The judge accepted that the applicant believed that "*nobody would lose out from this*".

14. The judge accepted by way of mitigation that the applicant was a man of good character, he accepted that there was some degree of remorse. The applicant had a medical condition, albeit not one which fell within the category of seriousness requiring urgent, intensive or long term treatment but it was nonetheless a relevant consideration. The judge also accepted that the applicant had potentially elderly relatives who might need and benefit from his support. The judge also stated that a "*powerful*" factor in mitigation was that the threat of prosecution had been hanging over the applicant since 2013.

15. The judge then stated this:

> "Bearing all those factors in mind, the sentence that I would have imposed upon you before reduction for your plea of guilty would have been one of 2 years and 6 months. I reduce that by a little bit over 15% to 25 months to reflect the fact that you have pleaded guilty at the earliest opportunity. So that is the sentence I pass upon you. It cannot be suspended. Even if I had considered a shorter sentence appropriate I would not, in the circumstances, have suspended it here because I consider the offences so serious that some immediate custodial sentence is necessary to act as a deterrent and to mark the seriousness of the offence."

D. **The Grounds of Appeal**

16. We have received detailed written submissions from Mr Ali Naseem Bajwa QC. We can summarise the principal points advanced in the following way.

17. First, in preparation for the sentencing hearing, the appellant tendered a detailed Basis of Plea. It was argued that had the Judge been in any doubt about the facts proffered he should have ordered a Newton Hearing. The Basis of Plea was responded to by the Prosecution in writing. That document helpfully indicated what matters the Prosecution could accept and which therefore, in the view of the Prosecution, obviated the need for a Newton Hearing. In the event, the judge decided that no Newton Hearing was required. Counsel for the applicant argues now that the sentence ultimately imposed was on the very cusp of the threshold at which a sentence could be suspended. In a number of material respects the judge made finding of facts against the applicant without having heard him. This included in relation to the risk of loss, the precise quantification of the actual loss, and the extent to which the applicant had full responsibility for the deposits. It is contended that the rejection of these matters set out in the Basis of Plea was, at the least, capable of exerting a "*more than minimal difference to the sentence*".

18. Second, it is said that had the judge found in favour of the applicant on one or more of the matters set out in the Basis of Plea which he rejected without a hearing then this

could have led to a reduction in the sentence taking it below the two year threshold for consideration of a suspended sentence.

19. Third, it is argued that had the Judge directed a Newton Hearing and, in the light of that, imposed a reduced sentence of 24 months or less then he would have been required to consider as a real and not a hypothetical exercise whether to suspend the sentence in accordance with the Guidelines.

20. Fourth, it is also argued that applying the Guidelines the Judge failed to attach any sufficient weight to important and uncontroversial mitigation which, had it been taken into account, could well have led to the sentence being suspended and a community order being imposed.

E. Conclusions

21. We agree that this is a Category 3 offence with a starting point of 3 years and a range of 18 months to 4 years. In our judgment there is however some force in the submissions made and there are features of this case which give cause for concern.

22. There are two issues at the heart of this application: First, whether the judge should have held a Newton Hearing in order to enable him to make clear and unequivocal findings of fact; and second, how the Judge should have addressed the question of suspended sentence. We have come to the following conclusions.

23. First, we see force in the argument that the decision not to direct a Newton Hearing might (i.e. there is a real risk) have exerted a material impact upon the sentence imposed. If the applicant had succeeded, during such a hearing, in persuading the judge that even modest additional mitigation should have been recognised then the sentence would, almost certainly, have fallen into the range of custodial sentences which could, in principle, be suspended.

24. Second, we consider that the Judge should have addressed himself to the principles governing Newton Hearings: see for example the commentary in Archbold (2020, paragraphs [5A – 290ff]). A judge should not reject a defendant's Basis of Plea absent a Newton Hearing unless the court determines that the basis advanced would be immaterial to the sentence being contemplated and/or is manifestly false and does not merit examination by way of the calling of evidence. In this case, the judge has not made any such findings. The sentence imposed was upon the very cusp of that which was capable of being suspended. Because of this the judge was under an obligation to ensure that he had the fullest possible evidence before considering the appropriate sentence.

25. Third, when we consider all of the surrounding facts we take the view that the amount of credit accorded for acknowledged mitigation was relatively low: more could have been given, for instance to take account of the length of time during which, for no fault of his own, the appellant and his family had these proceedings hanging over them. When we link this to our concern that the judge made findings without a Newton Hearing about other disputed matters we consider that there is a real possibility that on the facts of the case the sentence could have fallen below the two year threshold for a sentence to be suspended.

26. Fourth, the judge concluded that had the sentence been capable of being suspended, he would not have done so. His analysis is necessarily hypothetical. But even so he does not address the Sentencing Council Definitive Guideline on "Imposition of Community and Custodial Sentences". That Guideline applies to all offenders aged 18 and older sentenced on or after 1st February 2017, regardless of the date of offence. It applies in the present case. It identifies factors indicating where it might not be appropriate to suspend a custodial sentence, and, factors indicating that it might be appropriate to suspend a custodial sentence. The judge did not address these factors. A cursory review of the factors indicates that it would have been open to the judge to suspend a custodial sentence. Thus, for example, applying the Guidelines, it could not be said that the offender presented a risk or danger to the public. Nor could it be said that he had a history of poor compliance with court orders. In addition, it could be said that there was a realistic prospect of rehabilitation given the applicant's age and previous good character. Equally it could also be said that there was strong personal mitigation including, not least, the extended period of time during which the threat of prosecution had hung over the applicant and his family. And it could also be said that custody could result in an adverse impact upon others. The only factor listed in the Guidelines that the judge addressed was whether appropriate punishment could only be achieved by immediate custody but without taking account of other potentially relevant factors that was a finding that was arrived at upon a conclusionary basis.

27. Fifth, in these circumstances we take the view that the judge should have held a Newton Hearing. We conclude that the failure so to do has led to the real risk that the applicant has been subjected to an unfair procedure which could, in a marginal case such as this, have exerted a material impact upon his sentence. Had a Newton Hearing been directed we conclude that the judge could, realistically, have come to the view that a slightly lower custodial sentence was appropriate. If so then the Definitive Guidelines would suggest that, in principle, this was a sentence which could have been suspended. Indeed, on facts the Judge himself accepts and records there would in our view have been a proper case for the sentence to be suspended with appropriate conditions attached.

28. We therefore grant permission to appeal. We quash the sentence of 2 years and 1 month imprisonment. We are of the view that the custody threshold was met. Taking account of relevant mitigating and aggravating factors, we impose a sentence of 20 months imprisonment. We address ourselves to the Guidelines. We conclude that in principle this was a sentence that could be suspended. Applying the criteria in the Guidelines upon the basis of the facts found by the Judge we conclude that the sentence should have been suspended. We therefore suspend the sentence of 20 months imprisonment for 2 years (to run from the date of the original sentence). In relation to whether any conditions should be attached to the order for suspension, we take into account that the applicant has been in custody since 20th August 2019. We conclude, therefore, that it is unnecessary to impose additional community related conditions to the suspension. To this extent we allow the appeal.