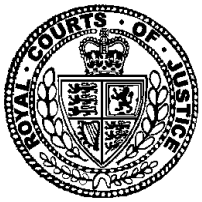

Neutral Citation Number: [2021] EWCA Crim 727

Case No: 202100849 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
THE HONOURABLE MR JUSTICE HENSHAW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2021

Before :

LORD JUSTICE BEAN
MRS JUSTICE YIP
and
THE RECORDER OF SHEFFIELD
His Honour Judge Jeremy Richardson QC

- -

Between :

THE QUEEN
- and -
BARRY RILEY

REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

- -
- -

Alison Morgan for the **Solicitor General**
Simon Csoka QC for the **Respondent**

Hearing date: 11 May 2021

- -

Approved Judgment

Lord Justice Bean :

1. On 28 February 2021 in the Crown Court at Bristol Barry Riley ("the offender") was sentenced by Henshaw J to 11 years 8 months imprisonment for the attempted murder of Ann Skelton with a concurrent term of 4 years 8 months for fraud by abuse of his position as holder of a power of attorney relating to Ms Skelton. The Solicitor General (The Rt Hon Lucy Frazer QC MP) seeks leave to refer this total sentence of 11 years 8 months imprisonment as being unduly lenient.

The attempted murder

2. The offender is now 64, having been born on 25 January 1957. He first engaged with Ann Skelton in the late 1980s when he helped her in the restoration of a house in Otley, Yorkshire where she was then living. Ms Skelton had little familyof her own. Her niece Hannah Roberts and nephew Joseph Pugsley were the only members of her extended family who maintained significant contact with her. The offender and Ann Skelton became close. She referred to him as her 'adopted son' and he referred to her as his 'mother'. It is accepted that the offender was kind and helpful towards Ms Skelton for a longperiod of time, including assisting her to manage her personal affairs over a number of years.

3. From 2011 onwards, issues began to emerge in relation to Ms Skelton's health. By 2015, she received a diagnosis of corticobasal degeneration, a condition that affects the central nervous system and leads to mobility problems, together with progressive supranuclear palsy. The offender was heavily involved in overseeing her care.

4. Ms Skelton trusted the offender to manage her financial affairs and granted him a Power of Attorney over her financial affairs from October 2015 onwards. Initially, Ms Skelton continued to make her own financial decisions, however, as a result of the deterioration in her physical condition and the fact she was sometimes in hospital or in residential care, the offender became more involved in the management of her financial position.

5. Ms Skelton's property in Yorkshire was sold and she moved back to Bristol, with the intention of moving back into her family home in Westbury on Trym. Special alterations were required to the property in order to accommodate her care needs. The offender oversaw the necessary alterations and renovations. Pending completion of those alterations, Ms Skelton was placed in two nursing homes in Bristol. She moved into her family home in August 2016.

6. By that time, Ms Skelton required 24-hour care. She slept in the ground floor living room which had been converted into a bedroom, equipped with a hospital bed. The offender hired a team of carers to look after her at the address. This included carers staying with her 24 hours a day. Those carers were paid in cash until a PAYE system was put in place in April 2017. The alterations, interim residential homes and the salaries of the carers were all paid from Ms Skelton's funds, much of which had been generated by the sale of the property in Yorkshire.

7. The offender travelled from his home in Bradford to Bristol to visit Ms Skelton on a weekly basis, staying from Wednesday through until Friday and sleeping in a bedroom on the first floor of the property.

8. Ms Skelton's health deteriorated and she spoke to others, including the offender about ending her own life and euthanasia, including travelling to Dignitas in Switzerland for that purpose. She was not resolved in this intention and did not make any request of the offender to assist her in taking her life. The offender mentioned to a friend of Ms Skelton, Sylvia Weston, that Ms Skelton had been making constant demands on him to take her to Dignitas. Material relating to Dignitas was accessed on the offender's computer in August 2016. In February 2018, the offender had used his mobile telephone to look at further material relating to euthanasia.

9. In March 2018, Ms Skelton was aged 75 and in the later stages of her illness. She was bed-bound, immobile and in need of full-time care. She could not move any part of her body independently apart from her right arm and was unable to talk clearly. She used hand signals and a handheld keyboard device to aid her communication. She remained mentally alert.

10. In the early hours of 10 March 2018, when Ms Skelton was 75 years old and extremely ill in bed, the offender attempted to smother her using a pillow. Ms Skelton managed to pull her emergency alarm, which caused the offender to leave her room and which alerted her carer, who came to assist her. In the aftermath of the incident, Ms Skelton made it clear to others that the defendant had attacked her and tried to kill her. The offender maintained to the police that she had asked him to assist her to end her life. He accepted in police interview that he had held a pillow over Ms Skelton's face for 30-40 seconds.

11. Shannell Farrel was the only other witness to the events on 10 March 2018. She was a carer who was staying at Ms Skelton's address overnight. Ms Farrel recalled that on the evening of Friday 9 March, the offender was not downstairs at any stage before she retired to her own room at about 8.30pm. When she did so, she took with her a box that would make a sound alert if Ms Skelton pressed the buzzer from her bed downstairs. The buzzer allowed Ms Skelton to select either routine or emergency assistance. It connected wirelessly to the box. The buzzer itself was attached to a piece of string, and would usually be on the hospital table, on castors, that was normally over Ms Skelton's bed. She could reach and use it even in the dark. It is clear that she was able to reach the buzzer after the offender tried to smother her.

12. Ms Farrel said she was woken by the buzzer at 12.56am on 10 March. It was the routine rather than the emergency alert. She went into Ms Skelton's room and found some of the furniture had moved. The hospital table usually placed over the bed had been moved aside, as had the chair with a wash bowl on it which was normally next to Ms Skelton's bed. The pillow was gone from under Ms Skelton's head, and her head was hovering above the mattress.

13. Ms Skelton looked very pale, her breathing was very heavy with shallow breaths but her chest was rising very high. Her eyes were closed and her eyelids were red. Ms Farrel was very concerned and thought Ms Skelton was going to die. She shouted out to the offender, but heard a sound like him running up the stairs. Ms Farrel tried to make Ms Skelton comfortable by repositioning the pillow under her head so that it was no longer hovering. She shouted for the offender again but did not hear a response.

14. Shortly after that, the offender walked into Ms Skelton's room from the dining room. He stood next to Ms Farrel and at first said nothing. Ms Farrel told him she was worried

and felt she should call an ambulance. The offender tried to dismiss the seriousness of the position and said that Ms Farrel should check on Ms Skelton again in half an hour.

15. Later that day Ms Farrel communicated her concerns about what had happened to her mother, Veronica Smith, who was also a lead carer. Ms Smith rang Alice Payne, the carer who was then looking after Ms Skelton. Ms Payne, who was unaware of the night's events, gave Ms Skelton her breakfast. As she did so, Ms Skelton said that she had a "nightmare" that the offender had been smothering her. Ms Payne sent a text to alert Veronica Smith.

16. Ms Skelton told Alice Payne that she was scared and did not want to be left alone. She said that it was not a dream and demonstrated how her face had been covered. She expressed her wish to Alice Payne that the police should be involved.

17. Veronica Smith called the police at 11.24hrs. PC Webb and PC Jones attended the address and spoke to Ms Skelton with the help of Alice Payne and the keyboard device used by the victim. She typed into her machine that "HE AWASANGER" ("he was angry"). In due course she added, he "HETR7IEDTOSTOPMEBBEAATHING" ("he tried to stop me breathing"). PC Jones clarified what Ms Skelton had typed and asked if the victim was saying "he tried to stop you breathing". Ms Skelton replied "yes" and became very upset. PC Jones asked "Did something happen with the pillow?" Ms Skelton replied "yes".

18. PC Jones then spoke to the offender, who was listening to classical music in his office upstairs. The offender was arrested on suspicion of attempted murder.

19. Hannah Roberts, Ms Skelton's niece, was aware that her aunt had previously expressed a wish to die with the assistance of Dignitas. Ms Roberts visited her aunt in hospital. Ms Skelton told her that she had not recently discussed euthanasia with the offender and that she was not expecting him to attempt to end her life.

20. Ann Skelton died in hospital on 26 May 2018. At the time of her death, she was entirely unaware of the offender's fraudulent activity. A post-mortem examination established that there was no connection between the attempt on her life and her death.. After her death, family and police investigations discovered the extent of the offender's fraudulent activity

The fraud

21. The Power of Attorney for financial affairs executed by Ms Skelton in 2015 placed Mr Riley under a legal duty to act in her best interests. Nevertheless, between 2015 and 2018 he exploited his position and used her accounts for his own benefit. Although it was difficult to precise as to how much money he took from Ms Skelton, a conservative estimate placed the sum at over £100,000 during the fraud indictment period. As her funds began to deplete, it became clear to the offender that his fraudulent activity risked discovery by Ms Skelton's extended family.

22. Ms Skelton had made provisions for the offender in her will, amending it in August 2015 to divide her estate in equal shares between her nephew, her two nieces and the offender. The offender was also bequeathed a further £10,000. In a codicil, dated 7

October 2016, specific provision was made for him to remain in her house after her death to allow time for the offender to sort out her affairs consequent on her death.

23. The rapidly depleting finances and the potential financial benefit to the offender from Ms Skelton's death appear to have been the motive for his attempt to kill her. It is clear that the offender must have been aware of the terms of Ms Skelton's will.

24. The offender had unfettered access to Ms Skelton's bank accounts. During the course of the indictment period (April 2015 to August 2018), the total sum of cash withdrawn and cheques made payable to the offender was £485,746. After Ms Skelton's death in May 2018, members of her extended family looked into her financial affairs. The family concluded that from these withdrawals and cheques, a sum in the order of £370,000 was unaccounted for by way of legitimate expenditure.

25. The accounts were analysed and consideration was given to all areas of justifiable expenditure, including considerable adjustments for claims based on the offender's assertions as to areas of suggested legitimate expenditure. This led to a revised figure of unexplained loss of £168,964.

26. The offender exaggerated and fabricated other areas of suggested expenditure in order to explain this loss. In interview he was asked whether or not he had received any payment from Ms Skelton. Initially he maintained that he had not, but later suggested that Ms Skelton had paid him a wage in order to administer her affairs. No records have ever been recovered to provide support for the offender's account in relation to this wage or for the large areas of unexplained expenditure.

27. During the course of the trial, the accounting expert relied upon by the prosecution concluded that about £139,000 remained unaccounted for, even after making generous allowance in the offender's favour for sums that might have been properly spent. An expert instructed for the offender concluded that £107,000 remained unaccounted for. Both experts included in their figures of potential legitimate expenditure a sum to reflect the offender's wages as calculated by him, despite the lack of any record of such wages. The jury were directed that they could convict the offender if they were satisfied that he had dishonestly taken money for his own benefit, including the sums suggested to be attributable to the payment of the wages. When sentencing the offender, the judge expressed 'grave doubts' that these sums had been properly and honestly taken.

Arrest, interview and trial

28. Following the police investigations, the offender was arrested and interviewed in relation to the fraud offence on 28 November 2018. On this occasion he had a legal representative present. He maintained that all expenditure had been legitimate and for the purposes of Ms Skelton's care. After initially denying being paid any kind of salary by Ms Skelton, he later suggested he had been paid £700 per week for his Power of Attorney duties.

29. The offender was interviewed about the attempted murder offence on 10 March 2018. Declining to have a solicitor present, he stated as follows:

    a) He set out the history of his relationship with Ms Skelton, including her requests for his assistance to take her to Dignitas, which began in 2016.

b) Ms Skelton began to talk about it again on the night of 9-10 March 2018, but he ignored her. He then became tired and mentally drained from the stress. Ms Skelton instructed him to "help her" and to "end it". He wanted to stop her pain and the pain that he was experiencing.

c) He had grabbed a pillow and smothered her with it for approximately 30-40 seconds. He accepted that his intention at that point was to kill Ms Skelton.

d) She grabbed his hand and so he stopped. He then walked out of the room.

30. The offender pleaded guilty to attempted murder. In a written basis of plea, which was not accepted by the prosecution, he asserted as follows:

> "'Anne Skelton had repeatedly expressed to the Defendant, and to her close friends, a willingness to die. She told them she no longer had any quality of life, that she was deeply distressed and had thought of ending her life by going to Dignitas in Switzerland…"
>
> On Thursday 10th March, the offender was at The Dell. Ms Skelton had come out of hospital on the previous day. That night he went into Ms Skelton's room and again she expressed her desire to end her life. Although Ms Skelton had difficulty communicating orally, the Defendant understood what she was trying to express. The Defendant picked up the pillow and placed it over Ms Skelton's mouth and nose for seconds. Ms Skelton tried to grab the Defendant's arm indicating for him to stop, which he did.
>
> The reason the Defendant committed the act was because he believed he was complying with the earlier wishes of Ms Skelton.
>
> Due to Ms Skelton's previous declarations about death and travelling to Dignitas, the Defendant believed that Ms Skelton had made a voluntary, informed and settled wish to die.'

31. He pleaded not guilty to the charge of fraud but was convicted by the jury. The issue of whether the admitted attempted murder was an act of mercy was dealt with by the judge at a *Newton* hearing to which we shall return shortly.

32. Ms Skelton's death in May 2018 meant that no impact statement was taken from her in relation to either offence. It is clear from the accounts that she gave to others at the time that the incident had caused her considerable distress and fear. It had the consequence that she was unable to return to her own home. Hospital notes indicate that there were significant concerns about Ms Skelton's mental health. On occasion, she was noted to be highly emotional and fearful. The judge, in sentencing, made a finding that he could not be satisfied that the psychological harm caused went beyond short-term distress.

33. It was accepted by the prosecution that the act of smothering Ms Skelton had not caused her specific physical harm and had not contributed to her death; and that she had been unaware of the fraud.

34. The offender has 24 convictions recorded against him for 73 offences, committed between November 1968 and January 2017. These included offences of dishonesty and violence, as well as driving matters. The offender had received custodial sentences in the past, but not since 2009.

The Newton hearing

35. On 22 February 2021, following the offender's conviction for fraud by the jury, the judge conducted a *Newton* hearing in relation to the facts of the attempted murder. At that hearing, the judge was invited to reach factual conclusions on two matters for the purposes of sentence:

    a) Whether or not in committing the offence of attempted murder the offender had been acting upon Ms Skelton's voluntary, informed and settled wish to die.

    b) Whether the offence was motivated, in part at least, by the offender's expectation of gain, namely to ensure that the fraudulent misappropriation of Ms Skelton's funds would go undetected and that he would also benefit from her will.

36. The judge heard oral evidence from Ms Farrel, the carer, and from the offender. He also had regard to many witness statements and watched the body worn footage which recorded the police interaction with Ms Skelton and the offender on 10 March 2018.

37. In his ruling dated 24 February 2021, the judge referred to Ms Skelton's historic expressions of her desire to go to Dignitas. He also noted that "it was apparent from the evidence given at trial that Ms Skelton could be a difficult lady to deal with and was not always easy to look after. She had been at four different care homes between July 2015 and August 2016 due to difficulties she had created."

38. The judge concluded as follows:

> "'I am sure that Mr Riley did not believe his attempted murder of Ms Skelton was an act of mercy. I accept that there was abundant evidence that, over time, Ms Skelton had asked for Mr Riley's help in bringing her life to an end. It is also possible that Ms Skelton continued her requests even after Mrs Weston told her to stop. Ms Skelton also expressed a wish to die at least once while in hospital after this incident. However, I am sure that Mr Riley did not believe his attempt to smother her early in the hours of 10 March 2018 to be something she had asked him, or wished him, to do or was otherwise an act of mercy.
>
> …in the light of all the evidence and considerations I have mentioned, I have come to the clear conclusion, of which I am sure, that Mr Riley is not telling the truth about this incident; that

> Ms Skelton did not ask him to kill her in the early hours of 10 March; that Mr Riley did not believe that Ms Skelton had asked him to do so; and that Mr Riley did not believe he was carrying out an act of mercy.
>
> Turning to the second issue, I am sure that Mr Riley's actions were at least partly motivated by a wish to reduce the chance of his fraud being discovered. He had been systemically draining her accounts for his own use. He was keeping careful track, as I have described, of how much money was left and how long it would last. He had been aiming to make the money last until January 2019, but by early 2018 expected the money to run out by August 2018. There was a risk that his fraud would be discovered whatever happened. But the risk was much greater if the money ran out with Ms Skelton still alive, so that her relatives would likely have faced the prospect of moving her to a local authority care home or putting up large amounts of money themselves to continue her care package at home. Regardless of whether Ms Skelton still retained capacity, Ms Skelton's family would have been much more likely in that scenario to have asked questions, perhaps enlisting the help of the Office of Public Guardian, than if Ms Skelton were believed to have quietly died in her sleep. Mr Riley will have known and understood all this. I am sure that he saw a clear advantage for himself in Ms Skelton passing away before the money ran out, and that that was at least part of his motive in trying to kill her…In all the circumstances I have described, I am sure that Mr Riley's attempt on Ms Skelton's life was at least in part motivated by financial gain.
>
> …The conclusions I have reached will have two effects. First, I will assess the gravity of the offence on the basis that I have found. Secondly, some of the credit that Mr Riley earned by his guilty plea will inevitably be lost bearing in mind that I have resolved this factual dispute against him."

Sentence

39. In passing sentence on 25 February 2021, the judge said that between 2015 and 2018, the offender had dishonestly abused his position, by using substantial sums of money belonging to Ms Skelton for his own benefit. The offender kept careful track of how much money was left in Ms Skelton's bank account week by week, after the withdrawals needed to pay for Ms Skelton's care team and other living expenses plus the sums he was taking for himself. By March 2018, he had realised that there was enough money to last only a few months longer, and faced the prospect of Ms Skelton having to be moved to a local authority care home. That would have been bound to lead to questions being asked by her relatives as to where all the money had gone, and the likely discovery of the fraud. Ms Skelton's quality of life was such that she had for a considerable time expressed a wish to end her life, and talked of going to Dignitas in Switzerland for that purpose. She had in mind ending her life in a dignified, orderly and painless manner. However, in the early hours of Saturday 10 March 2018, the offender decided for his own reasons to kill Ms Skelton. The judge repeated his conclusion that

he was sure that the offender did not believe that he was acting out of mercy, but was instead pursuing his own interests, in particular to reduce the chance of the long-running fraud upon Ms Skelton being discovered.

40. Referring to the Sentencing Council's Guideline for attempted murder, the judge found that the offence was motivated at least in part by financial gain, specifically the desire to reduce the chance of the fraud being discovered. Accordingly he held that, had the attempt to kill Ms Skelton succeeded, it would have fallen within what is now paragraph 3 of Schedule 21 to the Sentencing Act 2020 (previously paragraph 3 of Schedule 21 to the Criminal Justice Act 2003) on the ground that the seriousness of the offence was particularly high. He held that murder in order to avoid discovery of one's fraud on the victim was murder for gain, or to be equated to such result, and accordingly concluded that the case was within Level 1 in the Guideline for attempted murder.

41. The judge concluded as follows in relation to harm:

> 'The evidence I saw and heard in the trial and the Newton hearing indicates that your attempt on Ms Skelton's life resulted in little physical harm to her, from which she recovered quickly. The evidence I have referred to in my Newton ruling indicates that Ms Skelton remained in a state of trauma and afraid to go home for some time after the incident, including when Dr Wood saw her on 20 March, 10 days after your attack. When considering whether psychological harm has been caused, I can only act on evidence. I have to bear in mind that evidence dating from only a few weeks after an offence may provide clear evidence only as to its immediate consequences, and may be insufficient to enable me to make any safe finding as to the existence, severity or duration of any psychological harm. The medical notes provided to me show that Ms Skelton continued to be distressed and suicidal in the 10 days following the offence. It appears she had been due for discharge on 14 March 2018, four days after the offence, but it was decided that she should not be discharged unless the mental health team were happy with that. In the event, she was not discharged. On the other hand, that may at least in part be because Ms Skelton was continuing to suffer from swallowing and related problems, which were a symptom of her existing condition. It is also fair to say that Ms Skelton's mood had in any event been low because of her very disabling physical condition. On the available evidence, I do not consider that I can safely conclude that Ms Skelton suffered psychological harm, as distinct from inevitable shorter term distress, as a result of your offence.'

42. The result of these findings was that the applicable starting point within the attempted murder guideline was 15 years with the relevant category range being from 12 to 20 years.

43. In relation to aggravating factors, the judge indicated it was appropriate, when considering where in the category range the sentence should fall, to take into account the possibility that the offender's motives had been mixed. However, there were two specific aggravating factors in this case: firstly, Ms Skelton was particularly vulnerable because of her age and disability; and, secondly, the abuse of a position of trust.

44. An additional aggravating factor was that the offender attempted to smother Ms Skelton in her own bed in the middle of the night, in what must have been a terrifying experience for her. The judge indicated that he found this to be a calculated, rather than

spontaneous, attack, whether or not it had been planned for some time. The judge also noted the offender's previous convictions, but indicated that he did not regard them as carrying any great weight as they did not show any relevant pattern of repeat offending.

45. In relation to mitigating factors, the judge observed that the offender had looked after Ms Skelton over many years, organising her care and accommodation as well as providing companionship, even though Ms Skelton had been a difficult person to look after. The judge also took into account the offender's age and the fact that he suffered from cluster headaches, which might make it harder to manage in prison. He indicated that although the offender had admitted to having tried to kill Ms Skelton in his police interview , his reason for doing so was found to be untrue. He also took into account the age of the offences.

46. The judge concluded that the appropriate sentence following a contested trial of the attempted murder charge would have been one of 14 years. Although the offender had pleaded guilty at the earliest reasonable opportunity, his version of events was rejected at the *Newton* hearing. The judge concluded that, consistent with the Guideline, the appropriate level of credit the offender would otherwise have been entitled to should be halved, meaning one sixth credit rather than a third. The judge considered the issue of dangerousness. He considered that there was no significant risk of Mr Riley causing serious harm to members of the public by committing further offences of the relevant kind.

47. The judge therefore took a starting point of 14 years, less a reduction of one sixth to reflect the offender's guilty plea, resulting in a sentence of 11 years and 8 months for the attempted murder.

48. In relation to the offence of fraud, the judge indicated that he was applying the Sentencing Council's Guideline for Fraud. He concluded that the offence was one of high culpability, because the offender abused the position of trust and responsibility which he held by virtue of his Power of Attorney over Ms Skelton's property and financial affairs.

49. As to the degree of harm caused, the judge considered that it was proper to assume in the offender's favour that the harm should be measured by reference to the sums which the experts considered to be unaccounted for. On that basis, the loss caused or intended (referred to as "harm A" in the guideline) fell towards the lower end of category 2, which ranges from £100,000 to £500,000 with a starting point based on £300,000.

50. As to victim impact (referred to as "Harm B" in the Guideline), the Judge observed that the actual impact on Ms Skelton herself appears to have been very low: she did not know about the fraud and it does not appear to have affected her quality of life or care. However, the fraud significantly reduced the money that would otherwise have gone to the family members who were beneficiaries of Ms Skelton's will. Three members of her family each stood to receive a quarter share of her estate. Taking the prosecution's expert's figure of £139,000 for the unaccounted-for money, each of those relatives lost about £35,000 as a result of the fraud. The judge observed that, in addition, the three relatives were all put to considerable trouble and expense in investigating Ms Skelton's financial affairs, involving a "considerable detrimental effect" on Ms Skelton's family as a whole which would justify moving the sentence upwards within the relevant category range.

51. The judge further noted that where the victim is, as in this case, particularly vulnerable due to factors including but not limited to age, then the victim impact should be regarded as 'high', justifying moving up from one category to the next. Ms Skelton was vulnerable by reason of both her age and her physical incapacity. However, he found that there could not really be said to have been any impact on the victim at all stating: 'It would in my view be wrong to apply the guideline mechanically. It is also relevant to bear in mind that the financial starting point for harm category 2 is £300,000 and that for category 1 is £1 million: since I proceed on the basis that the actual financial harm here is of the order of £100,000, to move up to category 1 would be disproportionate. I do, however, regard the fact that you defrauded a vulnerable victim as an aggravating factor to be taken into account at the next stage. Consequently, it is appropriate to sentence you on the basis that your offence involved high culpability (level A) and harm category 2. That results in a category starting point of 5 years' custody and a category range from 3-6 years' custody.'

52. Considering the aggravating and mitigating features, the judge concluded that the fact that Ms Skelton was vulnerable by reason of her age and disability was a distinct consideration from the fact that Mr Riley committed a breach of trust by abusing his position as holder of her power of attorney. He noted that the mitigating features that applied to Count 1 also applied to Count 2.

53. The judge indicated that the shortest sentence commensurate with the gravity of the offending for the fraud offence was one of 4 years and 6 months.

54. When considering whether or not to impose consecutive or concurrent sentences, the judge indicated that he had regard to the Sentencing Council's Guideline on Totality, in particular that concurrent sentences will ordinarily be appropriate where offences arise out of the same incident or facts but that the overall test is what sentence is just and proportionate to reflect the offending as a whole. The judge observed: 'In the present case, your fraud on Ms Skelton and your attempt to murder her were factually distinct offences, against the same victim but of a different kind and committed at different times. On the other hand, your fraud is an intrinsic part of the sentencing for your attempt on Ms Skelton's life. I have found that you committed the attempted murder at least in part in order to seek to reduce the chance of your fraud being discovered. That in turn has resulted in the sentence for attempted murder being determined by reference to a higher category of seriousness, resulting in a longer sentence. It is important both to avoid double counting, and to stand back and form a view of what sentence is just and proportionate for your offending as a whole. Approaching the matter in that way, I have come to the conclusion that the sentence for fraud should be concurrent with that for attempted murder.' Mr Riley had also pleaded guilty to charges of possession of drugs. No separate penalty was imposed for these and we need not refer to them further.

Submissions for the Solicitor General

55. Ms Morgan submits that the sentences imposed on the offender for the offences of attempted murder and fraud were unduly lenient, and that the judge erred by:

a) making insufficient upwards adjustment within the sentencing ranges identified in the Sentencing Council's Guidelines; and

b) failing to adjust the overall sentence imposed to reflect the totality of the offending, having made the decision to impose concurrent sentences.

56. In relation to Count 1, having placed the offending within Level 1, the judge concluded that there was insufficient evidence of 'some' or 'serious' physical or psychological harm. It followed that he placed the offending within the lowest sub-category of Level 1 of the Sentencing Council's Definitive Guideline for offences of attempted murder: Ms Morgan takes no issue with that finding. She argues, however, that there was evidence of distress caused to Ms Skelton which justified placing the offending towards the higher end of this sub-category. In addition, given the significant aggravating features of the vulnerability of the victim and the abuse of trust involved in the offending, there were further reasons to move towards the higher end of the sentencing range identified within the sub-category. The mitigating features were insufficient to justify a reduction back down to the starting point of 14 years' imprisonment adopted by the judge.

57. In relation to the fraud, the judge placed the offending within the highest category of culpability, given that it involved an abuse of a position of power and trust. He identified a loss in the region of just over £100,000, consistent with the overall effect of the evidence. This placed the offending within Category 2 of the Sentencing Council's Definitive Guideline for fraud offences. However, the judge did not then move the offending from Category 2 to Category 1 as a result of vulnerability of the victim, as is suggested in the Guideline. The judge considered that this would be disproportionate, given the considerable difference in financial loss between the two categories and fact that there had, in fact, been no impact on the victim herself as a result of her ignorance of the offence. It is submitted that this approach was incorrect.

58. In relation to totality, the judge indicated that concurrent sentences were appropriate, given his approach towards the attempted murder offence, where he had taken into account the motive of financial gain in placing the offending within Level 1 of the Guideline. Ms Morgan accepts that approach, but submits that the judge failed to go on to make proper adjustment to the Count 1 sentence to take into account the significant and sustained fraudulent activity involved in the Count 2 offending. It is submitted that the judge's concern to avoid double counting in this regard resulted in sentences that failed to reflect the overall gravity of the offending.

Submissions for the offender

59. For the offender Mr Csoka QC contends that the sentence imposed was within the margins of discretion afforded by the guidelines. He argues that this was a sentencing exercise which carried grave risks of double counting the aggravating factors in relation to counts 1 and 2. The background of the fraud and the evasion of detection for fraud as a motive clearly overlapped. Likewise, the abuse of trust and vulnerability applied to both counts for the same reasons. The sentencing remarks set out clearly the reasoned steps taken by the learned judge to avoid such double counting. On the charge of attempted murder he submits that:

a) The starting point of 14 years is comfortably within the sentencing range.

b) The judge found that there were "mixed motives" and so applied the decision of this court in *R v Narendra Tailor*. This serves to bring down the starting point.

c) The balance of mitigating and aggravating factors carefully listed by the judge provide a reasoned basis for a sentence which is within the guidelines."

60. The reference to "mixed motives" and to the case of *Narendra Tailor* [2007] EWCA Crim 1564; [2008] 1 Cr App R (S) 37 derives from paragraph 20 of that judgment, in which Mitting J said:

> "It is to be noted that the definition of "a murder done for gain" includes a number of circumstances. The last: "done in the expectation of gain as a result of the death", in a domestic context is apt to include those cases where the husband murders his wife in the knowledge, and so in the expectation, that he will thereby not only achieve other ends (eg to satisfy lust and selfishness) but also, if not discovered, that he will make a significant financial gain. Such cases are, in our view, ordinarily to be distinguished from those where professional criminals kill for gain, or where they kill in the course of executing a serious offence of violence and dishonesty such as robbery. Cases of mixed motives will not ordinarily require a minimum term as long or that appropriate in such cases. In this case the only mitigation allowed by the judge was for the belated plea – for which he discounted the minimum term by three years. That was a generous perhaps over generous discount. But, in our view, he could and should have discounted the starting point by reference to the mixed motives that were present here. There is no reason to believe that there was uppermost in the mind of this appellant the financial gain that he would make upon the death of his wife. No doubt he expected it, but it was not, on the view which we have formed about the facts of the case, the primary motive for murder."

61. In relation to count 2 Mr Csoka argues that::

a) The fraud and concomitant abuse of trust were bound up with the determination of the correct starting point in count 1.

b) The actual impact upon Ms Skelton herself was non-existent. Her care did not deteriorate and she was unaware of any loss. The learned judge correctly interpreted the guideline for Harm B at paragraph 47 by focussing upon the impact upon the victim herself.

c) Further, the fact that the loss was at the bottom of the range was a strong reason for not going into the higher category;

d) The judge did not need to make an upwards adjustment to the overall sentence because of the length of the fraud. This overall background was

> taken account of in the starting point for the attempted murder. It is also important to avoid a disproportionate starting point for fraud where relatively small individual frauds are charged as a single offence over a long period of time. In any event the fraud and the attempted murder were each part of the same factual narrative. It is this background of fraud which doubled the starting point for the lead offence of attempted murder. In the circumstances, the overall sentence is within the guidelines. Even if it could be characterised as lenient, which is not accepted, it is not unduly lenient. "

Discussion

62. This was an unusual and difficult sentencing exercise, and we are conscious of the advantage which the judge had in having heard the evidence both at the trial for fraud and at the *Newton* hearing. Nevertheless, we are persuaded that the total sentence he imposed was unduly lenient.

63. The two offences were distinct but part of the same story. Mr Csoka is right to argue that one must avoid double counting aggravating features. But it is also right to say that in such circumstances the total sentence, whether reached by means of concurrent or consecutive sentences, should reflect the overall gravity of the offending. If concurrent sentences are passed the right course is often to pass a sentence on the most serious charge which reflects the overall gravity of the case.

64. Here, the offender defrauded Ms Skelton of sums running into six figures over a period of years, abusing his power of attorney, then tried to kill her in order to reduce the chances of the fraud being discovered if she were to be moved to a care home. There is and can be no dispute that the judge was right to categorise the attempted murder as a Level 1 offence with a starting point of 15 years. The fraud itself, in the sense of the money the offender had stolen and his desire to conceal what he had done, may be said to be factored into the categorisation of the attempted murder as Level 1. But the vulnerability of the victim and the abuse of trust are not. Each is a specific aggravating factor within the Sentencing Council guideline for attempted murder. As Mr Csoka conceded in the course of argument, a case in which a defendant defrauded a stranger or a friend, who was not elderly or vulnerable and in respect of whom he was not in a position of trust, of a six figure sum and then tried to murder her to cover up the fraud would still be a Level 1 attempted murder.

65. We do not find the passage cited from *Narendra Tailor* of any real assistance in this case. Firstly, that was a case of murder, for which the Sentencing Council has never issued a Guideline: instead the broad parameters are set by Parliament and more detailed guidance is derived from case law. Secondly, it is of course true that murders for gain vary greatly on their facts (as do murders generally). In *Tailor* itself the appellant had pleaded guilty to murdering his wife and admitted that he was motivated by financial greed, lust and selfishness. This court held that "there was no reason to believe that the financial gain he would make on the death of his wife was uppermost in the appellant's mind; it was not the primary motive for the offence", and reduced the minimum term set by the judge from 27 to 25 years. Here, by contrast, the judge had found that Mr Riley's primary motive was financial gain and that this was not an attempted act of mercy. In those circumstances we do not consider that this can properly

be described as a mixed motives case, at least in any sense which would justify a reduction in sentence.

66. As to mitigating factors, a modest allowance could properly be made for the fact that Mr Riley was 64 years old and that the impact of custody on him would be greater than for a younger prisoner. But we do not agree that the fact of Mr Riley having cared for Ms Skelton for many years is properly to be regarded as a mitigating factor, set in the context of an attempt to kill for financial gain.

67. We agree with Ms Morgan that in those circumstances the notional sentence after trial for these two offences taken together should have been significantly in excess of 15 years rather than being reduced to 14 years. In our view, taking into account the aggravating factors and the limited mitigating factors to which we have referred, the notional total sentence after trial should have been 18 years.

68. We observe also that a discount of one sixth for the plea of guilty is very favourable to Mr Riley given that he denied the fraud entirely and contended that the attempted murder had been an act of mercy to spare the victim the experience of trying to get to Dignitas to have her life ended. If he had been acquitted of fraud and the judge had accepted his evidence that he was only carrying out an act of mercy the sentence for attempted murder would have been at most a small fraction of what he actually received. However, it is not suggested that we should go behind the discount of one-sixth applied by the judge.

69. In these circumstances it is unnecessary to consider whether the concurrent sentence of 4 ½ years for the fraud was unduly lenient.

70. It was for these reasons that we announced after hearing oral submissions that our decision was to grant leave to refer, quash the sentence of 11 years 8 months on the charge of attempted murder and substitute a sentence of 15 years imprisonment on that count. The concurrent sentence for fraud will remain unaltered.