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COURT OF APPEAL

123.

28th September, 1993.

Before: A.C. Hamilton, Esq., Q.C., (President),
E.A. Machin. Esq., Q.C., and
Sir Louis Blom-Cooper, Q.C.

Christopher Anthony Delaney

-v-

Her Majesty's Attorney General

Application for leave to appeal against a total sentence of 6 years' imprisonment, imposed on 13th May, 1993, by the Royal Court (Superior Number), to which the applicant was remanded to receive sentence following guilty pleas before the Inferior Number on 23rd April, 1993, to 1 count of obtaining property by false pretences (count 1 of the indictment), on which he was sentenced to 5 years' imprisonment; 5 counts of fraudulent conversion of property (counts 2-6) on each of which he was sentenced to 5 years' imprisonment, concurrent with each other and with the sentence imposed in respect of count 1; and 1 count of forgery (count 7) on which he was sentenced to 1 year's imprisonment, consecutive.

C.E. Whelan, Esq., Crown Advocate.
Advocate S. Slater for the Applicant.

JUDGMENT

THE PRESIDENT: This is an application for leave to appeal against a total sentence of six years' imprisonment imposed by the Royal Court on 13th May, 1993. The applicant, Christopher Anthony Delaney, had previously pleaded guilty to an indictment served upon him, comprising seven counts. The first count involved the obtaining, in October, 1990, by false pretences from a bank in Jersey, the sum of £640,000. The second to sixth counts involved the fraudulent conversion of monies from various clients of the applicant at various dates between August, 1989, and September, 1991. The total sum involved was approximately £320,000.

Counts 1-6 inclusive were perpetrated by the applicant in an attempt to disguise from clients that he had misappropriated monies belonging to them or to other clients.

Count 7 was concerned with the forging by the applicant in 1987 of numerous documents for the purposes of facilitating false claims made by an Italian individual. For these criminal services the applicant received the sum of US$60,000.

The Royal Court imposed a sentence of five years' imprisonment on each of counts 1-6, these sentences to run concurrently. It imposed a consecutive sentence of 1 year's imprisonment in respect of count 7. The circumstances of these offences may be summarised as follows:

The applicant is a member of the Association of Certified Accountants. He has practised in Jersey for a number of years, obtaining his qualification in 1975.

In September, 1991, towards the end of that month, the applicant disappeared from the Island and was subsequently reported as a missing person. His car was later located in a car park here and the indications were that he had left the Island, although no reason was then known for his disappearance.

Attempts to trace him were unsuccessful until 26th January, 1992, when he, of his own volition, telephoned an officer of the States of Jersey Police. He indicated that he wished to return to the Island and would submit to arrest.

On the evening of 28th January, 1992, as a result of that prior arrangement, he was arrested at Jersey Airport, after arriving on a flight from Paris. He was advised of various complaints made against him and was taken to Police Headquarters. It transpired that, in the interval, he had travelled in France and in the United States and the Caribbean. Later on the evening of his arrest, at Police Headquarters, he was cautioned and he discussed in outline the circumstances of his disappearance and the broad background to the present offences. He named certain companies which had been the subject-matter of his misappropriations and offered the police complete co-operation. He made good that offer there and then, passing to the officers a paper which he had compiled in Paris in which he isolated various dates and trading losses. He estimated at that stage that the trading losses between 1982 and 1985 were as high as half a million pounds and that clients' funds had formed part of these losses. These losses and transactions had been entered into without their permission. He estimated that at the end of 1991, taking into account interest rates, the losses involved in relation to clients' funds were in the order of £1.2m. He provided further information to the police in a question and answer interview under caution.

He gave a frank account of his business activities going back as far as 1982, when he had experienced trading problems consequent upon which certain losses had accumulated over a period of years.

He was forthright in his acknowledgment and description of what his activities had been.

It is to be said in his favour that he was sufficiently candid in relation to his business dealings that significant trouble was avoided. Explanations afforded of transactions which might otherwise have been difficult to identify.

The applicant went into business in the early 1980's and, having been over-ambitious in his expectations of remuneration from his professional practice and in relation to his ability to cope with various obligations which he had undertaken, it appears that, at a fairly early stage, he became involved in misapplication of clients' monies. What happened thereafter, culminating in the charges which he faced in the Royal Court, was the result of various attempts - often of a bizarre nature - to try, by using clients' monies, to recoup the losses which had been sustained. The only effect of these activities was to aggravate the extent to which clients' money was lost. In the end the amount involved was that which we have already described.

So far as the last count is concerned, count 7 (the forgery charge), that arose in somewhat different circumstances, although it is in some measure connected with the difficulties in which the applicant found himself in 1987 because of his prior activities. It has, however, certain distinct features and involves a series of criminal activities of a somewhat different character. These, in outline, involved his having been approached by some other person with a view to using his professional services and professional authority for the purposes of making available to an Italian individual various bogus documents which he understood were to be used for an illegitimate purpose. As it turned out - though it appears that the applicant did not know it at the time - the use to which these documents were intended to be put, and indeed were put, was for the purposes of seeking to pervert the due administration of justice in Italy. The applicant's understanding of the matter, it appears, was that they were to be used for another purpose in Italy, though equally of an illegitimate character, namely to defraud the fiscal authorities in that country. In that matter the applicant has also been frank, after matters came to a head and he returned to this Island, and he has given information and we understand also evidence for the purposes of certain proceedings abroad.

The applicant is now some 51 years of age and he is of previous good character. A number of factors play a part in mitigation of his crimes: his good character, his plea of guilty in a complex situation; his expressions of genuine remorse which are accepted by the Crown; and the high level of co-operation

which he gave to the Crown and its investigating bodies in relation to clearing up this lamentable state of affairs. It has to be said, however, that the end result of his defalcations has been that clients - including clients who come from outside this Island - have sustained losses which approach £1m.

In the course of its judgment the Royal Court, referring to the case of Barrick (1985) 7 Cr.App.R.(S.) 142, made certain observations. In that case, the Court of Criminal Appeal in England had made certain suggestions as to the range of sentences which might be regarded as appropriate in cases of theft involving a breach of trust by employees or professional persons. It also indicated a number of factors which may be relevant for a sentencing court to take into account when considering the appropriate sentence in a particular case. The Royal Court in the present case had regard to the factors so indicated and reached its decision in the light of its analysis of the factors relevant to the present case. No criticism is made of it in that regard. However, it was submitted, on behalf of the applicant, that the Royal Court ought to have applied the range of sentences indicated in Barrick but had failed to do so and the Court had accordingly fallen into error.

We are unable to accept that submission. While it is consistent with Jersey practice to have regard, as the Royal Court did in the present case, to the qualitative factors referred to in Barrick, the Courts here are not obliged to follow the quantitative levels or tariffs indicated in that case. This was recognised by a decision of this Court in the case of Lloyd -v- A.G. (23rd September, 1986) Jersey Unreported C.of.A., when this Court reiterated that the Courts in this Island are entitled to pursue an independent policy in relation to the general level of sentences for crimes, including crimes of dishonesty such as the present one.

Certain of the underlying factors relevant to differences in sentencing policy which exist or have existed between Jersey and England are noticed in the decision of this Court in Pagett -v- A.G. (1984) J.J. 57 C.of.A. An additional factor of relevance to the present case is that noted in Hayden -v- A.G. (10th July, 1985) Jersey Unreported C.of.A., where this Court indicated that it was of paramount importance that the reputation and integrity of the financial businesses of the Island should be preserved and its reputation remain untarnished.

Reference was made on behalf of the applicant to certain observations made in the Royal Court in the course of sentencing in the cases of A.G. -v- Hamon (8th January, 1990) Jersey Unreported; (1990) J.L.R. N.11; and A.G. -v- Amy (26th October, 1992) Jersey Unreported. But neither reference does, in our view, justify the conclusion that sentencing practice in Jersey is committed to the range of sentences indicated in Barrick. In any event we accept the Crown's contention that even if the Barrick range were to be applied, the sentence passed in the present case

is not inconsistent with it. The uppermost range referred to in that case, namely 3½ to 4½ years, is not intended to indicate a maximum for offences of this kind.

The applicant also contended that the Royal Court had failed to give adequate credit for the applicant's guilty plea and his co-operation with the authorities. In the course of the discussion it appeared that there was no real dispute between the applicant and the Crown that a discount of one-third was appropriate to reflect those factors.

The Royal Court dealt with mitigation by making a reduction of one year in the sentence asked for in the Crown's conclusions. The Crown's conclusions had been for a total of seven years' imprisonment. The Royal Court imposed six years' imprisonment in total. Although it did so by restricting the length of the consecutive sentence, that for forgery, it is plain that it is looking at the sentence as a totality. The Royal Court would also recognise that the Crown's conclusions took some account of mitigation. Although the Royal Court did not specify what total sentence it would have considered appropriate before discounting for mitigation, it is not unreasonable to infer from its decision that it had in mind a figure in the order of nine years in total.

The question for this Court is whether that figure was manifestly excessive or wrong in principle. Having regard to the whole circumstances of this case, we are unable to affirm that it was. We have in mind in particular that the crimes which the applicant admitted were frequently repeated acts of dishonesty. They constituted the culmination of a protracted course of breaches of trust. They involved very substantial sums of money. Very substantial losses were sustained, by those, including many clients from outside the Island, who put their trust in the appellant. The crimes constituted by counts 1 - 6 were clearly very serious. The forgeries comprising count 7, committed as they were by a professional man, were also serious and merit distinct and cumulative treatment. A total sentence before mitigation of nine years comprising, say, six years for each of counts 1 - 6 and three years for count 7 cannot be said to be manifestly excessive or wrong in principle. The circumstance that the discount has been applied more heavily to count 7 than to the other counts cannot affect the substance of the result.

An argument was also presented that there had been undue delay in bringing proceedings and that this should be reflected in the sentence. We are unable to accept that the interval of some 9 months between January, 1992, when the applicant surrendered himself, and October, 1992, when the indictment was served justifies any discount in sentence. Albeit substantial progress had been made in financial investigation during the applicant's abscondence, completion of the investigation to a stage to justify initiating criminal proceedings necessarily takes time in a case of this sort, even where the person being investigated co-operates with the authorities.

We should not leave this case without noting that this Court has had some concern in relation to a potential disparity between the custodial regime to which the applicant may be subject and that which, until recently, might have been expected to be applied to a person convicted of similar crimes. Until recently a person so convicted and sentenced to substantial periods of imprisonment might have expected to have had consideration given to serving his sentence in open prison conditions on the mainland. It appears, as a result of administrative changes, that that is significantly less likely now. There is a material prospect that the applicant will be required to serve his imprisonment in more confined conditions.

We have, in the end, come to the view that these administrative arrangements are not such as to justify our interfering with the decision of the Royal Court. We would indicate, however, that the appropriate authorities may wish to take this concern into account when consideration is, in due course, given to the possibility of any transfer of the applicant to any such open prison regime. In the event we refuse the application for leave to appeal.

AUTHORITIES.

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R. -v- Higgs (1986) 8 Cr.App.R.(S.) 440.
R. -v- Aucott and Penn (1989) 11 Cr.App.R.(S.) 86.
R. -v- Ross (1989) 11 Cr.App.R.1(S.) 324.
R. -v- Bingham (1991) 13 Cr.App.R.(S.) 45.
R. -v- Wheeler (1991) 13 Cr.App.R.(S.) 73.

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Pagett -v- A.G. (1984) J.J. 57 C.of.A.

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A.G. -v- Godfrey (5th March, 1992) Jersey Unreported.

A.G. -v- Hamon (8th January, 1990) Jersey Unreported: (1990) J.L.R. N.11.

A.G. -v- Amy (26th October, 1992) Jersey Unreported.

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A.G. -v- Petch (1st April, 1993) Jersey Unreported.

Prison Act 1952.

Thomas: "Principles of Sentencing" (2nd Ed'n 1979):
p. 48: Effect of Remission and Parole.
p.298: Security.

Current Sentencing Practice: paragraph A7-2A01.
: paragraph 35-2F.
: paragraph C.5-2.C.01:
R. -v- Holmes (1979) 1 Cr.App.R. (S.) 233.
R. -v- Kay (1980) 2 Cr.App.R. (S.) 284.