



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 48
HCA/2020/223/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in a

SCOTTISH CRIMINAL CASES REVIEW COMMISSION REFERRAL

in

APPEAL AGAINST SENTENCE

by

MARK CONWAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Party

Respondent: Farquharson QC AD; the Crown Agent

28 October 2020

[1] On 2 August 2017, in the High Court at Edinburgh, the appellant pled guilty by section 76 procedure to an indictment in the following terms:

“Between 6 August 2009 and 25 May 2016, both dates inclusive, at Dundee House, 50 North Lindsay Street, Dundee, 44 Latch Road, Brechin and elsewhere you Mark

Andrew Conway, whilst employed as an IT Officer for Dundee City Council did form a fraudulent scheme to obtain money from Dundee City Council and in pursuance of said scheme you did on various occasions enter onto Dundee City Council computerised payment ledger entries purporting to represent sums due to genuine suppliers to Dundee City Council with associated bank account payment instructions made out to bank accounts under your own control, and you did thus induce Dundee City Council to transfer money to you to which you knew you were not entitled and you did thus obtain £1,065,085.32 by fraud.”

The sentencing judge adjourned the diet until 24 August 2017 to permit the preparation of a criminal justice social work report. On that date he imposed a sentence of 5 years and 4 months imprisonment, restricted from the period of 8 years which he would otherwise have imposed but for the appellant’s early plea of guilty. Sentence was backdated to 2 August 2017, on which date the appellant was remanded in custody.

[2] In August 2019 the appellant applied to the Scottish Criminal Cases Review Commission (“the SCCRC”) inviting it to refer his case to this court. In its statement of reasons dated 27 March 2020, the SCCRC referred the appellant’s sentence on the basis that there was fresh evidence showing that, after the appellant had been sentenced, Dundee City Council had recovered sums equal to the value of the fraud and that had this information been available at the time of sentencing it may have had a material bearing upon the sentence selected. Having regard to disposals in similar cases where offenders had been convicted of crimes of dishonesty involving significant values, the SCCRC also considered that the sentence imposed may have been outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. In due course the appellant lodged a note of appeal reflecting the basis upon which his case was referred by the SCCRC. The relevant parts of the note of appeal were grounds 1a, 1b and 2a.

The appellant's offending, mitigation and sentence

[3] In August 2017 the appellant was 51 years old. He had been employed by Dundee City Council between 1986 and 2016 as an IT officer specialising in financial IT systems and was regarded as the council's primary specialist in this field. The council used a custom financial computer system for the payment of monies to those who supplied services to, or on behalf of, the council. The appellant had unrestricted access to all components of the system for the purpose of ensuring its proper running. During 2009 the appellant fell into debt due to his use of online gambling websites. On 6 August he made an entry in the council's financial system purporting to relate to payment due to a fuel supplier but which contained the payment details of his own building society account. That initial entry was for payment of a sum of almost £18,000. Thereafter, and up until May 2016, he continued to engage in the fraudulent process which he had created. When the scheme was identified an investigation was launched which concluded that the appellant had set up a total of 57 payments of sums of money to which he was not entitled, with the individual sums obtained ranging between £5,898 and £27,557. The total sum dishonestly obtained by the appellant from the council was £1,065,085.32, of which he returned £7,337.58 at the time of the investigation.

[4] At the sentencing diet the judge was told that the underlying reason for the appellant's offending was the personal debt which he had accrued from a long-standing gambling addiction. He had re-mortgaged his house twice in an attempt to manage his debts. His initial aim had been to pay back all of the money obtained from his employer. His anticipated means of doing so was by future gambling winnings, which never materialised. After a few years his level of gambling was such that he appreciated he had no realistic hope of ever winning enough to repay the sums obtained. All of the money

received through the fraudulent scheme had been gambled away. The level of the appellant's gambling led to him being referred to as a "VIP" client by gambling companies. He was routinely incentivised to continue betting by the provision of presents, invitations to attend hospitality events and free bets being credited to his account as a "reward". Despite inviting the court to take account of the level of encouragement which had been engaged in by the gambling companies, counsel who appeared for the appellant informed the judge that he was not suggesting that there had been any breach of the Gambling Act 2005.

[5] The judge was invited to take account of the efforts which the appellant had gone to by way of assisting, to the extent that he could, in reducing the extent of the overall loss to Dundee City Council. Although he was told that there was no realistic prospect of the full sum specified in the charge being recovered, the judge was informed that the appellant had consented to the recovery of his entitlement to a lump sum and annual pension, allowing the council to recoup a sum of £258,966.15. He did not intend to contest confiscation procedures under the Proceeds of Crime Act and had instructed his legal representatives to seek early resolution of that matter with the Crown. It was expected that this would result in the loss to him of the net equity in his home, valued at approximately £49,000.

[6] The appellant lodged a note of appeal challenging the sentence imposed submitting, amongst other points, that the sentencing judge had failed to give adequate weight to the mitigating factors relied upon. Leave to appeal was refused by the first sift judge who stated that all matters had been properly taken into account and that the appeal was "plainly without merit and unarguable". There was no application to the second sift.

New information

[7] In his application to the SCCRC the appellant included an extract of a copy of the

publicly available Dundee City Council Scrutiny Committee Report into his conduct, dated December 2017. That report noted that, in common with other Local Authorities, Dundee City Council was required to have a fidelity guarantee insurance policy providing cover against loss through the dishonesty of employees. The report revealed that by the end of 2017 the council had recovered a sum in excess of £1 million. In response to the SCCRC, the council advised that £335,923 had been recovered from their insurers, £258,966 had been recovered from the appellant's pension and an ex-gratia payment had been received from William Hill Bookmakers in the sum of £500,000, providing a total sum of £1,094,889.

[8] In addition to the Scrutiny Committee Report, the appellant also provided a letter to the SCCRC dated 6 March 2018 from the Gambling Commission. This concerned the outcome of an investigation into the conduct of William Hill which had been concerned with, amongst other matters, the appellant's gambling activities. Providers of gambling services such as William Hill are required to hold a gambling licence under the 2005 Act and are subject to the regulation of the Gambling Commission. The Act requires the Gambling Commission to produce codes of practice with respect to social responsibilities and licence holders are bound to comply with those. The investigation discovered systemic failings with William Hill's methods aimed at preventing money laundering and limiting harm to those considered problem gamblers. The Gambling Commission found that William Hill had failed to comply with conditions of their operating licence requiring them to adhere to the Money Laundering Regulations 2007 and the Gambling Commission's own code of practice relating to licence holders' social responsibility. The Gambling Commission ordered William Hill to reimburse the identifiable victims who had suffered due to its customers frauds. On 11 October 2017 they paid Dundee City Council £500,000 in

recognition of the Gross Gambling Yield they had obtained from the appellant gambling with them the fruits of his illegal activity.

The SCCRC reference

[9] In its statement of reasons, the SCCRC observed that there is a consistent body of case law which indicates that repayment of or towards the financial loss occurred in crimes involving financial dishonesty will be a relevant factor at sentence (paragraph 23). It concluded that sentence was passed on the appellant prior to two key pieces of information becoming available. Those were that Dundee City Council had recovered the full value of the fraud, and that the most significant payment came from William Hill in recognition of the regulatory breach concerning the amount and regularity of the appellant's gambling with it that went almost unchecked. The SCCRC concluded that this information may have had an effect upon the length of the headline sentence selected, that there was a reasonable explanation for it not being led and that in its absence a miscarriage of justice may have occurred.

[10] The SCCRC also took account of information which the appellant had provided to it about a number of cases decided in Scotland including:

- The case of Christopher Proudfoot who, in July 2009, at the Sheriff Court at Inverness, was sentenced to a period of 40 months imprisonment reduced from a headline sentence of 5 years having stolen £930,000 from his employer over a period of three years through his position as a bookkeeper in order to pay off debts accrued through gambling.

- The case of Anthony DeMarco who, in July 2010, at the High Court at Edinburgh, was sentenced to a period of 5 years and 4 months imprisonment reduced from a headline sentence of 8 years having pled guilty to an offence involving arranging loans from financial institutions by means of fraud to a total value of £1 million over a period of one year.
- The case of David Dinham who, in July 2011, at the Sheriff Court at Edinburgh, was sentenced to a period of 2 years imprisonment (headline sentence not known) having embezzled £550,000 from his employer over a four year period.
- The case of Daniel Dreghorn who, on 2 September 2015 at the High Court at Glasgow, was sentenced to a period of 4 years imprisonment reduced from 6 years having pled guilty to stealing medical equipment worth £1.3 million over a four year period.
- The case of Jacqueline McPhee who, on 12 July 2016, at the High Court at Edinburgh, was sentenced to a period of 3 years and 4 months imprisonment reduced from a headline figure of 5 years having pled guilty to a charge of defrauding her employer of a sum in excess of £1.3 million over a period of thirteen months.
- The case of Stephen Farley who, on 21 September 2016, at the High Court at Edinburgh, was sentenced to a period of 7 years imprisonment reduced from a headline sentence of 9 years having created a “Ponzi scheme” through which he

obtained over £18 million from investors with a benefit to him over the term of the libel of £800,000.

[11] Whilst acknowledging that it was unaware of the exact details and circumstances of the cases mentioned, the SCCRC considered that, assessing generally the value of the crimes at issue and the disposals arrived at, the sentence imposed on the appellant may have fallen outside a range of sentences which the sentencer applying his mind to all of the relevant factors could reasonably have considered appropriate. It explained that this view was strengthened in consideration of the new evidence and for this reason also considered that there may have been a miscarriage of justice.

Sentencing judge's report

[12] In the report which the sentencing judge prepared in response to the original note of appeal he explained that, despite the mitigating factors relied upon by the appellant's counsel, he selected a headline sentence of 8 years imprisonment having regard to five factors:

1. the appellant fraudulently obtained a sum of money in excess of £1 million;
2. he persisted in his conduct for almost 7 years;
3. his conduct amounted to a very grave breach of trust;
4. even after he became aware in May 2016 that colleagues had discovered something suspicious in relation to an earlier payment he created a further false invoice in the sum of nearly £18,000 and arranged for that to be paid into his account;

5. the amount of public money involved and the persistent and brazen nature of the appellant's fraudulent behaviour required a deterrent sentence to be imposed to prevent others from acting in a similar way.

Supplementary report

[13] The sentencing judge prepared a supplementary report for the benefit of this court having considered the terms of the reference and the fresh note of appeal prepared on the appellant's behalf. In that report he explains that he was aware of the sentences passed in the cases of *McPhee* and *De Marco* at the time of sentencing and was to an extent guided by the sentence imposed in *De Marco*. He adhered to his original view that the appellant had committed a grave breach of trust carried out over a very substantial period of time. He explained that, in his view, it was an aggravating feature of the crime that the fraudulent behaviour resulted in substantial losses to the public purse.

[14] He explained that when assessing sentence he had proceeded upon the view that the loss suffered by Dundee City Council was in the region of £800,000, whereas he now understood from the material he had been provided with that almost all of the sums lost had been recovered. He explained that the level of harm actually caused to the victim of a crime is a relevant factor in selecting the appropriate sentence and, had he known at the time what the eventual level of harm caused to the council was, he would have selected a different sentence. He explained that he would have selected a headline sentence of 7 years imprisonment and, applying the same discount of one third in light of the plea, he would have imposed a sentence of 4 years and 8 months.

The appellant's submissions

Grounds 1a and b

[15] The appellant relied upon the material set out in the reference and the SCCRC's reasons for considering that a miscarriage of justice may have occurred. He argued in particular that when the sentencing judge was informed that there was no realistic prospect of the victim recouping the full sum mentioned in the charge he was given a misleading piece of information. Subsequent enquiry demonstrated that Dundee City Council had all along been in possession of fidelity guarantee insurance, in light of their obligations as a local authority.

[16] The appellant submitted that whilst the payment from William Hill had been described in the Dundee City Council's Scrutiny Committee report as being ex-gratia, it was quite clear from the correspondence considered by the SCCRC that the payment had been made in order to satisfy William Hill's requirement to divest themselves of funds acquired from illegal sources and to make redress to the victims of crime in cases where the unlawful funds received could be demonstrated as rightfully belonging to those victims.

[17] Attention was drawn to the Principles and Purposes of Sentencing Guideline prepared by The Sentencing Council for Scotland. As set out at paragraphs 1 and 2, the core principle that sentences must be fair and proportionate required that all relevant factors of a case must be considered. One aspect of the crime to which the appellant pled guilty was the financial loss to the victim. What was important was the lasting impact of that loss. In the present case that lasting impact was very little given the sums recovered by the council.

Ground 2a

[18] The appellant submitted that there were a number of relevant mitigating factors in

his case. He was a first offender with a full and commendable work record who presented with minimal risk of further offending. He had co-operated fully with the police enquiry, had self-referred to addiction agencies and had stopped gambling prior to the sentencing diet. In addition to losing his pension built up over thirty years of employment he had lost his reputation and prospects of future employment. In all of these circumstances the disposals in the cases mentioned in the SCCRC statement of reasons supported the submission that the sentence selected in his case was excessive.

Discussion

The new information

[19] At paragraph 23 of the statement of reasons the SCCRC state that:

“There is a consistent body of case law which indicates that repayment of or towards the financial loss incurred in crimes involving financial dishonesty will be a relevant factor at sentence.”

The cases which are cited in support of this proposition are *Restorick v HM Advocate* 2003

SCCR 609, *White v HM Advocate* 1987 SCCR 73, *Dolan v HM Advocate* 1986 SCCR 564, *Islam and Meah v HM Advocate* 1989 SCCR 109 and *Hughes v HM Advocate* 2014 SCCR 506.

[20] The case of *Restorick* involved an entirely different type of dishonest conduct through which a very large sum of money was obtained from an elderly and vulnerable victim and there was no restoration. A sentence of 10 years imprisonment was upheld on appeal. The case of *Hughes* also involved large sums of money but the nature of the fraud was a false statement as to income, leading lending institutions to provide loans for the purchase of two properties. The loan payments were met, one loan was repaid and the loans were at all times secured. The court stated that there was never any risk of loss to the lending institutions.

[21] The court is not persuaded that what was said in any of these cases is of application to sentencing decisions involving the nature and extent of the offending in the appellant's case. That said, repayment of, or towards, financial loss incurred through an accused person's dishonesty may be a factor which a sentencer can take into account in determining the appropriate disposal. What effect, if any, to give to evidence of repayment will depend upon the particular facts and circumstances of the individual case.

[22] It is appropriate to begin by proceeding on the basis that the harm caused to Dundee City Council in the present case was the loss occasioned to it directly by the appellant's conduct. That is reflected by the sum specified in the charge to which the appellant pled guilty. Mitigating factors may then be taken account of and given appropriate weight. In assessing sentence the judge took account of the sum of almost £259,000 which the council was able to recoup from the appellant's pension fund. He was entitled to do so.

[23] However, quite different considerations apply to recompense achieved by a victim as a consequence of events over which the perpetrator of the crime has no control, which do not require his participation and which cause him no loss or hardship. Although the council received substantial further sums, the court does not consider that it would be correct to proceed on the basis that, in the end, Dundee City Council suffered only a very small or no loss. This would be to ignore the fact that this result was only brought about as a consequence of payments made from other sources. There is no reason at all to view the payment of almost £336,000 from the council's insurance company as a factor in mitigation of the appellant's sentence. To do so would be to ignore that this loss to a commercial enterprise was a direct consequence of the appellant's offending.

[24] The effect of the payment by William Hill is more difficult to determine. On the one hand, had they done what was required of them they might have ceased to engage in betting

transactions with the appellant. Whether that would have brought his offending to an end or not seems entirely speculative and perhaps unlikely. Equally, the fact that the company was in breach of a social responsibility requirement to the appellant in failing to check the extent of his gambling is something which only has a tenuous connection with the fact that he was embezzling money from his employers. On the other hand, it might be said, as the sentencing judge did in his supplementary report, that William Hill's decision to pay £500,000 to the council can reasonably be interpreted as an acceptance by them that their dealings with the applicant were dishonourable and contributed to a situation where he became ever more immersed in and addicted to gambling.

[25] Assuming at best for the appellant that the fact of the payment by William Hill can be viewed as a mitigating factor, the weight that properly can be attached to it is limited. In particular, it would be wrong for a sentencer to engage in a form of arithmetical exercise through which the custodial sentence to be imposed became shorter by way of correlation with the increasing amount of money recouped by the victim.

[26] The general approach which the sentencing judge took in determining the appropriate disposal was correct. The five factors which he relied upon were all relevant and led him, correctly, to conclude that only a significant prison sentence was appropriate. The court does not consider that the new information relied upon ought to have any substantial impact on the selection of the appropriate length of sentence.

The sentence selected

[27] The appellant's submission was, that regardless of the mitigatory value of payments received, the sentence selected could be seen to be excessive by reference to the circumstances of, and sentences imposed in, the various cases to which attention was drawn.

Little by way of detailed information is available to the court in respect of these cases. None is the subject of a reported decision and each is an example of a sentence imposed by a first instance judge. Something of the circumstances of the cases of *De Marco* and *Farley* can be understood from the sentencing statements published on the Judiciary of Scotland website and the court had available to it a copy of the sentencing judge's report to the Parole Board for Scotland in the case of *Dreghorn*. The case of *Farley* concerned quite distinct behaviour in which the accused set out by determined effort to lead a lavish lifestyle funded by his sophisticated criminal conduct. The remaining cases though can perhaps be seen as a group in which the general nature of the offending was similar and was carried out by individuals in similar positions to the appellant. As the appellant submitted, there were significant aspects of aggravation in the case of *De Marco* which were absent in his case. We also understand that the accused *McPhee* had a previous conviction, albeit 16 years earlier, for embezzling the sum of £250,000 from a former employer. The sentence in her case seems surprisingly lenient.

[28] Despite the limitations of the information available, the picture which emerges reasonably clearly from this collection of cases involving similar conduct to that engaged in by the appellant, is that the sentence selected in his case stands out as being high. Taking a broad view of the facts of the comparable cases relied upon, a sentence of 6 years imprisonment would seem to the court to be the appropriate sentence in the appellant's case. Such a sentence would reflect the extent to which deterrence need feature as a sentencing purpose in cases of this sort. That sentence would fall to be discounted by a period of one third in recognition of the utilitarian value present in the early plea tendered.

Decision

[29] The sentence imposed shall be quashed and in its place there shall be substituted a sentence of 4 years imprisonment to date from 2 August 2017.