

Neutral Citation No. [2019] EWCA Crim 921

2019/00546/A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Tuesday 21st May 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE JEREMY BAKER

and

THE RECORDER OF CARDIFF

(Her Honour Judge Rees)

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

CHANTEL NEWSOME

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Miss C Mawer appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Tuesday 21st May 2019

LORD JUSTICE DAVIS: I shall ask Mr Justice Jeremy Baker to give the judgment of the court.

MR JUSTICE JEREMY BAKER:

1. The applicant, Chantel Newsome, having pleaded guilty before the magistrates and been committed for sentence, appeared in the Crown Court at Bristol where, on 10th January 2019, she was sentenced to three years' imprisonment in respect of an offence of fraud, contrary to section 1 of the Fraud Act 2006.
2. The applicant's application for leave to appeal against sentence has been referred to the full court by the Registrar. We grant leave.

Facts of the offence

3. The circumstances giving rise to the offence are that over a period of about seven years, between 2011 and 2018, the appellant was employed as an accounts and office clerk for a family owned business in Bristol known as ABD Limited. Due to family ill-health, the appellant's role developed such that she soon had full financial responsibility for the company bank and internal accounts. Over a period of about six years, between 2012 and 2018, the appellant abused her position by raising false invoices for products which had not been purchased and work which had not been done, such that she was enabled dishonestly to pay company funds, which were held in its business accounts, into two separate bank accounts, both of which were in the appellant's name.

4. The offences were not discovered until April 2018, when the appellant was dismissed from her employment after it was found that the total loss to the company was £565,709.82. The matter was reported to the police and the appellant was arrested. In interview, she made full admissions in respect of her offending, albeit she did not provide a full explanation as to the whereabouts of the funds which she had unlawfully gained.

5. As a result of the loss to the company, it has suffered significant financial difficulties so that a number of key members of staff have had to be made redundant.

Sentencing exercise

6. At the sentencing hearing the judge had before him documentation which disclosed that the appellant was 47 years of age and had no previous convictions. She was married with two young children aged 10 and 12. In January 2018, the appellant was diagnosed with stage 4 bowel cancer and underwent surgery, as a result of which she was fitted with a stoma. At the date of the sentencing hearing, she was undergoing palliative chemotherapy every two weeks involving several visits to hospital every fortnight. The consultant medical oncologist, Dr Gangadhara, in a report dated 9th January 2019, stated:

"There are no curative options in her case and treatment options are aimed at disease control with improving her quality of life and survival. Without treatment her prognosis is measurable in months, but with treatment this can be improved to a median of around 18 to 24 months."

7. In sentencing the appellant, the judge determined that the offence was a category 1A offence within the relevant sentencing guidelines. After taking into account the appellant's good character, the judge reduced the notional term to five years which, when discounted for her early

guilty plea, reduced the figure to three years and four months.

8. The judge had been referred to *R v Bernard* [1997] 1 Cr App R(S) 135 and stated that normally the fact that a person is suffering from a terminal illness will not have a dramatic effect upon sentence, as it is a matter which can be taken into account by the Secretary of State in deciding to permit early release. However, as an act of mercy, the judge stated that he would reduce the period of imprisonment in this case to one of three years.

Post-sentence update

9. Since the date of her sentence, further reports have been obtained from Dr Gangadhara, dated 16th January, 13th March and 10th April 2019. He clarified that the appellant's median survival figure of eighteen to twenty-four months was from the date of diagnosis in January 2018, such that with the particular chemotherapy she is receiving, as at March 2019 her median survival was twelve to fifteen months. He also stated:

"As you will note, she is currently on chemotherapy treatment which suppresses her immune system and she would be at an increased risk in a prison environment with other inmates, which will put her at risk of life-threatening infections, including life-threatening sepsis/infection and increased risk of blood clots. She would also be disadvantaged in this situation, for instance if she had an overwhelming fever or she felt unwell on her chemotherapy during her stay in prison, then she may not be in a position to get appropriate medical help by her immediate team looking after her and this may put her in a detrimental situation, including risk of death from severe complications on treatment. She has a stoma from previous surgery for her bowel obstruction and she has to deal with this on a daily basis, involving bag changes and the need for a supply of regular stoma bags and care. She is also currently experiencing treatment-related side-effects, including fatigue, sore mouth, loss of appetite, loose stools and weight loss on a regular basis, which requires regular input from oncologists, specialist nurses and the rest of a multidisciplinary team looking after her on a regular basis."

10. We have been provided with statements from the appellant's husband and letters from her children. Not unnaturally, the appellant's present situation is causing the whole family a great deal of distress. The appellant's husband sees the appellant every weekend and he is allowed to accompany her to the fortnightly chemotherapy sessions. The children see their mother every other week and there are further visits to the appellant by other members of her family.

11. Letters from both the prison and healthcare providers at the prison confirm that in order to limit the risk of infection, the appellant is currently being cared for in a single room with lavatory facilities, albeit on a unit for those suffering from personality disorders due to this being the unit with the least number of residents. The appellant's regular chemotherapy sessions at hospital are managed through release on temporary licence, as are other necessary hospital visits. Moreover, the appellant has been provided with additional compassionate visits by her family.

12. Quite properly, those now representing the appellant have made a written application to admit this material as "fresh evidence" under section 23 of the Criminal Appeal Act 1968. Having considered the matter, we are of the view that this material can be properly regarded as updating and clarifying material rather than evidence which significantly affects the evidential basis for the original sentencing exercise, as explained at [8] to [10] in *R v Rogers* [2016] EWCA Crim 801, such that when considering this appeal we will take this material into account in addition to that which was before the sentencing judge.

Grounds of appeal

13. In essence, Miss Mawer, who now represents the appellant, seeks to argue that the sentence

of three years' imprisonment is manifestly excessive due to the court having failed sufficiently to take into account the available mitigation, including the appellant's good character and remorse, the effect of the sentence upon her children and the nature and extent of her terminal illness. It is submitted that, bearing these matters in mind, the period of imprisonment should either be substantially reduced or suspended so as to permit the appellant's immediate release from custody.

Analysis

14. On any view, this was a serious case of fraud and rightly determined by the sentencing judge to be a category 1A offence within the relevant sentencing guidelines. High culpability A was demonstrated by the abuse of the appellant's position of trust and responsibility, whilst the amount of loss placed it into category 1 harm. Therefore, the appropriate starting point was seven years' custody, with a category range of between five and eight years.

15. It is pointed out that the amount of loss (about £500,000) was significantly less than the figure of £1 million upon which the starting point is based. However, there was evidence of high impact due to the serious detrimental effect which the fraud has caused to the business, which would have entitled the judge to have elevated the offence within the category range.

16. This is of relevance when considering whether the judge failed to make any or any sufficient reduction to take into account the appellant's good character and remorse for her offending together with the effect of her imprisonment upon her children. Although the judge made express reference to the appellant's good character, it is correct that he did not make any express reference to the appellant's remorse which was considered to be genuine by the author of the pre-sentence report; nor did he make any express reference to the effect of the appellant's

imprisonment upon her children. However, we have no doubt that having been addressed about these matters by those representing the appellant and the judge having alluded to the tragic nature of the case, he had both of these matters well in mind. In any event, in our judgment the reduction of the term, prior to the discount for her early guilty plea, to five years sufficiently recognised those mitigating factors.

17. The real point which arises in the present case is the judge's approach to the appellant's terminal illness and whether it was sufficiently recognised by reducing what he determined would otherwise have been the correct sentence by a period of four months, to one of three years' imprisonment.

18. The principles regarding this matter were explained by Rose LJ in *Bernard*, after the court had reviewed a number of previous cases, as follows:

"It is apparent, as we have said, that these decisions are not easily reconcilable. However, we take the view that the following principles emerge from them:

- (i) a medical condition which may at some unspecified future date affect either life expectancy or the prison authority's ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this court to interfere with an otherwise appropriate sentence;
- (ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;
- (iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than otherwise would be appropriate;
- (iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by

virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate."

19. Since then there have been a number of cases which have dealt with the application of these principles to the particular facts of those cases, none of which we have found to be particularly helpful in guiding our views with regard to the particular facts of this case.

20. We have of course borne in mind what was said by Lord Thomas CJ in *R v Qazi* [2010] EWCA Crim 2579 concerning the potential relevance of Article 3 of the European Convention on Human Rights to the sentencing of those affected by serious medical conditions and note that quite properly this is not a case in which it is submitted that the mere fact of imprisonment would inevitably expose the appellant to inhuman or degrading treatment contrary to Article 3.

21. However, as Hughes LJ (as he then was) said in *R v Hall* [2013] EWCA Crim 82, having referred to *Qazi*:

"14. ... the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the defendant, or as a matter of generally expressed mercy in the individual circumstances of the case: see *R v Bernard* ... It will not necessarily do so, and normally will not do so if, for example, the powers of release under the Prerogative powers will provide sufficient response if it is a case of possible future deterioration, nor will it normally do so if the prisoner represents a danger from which the public needs to be protected. But in an appropriate case it might be right to do so. ..."

22. Finally, we also remind ourselves of what Hallett LJ said in *R v Clarke* [2017] EWCA Crim 393 in relation to the related context of old age:

"25. ... Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in *Forbes*, we consider that the approach of taking them into account in a limited way is the correct one."

23. Turning to the facts of the present case, we accept that the appellant's health is in a parlous state, as indeed it was at the date of the sentencing hearing. However, although there has been some clarification of the appellant's life expectancy and further details concerning her palliative care regime, there is little before us that was not known to and taken into account by the lower court. Furthermore, it is clear that the judge not only made specific reference in his sentencing remarks to *Bernard*, but his approach to the sentencing exercise properly reflected its principles.

23. Therefore, there can be no principled criticism to the approach taken by the sentencing judge in this very difficult case and the only question for us is whether the limited reduction which he granted, namely one of four months, was sufficient properly to reflect the effect of the appellant's state of health.

24. Having given anxious scrutiny to the appellant's circumstances, including the terminal nature of her illness, the severity of the curtailment of her life expectancy and the impact that these matters are likely to have upon her two young children, we are just persuaded that as an act of mercy the period of imprisonment, whilst it will remain of immediate effect to reflect the serious nature of her offending, should be reduced to one of eighteen months.

25. Accordingly, we quash the sentence of three years' imprisonment and substitute for it a

sentence of eighteen months' imprisonment. The appeal against sentence is allowed to that extent.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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