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2019/02423/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Wednesday 23rd October 2019

B e f o r e:

LORD JUSTICE IRWIN

MRS JUSTICE ANDREWS DBE

and

HIS HONOUR JUDGE AUBREY QC

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

R E G I N A

\- v -

NICOLA HAYTER

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Mr C Witcher appeared on behalf of the Appellant

J U D G M E N T

Wednesday 23rd October 2019

LORD JUSTICE IRWIN:

1. On 3rd January 2019, in the Crown Court at Cambridge, in the early stages of a trial before His Honour Judge Enright and a jury, the appellant pleaded guilty to theft (count 8 on the indictment).

2. On 18th June 2019, in the Central Criminal Court, the appellant was sentenced by the same judge to 42 months' imprisonment.

3. She now appeals against that sentence by leave of the single judge.

4. The facts may be summarised briefly as follows. The appellant's offending occurred during her employment as the account manager for a company called Retrofit UK Limited. She used company credit cards dishonestly and made overpayments to herself and to her daughter, who was a co-defendant. The appellant had been employed by the company for a long period. She had begun in 2007. The offending occurred over a period of years, from 2012 until 2016. By 2014, as the Crown described the facts, the appellant's spending on the company credit card was "out of control". She used the cards as if they were her own for day-to-day expenses for herself and her family and, following that expenditure, she paid the balance from company funds. She continued in this dishonest course of conduct until it was eventually uncovered.

5. In the course of her interview following arrest, the appellant asserted that this was a malicious allegation by the company and that the company had acted dishonestly in an attempt to evade tax.

6. Due to the nature of the appellant's role within the company, the length of the offending and the nature of the thefts, it proved to be difficult, despite considerable effort, to establish the precise monetary loss to the company from the appellant's dishonesty. The prosecution case was that the appellant's dishonest appropriation of funds was in excess of £60,000. However, the defence indicated that their view was that the loss was in the region of £50,000.

7. The appellant eventually pleaded guilty to the count of theft, but maintained her not guilty pleas to associated counts of fraud and deception. It was on the second day of the trial, and following a considerable amount of evidence from the managing director of the company, that the Crown indicated that they would accept that plea. It was for that reason that she was given considerable credit for entering the plea, despite the fact that trial had commenced. The "basis" on which it was offered was not accepted by the Crown in its entirety, but the prosecution indicated to the judge that they were content that the appellant should be sentenced on the basis of loss in the region of £50,000. The other critical point in the basis of plea, which was accepted, was that the activity had not begun fraudulently, although it became a considerable course of theft.

8. The appellant's offending had a considerable impact upon the company. Mr Hall, the managing director of the company, spoke of the money loss and the very bad breach of trust. In the Impact Statement for Business he emphasised that the offending had placed the company in difficulties; that it had become hard to raise a loan; that the losses drove the company into a considerable overdraft, with consequential high interest charges; that, as a consequence, it was hard to advance the company premises as security for a loan; and that it took considerable time and effort to research what had happened. Mr Hall valued the staff time alone in attempting to work out the losses at over £21,000.

9. The appellant is a married lady of 52 years of age. She had no previous convictions. She lost her subsequent job following the conviction.

10. A pre-sentence report which was before the sentencing judge indicates several significant points. First, the appellant's attitude to her offending can properly be described as "evasive". She displayed a tendency to minimise and to excuse herself from the offending. She still claimed that her employer was aware of the money that she was taking. She stated that there was no financial difficulty at the time of the thefts. So far as re-offending in a similar way, she was assessed as being of medium risk of serious harm to known adults and of low risk to others if she were to be placed in such a position again.

11. In sentencing, the judge accepted that the appellant did not begin this course of activity fraudulently. He emphasised the obvious high degree of trust and thus breach of trust in the offending. He described the appellant as the "right-hand man" of the boss of the firm. That was a measure of the reliance that had been placed on the appellant. He also emphasised the long time span of four years or more and that no money had been recovered.

12. The pre-sentence reveals one particular fact which is of some significance. The appellant had equity in her house. In the course of the period between her plea of guilty and sentence, she raised money from equity release. But, having lost her subsequent job, she then repaid that money into the equity of the house, rather than making reparation for the losses.

13. The judge noted that there had been a big impact on the company, as set out in the Impact Statement for Business. He identified the culpability as very high: the appellant had a "leading role" and a high degree of trust. He said that initially the categorisation of the losses, at around £50,000, would place the matter into category 2 of the sentencing guidelines, but the significant additional harm brought the matter into category 1. He had seen Mr Hall in the witness box for a considerable period and was in a very good position to gain a reliable impression of the man and of his evidence.

14. The judge gave credit for the appellant's guilty plea, as we have indicated, on the ground that the original indictment had been "overloaded". He took a starting point of four years six months' custody, before giving around 22 per cent credit for the guilty plea and any personal mitigation, and by that route reached the sentence which he passed.

15. In the grounds of appeal advanced on the appellant's behalf, Mr Witcher properly accepted that there was high culpability and agreed that it was a category A case, but submitted that it should have fallen into category 2 because of the amount of money stolen. Initially, the suggestion was that the harm caused was not significant enough to move the offending up into category 1. But, realistically, Mr Witcher added, in a fallback position, that even if the offending was properly categorised as A1, there was no good basis to move the starting point from three years six months to four years six months' custody.

16. We agree with that submission. The starting point here was too high and there was no proper reason for that shift. In our view, the categorisation of the case was entirely appropriate, particularly given the factor which may be thought to have aggravated the harm caused: that the appellant not only was able to, but had made the preparations to make significant reparation, but chose not to do so.

17. For those reasons, we quash the sentence passed. The starting point should have been three and a half years' imprisonment. We apply a similar reduction for the guilty plea and any personal mitigation and substitute the sentence of 32 months' imprisonment. To that extent, this appeal succeeds.

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