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No: 2018 03089 A4

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Friday, 16 November 2018

**B e f o r e:**

**LORD JUSTICE BEAN**

**MR JUSTICE NICOL**

**MR JUSTICE PEPPERALL**

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**R E G I N A**  
**v**  
**C O R Y A G U I L A R**

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**J U D G M E N T**

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1. MR JUSTICE PEPPERALL: On 24 April 2018 in the Crown Court at Sheffield the appellant pleaded guilty to an offence of converting criminal property, contrary to section 327 of the Proceeds of Crime Act 2002. He was sentenced by His Honour Judge Kelson QC to two-and-a-half years' imprisonment and now appeals against sentence with leave of the single judge.

## **FACTS**

2. The appellant's offending involved frauds against a company called Sheaf Power Ltd. The company trades internationally in high value generators. Sheaf Power received an email from a genuine and well-known customer to its then chairman, Bob Linley, asking if he could borrow £4,000 from the company by a transfer to his bank account which he would later repay. That email must have been intercepted by fraudsters because they then sent emails to the company's financial controller, purporting to come from the chairman, asking for various amounts of money to be transferred to specified bank accounts. The financial controller did not notice the difference in the email addresses and believing them to be genuine instructions from the company's chairman, she actioned nine transfers to five individuals. The total amount transferred was £100,000. One transfer was in the sum of £40,000, and the others were all between £5,000 and £15,000.
3. In the case of the appellant, a transfer of £15,000 was made on 23 February 2015 to

an account in the name "Williams Roberts". While not in his name, the appellant accepted that this account was registered to him.

4. On 23 and 24 February 2015, various sums were withdrawn from the appellant's account: £2,600 was withdrawn in cash and almost £11,000 was transferred out to various third parties, including £1,500 to his father and brother.
5. By the end of 24 February, there was just £1,462 left in the account. On discovery of the fraud, the account was frozen and the balance was subsequently recovered by the complainant company. According to the managing director of Sheaf Power Ltd, the money recovered overall was just under £17,000, so that the total loss to the company was £83,000.
6. The appellant was arrested in April 2016 and interviewed. He made no comment.
7. The appellant initially pleaded not guilty to this indictment and the case was adjourned for trial. The appellant changed his plea to guilty shortly before trial and, while his initial basis of plea was not acceptable, ultimately he pleaded guilty on the following basis:
  - First, that on 23 February 2015, £15,000 was transferred into his bank account.
  - Secondly, having seen the money arrive into his account, he made some transfers knowing that the money was not his.
  - Thirdly, he accepted that he knew that he should not have transferred the money and that he had acted dishonestly in doing so.
  - Fourthly, he played no role in stealing or defrauding the complainant and could not offer any explanation as to how the money came to arrive in his account; he was not expecting the money and there was no prior arrangement to receive it.
  - Fifthly, his criminal culpability began only from the point at which he saw that the money had arrived in his account.
8. A victim personal statement by Bob Linley, the managing director of Sheaf Powell Ltd, was

read. He told the court that Sheaf Power was a small company, with only fifteen employees, and that the fraud had had a profound effect on the company and its employees. One employee had to be made redundant as the company struggled in the immediate aftermath of this fraud. In addition, the financial controller felt responsible for failing to spot the fraud and resigned her position. Plainly she felt a great weight of responsibility to her colleagues; but it is clear that she was an entirely innocent victim of this fraud. In addition, Mr Linley told the court that, tragically, the then managing director had a heart attack and died about three months after the fraud at the age of 46. He was under stress in any event but, Mr Linley observed, the fraud added to his stress.

#### **SENTENCE**

9. In passing sentence, Judge Kelson referred to Mr Linley's statement and observed that people's lives had been affected by this fraud. The judge referred to the guidelines issued by the Sentencing Council for this offence and identified that this was a culpability B case, namely a case of *medium* culpability where the appellant had played a *significant but neither a leading nor a lesser role* in the fraud. As to *harm*, he put the offence in either Category 5 or 6. Category 5 is for offences involving sums of £10,000 to £100,000, whereas Category 6 cases are for sums of less than £10,000.
10. The judge recorded that the appellant was 19 at the time of the offence and 22 at the date of sentence. He observed that he had no previous convictions and that the offending was out of character. He also took into account that the appellant had health issues.
11. As to credit for the late plea, the judge said that the appellant was entitled to credit of 15%, which, he observed, was approximately one-sixth.
12. In passing sentence, the judge said:

"The damage that has been caused to this company was relatively easily occasioned by the sophisticated criminals at the head of this whole operation; but just as burglars need handlers so fraudsters need bank accounts, and those who lend their services to fraudsters and the use of their bank accounts to fraudsters are facilitating grave crimes by taking their part. This is a cyber crime with a very real human effect."

13. The judge sentenced the appellant to two-and-a-half years' imprisonment.

### **APPEAL**

14. In his helpful written submissions Mr Foster, counsel for the appellant, argues that, given that the judge indicated that he was giving credit of around one-sixth, he must have had a sentence in mind, before credit for the late guilty plea, of three years. By reference to the guidelines, he concedes this was a Category 5 case, but points to the fact that the sum involved in the appellant's case fell significantly nearer the bottom of that category range than the top. As to culpability, Mr Foster suggests that the case lay somewhere between B and C.

15. Mr Foster submits that the judge took too high a starting point. He does not challenge the credit for the appellant's plea, but argues that the judge gave insufficient credit for the other mitigating features in this case. The sentence should, he submitted, have been significantly less than two years' imprisonment, meaning that the judge could, and in Mr Foster's submission should, have passed a suspended sentence.

### **DECISION**

16. While primarily structured around value, the Sentencing Guidelines call for a broader evaluation of harm. Indeed, the guidelines expressly provide that, after initial consideration of value, the sentencing judge should take into account "the level of harm associated with the

underlying offence to determine whether it warrants upward adjustment of the starting point within the range or, in appropriate cases, outside the range".

17. In our judgment, Judge Kelson was right in assessing harm to take into account the impact of this and associated offending upon the complainant company. This was, as the judge rightly observed, fraud with real consequences. We consider that the judge was right to have particular regard to the fact that two people had lost their employment in the circumstances already described.
18. As counsel concedes in his written submissions, the judge was right to consider Category 5. Here the monetary value involved in the appellant's offending was, as counsel submits, towards the bottom of the range for Category 5 offences. Nevertheless, the judge was right to take a broader view of harm and to move up within the sentencing range.
19. We do not accept counsel's submissions that this case fell into the lesser culpability bracket, although we do accept that it was not the most serious case of medium culpability.
20. The guideline for a Category 5B offence provides a starting point of eighteen months' imprisonment on the basis of an offence involving £50,000, with a sentencing range of 26 weeks to three years. Plainly a case involving a little over £10,000 with no additional evidence of harm might attract a starting point towards the bottom of the sentencing range. Here, however, the evidence of harm justified the judge in taking a significantly higher starting point. Bearing in mind value, the evidence of actual harm and the appellant's culpability, we consider that the correct starting point was around eighteen months' imprisonment.
21. We turn then to consider the aggravating and mitigating features of the case. The guidelines rightly indicate that damage to a third party, for example through loss of employment, is an aggravating feature. Having, however, taken this into account in assessing harm, we

must not double count this aspect of the offence.

22. As to mitigation, we take into account that the appellant was 19 at the time of the offence; that he was a working man of good character; that he had health difficulties; and the fact that, through no fault of his own, he had to wait for two years before this matter came to court. We say *two years* rather than *three* because he cannot complain about the further delay caused by his initial not guilty plea. Finally, we remind ourselves that the sentencing judge was required not to pass a custodial sentence unless he was of the opinion that the offence was so serious that neither a fine alone nor a community sentence could be justified, and that, in fixing the length of any custodial sentence, the judge was required to pass the shortest sentence that was commensurate with the seriousness of the offence.
23. We consider that the judge was right to find that a custodial sentence was justified, but in our view the proper sentence after trial was around sixteen months' imprisonment. As counsel concedes, the judge was right to allow credit of around 15%. Indeed, we consider that, in circumstances where there was a late change of plea shortly before trial and, even then, the initial basis of plea was unacceptable, there could be no complaint as to the credit given by the judge. In our judgment, after credit for the late plea, the proper sentence was thirteen months' imprisonment.
24. Plainly a sentence of this length would have allowed the judge to consider suspension. We do not, however, accept that this was an appropriate case for a suspended sentence. In our judgment the appropriate punishment for this offending was an immediate custodial sentence.
25. For these reasons, while we agree with the learned judge that the offending was seriously aggravated by the very real harm that it caused, we consider that the appellant should have been sentenced differently. Accordingly, we allow this appeal. We quash the sentence of two-and-a-half years' imprisonment and, in its place, substitute a sentence of thirteen months'

imprisonment.

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