



Neutral Citation Number: [2019] EWCA Crim 1897

Case No: 201803545/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2019

Before:

LORD JUSTICE LEGGATT
MRS JUSTICE CARR DBE
and
HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the CACD)

Between:

REGINA
- and -
ANITA WHITTLE

Respondent

Appellant

Miss E McAnaw appeared on behalf of the **Appellant**
Mr R Davies appeared on behalf of the **Crown**

Hearing date: 25 October 2019

Approved Judgment

Lord Justice Leggatt:

1. This appeal raises an issue about the assessment of the amount which the appellant has been ordered to pay under a confiscation order.
2. The appellant, Anita Whittle, was employed for many years as the Parish Clerk and Responsible Financial Officer of Bratton Parish Council in Wiltshire. On 26 May 2017 she was convicted after pleading guilty to four offences involving dishonesty in the course of her employment. Two of the offences were straightforward thefts committed by transferring money from the Parish account to her own bank account electronically and by paying cheques into her account. The total amount stolen was £11,972.66.
3. The other two offences were charged as obtaining property by deception in respect of a period before the Fraud Act 2006 came into force, and dishonestly making a false representation contrary to sections 1 and 2 of that Act in respect of a subsequent period. These offences were committed after Bratton Parish Council had agreed in or around December 2005 to pay monthly pension contributions into a pension fund held by Wiltshire County Council for the benefit of the appellant. What in fact happened was that money was paid by the Parish Council which the appellant represented was being paid into the Wiltshire County Council pension fund but which she in fact received and retained for her own use. The total amount of money misappropriated in this way was £14,928.64. Adding together the amounts involved in all four offences produces a figure of £26,901.30.
4. After the appellant was convicted, the prosecution applied for a confiscation order under the Proceeds of Crime Act 2002. A hearing eventually took place on 25 July 2018 at which the judge made such an order for the full sum of £26,901.30.
5. Before making a confiscation order, the court must first decide whether the defendant has benefited from his or her criminal conduct and, if so, the amount of the benefit. Provided that it does not exceed the available amount, this is the "recoverable amount" as defined in section 7(1) of the Act. Pursuant to section 6(5)(b), the court must then make a confiscation order for the recoverable amount, unless and to the extent that it would be disproportionate to require the defendant to pay that amount. In this case it was agreed by both parties that the amount of the appellant's benefit from her criminal conduct was the full sum of £26,901.30 and that this was also the recoverable amount. The defence argued, however, that it would be disproportionate to require the appellant to pay the sum of £14,928.64 which was supposed to have been paid into a pension fund for her. The argument made was that the appellant would have received the benefit of this money in any event, albeit not until she had reached her retirement age in 18 years' time. The judge appears to have seen some force in this argument, but ultimately concluded that it would not be disproportionate to make a confiscation order which included the sum of £14,928.64 in full.
6. On this appeal, Miss McAnaw, in her excellent submissions made on behalf of the appellant, has urged the same argument on this court. In granting leave to appeal, the single judge raised a further issue of whether, on the facts of this case, the appellant's benefit from her conduct was the full value of the pension contributions or a lesser

amount representing the benefit of the early receipt of sums that would in due course have been paid as pension payments.

7. To take the latter point first, there can in our view be no doubt that the parties were right to agree that the amount of the appellant's benefit was the full amount of money that was supposed to be used to pay pension contributions but which she in fact kept for herself. Pursuant to section 76(4) and (7) of the 2002 Act, if a person obtains property as a result of criminal conduct, the benefit is the value of the property obtained. The payments received by the appellant were intangible property and the value of those payments was the sum total of them. It is clear from the decision of this court in *R v Shabir* [2008] EWCA Crim 1809; [2009] 1 CrAppR (S) 84 that this would be the correct measure of the benefit even if on the facts all that had happened was that the appellant had dishonestly obtained early receipt of money that she was entitled to receive at a later date. In the *Shabir* case the defendant was a pharmacist who dishonestly claimed and obtained more money for the cost of prescriptions that he dispensed than he was entitled to be paid by the Health Service. The total amount that he claimed and received in the relevant period was £179,731 and it was accepted that, of this, only £464 had been obtained improperly. It was nevertheless held that the benefit was the full amount received.
8. In the *Shabir* case, the court went on to hold that it would be disproportionate to order the defendant to pay the full amount of the benefit obtained. But in our view in the present case the judge was not merely entitled but plainly right to conclude that it would not be disproportionate to require the appellant to pay the full amount. Unlike *Shabir*, this is not a case in which the appellant was entitled to receive for her own benefit any of the relevant sums of money. Nor could it be said that she had a right to receive the amounts in question or any part of them at a later date. A report prepared by Osborne Clarke, the appointed legal advisers of Wiltshire County Council in connection with its pension fund, explains that under the applicable legislation the appellant would only have become entitled to join the Local Government Pension Scheme if her employer had issued a statutory resolution authorising her to do so. There is no record that Bratton Parish Council ever issued such a resolution. To accrue any pension rights, it would also have been necessary for Bratton Parish Council to pay contributions into the pension fund, which also never happened.
9. One difficulty that arises in this case is in valuing the pension rights which the appellant would have accrued if the money had been paid into the fund. That is not straightforward in circumstances where the value of the pension would depend upon what the contributions had grown to, if indeed they had grown, in 18 years' time but account then needs to be taken of the fact that the appellant has received the money early. The appellant faces a difficulty in that respect that there is no evidence of the value of the rights which the appellant would have obtained, and Miss McAnaw realistically accepts the burden of proof must fall on the defence to present an appropriate valuation. But Miss McAnaw submits that it would have been a reasonable assumption for the judge to make to assume that the value of the rights that the appellant would have acquired would have been equal to the amount of the contributions paid, if the money had been paid into the Local Government Pension Scheme.
10. At the end of the day, however, we do not think it necessary to decide these questions of valuation. In our view, there is a more fundamental question of principle. We do

not think that, as a matter of principle, a defendant can rely in order to advance an argument that confiscation is disproportionate on a contention that she would or might have acquired valuable rights if only she had acted honestly instead of acting dishonestly as she did. Determining what amount it is proportionate to require the defendant to pay is not simply, as Miss McAnaw sought to argue, an accounting exercise. In *R v Wya* [2012] UKSC 51; [2013] 1 AC 294, para 26, the Supreme Court made it clear that a legitimate and proportionate confiscation order may require a defendant to pay the whole of the sum which he has obtained by crime without enabling him to set off expenses of the crime. As Lord Walker and Hughes LJ explained:

“To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation.”

The same is true of an accounting exercise in which the defendant is permitted to deduct benefits that would have been received if he or she had not engaged in criminal conduct. In this regard there is no difference in principle between costs that would have been avoided and benefits that would have been gained if the defendant had acted lawfully.

11. In our view, therefore, it does not avail the appellant in this case to say that she would or might have acquired pension rights if only she had acted honestly instead of defrauding the Parish Council of money which she had falsely represented was being used to make pension contributions. In circumstances such as this, there is nothing disproportionate about confiscating the full amount of the benefit that has been obtained.
12. For those reasons the appeal is dismissed.