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IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
[2022] EWCA Crim 1062



CASE NO 202200356/A2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 29 June 2022

Before:

LADY JUSTICE THIRLWALL DBE

MR JUSTICE SPENCER

MRS JUSTICE ELLENBOGEN DBE

REGINA  
V  
GARY STEVEN BLAKE

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MS S DASHANI & MS N LLOYD-OWEN appeared on behalf of the Appellant.

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

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. On 17 August 2021 in the Crown Court at Salisbury, the appellant (who is now 58 years old) was convicted by the jury of two counts of fraud, contrary to section 1 of the Fraud Act 2006. He was acquitted on several other counts on the indictment. He was sentenced on 21 January 2022 by the trial judge, HHJ Barnett, the Recorder of Salisbury, to a term of 2 years 9 months' imprisonment concurrent on each count.
3. The grounds of appeal, in short, are that the judge took too high a starting point under the relevant Sentencing Council guideline and allowed insufficient credit for the appellant's substantial mitigation. It is contended that the sentence should have been no more than 2 years' imprisonment and should have been suspended.
4. The appellant was convicted after a 6-week trial. He was charged jointly with his wife with these two counts of fraud and the other offences of dishonesty of which he was acquitted. His wife was suffering from serious mental health issues at the time of the trial and was found unfit to be tried. So alongside the appellant's trial the jury had to determine whether his wife had committed the act in respect of the relevant offences. In relation to these two counts and three others the jury were satisfied that she had, and she was made the subject of a supervision order for 2 years pursuant to section 4 and 4A of the Criminal Procedure (Insanity) Act 1964.
5. The background to the offences can be shortly stated. The prosecution case was that between January 2014 and May 2018 the appellant and his wife were providing care to a number of vulnerable individuals whose need for personal assistance care was assessed by the local authority. The individuals in question were allowed specified numbers of care hours per week or month to meet their need for such assistance. Management of the budget and payment for the care was administered on behalf of the local authority through two entities, a trust and a limited company.
6. It was the appellant's wife who was the primary care provider although the appellant also provided care. The invoicing was of care in her name. His main role, as well as taking part in the provisions of some of the care, was to invoice the trust and the company under whose auspices the care was being provided. Count 1 related to Enham Trust, count 2 related to Payroll Perfection Ltd.
7. The allegation in each count was that the appellant and his wife dishonestly made representations to those entities that his wife had worked all the hours detailed in the invoices submitted for payment, which they knew were or might be untrue intending thereby to make a gain for themselves. There was no criticism of the quality of care provided, but by their verdicts the jury were sure that the appellant and his wife had overcharged for the care they had provided by dishonestly billing more hours than had been worked.
8. For the purposes of the sentencing hearing there were complex competing calculations by accountancy experts for the prosecution and the defence, seeking to establish the quantum of the excessive number of hours and, based upon that excess, the amount of the fraud. The prosecution's initial position was that the appropriate sum was in the bracket £80,000 to £90,000 but this was later reduced to £50,000 to £60,000. The defence contention was that a more realistic figure was £30,000. In the event the judge concluded that the amount overcharged was "something in the order of £40,000" and that

was the figure he adopted for the purpose of applying the relevant Sentencing Council guideline.

9. There is no challenge to that assessment. As the judge made clear, it was based not only on the competing figures put forward by the experts but also reflected his own assessment as the trial judge after hearing the evidence for several weeks.
10. It was and is common ground under the Sentencing Council guideline that there was high culpability level A because the fraudulent activity had been conducted over a sustained period of time. It was also common ground that Harm A under the Guideline was category 3, because the amount of the loss was in the bracket £20,000 to £100,000. There was no Harm B victim impact. That was because there had been no detrimental impact on the recipients of the care that had been provided.
11. For category 3A offending the starting point under the guideline is 3 years based upon a loss of £50,000, with a range of 18 months to 4 years' custody. We shall return to the judge's approach to the guideline.
12. The appellant had no previous convictions. His only previous caution had been for road traffic offences many years earlier in 2004. There was a pre-sentence report. At that stage the appellant was still denying his guilt. He now accepts the jury's verdicts.
13. The appellant and his wife had been married for 21 years. She was significantly older (aged just 71 at the time of sentence). She suffers from post-traumatic stress disorder, anxiety and mobility issues. The appellant was her principal carer, preparing her meals, getting her washed and changed and administering her medication.
14. The assessment in the pre-sentence report was that there was a low risk of re-offending. If custody could be avoided and a community order considered, the report recommended a rehabilitation activity requirement for 15 days for the appellant to undertake a Thinking Skills Programme. An unpaid work requirement would not be appropriate because of the appellant's poor health and his caring responsibilities.
15. There was medical evidence before the judge which confirmed that the appellant had a heart condition for which he had been undergoing investigations. He suffered from Type 2 diabetes and also suffered from mild anxiety and depression. A letter from his general practitioner described him as a relatively frail man whose health had been significantly affected by the stress of the case, the long wait for the trial, and the trial itself. The doctor's assessment was that any custodial sentence would have a significant impact on his mental and physical health.
16. There was evidence before the judge from the appellant's wife's daughter-in-law, on whom the role of overseeing the care of the appellant's wife would fall, and indeed has fallen, in the event of a custodial sentence. In one of those statements, dated 24 November 2021, the daughter-in-law reported that since the conclusion of the trial in the summer 2021 there had been a rapid and significant deterioration in Mrs Blake's health. She was almost entirely reliant on the appellant for all her needs. The daughter-in-law could not contemplate how Mrs Blake could cope if the appellant were not there to look after her. She herself and her husband could only offer limited practical support as they live some considerable distance away (a 90-minute round trip) and they have caring responsibilities of their own for their children, one of whom has special needs.
17. In advance of the sentencing hearing, detailed sentencing notes were provided by prosecution and defence. The notes dealt principally with the thorny issue of assessing

the quantum of the loss from the fraud but, in addition, the defence note contained focused submissions on the mitigating factors which were present. We have already touched on those factors. As to delay, although the criminal proceedings began in May 2019, the trial date had to be adjourned from January 2020 to June 2021 owing to the pandemic. By the time of sentence, no less than 3½ years had elapsed since the appellant's arrest in May 2018.

18. There was a strong plea for a suspended sentence of imprisonment. We have no doubt that those written submissions by Ms Dashani and her junior, Ms Lloyd-Owen, were forcefully reinforced orally by Ms Dashani in mitigation at the hearing.
19. In his sentencing remarks the judge said that it was plain that the appellant and his wife had fallen to the temptation of exploiting the payment system. He accepted that they both had a long history of looking after people and in the past no doubt they had done a lot of good for people. The judge acknowledged that the appellant did not enjoy the best of health and he took into account the medical reports. He noted that the appellant had no previous convictions and had lost his good character. He acknowledged that there was no aggravating feature of vulnerable persons being prejudiced, although he did note that the money was effectively being paid by the local authority to improve people's lives.
20. The judge was satisfied that there must have come a time in the indictment period when the appellant realised full well that he was exploiting the payment companies and that he and his wife were fraudulently obtaining money for work that had not been done. He described that as a very serious matter bearing in mind for how long it went on.
21. The judge estimated the loss at something in the order of £40,000, as we have already explained, and then he continued:
  - i. "The starting point which could well be aggravated by virtue of the time that this fraud went on, as I have been reminded, is some 3 years for a sum which is probably in excess of what I have found. I balance the gravity of the offending, because it is something that just cannot be overlooked, against the various mitigating matters which have been ably deployed on your behalf. Your health, the delay, the effect on you, the loss of your character and the fact that this whole matter has taken its toll upon you. I am acutely aware of your family situation that you are the principal carer for your fellow defendant, your wife. But I am afraid the matter is so serious and, as you were perfectly entitled to do, you contested the matter and therefore I cannot I am afraid accede to the submissions made on your behalf that I should take any other course than impose an immediate sentence of imprisonment.
  - ii. Taking all the factors and features that I have mentioned into account, the least sentence that I can pass upon you on each of these counts concurrent is one of 2 years and 9 months and that is the sentence that I pass upon you."
22. On behalf of the appellant we have the benefit of written and oral submissions from trial

counsel, Ms Dashani, for which we are grateful. First, it is submitted that the judge took too high a starting point for sentence before allowing for aggravating and mitigating factors. She points out that 3 years is the starting point under the Guideline for a loss of £50,000, whereas here the loss was £40,000. The judge's eventual sentence of 2 years 9 months' imprisonment was too high for that reason alone, she submits, bearing in mind that he must have made some further reduction for mitigating factors.

23. Second, Ms Dashani submits that the judge failed to give sufficient credit for the multiple mitigating factors, namely the appellant's lack of convictions, his previous exemplary conduct, that the activity was initially legitimate, that he would never be able to work in the care sector again despite this having been his profession and his passion for many years, his poor physical and mental health, and the impact of the pandemic on the prison conditions in which he has been serving his sentence. She relies on the significant delay in his case being dealt with. She also stresses his caring responsibilities for his wife as an important mitigating factor. In combination she submits that these factors justified and should have resulted in a reduction from the appropriate starting point, bringing the sentence within the range which could properly be suspended; in other words, down to 2 years or less.
24. Third, Ms Dashani submits that weighing the factors for and against suspending the sentence in accordance with the relevant Sentencing Council guideline the balance should have come down firmly in favour of suspension. She reminds the Court of the principles in R v Petherick [2012] EWCA Crim 2214; the Article 8 ECHR rights of family members have to be considered. The court had to have regard to whether the sentence contemplated was or was not a proportionate way of balancing the impact on the appellant's wife against the legitimate aims which sentencing must serve.
25. Ms Dashani enlarged in her oral submissions upon her Petherick argument. She submitted that the judge had not sufficiently considered the two-stage approach of considering the extent to which there was an impact not only on the appellant himself but on his wife and the family members who were having to look after his wife and then, secondly, balancing that against the interests of the State in seeing that appropriate punishment was imposed.
26. Ms Dashani pointed out that we have more up-to-date information than the judge had in relation to the practical impact of the appellant's imprisonment on his wife's well-being. Ms Dashani submits that this is more serious a position than had been contemplated.
27. There are two further statements from the daughter-in-law (Mrs Bader). The first, dated 26 January, only a matter of days after sentence, explains that Mrs Blake had been almost totally dependent on Mrs Bader and her husband during the short period since sentence. Mrs Blake was not coping at all, barely functioning; she cried all the time and had uncontrollable shaking episodes and regular panic attacks. She would not leave the house at all. She was going to bed by 6.00 pm feeling it was the best place to hide. Mrs Bader explains in that statement that through her and her husband's own family and work commitments they were unable to devote themselves full-time to Mrs Blake's care, living some distance away as we have explained.
28. There is also a recent update of the situation in a further statement from Mrs Bader, dated 13 June. She reports that Mrs Blake has mobility issues, is constantly shaking, barely eats, is unsteady on her feet and in pain. She suffers from bouts of urinary tract infection relating to stress. She is very anxious and depressed, showing all the classic signs of

sleeplessness. She has bouts of confusion. She will lock herself down for days and not answer phone calls so that Mrs Bader and her husband have to make the 90-minute round trip to check on her. She will phone them at all hours of the day and night. She is afraid of loud noises and terrified if there is a knock at the door. She will occasionally make a short accompanied trip to local shops but will usually panic and hide in the car. She has a host of medications. Mrs Bader explains that she and her husband have continuing demanding caring responsibilities for a teenage daughter with special needs and other caring responsibilities for family members, one of whom is recovering from throat cancer. Mrs Bader says that she and her husband have done their best to support Mrs Blake, including taking her to visit the appellant in prison on more than one occasion, which occupies a whole day. Mrs Blake often panics in the car, and cries uncontrollably on the journey. Mrs Bader's overall assessment is that Mrs Blake's mental and physical health has really deteriorated. In Mrs Bader's opinion, Mrs Blake needs 24-hour care, which Mr and Mrs Bader cannot provide.

29. In the course of the hearing we drew counsel's attention to the pre-sentence report and addendum psychiatric report in respect of Mrs Blake, prepared for her own sentencing hearing. It is clear from those documents that it was anticipated that there would be some other regime in place to provide care in the event of the appellant being sent to prison, no doubt (by inference) through Mrs Bader and her husband.
30. We also remind ourselves that the appellant's wife is herself the subject of a supervision order in favour of the Probation Service, which will involve, or should involve, some degree of oversight of her. So far as Ms Dashani was able to assist us, there has been no attempt by the family to seek assistance through a combination of the general practitioner, Social Services and the Probation Service under the auspices of the supervision order, in order to assist them and ameliorate the difficulties they have been experiencing in looking after Mrs Blake. We are bound to say that we find that a little surprising.
31. We have considered all these submissions carefully. We are persuaded that there is force in some of the submissions but not to the point of feeling able to suspend the sentence.
32. The judge's sentence of 2 years 9 months was only 3 months less than the starting point under the Guideline of 3 years, based on a loss of £50,000. Here the loss was £40,000 - significantly less. It follows that the judge should have taken a somewhat lower starting point although it is not appropriate to seek to apply a mathematically proportionate reduction. We think that a figure of 32 months is the starting point that the judge should have taken before consideration of mitigating factors.
33. In this case there were no aggravating factors under the guideline. To the extent that the judge may have seemed to suggest that the duration of the fraud could itself be regarded as an aggravating factor we accept that that could not be correct. It was the duration of the fraud which made the offence one of higher culpability level A and to take into account a second time, if he did, would have been double counting.
34. We agree with counsel's analysis of the mitigating factors. First, the appellant had no previous convictions and only a very old caution for motoring offences. Second, aside from this serious lapse, the appellant was of positive good character, devoting himself to the care of the vulnerable in a commendable way. Third, he suffered from a combination of medical conditions which were bound to have an impact on his time in

custody. He suffers from mild depression and he has been diagnosed with heart trouble. He also suffers from Type 2 diabetes. Fourth, there had been a considerable delay in dealing with his case which was not his fault. We note that although delay can be a general mitigating factor in any case, particularly in the light of the pandemic, it is specifically a factor in fraud cases which is reflected in the guideline itself. Fifth, and in our view importantly, he is or would be his wife's primary carer. There can be no doubt about the level of her disability and her need for care. The point made by Ms Dashani is that even if care could be provided through the agencies we have mentioned, that does not take away from the importance of the appellant's personal role in caring for his wife and the psychological deficit that she suffers as a result of his not being there to look after her.

35. Finally, although he lapsed into dishonesty in billing the hours for the work that was done in a fraudulent manner, it is right to say this was not a case of fraud from the outset. We also bear in mind the impact of the pandemic as a factor.
36. These were all substantial mitigating factors which, in our view, should have resulted in a significant reduction from the appropriate starting point. We think that the proper sentence in this case to reflect all these mitigating factors was 26 months' imprisonment rather than 33 months' imprisonment.
37. That does not bring the sentence into the range where it could be suspended. We have considered carefully the position of the appellant's wife but we could not in any event overlook the seriousness of the appellant's offending and in particular, the fact that this was effectively defrauding the public purse.
38. We therefore allow the appeal. We quash the sentence of 2 years 9 months and we substitute concurrent sentences of 26 months' imprisonment on each count. To that limited extent the appeal is allowed.

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

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