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NEUTRAL CITATION NUMBER: [2023] EWCA Crim
1114

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01140/A5



Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 19th September 2023

B e f o r e:

LORD JUSTICE SINGH

MRS JUSTICE COCKERILL DBE

MR JUSTICE HILLIARD

R E X

- v -

EMILY ELLWOOD

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Miss D Bilan appeared on behalf of the Appellant

APPROVED JUDGMENT

Tuesday 19th September 2023

LORD JUSTICE SINGH: I shall ask Mrs Justice Cockerill to give the judgment of the court.

MRS JUSTICE COCKERILL:

1. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are engaged in this case because the appellant's co-defendant was at the time 17 years of age. Accordingly, no matter relating to that youth may be published that would identify them, including their name, address, any educational establishment or any workplace they attend, and any picture of them. This order lasts until the youth reaches the age of 18.
2. On 7th February 2023, the appellant pleaded guilty before the Magistrates' Court to one count of fraud, contrary to section 1 of the Fraud Act 2006.
3. This is an appeal, brought by the leave of the single judge, against one aspect of the sentence later imposed on 13th March 2023, in the Crown Court at Oxford, by Mr Recorder Bate-Williams. That sentence was one of two years' imprisonment suspended for two years, with the following requirements: 150 hours of unpaid work and a rehabilitation activity requirement of up to 35 days; and, secondly, a compensation order in the amount of £12,261 and the statutory surcharge.
4. It is only the compensation order which is the subject of this appeal.
5. To comprehend the issue it is necessary for us to summarise the facts.
6. Over a period of eight months, between 1st April and 31st December 2019, the appellant

and her youth co-defendant committed an offence of fraud by false representation.

7. The appellant accepted that she used the bank card details of her step-grandmother to make online purchases. Her step-grandmother, who had advanced dementia, was in a care home. Her finances were managed by her children and the appellant's stepfather.
8. The bank details were initially provided to the appellant by her stepfather for a legitimate purpose. They then saved automatically to the appellant's PayPal account. She then continued to use the card to make online purchases. Over the relevant period she made purchases online to the value of £12,261.74. There were many transactions, some for just a few pounds, but others for hundreds of pounds. They were described by the author of the pre-sentence report as "*purchases of whim or luxury*". At the bottom end, there were many sweets and Pepper Pig items. The largest single item was £500 for an item which was not described. There were a number of other items which cost over £100, such as a Gucci backpack, a Samsung television, and no less than three Disney Princess Carriage Toddler beds, each of which cost over £250.
9. The appellant did not herself have that kind of money at her disposal. As the author of the pre-sentence report notes:

“Finances are a major issue for [the appellant]. [The appellant] stated that she had debts. She was not sure to what extent, but somewhere in the region of £20,000 to £30,000, but it was fine because any debt letters were going to an old address, and she was not paying any of it back. Her legitimate income and that of her household is made up of a web of universal credit, carer's allowances and PIP.”

10. In sentencing, the Recorder concluded by a very narrow margin that the custodial

element of the sentence should be suspended. On compensation he stated:

“I appreciate your limited financial circumstances at the moment, but I see no reason at all why you should not be ordered to pay full compensation to your step-grandmother and her representatives, those responsible for her care and the arrangement of her legal affairs and responsibilities. I am going to order you to pay compensation of £12,261. I will make a collection order requiring you to pay at the moment £25 per month but that must increase as your income increases when you return to work.”

11. The appellant appeals on the basis that the compensation of £12,261 was manifestly excessive and not reasonable in the circumstances. It was said that the Recorder erred in that the terms of the compensation were not realistic and that the order should not have been made on the basis that the appellant would raise the money in the future.
12. Before us this morning submissions have been made by Miss Bilan, who has stepped in for counsel who appeared below. We are most grateful for the clarity and comprehensiveness of her submissions. It is submitted that the order was wrong in principle and thus manifestly excessive: in particular, that it would take 40 years to be repaid on the basis that it was ordered. It is said that that was plainly excessive. She has referred us to *R v York* [2018] EWCA Crim 2754 and submits that the appellant had very limited means. She is in receipt of benefits only. She has three children, aged 5, 17 and 20, the eldest of whom has Asperger's syndrome, and was informally caring for another. As well as a limited income, she had a lot of outgoings.
13. In response to questions from the court about the possibility of raising money in the future by selling items in the appellant's possession, Miss Bilan kindly took instructions over the course of the lunchtime and informed us that at the previous hearing the Crown

had indicated that there was nothing of value realisable. Having double-checked that position, she has ascertained that the remaining realisable assets have a very low value, either because they are damaged or because they have been sold and are no longer in the appellant's possession. That position, which pertained substantially at the time of the hearing below, informed the Crown's decision not to pursue any Proceeds of Crime proceedings.

14. Although the position is unattractive, we are persuaded that on the authorities Miss Bilan is correct. It is clear that the Court of Appeal Criminal Division in *York* at [19] set out the relevant principles: that a compensation order should not be made unless it is realistic in the sense that the court is satisfied that the offender has or will have the means to pay that order within a reasonable time; that in general excessively long repayment periods should be avoided. What reasonable means may be judged against the fact that: (1) a compensation order based on the repayment period as long as 100 months has been upheld; but (2) it has been said that a repayment period of two to three years is an exceptional case and, as such, would not be open to criticism. That means, in our judgment, that a repayment period of two to three years, which is towards the top of the range, must be regarded as reasonable. *York* also establishes that it is wrong to fix an amount of compensation without regard to the instalments which are capable of being paid by the offender, and the period over which those instalments should be paid.
15. We should make it very clear that *York* does not seem to have been drawn to the Recorder's attention at the time. Both the prosecution opening of facts and the pre-sentence report proceeded on the basis that a compensation order in the full amount was appropriate. The author of the pre-sentence report said:

- i. "It may be felt that a structured plan of repayment ...

would be an appropriately punitive solution ...
compensation order to equal the amount defrauded.”

16. Here, on the facts, it appears that the appellant cannot pay more than £25 per month. It follows that the total ordered by the judge below cannot be repaid in anything like a reasonable time. In the absence of the assistance which we have now had, and which the Recorder below should have had, the Recorder, understandably, erred. It follows that some adjustment must be made to the compensation order. We are not minded to quash it in its entirety. The appellant, who has narrowly evaded a custodial sentence, probably in part because of the compensation order, should be made to feel some of the loss which she has caused to her vulnerable relative. It appears to be common ground that the maximum she can afford as a regular payment, absent any other recoveries, is £25 a month.

17. We have considered very carefully the position as regards the items which the appellant purchased with the money which she obtained criminally which, on the face of it, ought to have been capable of being sold and the proceeds put towards the recovery. However, the detailed investigations undertaken by Miss Bilan have indicated that there is no realistic prospect of any further recovery in this way. We have concluded that it would be wrong to make any adjustment based on that. We have also been informed by Miss Bilan that there is no positive change to the appellant's position, as was hoped by the Recorder.

18. Accordingly, the appeal succeeds to a limited extent. We quash the compensation order imposed by the judge and substitute a compensation order in the amount of £900, to be paid at the rate of £25 a month over the course of three years. To that extent only the appeal succeeds.

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