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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202301361/A4
[2023] EWCA Crim 1413

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 26 September 2023

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE JEREMY BAKER
MRS JUSTICE LAMBERT DBE

REX
v
MICHAEL O'BRIEN

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MR T QUINN appeared on behalf of the Appellant
MR D HUGHES appeared on behalf of the Crown

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: In April 2022 this appellant was sent to the Crown Court at Woolwich for trial on charges of fraud and money laundering. At a plea and trial preparation hearing the following month he pleaded not guilty, denying any involvement in the crimes, and his trial was fixed for March 2023.
2. About a week before the trial date, he pleaded guilty to five offences: fraud (count 1), acquiring criminal property (count 2), entering into or becoming concerned in a money laundering arrangement (count 3), fraud (count 6) and possessing criminal property (count 7).
3. On 31 March 2023 he was sentenced by Mr Recorder Kovats KC to a total of six years seven months' imprisonment. He now appeals against his total sentence by leave of the single judge.
4. Counts 1 to 3 were offences relating to Mr Kuehn, a gentleman in his sixties who was planning to reduce his hours of work as he approached retirement. In October 2016 a man calling himself Jones approached Mr Kuehn at his home and offered to repaint the front of the house for £1,000 in cash. When Mr Kuehn agreed he was introduced to Jones' "business partner" - this appellant. Jones and the appellant thereafter identified various works which were said to be needed around the house and purported to carry them out over a period of months. Mr Kuehn paid a total of £85,800 in cash, £9,500 of which was paid to this appellant. Mr Kuehn also made bank transfers totalling £41,000 into the bank account of the appellant's wife.
5. The appellant and Jones abandoned the site in October 2017 and disappeared, leaving the work unfinished. There was expert evidence that some of the work was substandard, that other work may not have been necessary and that Mr Kuehn should not have had to pay more than about £24,000.

6. Mr Kuehn's victim personal statement indicated that the stress which he had suffered had for a time rendered him unable to speak or communicate effectively and caused him to shake physically. He had been left emotionally drained and depressed and with a legacy of debt which had made it necessary for him to continue working full time beyond his planned retirement age.
7. Counts 6 and 7 were offences relating to Miss Williams-Reid, a retired nurse. In March 2020 she sought a contractor to mend a leak in her roof. A man calling himself 'Tony' said he could assist. He was joined by his "business partner" - the appellant. They told Miss Williams-Reid it was necessary to replace the roof, for which they quoted £6,000. She agreed. Further quotes then followed for additional works which were said to be necessary. Within a few days, Miss Williams-Reid had paid £10,300. She was then told she must pay a further £2,000 to replace electrical wiring which had been pulled out during the purported works. She refused. The men departed, leaving her roof open and unprotected, with the result that the loft and Miss William-Reid's bedroom were damaged by ingress of rain water. The gardens were left full of rubble and rubbish and could not be used during the Covid-19 lockdown.
8. Inspection showed that replacement of the entire roof had not been necessary and that the standard of work was abysmal. Miss William-Reid's victim personal statements show that she suffered clinical depression as a result of her experience. The overall cost to her, including the necessary remedial works, accounted for more than half of her life savings and she suffered severe stress and sleepless nights.
9. In short, as the single judge observed, these were despicable offences with the appellant preying on vulnerable victims with seeming complete disregard for the impact of his

offending upon them.

10. The appellant pleaded guilty on the basis, accepted by the prosecution, that he was responsible for a loss to Mr Kuehn of £50,500 and a loss to Miss Williams-Reid of £10,300. None of that money has been recovered.
11. At the sentencing hearing no pre-sentence report was thought to be necessary. We are satisfied that none is necessary now.
12. The appellant, now aged 49, had previous convictions some years ago for offences of violence but none for offences of dishonesty. Very regrettably, there was a problem with the audio equipment in the Crown Court with the result that it has not been possible to transcribe the Recorder's sentencing remarks. We have however been assisted by a note of those remarks, which has helpfully been agreed by both counsel.
13. The recorder followed the Sentencing Council's definitive guideline for Fraud offences. He treated counts 1 and 6 as the lead offences for the two groups of offending. He found that each of the count 1 and count 6 offences involved high culpability. The initial assessment of harm placed count 1 into Category 3 and count 6 into Category 4. However, the recorder found that each offence had caused a high impact, making it appropriate to move up a category. In the result, he took in respect of count 1 the guideline starting point for Category A2 of five years' imprisonment and in respect of count 6 the guideline starting point for Category A3 of three years. He reduced those sentences by 15 per cent as credit for the late guilty pleas, and made a further reduction of two months to reflect the particular difficulties currently faced by prisoners. He declined to make any further reduction on grounds of totality.
14. The recorder imposed the following sentences: Count 1, 53 months' imprisonment; count 2, 12 months; count 3, 36 months; count 6, 26 months; count 7, 26 months. All of

those sentences were ordered to run concurrently, save for the sentence on count 6 which was consecutive. Thus the total sentence was, as we have said, six years seven months' imprisonment.

15. We have been assisted by written and oral submissions from Mr Quinn on behalf of the appellant and Mr Hughes for the respondent, both of whom appeared below.
16. The grounds of appeal, resisted by the respondent, are that the recorder wrongly failed to make any reduction for totality and in some respects fell into the error of double counting, and that the total sentence was too high.
17. In support of that second ground, a comparison is made with sentences imposed in R v Wharf and others [2015] EWCA Crim 2320. We say at once that the appellant can derive no assistance from that comparison. The three appellants in Wharf appealed against their sentences for offences of fraud. This court dismissed their appeals. That decision merely indicates that the sentences imposed were neither wrong in principle nor manifestly excessive in the circumstances of that case. It cannot provide a benchmark for the appropriate level of sentencing in this case.
18. In our view no successful challenge can be made to the recorder's conclusions as to the appropriate length of the sentence for the individual offences. He correctly followed the guideline. He erred, if anything, on the side of leniency in relation to count 1. He could, in our view, have made some upward adjustment from the guideline starting point to reflect the fact that the appellant's offending was carried out when he must have been well aware that Mr Kuehn was simultaneously being defrauded of further large sums by Jones. Nor can there be any challenge to the recorder's decision to impose consecutive sentences. The principal issue in this appeal is whether the recorder should have made some reduction in the sentence which would have been appropriate for count 6 if it had

stood alone. In that regard, counsel's agreed note of the sentencing remarks is that the recorder stated that: "Considering the nature of these offences he makes no further reduction for totality."

19. The Sentencing Council's guideline on Totality sets out general principles in relation to sentencing an offender for more than one offence. It states that:

"... the overriding principle of totality is that the overall sentence should:

- reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and
- be just and proportionate."

20. It goes on to state that there is no inflexible rule as to whether sentences should be structured concurrently or consecutively. If sentences are consecutive, the guideline states that:

"it is usually impossible to arrive at a just and proportionate sentence simply by adding together notional single sentences. Ordinarily some downward adjustment is required."

21. If counsel's note of the explanation given by the recorder is correct, then we are bound to say with respect that we find it rather difficult to understand. We think it possible that the recorder may have been referring to the fact that the two groups of offences, though broadly similar in character, were separated by a lengthy period of time. Be that as it may, that feature of the case is in our view important.

22. The guideline makes clear that the reduction which is ordinarily made when sentences are ordered to run consecutively is not mandatory. Where there has been a substantial interval of time between two groups of offences, as there was here, a sentencer may

properly conclude that little or no separate reduction should be made on grounds of totality. We accept that in the present case many sentencers would have felt it appropriate to make at least a small reduction on that ground. The question for us, however, is whether the decision to make no reduction was a decision which the recorder could properly make. In our judgment it was. That being so, no separate point arises in relation to the suggested double-counting.

23. We conclude that the total sentence was a stiff one but it was not wrong in principle and it was not manifestly excessive. This appeal accordingly fails and is dismissed.

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