

IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 739



No. 202203545 A1

Royal Courts of Justice

Wednesday, 7 June 2023

Before:

LORD JUSTICE WARBY
MR JUSTICE JAY
HER HONOUR JUDGE ANGELA MORRIS

REX
V
KELLY JEAN BENNETT

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MS V MEADS appeared on behalf of the Appellant.

MS H STEVENS appeared on behalf of the RSPCA.

J U D G M E N T

LORD JUSTICE WARBY:

Introduction

- 1 This is an appeal against sentence in a case of fraud and animal welfare offences. The defendant is Kelly Jean Bennett, aged 44.
- 2 On 13 May 2022, in the fourth week of her trial in the Crown Court at Basildon, the appellant changed her plea to guilty of Count 1 on the indictment, an offence of fraud by false representation, contrary to section 2 of the Fraud Act 2006. The particulars of that offence were that over some 21 months between 30 July 2019 and 2 May 2021 she had committed fraud by making false representations to members of the public as to the condition, breeding and history of puppies for sale through advertising with false names and locations intended to represent the private sale of a homebred puppy with intent to make a gain for herself or another or to cause loss to another.
- 3 The appellant had earlier pleaded guilty in the Magistrates' Court to three animal welfare offences: two of causing unnecessary suffering, contrary to section 4 of the Animal Welfare Act 2006, and one of failing to meet the need to protect animals from pain, injury, suffering or disease, contrary to section 9 of that Act.
- 4 On 14 October 2022 she was sentenced for all these offences by the trial judge His Honour Judge Collery KC. He passed a sentence of imprisonment of 4 years and 1 month for the fraud, with concurrent sentences of 3 months' imprisonment for each of the section 4 offences, and 2 months for the offence contrary to section 9. He also made an order under section 34 of the Animal Welfare Act, prohibiting the appellant for life from owning, keeping or dealing in animals, with a 10-year bar on any application to lift the prohibition.

The Facts

- 5 The prosecution was brought by the RSPCA following complaints from members of the public. The Society conducted a joint investigation with Essex Police which led to the execution of warrants on 9 January 2020.
- 6 The appellant was one of four defendants. The others included Ricky Bennett, the appellant's partner, who was sentenced to 15 months' imprisonment on his plea of guilty to acquiring criminal property; and Stacey Hayward, who pleaded guilty to Count 3 on the indictment, which was a separate count of fraud by false representation, and was sentenced to 47 months' imprisonment.
- 7 The appellant, who had no breeder's licence, had posted adverts for homebred puppies, using false names and locations, as well as false photographs, many downloaded from the internet, all to give the impression of being a private seller. Many of the puppies were infected.
- 8 In his sentencing remarks the judge, who had heard three and a half weeks of evidence in the case, summarised the facts of the appellant's offending in pithy terms. He said:

"I'm quite sure, having listened to the evidence, that this was a cynical calculated effort over a period of time to deceive buyers into believing they were buying fit, home bred puppies when in fact, few of them were.

They were puppy-farm-bred animals."

- 9 The animals had been exposed to viruses and although the appellant had also bred some of her own dogs, these were mixed with the farmed dogs, and thus exposed to the same pathogens and diseases. They were not homebred in the sense that buyers would understand the term.
- 10 The judge found that the appellant had known that she was not only acting dishonestly but also cruelly, both to the animals involved and to the customers who were being defrauded. The appellant had shown what the judge called a “blithe disinterest” in that fact. When people bought dogs they were often lied to, told that the dogs had been chipped and vaccinated when in many cases they had not. The appellant had falsely claimed to be surprised when dogs she had sold became ill. She had suggested treatment other than taking the dogs to the vet, purely in order to reduce any claim for compensation. On occasions she had told customers that the illness must be their fault or that they were panicking. The increase in profit, said the judge, was her prime concern.
- 11 The appellant had been undeterred by a visit from an RSPCA inspector in August 2019. She had carried on. When COVID came it increased the market because more people wanted puppies and the price shot up. Seventeen witness statements set out the impact of the appellant's conduct on her customers. Thirty-one of the dogs they bought from her had needed veterinary treatment, and nine of them died. The purchasers had spent vast sums on vets' bills. There had naturally been considerable emotional impact on the families involved. When the police entered and searched the appellant's property they found six spaniels in the pens, all of them diseased. Two dead spaniels were in the fridge, showing some signs of decay.
- 12 As for the appellant, she had lived what the judge called, "something of a high life", with nice cars and expensive Caribbean holidays, leaving others to sort out the trail of illness and unhappy customers. When they executed the warrant at her premises, the police found Gucci handbags and lots of other high value and luxury goods, together with receipts for more than £20,000-worth of jewellery and over £43,000 in cash. The judge rejected the appellant's claim that this money had come from her parents or the parents of her partner.

The appellant

- 13 The appellant was of previous good character in the sense that she had no previous convictions, and she did benefit from some good character references. But a pre-sentence report observed that her offending had spanned a lengthy period of time and demonstrated a pattern of dishonesty over many months. She had acted from greed, giving no thought to the impact of her actions. The report depicted the appellant as someone who had acted callously, lacking remorse or empathy.
- 14 Interviewed by the probation officer, she continued vehemently to claim that the puppies she sold were well cared for, a claim which the sentencing judge described as "nonsense". The judge also rejected the appellant's claim that she had believed the puppies were homebred, and he pointed out that she had lied in interview. As we have said, she denied her guilt until well into her trial, admitting guilt only when she was giving evidence and, as the judge put it, it was not going well, to say the least.
- 15 There was, however, evidence of some physical and mental health difficulties. The pre-sentence report identified a background of domestic abuse, which may have had an influence on the appellant's offending behaviour. The appellant also had three children, aged 19, 17 and 10. The eldest suffered from ADHD. The pre-sentence report informed the court that the appellant was worried to the point of expressing anguish about the impact that a custodial sentence would have on her children. Neither her parents, nor the parents of her

partner would be able to care for them it was said. It was contemplated that the youngest would have to go into care if the appellant was imprisoned.

- 16 In these circumstances, the author of the report was moved to suggest that the court might consider the exceptional course of a non-custodial sentence in the form of a suspended sentence order or an intensive community order.

The judge's reasoning

- 17 The judge rejected that suggestion as unrealistic for offending of this nature. He held not only that the offence was plainly so serious that only an immediate custodial sentence was appropriate, but also that the offending merited imprisonment for a period well beyond any that could have been suspended.
- 18 The judge treated the fraud as the lead offence, imposing a sentence on that count to reflect the overall criminality involved, with concurrent sentences for the animal welfare offences. This, he explained, was intended to reflect an overlap between the offences, and to give effect to the principle of totality.
- 19 Applying the guideline for fraud, the judge identified the appropriate starting point as one of six years' imprisonment. He found this was offending in Category A, high culpability: the appellant had played a leading part in a group activity, using influence to involve other family members, including her son's girlfriend and a niece; the offending was sophisticated and involved significant planning; and there was a large number of victims. Harm A was treated as in the region of £250,000, and thus in sentencing guideline Category 2. The four-year starting point which this categorisation would suggest was increased to six years to reflect Harm B, the high impact on the victims, and an aggravating factor.
- 20 The judge observed that the impact on the victims was not only emotional and financial. It also included a risk of physical harm from some pathogens which could have been passed on from animals to humans, and some abuse to which the appellant had subjected some of her victims. The aggravating factor was the appellant's conduct in continuing with her offending behaviour, failing to heed the warning she was given when the police raided her home in January 2020.
- 21 From the six-year starting point arrived at in this way, the judge reduced the sentence by 12 months to reflect the appellant's mitigation. He then reduced his notional sentence after a trial by a further 15 per cent to reflect the appellant's guilty plea. He thus arrived at 52 months. He reduced that by a further three months to reflect the Article 8 rights of the appellant and her family, and in particular, the interests of the youngest child. That last reduction was an application of the principles identified by this court in *R v Petherick* [2012] EWCA Crim 2214, [2013] 1 WLR 1102, and in particular the principle that where immediate custody is unavoidable, its impact on the fundamental right to respect for family life may call for a reduction in the period of custody.

The grounds of appeal

- 22 There are three written grounds of appeal. They complain that the judge:
- (1) made insufficient allowance for the impact of imprisonment on the children and the appellant's personal mitigation;
 - (2) failed properly to consider parity in sentencing the appellant and Stacey Hayward, and further that;

(3) the overall sentence was manifestly excessive in all the circumstances.

23 The written argument of Ms Meads in support of the appeal focused primarily on the second of these grounds. Comparing the cases of the two principals, including the facts of the offending and the personal circumstances of the two, she submitted:

"There is no parity in the sentences as between Kelly Bennett and Stacey Hayward. Kelly Bennett had far greater mitigating features both within the context of the offence and in her personal circumstances. The learned judge failed to give sufficient consideration to personal circumstances and the impact of the sentence upon her children which has inevitably led to a manifestly excessive sentence."

In her written argument Miss Meads placed particular emphasis on the role of this appellant as the mother of dependent children. She drew our attention to a number of cases in which that factor has led the court to allow appeals against immediate custody, either by suspending the term, or by reducing it.

24 In her argument before us today Miss Meads has withdrawn Ground 2 on the basis that Miss Hayward was later sentenced by magistrates to a consecutive sentence of 10 weeks for animal welfare offences. She has further sought to elaborate Ground 3 by suggesting that the judge erred in his approach to the increase in the notional sentence from four years to six years at that stage of the sentencing process, but she has maintained the core proposition in Ground 3, that is, that the sentence was manifestly excessive in all the circumstances.

Assessment

25 We are satisfied that Miss Meads was right to withdraw Ground 2 although not, in our view, for the reasons she has given.

26 Disparity is a point often raised in this court, but one that very seldom succeeds. The authorities show that disparity can only prevail as a ground of appeal if the court is satisfied that the appellant can justifiably feel aggrieved at the difference between her sentence and that imposed on a co-defendant. That will not be so if the difference in outcome can be explained by differences between the offending or the circumstances of the offenders. Nor can one offender have any justifiable complaint if a co-offender has fortuitously received an unduly lenient sentence. And in a case governed by sentencing guidelines, following the guideline approach effectively removes arguments surrounding disparity flowing from different outcomes. These propositions are set out clearly in *R v Saliuka* [2014] EWCA Crim 1907 at [11]; *R v Dyer* [2014] EWCA Crim 2114, [2014] 2 Cr App R (S) 11 at [11], and *R v Hussain (Khalid)* [2018] EWCA Crim 290 [2018] 2 Cr App R (S) 4 at [26]-[29].

27 In this case, the argument was that Stacey Hayward had received a lower sentence than the appellant although Hayward's offending was longer in duration, involving more money and was thus more serious, and it was aggravated by previous convictions. Hayward was said to lack the significant personal mitigation put forward on behalf of this appellant; and she was given the same reduction for her guilty plea.

28 Bearing in mind the principles we have identified, we do not consider that those arguments ever came close to providing a sufficient platform for a complaint of unfair disparity.

29 The greater seriousness of Hayward's offending and the aggravating features in her case were reflected in the higher starting point adopted by the judge in her case, which was one of six and half years. The judge observed that it would not have been hard to justify

a higher starting point for her. Like the appellant, Hayward had three children and a violent partner. Unlike the appellant, Hayward had expressed remorse, but the judge made the same reductions for her mitigation and plea as he made in the appellant's case. The difference in the outcomes reflected the much greater allowance that he made for the Article 8 rights of the family when sentencing Hayward. The key factor was that one of her children was an infant, born in 2022, while the proceedings were on foot. The judge made clear that for this reason he was deliberately taking an exceptional course, keeping Hayward's sentence below four years for the express purpose of ensuring that the baby could stay with its mother in the mother and baby unit at HMP Bronzefield if a place was available. The appellant has no reasonable grounds for complaining that her case was not treated in a similar way.

- 30 Looking then at the appellant's case in isolation, we note that her written grounds made no argument that the fraud guideline was misapplied. In our judgment, clearly it was not. The increase in sentence before reduction for plea from four to six years was proper. The appellant's complaint that the judge made insufficient allowance for her personal mitigation and the Article 8 rights engaged lacks any force. The judge gave careful consideration to each of these aspects of the case. He afforded the appellant a 20 per cent reduction on account of her personal mitigation. His approach to the *Petherick* issue was careful and measured, and in our view impeccable. He considered the circumstances of the oldest adult child, concluding that these attracted relatively little weight. He took full account of the circumstances of the other family members, including those of the ten-year-old, and in our view his further three months' reduction was fair and reasonable.
- 31 The conclusions we have reached so far are in line with those of the single judge, who was unimpressed with Grounds 1 and 2, although he did not limit his grant of leave. The reason he gave leave was that he considered that the overall sentence might infringe the principle of totality. We have, therefore, taken a step back, and asked ourselves whether a sentence of four years and one month is just and proportionate in all the circumstances of this case. We are satisfied that it is.
- 32 Our conclusion is reinforced by three considerations. First, it seems to us that the animal welfare offences to which this appellant pleaded guilty could reasonably have been treated as involving criminality that was separate from and additional to the fraud, justifying an upward adjustment in the sentence. The approach of the magistrates to the case of Hayward tends to support that view. Secondly, the sentencing judge made a significant departure from the applicable guideline in favour of the applicant in the downward adjustment he made on account of her guilty plea. The guideline provides that where a plea is indicated after the first stage of proceedings the maximum reduction is one quarter, reduced to a maximum of one tenth on the first day of trial. It goes on to say that the reduction, "*should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial.*" The appellant was therefore fortunate indeed to receive a fifteen per cent reduction. It was in no sense earned by her. The judge's reason for taking this exceptional course was that the plea took pressure off much-needed court resources. Thirdly, the prison and pre-appeal reports which were ordered by the single judge make unhappy and unhelpful reading from the appellant's point of view. They underscore her lack of remorse and reveal that even while in prison she continued to sell dogs.
- 33 Accordingly, this appeal is dismissed.
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