

Judgment 35/2008

**Sharon Jean McCarthy – Court of Appeal (Criminal
Appeal File 385) – 17 September 2008**

Theft by bank employee – appeal against sentence – approach to sentencing where the offender was in a position of trust – suggested sentencing bands based on the amount stolen – disparity argument from unrelated cases appropriate only in the most exceptional circumstances – held that in the present case the sentence was manifestly excessive – sentence reduced from 15 months to 9 months imprisonment, concurrent, on each of the three counts.

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Criminal 384

The 17th day of September, 2008 before The Hon Michael Jacob Beloff, QC, presiding, Michael Scott Jones, Esq., QC and John Vandeleur Martin, Esq., QC

SHARON JEAN MCCARTHY

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the matter of the appeal, with leave, by the Appellant from the sentences totalling fifteen months' imprisonment, imposed on her by the Royal Court on 8th April 2008;

THE COURT this day, having on 15th September 2008 heard Advocate Miss S L Brehaut and Crown Advocate G D McKerrell thereon, ALLOWED the appeal, QUASHED the sentences imposed by the Royal Court and IMPOSED a sentence of nine months' imprisonment on each count, the sentences to run concurrently.

K H TOUGH

Registrar of the Court of Appeal

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CRIMINAL DIVISION

17 September 2008

Before: The Hon Michael Jacob Beloff, Esq., QC, President
Michael Scott Jones, Esq., QC
John Vandeleur Martin, Esq., QC

Between: SHARON JEAN MCCARTHY Appellant

v

LAW OFFICERS OF THE CROWN Respondent

Advocate S L Brehaut representing the Appellant
Crown Advocate G D McKerrell for the Crown

Cases: -

Law Officers of the Crown v E L Le Sauvage (Unreported October 2007)

R v Barrick (1985) 81 Cr. App. R. 78

R v Clark [1998] 2 Cr. App. R. 137

Law Officers of the Crown v E L Robilliard (Unreported April 2008)

Law Officers of the Crown v Harvey (Unreported 2001)

R v Pitson (1972) 56 Cr. App. R. 391

R v Fawcett (1983) 5 Cr App R (S) 158

O'Brien v Independent Assessor [2007] 2 A.C. 312

Texts: -

Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999, as amended

Practice Statement (Crime: Sentencing) (1992) 95 Cr.App.R. 456

Criminal Justice Act 1991

JUDGMENT

Jones JA

1. On 14th February 2008, the appellant appeared before the Royal Court and pleaded guilty to one count of theft, one count of obtaining property by deception and one count of concealing or disguising the proceeds of criminal conduct. On 8th April, she was sentenced by the Royal Court to fifteen months' imprisonment on each of the three counts, the sentences to run concurrently. Leave to appeal against sentence was granted by the single judge on 11th August 2008.

Circumstances and Discovery of the Offences

2. At the time when these offences were committed, the appellant was employed by the Guernsey branch of The Royal Bank of Scotland International Limited, trading as NatWest ("the bank"). Between 1st November 2004 and 31st October 2006, she stole money totalling £8,475.85 from her employers, contrary to section 1 of the Theft (Bailiwick of Guernsey) Law 1983 as amended. Money was taken on four occasions: £1,540.35 on 1st November 2004, £2,343.60 on 8th September 2005, £943.50 on 28th

October 2005, and £3,657.40 on 11th September 2006. (Count 1.) On 27th October 2006, she obtained £1,500 in cash from the bank, by deception, in contravention of section 15(1) of the 1983 Law. (Count 2.) Between 8th September 2005 and 31st October 2006, she concealed £6,001 of the stolen money (being the total of the second and the last of the sums referred to in count 1), by a process known as “layering”. That was contrary to section 38(1)(a) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999, as amended. (Count 3.)

3. The last of the thefts caused questions to be asked, and the appellant was invited to attend a meeting with her managers on 1st November 2006. At that meeting, she denied any wrongdoing, as she did during a further meeting the following day. After the second meeting, however, she sent a text message to her managers, admitting that money belonging to the bank had been paid to one of her creditors and that she “*broke all the rules*”. The appellant was formally interviewed by the bank on Friday 3rd November, in accordance with its disciplinary procedures. During that interview, she admitted that she had paid £3,657.40 of bank funds into an account held by Stan Brouard Limited to whom she owed money. She resigned on 6th November, the matter was reported to the police, and she was arrested on 17th November 2006.
4. The appellant was interviewed by the police on three occasions between 17th November 2006 and 10th August 2007. By the time of the first interview, the police had discovered all four of the transactions specified in the first count on the indictment. During the interview, the appellant volunteered that she had dishonestly obtained £1,500 in cash from the bank.

Use of the Funds

5. All of the money involved in this case was used by the appellant to pay debts. At the time of her first interview, it was estimated that she had personal unsecured debts of approximately £98,000, owed to loan companies and credit card providers. All of her bank salary went to the payment of these debts.

The Appellant

6. The appellant was 34 years old at the time of the first offence. She had a clean record. She had been employed by the bank for 11 years, and held a senior position. By the time of the sentencing hearing, she had repaid the money involved in full.

Offences involving Breach of Trust – Approach to Sentencing

7. In granting leave to appeal in this case, the single judge, Sir de Vic Carey, explained that he did so on two grounds. The first is that there has been no recent consideration given by the Court of Appeal to offences of dishonesty of this kind. The second is that, as he put it, the single judge was “*mildly troubled by the disparity*” between the treatment of this appellant and that of the defendant in the case of Law Officers of the Crown v. Le Sauvage, about which we say more later in this Judgment.
8. In its sentencing remarks, the Royal Court noted that, in the past, it has derived some guidance from the Judgments of the Court of Appeal of England and Wales in the cases of R v. Barrick (1985) 81 Cr.App.R. 78, and R. v. Clark [1998] 2 Cr.App.R. 137. In the former, the Court of Appeal gave consideration to the proper sentence to be passed in cases of the following type:-

“... ... where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family.”

9. The Judgment of the court was delivered by Lord Lane C.J., who acknowledged the danger of generalising, when the circumstances of the offender and the offence may vary so widely from case to case. In the hope that they might be helpful to sentencers generally, and might lead to a little more uniformity, however, the court made the following suggestions:-

“In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about eighteen months are appropriate (see for example *Weston (1980) 2 Cr.App.R.(S) 391*). Cases involving sums of between about £10,000 and £50,000 will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of three and a half years to four and a half years would be justified”

10. The court went on to say that it considered that the suggested terms were appropriate where the case is contested and that, in any case where a plea of guilty is entered, the court should give the appropriate discount. The view was expressed that it will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence.

11. The Court of Appeal gave guidance, also, on some of the matters that the sentencing court would wish to take into account when determining what is the appropriate sentence in any particular case, in the following passage:-

“... ... (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.”

12. In Clark, leave was given by the single judge for an appeal against sentence in a breach of trust theft case in order to allow the Court of Appeal an opportunity to consider the possibility of updating the guidelines in Barrick, **“in the light of factors**

occurring since that decision.” Among those factors were the effect of inflation on the boundary figures referred to by the court in Barrick, the reduction in the maximum penalty for simple theft in England and Wales from ten to seven years and changes in sentencing practice introduced by the Practice Statement (Crime: Sentencing) (1992) 95 Cr.App.R. 456, consequent upon the changes made by the Criminal Justice Act 1991 in relation to remission and parole.

13. The Judgment of the court was given by the Vice President (Lord Justice Rose) who said this:-

“In the light of all these considerations, we make the following suggestions. We stress that they are by way of guidelines only and that many factors other than the amount involved may affect sentence. Where the amount is not small, but is less than £17,500, terms of imprisonment from the very short up to 21 months will be appropriate; cases involving sums between £17,500 and £100,000, will merit two to three years; cases involving sums between £100,000 and £250,000, will merit three to four years; cases involving between £250,000 and £1 million will merit between five and nine years; cases involving £1 million or more, will merit 10 years or more. These terms are appropriate for contested cases. Pleas of guilty will attract an appropriate discount. Where the sums involved are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for.”

14. In the present case, Advocate Brehaut for the appellant has referred us to two recent Guernsey cases of theft involving breach of trust. In the first, Law Officers of the Crown v. Le Sauvage (Unreported, October 2007), the defendant stole £277,335 from her employer, The Royal Bank of Scotland International Limited. Her course of conduct involved 134 transactions over a period of three years and eight months. Some of the money was taken from the accounts of her in-laws and she concealed the theft from her father-in-law by diverting his bank statements and by lying to him. We are told that none of the stolen money was repaid. It appears that the money was used to fund her lifestyle. Following a guilty plea, on 29th October 2007 she was sentenced to two years and three months’ imprisonment. In its sentencing remarks the Royal Court referred to Barrick and Clark and said that the sentence that would have been imposed if the defendant had been convicted after trial, and before taking account of mitigating circumstances, was four years and six months’ imprisonment.
15. In the case of Law Officers of the Crown v. Robilliard (Unreported, April 2008), the defendant was a civil servant, employed in the Driver Licensing and Vehicle Registration Office. Between 2005 and July 2007, she stole a total of £9,180.83 in cash from the till at work to fund the repayment of debts. She was sentenced on 29th April 2008 following a guilty plea. The Royal Court regarded a medical condition, not identified in the sentencing remarks, from which she and her son of two years six months were suffering, worthy of note and referred to *“other problems”* which her son had had as having been likely to have caused her to become *“exhausted and depressed”* at the time of the offences. We were advised by Advocate Brehaut that none of the stolen money had been repaid. The court took a *“starting point”* of eighteen months’ imprisonment, discounted that by one third for the guilty plea and made a further discount of three months in the light of what had been said in mitigation. Although it is not recorded in the sentencing remarks, it seems that the Royal Court may have had in mind the guidance given in Barrick and Clark when determining sentence.

16. In our judgment, the English Court of Appeal cases provide useful guidance on the principles which should underpin the determination of the sentence to be imposed in a case of this kind. As a general proposition, where someone in a position of trust takes a deliberate decision to abuse that position, it is right that the person should know that he or she will almost certainly go immediately to prison when convicted, and that the length of the sentence will reflect, among other things, the amount misappropriated.
17. In two of these recent Guernsey cases, the Royal Court appeared to be comfortable with the principle of approaching sentencing within parameters set by reference to the sums of money involved. As we have noted in paragraph 14 of this Judgment, in Le Sauvage the Royal Court would have imposed a sentence of four years and six months, but for the guilty plea and the mitigatory factors. That is very close to what might be expected if the Clark guidance were applied directly. (Four years for theft involving £250,000.) In Robilliard, the eighteen months starting point for a case involving the theft of just over £9,000 seems to bear some relation to the Clark suggestion of up to twenty one months for £17,500 if, perhaps, a little more than might be expected by such direct application.
18. Drawing parties' attention to the single judge's reasons for allowing leave to appeal in this case, we asked Crown Advocate McKerrell to provide us with an insight into the attitude of the Law Officers of the Crown to sentencing guidance in cases of this kind. We understand it to be positive. We believe, therefore, that it may be of assistance to sentencing courts if we were to suggest what we consider to be the appropriate sentencing parameters in theft cases which involve breach of trust. In identifying these parameters, again we look to the Royal Court for pointers.
19. The Royal Court in Le Sauvage remarked that the Clark figures "***should be updated for inflation***", but that the effect of inflation was "***largely balanced out***" by the fact that, in Guernsey, the maximum sentence for theft is ten years, compared with seven years in England and Wales. It is to be noted, however, that the court in Clark did not appear to feel constrained by the new maximum, and suggested that cases involving between £250,000 and £1 million would merit between five and nine years and cases involving £1 million or more would merit ten years or more for contested cases. We assume that the court intended sentences of greater than seven years to be achieved by consecutive sentencing.
20. In this case, the Royal Court acknowledged that it derived assistance from Barrick and Clark, but observed "***that conditions differ in England; that the integrity of the financial sector is perhaps even more significant here, and that Guernsey did not follow England in reducing the maximum sentence from 10 years to 7 years.***"
21. It is, of course, true that conditions in England differ from those in Guernsey. In our view, however, it is important to keep in mind the focus of the Barrick and Clark guidance, i.e. cases where a person in a position of trust has abused that position for his own gain. It seems to us that the crime is no more or less serious depending on where it is committed. This is not akin to cases involving the importation of commercial quantities of controlled drugs where, for a variety of well-known reasons which are special to Guernsey, sentences are generally higher here than in the United Kingdom. We acknowledge the significance of the integrity of the financial sector in this jurisdiction, and agree that sentencing courts should consider the need to protect the reputation of Guernsey as a financial centre. That does not militate against the adoption of the Barrick and Clark guidance in principle, however, because the sentencing suggestions in these cases are of general application, not restricted to theft from financial institutions. If, in a particular case, the defendant's actions have, or

were likely to have damaged Guernsey's reputation, that can be taken into account as an aggravating factor. Further, as we have already noted, the guidance in Clark is not circumscribed by the maximum penalty of seven years.

22. It is important that we emphasise that sentencing suggestions are given for guidance only. They indicate a band within which the appropriate sentence may be found, but they are not tariffs. They should not be applied with arithmetical precision. As the Court of Appeal observed in Barrick, the circumstances of cases will vary almost infinitely and, ultimately, the sentence imposed in any particular case should reflect the particular circumstances.
23. With these thoughts in mind, we suggest that, as a general approach to sentencing in cases of this kind, courts should have regard to the guidance given in Barrick, as set out in paragraphs 9, 10 and 11 of this Judgment. That avoids the perceived problems first, that the Clark update was intended to take account of the changes in sentencing practice introduced by the Practice Statement of 1992 and second that, by the date of Clark, the maximum sentence in England and Wales had been reduced to seven years. To be of assistance in this jurisdiction, it is necessary that the Barrick guidance be adjusted to take account of inflation and augmented to assist in determining the appropriate sentence in cases where the amounts stolen are large. We suggest, therefore, that, where the total amount involved is less than £20,000 or thereabouts, a term of imprisonment in a range between the very short and about eighteen months would be appropriate. Cases involving sums of between about £20,000 and £125,000 will merit a term of about two to three years' imprisonment. Where the amount involved is between £125,000 and about £325,000, a term of three and a half years to five years would be justified. Above £325,000 the length of sentence will be determined by the circumstances of the case, within the five year band available between five years and the maximum. Where appropriate, for example in the type of cases mentioned in Clark, consecutive sentences may be merited. We emphasise that the suggested bands are intended for contested cases and that, in any case where a plea of guilty is entered, the court should give the appropriate discount.
24. We acknowledge without hesitation that these bands are arbitrary. The merits of approaching sentencing with reference to such guidelines, however, are that it (a) gives to those who are tempted to steal in a cold and calculating manner in breach of trust notice of what punishment is likely to befall them when convicted and so may deter, (b) assists the sentencing court in what is often an anxious and difficult task and (c) operates in the greater public interest in achieving consistency of sentencing.

The Present Case

25. In her Grounds of Appeal and in the hearing before us, Advocate Brehaut invited us to compare the sentences in Le Sauvage and Robilliard with the sentence in the present case. She pointed to what she described as a disparity such that "right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence (would) consider that something had gone wrong with the administration of justice" in the present case. (See Law Officers of the Crown v. Harvey (Unreported, 2001, applying [R v. Pitson \(1972\) 56 Cr.App.R. 391, and relying on R v. Fawcett \(1983\) 5 Cr.App.R. \(S\) 158.](#)) On that approach, she submitted that we should find the sentence in this case to be "manifestly excessive."
26. Advocate Brehaut frankly acknowledged that Harvey and Pitson were concerned with unequal treatment among co-defendants. Even in such cases, the following words of Lord Bingham of Cornhill in O'Brien v. Independent Assessor [2007] 2 A.C. 312, at paragraph 26 are apposite:-

“It is convenient to touch first on this disparity argument. In some cases (of which R v Fawcett (1983) 5 Cr App R (S) 158 is an example) an appeal against sentence has succeeded because right-thinking members of the public, learning of a lenient sentence imposed on a co-defendant, would think something had gone wrong with the administration of justice on also learning of a disproportionately severe sentence passed on the appellant. In some of the cases such an appellant is said to have a justified sense of grievance. If the matter is viewed through his eyes alone, that may sometimes be so. But the appellate courts of all three United Kingdom jurisdictions have shown themselves to be, in varying degrees, resistant to disparity arguments of this kind, and the reason is not hard to discern. For while the perception of the sentenced defendant is important, a criminal sentence is imposed in the interests of the public and for its protection. The "right" sentence in a given case is that shown by statute, authority and other guidance to be best fitted to serve those ends. Thus a court will, and generally should, be very slow to impose what it regards as anything other than the right sentence simply because it or another court has imposed a "wrong" sentence on a co-defendant. The more usual approach is that very recently articulated by the Court of Appeal (Criminal Division) in R v Tate [2006] EWCA Crim 2373 at [20]: "The fact that the co-defendant Sheppard appears to have been extremely fortunate is not in our judgment a good reason for imposing a sentence on the appellant that would in our judgment be less than the facts of the case merit."”

27. In our judgment, it is wholly inappropriate to attempt to determine whether the sentence in any particular case is manifestly excessive by reference to other unrelated cases, (i.e. those where the comparator is not a co-defendant) except, perhaps, in the most exceptional and clearest circumstances. (Even then, the court should be alive to the risk to the public interest identified by Lord Bingham and to the danger of perpetuating sentencing error, as it should where the comparator is a co-defendant.) No such exceptional circumstances are present here. On the contrary, it is clear from what we can discern from the sentencing remarks in all three sentencing cases under consideration that both the mitigating and the aggravating factors were dissimilar. Further, it is not possible to know with sufficient confidence what weight was given to these factors by the Royal Court.
28. As we have recorded in paragraph 17, in this case the Royal Court selected a starting point of two years. In doing so, it took into account a number of factors: the offences were committed over a period; they were planned; the defendant was a senior employee; and there was an element of sophistication. The total amounts were described as *“significant but not huge”*, and the Royal Court emphasised the defendant’s *“significant position of trust”*. The court did not characterise this case as damaging to the reputation of Guernsey as a financial centre, nor would the circumstances have justified its doing so. In our view, the Royal Court was entitled to take the view that, as it was put in the sentencing remarks, *“this was thoroughly dishonest and reprehensible behaviour”*. The court was entitled, therefore, to fix the starting point at a relatively high level in the range for offences involving amounts of money that were *“significant but not huge”*. In our view, however, in a case involving just under £10,000, the range does not extend to two years, and in choosing that as the starting point for sentencing, the Royal Court fell into error. In the result, in our judgment, the sentence was manifestly excessive.
29. We are of the opinion that the gravity of this offence would be sufficiently marked by following the general guidance that we have recommended. We have suggested a

starting point of eighteen months where the sum involved is £20,000, twice as much as here. We are conscious that the Royal Court was clearly concerned to reflect what it regarded as a high degree of culpability on the part of the defendant. On the evidence before it, that was a view that it was entitled to take. A starting point of fifteen months adequately acknowledges that level of culpability. Discounting the figure by one third to give credit for the guilty plea, and applying the further reduction of one month for what the Royal Court described as “*some limited personal mitigation*”, the resultant sentence is one of nine months’.

30. In the whole circumstances, we quash the sentence imposed by the Royal Court and impose a sentence of nine months’ imprisonment on each count, the sentences to run concurrently.