



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 27
HCA/2021/73/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by Lord Pentland

in

APPEAL AGAINST SENTENCE

by

R A

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Collins, sol adv; Collins & Co
Respondent: Jessop, sol adv; Crown

23 April 2021

Introduction

[1] The appellant pled guilty at a first diet to an amended charge of contravening section 35 of the Tax Credits Act 2002 by fraudulently obtaining child tax credits over a period between May 2012 and January 2018. The appellant certified that she was a single parent living with her children at an address in East Lothian. The amount of the fraud was

£55,000. The appellant had been living with her partner during this period in a single household, but failed to declare this. He had been in full-time employment. As the Sheriff points out in her helpful report, the appellant demonstrated a clear understanding of the requirement to notify HMRC of any changes in her domestic circumstances as she reported the birth of a child and changes in her childcare costs.

[2] In mitigation before the Sheriff it was explained that the appellant was the primary carer of six children. The father of the eldest child was deceased. It was said that the appellant's former partner had been physically and emotionally abusive towards her; he was dependent on alcohol, and failed to provide financially for the appellant and the children. The appellant had not led a lavish lifestyle. She was now living with a new partner, who was the father of her youngest child. He was willing and able to care for all of the children in the event of a custodial sentence being imposed.

The criminal justice social work report

[3] The criminal justice social work report explained that the appellant was making payments of £100 per month to the Department of Work and Pensions to repay the tax credits to which she had not been entitled. She was unlikely ever to be able to repay or significantly reduce the amount defrauded. She did not have the means to pay a financial penalty. She was at low risk of reoffending. The report concluded that there was little focus for supervision under a community payback order; this was not recommended. Whilst fit to carry out unpaid work, the appellant would only be able to do this if suitable childcare arrangements could be made. She was a suitable candidate for a restriction of liberty order.

The Sheriff's approach

[4] The Sheriff understandably took the view that the appellant had pled guilty to a serious offence involving deliberate benefit fraud over a period of 5 years and 8 months with a monetary value of £55,000. Having regard to the guideline case of *Gill v Thomson* 2010 SCCR 922, only a custodial sentence was appropriate. There was in the circumstances no meaningful alternative to custody. A headline sentence of 18 months imprisonment discounted for the plea to 12 months was appropriate. In selecting that sentence the Sheriff acknowledged that the appellant's family circumstances were compelling, but they did not persuade her that, where she would retain her tenancy and where her new partner could care for the children whilst she was in custody, the circumstances could be said to be sufficiently exceptional to justify an alternative to custody.

The Note of Appeal

[5] In the note of appeal it was accepted that, even after amendment, the monetary value of the fraud was high, and that the court was entitled in the circumstances to consider a custodial sentence. The appellant is a first offender, who has six children under the age of 16, the youngest being just 5 months old. She admitted claiming the benefits in the knowledge that she was not entitled to them. The background to the offending was that the appellant was, at the time, in an abusive relationship with her former partner, who is named on the indictment. He resided at the family home, but would be absent for periods of time. He had an alcohol problem and subjected the appellant to domestic violence during the relationship. The appellant was aware that she was not entitled to the benefits she claimed, but did so to support the family in circumstances where her partner failed to provide financially for the appellant and the children, and would use money intended for the family

to support his alcohol dependency. The relationship came to an end in 2019. It was submitted that the circumstances surrounding the commission of the offence mitigated the high value of the fraud, and, in these circumstances, an alternative to custody remained an appropriate disposal.

[6] It was submitted that the impact of a custodial sentence upon the children was a further mitigatory factor. The appellant's present partner is the father of the youngest child, but not of the other children. The appellant was concerned for the welfare of her children and her current partner had made an application for an interdict preventing the former partner from removing the children.

[7] In the circumstances, despite the high value of the fraud, it was submitted that the Sheriff erred in imposing the custodial sentence.

[8] If, contrary to the principal submission, a custodial sentence was thought to be appropriate, it was submitted that the starting point of 18 months' imprisonment was excessive in the whole circumstances.

Submissions for the appellant

[9] In his written and oral submissions to this court Mr Collins, on behalf of the appellant, accepted that she had pled guilty to a serious offence involving the deliberate claiming of benefits, totalling £55,000, to which she was not entitled. The appellant had submitted her claim for Child Tax Credits without declaring that she was residing with her then partner. The value of the fraud was such that the court was obliged to give consideration to a custodial sentence, but Mr Collins submitted that the mitigatory circumstances surrounding the commission of the offence, and the appellant's own personal circumstances, were such as to provide the Sheriff with a viable alternative to such a

custodial sentence. The appellant was residing with her partner at the time of the offences, but that relationship was an abusive one. The appellant's then partner had now been charged with an offence under section 1 of the Domestic Offences (Scotland) Act 2018 in relation to his controlling and abusive behaviour towards the appellant.

[10] Whilst the couple were residing together, the appellant's partner would frequently absent himself for periods of time from the family home, leaving the appellant and her five children without any means of financial support. He controlled the family finances, and did not provide any money for the appellant or the children, instead using the money to support his alcohol dependency and other pursuits. The appellant knew that she was not entitled to the Tax Credits. In answer to questions from the court, Mr Collins explained that the appellant's account was that she would require to lend money to her former partner. He would repay her and from time to time pay small amounts for the children, but he did not support them on a regular basis. The appellant said that she did not feel able to ask him to do so because she was scared of his violence.

[11] The last date on the libel was 19 January 2018, some three years before the date of sentence. By the time of sentence the appellant was living with her new partner and their child (the appellant's sixth child). She was concerned about the impact of a custodial sentence upon her children. The appellant's partner had sought parental rights to look after all the children. That application has been opposed by the former partner, who is seeking to have the children live with him. Whilst the appellant was in custody before being released pending the present appeal, her partner had had to seek an interdict to protect himself and the children from the former partner.

[12] The criminal justice social work report assessed the appellant as being at low risk of reoffending, and as such saw little focus for a Supervision Requirement of a Community

Payback Order. She was, however, assessed as suitable to undertake unpaid work as an alternative to custody. She was repaying the money by way of a deduction from her benefits, and was in a position to offer further repayment at the rate of £100 per month on top of that deduction.

[13] In the particular circumstances of the offence, and of the appellant, Mr Collins submitted that the Sheriff erred in imposing a period of imprisonment. *Esto* a custodial sentence was appropriate, the length of the sentence was excessive in light of the circumstances relied on.

Analysis and decision

[14] In *Gill v Thomson* this court noted the existence of a divergence in sentencing practice in cases involving statutory offences of fraud. The court took the opportunity in three sentence appeals to set out general guidelines which would apply to cases of this type. Whilst recognising that each case must depend on its own facts and circumstances, the court stated that for an offence involving less than £5,000 of gain a community service order may be taken as the norm, being a direct alternative to a custodial sentence for an offence at the higher end of the range. A fine or other non-custodial disposal, not being a direct alternative to custody, may be seen as reasonable for offences in the middle of the range (£2,500). The court did not consider that a short custodial sentence (less than three months) ought to be regarded as appropriate for offences in the range of £5,000 to £20,000. At the lower end of this range, a community service order may again be appropriate as a norm, as a direct alternative to custody. But where the offence is in the higher reaches of the range, the court would expect a significant custodial sentence to be imposed in the absence of quite

exceptional circumstances. Offences above the level of £20,000 might attract penalties only available in solemn proceedings.

[15] In the present case, as we have explained, the amount defrauded by the appellant was £55,000. There can be no doubt that, in view of the large sum defrauded by the appellant, a custodial sentence would normally be required in terms of the guidelines approved in *Gill v Thomson*. The circumstances would have to be truly exceptional to justify the imposition of a non-custodial penalty in a case where such a large sum of state benefits had been fraudulently obtained. Having given close consideration to all the circumstances of the present case, we are unable to say that a non-custodial disposal would be appropriate. The appellant deliberately defrauded the state of a very large amount of benefits over many years. She was well aware that she was not entitled to these benefits. Yet she persisted in a prolonged course of conscious dishonesty. We acknowledge the various difficulties that the appellant faced with her former partner, but we do not consider that these were sufficient to justify fraud on such a substantial and sustained scale. As the Sheriff aptly observed, it is important to ensure consistency and predictability in sentencing in cases of this type. That was why sentencing guidelines were issued by the court in *Gill v Thomson*. There is no basis for departing from the guidelines in the present case. A custodial sentence was, in our view, amply merited.

[16] As to the length of the sentence, the Sheriff took full account of the appellant's personal and family circumstances. She noted that the appellant would retain her tenancy and that her current partner could care for the children. The Sheriff selected a headline sentence which, in our view, properly reflected the appellant's particular circumstances, including her various difficulties and the challenges she has faced. We can find no fault in

the approach that the Sheriff adopted or with the headline sentence she selected. No issue is taken with the level of discount.

[17] For these reasons we conclude that the appeal must be refused.