No: 9601511/Y2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 5th December 1997

B E F O R E :

THE VICE PRESIDENT
(LORD JUSTICE ROSE)

MR JUSTICE CAZALET

and

MR JUSTICE TOULSON

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R E G I N A

- v -

CHARLES NALL-CAIN (LORD BROCKET)

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MR J CAUSER appeared on behalf of the Appellant
MR P ST JOHN STEVENS and MR P STAGE appeared on behalf of the Crown

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JUDGMENT
(As Approved by the Court)

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Friday 5th December 1997

LORD JUSTICE ROSE: On 19th December 1995 at Luton Crown Court, this appellant pleaded guilty to conspiracy to defraud, and on 9th February 1996, he was sentenced by His Honour Judge Rodwell QC to 5 years' imprisonment. On 29th November 1996, having pleaded guilty to a related matter, an offence of obtaining by deception, he was sentenced by the same judge to 2 years' imprisonment concurrently. That sentence is not the subject of complaint.

There were co-accused, Gwyther and Caswell, who pleaded guilty to the same conspiracy offence and were sentenced to 20 months' imprisonment suspended for 2 years, a man called Campbell-Bowling was found not guilty and discharged, and a man called Furtado has subsequently been convicted of conspiracy to defraud and sentenced to 18 months' imprisonment, on the basis that he was unaware that the burglary, to which in a moment we shall come, was bogus.

The appellant appeals by leave of the Full Court, following refusal of leave by the Single Judge, against the sentence of 5 years' imprisonment.

The facts were these. The appellant arranged for a bogus burglary of four classic cars and some engines which had been deliberately overvalued for insurance purposes at a sum of £4.5 million, which was some £1.5 million in excess of what they were truly worth. In consequence of the alleged burglary, a fraudulent insurance claim was made.

The background to the offence was that, in 1990, the appellant was in serious financial difficulty with his bank. He also wanted further to develop the facilities at Brocket Hall which he had turned into a conference centre. He was warned in a letter from his accountants that he was heavily over-borrowed. In consequence, as we have said, he overinsured all his cars, with cover which also enabled him to claim the whole value of a car if only parts of it were stolen. To that end he persuaded an inexperienced valuer to overvalue them to the extent of £1.5 million. He did so by saying, falsely, that he had offers already from Japanese buyers to buy the cars at higher values. Purely by way of example, there was a car called a Maserati Birdcage which he bought in September 1990 for £320,000, that was insured shortly afterwards for £1.2 million.

On 7th May 1991 he reported that the most overvalued and unsaleable cars, the Maserati and three Ferraris and engines, had been stolen over the previous bank holiday weekend. What had actually happened was that he had induced

two of his employees, the co-accused Caswell who was a mechanic and then a security guard and Gwyther who was a specialist mechanic, to join him in this scheme by threatening them with unemployment and the loss of their housing if he, the appellant, went bankrupt by reason of his financial difficulties.

The three of them cut up the cars and engines, working over a number of nights, and then burnt, dumped or stored the resultant pieces in a container in Greenford, which had been hired in March 1991.

The man Furtado, to whom we have referred, was a car dealer whom the appellant persuaded to pretend that he had a number of purchasers for the fully insured value of the cars. That pretence was, of course, essential for the overvaluation to which we have referred.

The insurance claim for £4.5 million having been made, the insurers declined to pay. They had no evidence of fraud at that stage. The appellant sued them. It was not until July or August 1994 that that action was discontinued, without any payment being made, on the basis that both sides paid their own costs. The costs of the insurers incurred by them and irrecoverable by them were something of the order of £200,000. In its concluding stages that litigation had been pursued by the bank. But the appellant was of course a necessary and willing witness if those proceedings were to have any chance of success.

The police became suspicious, because the premises had quite a sophisticated security system. But they were not able, initially, to demonstrate that the burglary had never taken place until, in February 1995, when Caswell and Gwyther were interviewed, they admitted doing that which we have already described.

Initially, the appellant denied involvement but, having heard what Caswell said he, on the advice of his solicitors, when interviewed made no comment. At the committal proceedings Caswell gave evidence for the prosecution.

The learned judge, in passing sentence, referred to the circumstances which we have endeavoured to outline. He rejected the submission made on behalf of the defence that this was some sort of panic attack on behalf of the appellant which had lasted from October 1990 to July 1994. He regarded the operation as being carefully planned, regardless of the extent of the involvement of Furtado, which was a matter of some dispute. The judge referred to the suborning of employees, of previous good character, as being one of the most seriously aggravating features and being quite disgraceful. The judge gave credit for the appellant's public admissions, prior to sentence, of his role and of his

exoneration, so far as lay within his power, of his employees. The judge referred to the appellant pursuing with vigour, over the period which we have indicated, his claim against the insurers. The judge accepted that discount should be given substantially for the plea of guilty. But the judge drew attention to the overwhelming nature of the evidence, particularly having regard to that what Caswell had said at the committal proceedings. The judge referred to the appellant's primary concern being to protect the inheritance of his children. The judge also referred to the greatness of the appellant's fall, his contrition and the ruin which this matter had brought upon him when he was a man not only of good character but one who had, by his charitable works, made a contribution to the welfare of other people.

On the appellant's behalf the sentence of 5 years is challenged by Mr. Causer on two grounds. First, he submits that 5 years was in itself too long a sentence for this offence. He stresses that the genesis of the offence was what he described as unbalanced thinking, borne of panic, in a situation in which cash for the appellant was tight. He stressed the wish of the appellant to preserve the inheritance of his family. He pointed out that the judge had, as we have said, accepted that a substantial discount for the plea of guilty was appropriate, and that the appellant had eventually shown contrition and had sought to exonerate other people and, says Mr. Causer, "smaller fish are often drawn into conspiracies". Mr. Causer referred to the appellant's sad childhood, his good character and his charitable works.

In documentation which the Court has had the opportunity of digesting prior to today, Mr. Causer has referred us to over 50 authorities in relation to the appropriate level of sentence in a case of this kind. It seems to us that, save for the case of R v. Guppy (1995) 16 Cr.App.R.(S.) 25 to which in a moment we shall return, the cases in relation to frauds or attempted frauds on insurance companies are of little assistance in the present case, because the sums involved in all the authorities in that category to which we were referred are, by comparison with the present £4.5 million claim, very small. Likewise, the authorities in relation to mortgage frauds are only of limited assistance because the nature of those offences is somewhat different from the present. In looking at the level of sentence which the courts deem appropriate for this kind of offence we have derived most assistance from the authorities we now identify: in R v. Alabhai (1992) 13 Cr.App.R.(S.) 682, a sentence of 7 years was upheld following the trial of the mastermind of a conspiracy to obtain £1.5 million in VAT by deception; in R v. Harris (1994) 16 Cr.App.R.(S.) 331, following a trial, a sentence of 6 years was reduced by this Court to 5 years, for the ringleader of a conspiracy to defraud building societies of just under £1

million, with actual losses of just under £500,000; in

R v. Sivyer (1988) 9 Cr.App.R. (S.) 428, a sentence of 4 years was upheld, following a trial, for the principals of a conspiracy to defraud the Revenue of £400,000; in

R v. Ryall (1995) 16 Cr.App.R.(S.) 425, following a trial, a sentence of 4 years was upheld for conspiracy to defraud Customs and Excise of £176,000; in R v. Aziz (1996) 1 Cr.App.R. (S.) 265, following a trial, a sentence of four-and-a-half years was upheld for cheating the public revenue of £400,000 in VAT over 6 years. In R v. Guppy, following a trial, for a conspiracy to defraud insurers of £1.8 million and other offences, 5 years was upheld and a fine of approximately £500,000, with 3 years consecutive in default, was varied by this Court to a compensation order of £227,000, with 3 years consecutive in default. The essence of the offence was that a robbery was faked, and an insurance claim made for £1.8 million in relation to gems which were only worth £400,000. The similarities with the present case are obvious; there were obviously differences. In R v. De Beer [1997] 1 Cr.App.R. (S.) 97, following a plea of guilty, 6 years was reduced to 4 years, when £1.3 million was fraudulently obtained from finance companies and £500,000 was actually lost.

We have also had regard to R v. Clarke (unreported, 4th December 1997) in which this Court, differently constituted, updated the guidelines in R v. Barrick (1985) 7 Cr.App.R.(S.) 142. At page 10 of the transcript of the judgment in that case, it was pointed out that the scale of so-called white collar dishonesty, in the form of theft and fraud, has increased both in complexity of execution and in the rewards which can be dishonestly achieved in the 12 years since R v. Barrick was decided.

In our judgment, it is apparent that the sentence of 5 years passed for the present offence is not out of line with these authorities, despite the plea of guilty and the appellant's previous good character. The sum sought to be dishonestly obtained was huge. The means adopted to achieve it were carefully planned and executed by the appellant. He persisted in the fraud for 4 years. He abused his position both as an employer and as a person of standing in the community to induce others to help him. The sum actually lost by insurers was, as we have said, of the order of £200,000. Accordingly we are unpersuaded by Mr. Causer's first submission.

We turn to the second of Mr. Causer's submissions, which is based on the appellant's experiences in prison since

he was sentenced. There can be no doubt that, until about 12 months ago, he had a very bad time. His diary was stolen by a gang of prisoners for sale to the press; he was blackmailed by other prisoners; and threats were made to himself and his family. One prisoner who went to his aid on one occasion was assaulted and wounded. The leader of the gang and other members of it were arrested and charged with offences, including theft, assault occasioning grievous bodily harm and blackmail. But, apart from the appellant none of the others who might have given evidence in support of his complaints were prepared to do so. Because of his treatment, the appellant has been moved from one prison to another, on a number of occasions. The most serious and significant incident of violence against him was when, in the absence of prison warders, his shoulder was dislocated and he was stabbed in the hand and repeatedly punched so that he sustained a black eye, and was repeatedly kicked. Threats were made against him on the basis that he was a 'grass'.

We are told, and we accept, that since the appellant was moved to an open prison, in November 1996, no incidents of this kind have occurred, although Mr. Causer suggests that he would be justified in fearing that further attacks might take place.

The question is to what extent, if at all, this Court should have regard to matters of this kind, in determining an appeal against sentence. Mr. Causer draws the Court's attention to the difference in wording between section 11(3) of the Criminal Appeal Act 1968 and section 4(3) of the Criminal Appeal Act 1907. The earlier Act provided that the Court of Appeal should "if they think that a different sentence should have been passed" quash the sentence and pass some other sentence, whereas the 1968 Act provides that the court may "pass such sentence or make such order as they think appropriate for the case." He submits on the basis of that change of wording, that this Court has a somewhat wider power when considering sentence, than it had under the provisions of the 1907 Act. We are prepared to accept that that is so.

There are a number of authorities in relation to the principle which we have sought to identify which, as it seems to us, do not speak with one voice. In

R v. Holmes (1979) 1 Cr.App.R. (S.) 233, on which Mr. Causer principally relies, the Court did have regard to the appellant's treatment by other inmates. Three observations upon that case seem pertinent. First, as was said in R v. Parker [1996] 2 Cr.App.R. (S.) 275, at pages 277 and 278, the circumstance of that case were wholly exceptional.

Secondly, as a sentence of 2 years for rape was reduced to 18 months' imprisonment suspended, it can hardly be said that Holmes represents current sentencing practice. Thirdly, it is, as it seems to us, a decision which is, on the face of it, at variance with earlier and subsequent authority in this Court. In R v. Kirby (1979) 1 Cr.App.R. (S.) 215, which was not cited to the Court in Holmes, a division of this Court presided over by Lord Widgery C.J. and of which the other members were Waller L.J. and Lloyd J, now Lord Lloyd of Berwick, the Court expressly rejected the point on which the Court in Holmes relied and held that the fact that a defendant, for his own protection, has to serve his sentence in isolation from other prisoners under Rule 43, is not a factor which the Court should take into account in determining length of sentence. The same approach was reiterated by this Court, differently constituted, in R v. Kay (1980) 2 Cr.App.R.(S.) 284 and, more recently, in Parker, to which we have already referred.

In R v. Kay, at page 286, appears the following:

"...it is perfectly plain from all the material which I have mentioned that prison life is a very harsh experience for Kay. It is plain from the evidence before the Court that he is unable to come to terms with his sentence and that he suffers very sorely at the hands of his fellow prisoners. We add that it has unfortunately been necessary for Kay to be seen by a psychiatrist and to be supported by medication and by the probation officer...

It seems to this Court that how a man reacts to prison life is not a matter which should affect the principle of the sentence. When sentencing a man the court is concerned with the character of his crime and with his individual circumstances as revealed in his criminal background, if any."

Then these words:

"...it is really a matter for the prison authorities to deal with the most unhappy situation which has developed in the case of Kay within the context of the prison system."

In our judgment the authorities, in particular, Kirby, Kay and Parker, by which, as it seems to us, we are bound and with which, in any event, we respectfully agree, show that a defendant's treatment by other inmates is not generally a factor to which this Court can properly have regard. It is to be noted that a prisoner who is maltreated by other prisoners, has a number of avenues of redress open to him, some of which are exemplified in the present case. He can complain (as the appellant has done), in relation to related matters, to the Prison Ombudsman: the Prison Ombudsman has upheld certain of the appellant's complaints. He can obtain compensation via the Criminal Injuries Compensation Board in appropriate circumstances. And, above all, he can apply to the Home Secretary for

compassionate release.

In our judgment, the position is quite different, so far as treatment by other prisoners is concerned, from that where, for example, there is a deterioration in a defendant's health, or it is impossible, by reason of a prisoner's physical disabilities, for the prison authorities to cope with him. Such cases may give rise to the exercise of mercy by this Court: see, for example, R v. Bernard (1997) 1 Cr.App.R.(S.) 135. But, in our judgment, the difficulties which would arise if this Court were called upon to adjudicate upon the nature of disputes between prisoners is a reason of practice, in addition to the reasons of principle and authority which we have sought to identify which, generally speaking, precludes this Court from taking into account the treatment of an appellant by other prisoners when considering the sentence which was passed upon him.

In the circumstances of this particular case, it is to be noted, as we have said, that, for 12 months, there seem to have been no problems of the kind by which, unhappily, the appellant was beset in the initial period of his sentence. Having regard to all the other matters which we have set out, we are not persuaded that this is a case in which the sentence passed by the learned judge should be altered by this Court. Accordingly this appeal is dismissed.