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2016/01425/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 12th August 2016

B e f o r e:
LORD JUSTICE BEAN

MR JUSTICE FOSKETT

and

MR JUSTICE HICKINBOTTOM

R E G I N A

v

VALERIE ANN WINDSOR

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(Official Shorthand Writers to the Court)

Mr J Hingston appeared on behalf of the Appellant

J U D G M E N T
(Approved)

MR JUSTICE HICKINBOTTOM:

1. On 22 February 2016 in the Crown Court at Peterborough, having earlier pleaded guilty, the Appellant, Valerie Ann Windsor, was sentenced to a total of three years nine months' imprisonment, made up as follows.

> Count 1: Being knowingly concerned in the fraudulent evasion of income tax, 18 months' imprisonment;
>
> Count 2: Being knowingly concerned with the fraudulent evasion of VAT, 18 months' imprisonment consecutive;
>
> Count 3: Making and supplying an article for use in fraud, 18 months' imprisonment concurrent; and
>
> Count 5: Acting in contravention of a director's disqualification order, nine months' imprisonment consecutive.

She pleaded guilty to Count 5 on the day of trial, but the other three matters earlier, at the plea and case management hearing. On sentence, an order disqualifying her from being a director of a company for ten years was also imposed.

2. The Appellant now appeals against sentence with the leave of the single judge.

3. From 1998, the Appellant and her co-defendant, Gerard Boucher, owned and operated a series of software companies. First in time was Epsilon Technology Solutions Limited, of which they were both directors. It went into liquidation at the end of 2004. Immediately afterwards, a new company was formed, Object Laboratories Limited ("OLL"), of which they were also directors.

4. On 9 October 2008, both were disqualified as directors, the Appellant for three years and Mr Boucher for five years. Under those orders each was prohibited from being a director of a company, and from in any way being concerned or taking part in the formation or management of a company, the breach of which would be a criminal offence. They each signed forms terminating their appointments as directors of OLL in November 2008. Indeed, the Appellant wrote to Companies House saying that OLL had ceased to trade.

5. However, another company, Object Laboratories International Limited ("OLIL") had been formed in 2004. Following the demise of OLL, trading was effected through OLIL. It had two directors, who were Mr Boucher's children; but, in breach of the director's disqualification order, the Appellant continued to run the company on a day-to-day basis. Mr Boucher was also involved in the company management, but because of ill-health his role was limited.

6. Employees of OLIL had PAYE, tax and National Insurance deducted from their pay at source, by the company, in the usual way. At the end of each financial year, they were each provided with a Form P60. However, the company did not account to Her Majesty's Revenue and Customs ("HMRC") for that tax. Indeed, they knew nothing of the concern. Between November 2008 and November 2013, over £150,000 was withheld. That formed the basis of count 1. The fraudulent preparation of the Forms P60 was count 3. By the time of the sentence, HMRC had confirmed that they had adjusted their records to show the employees had been employed during the relevant period; so, in the event, the employees did not lose out on pension

or other benefits as a result of the fraud.

7. In addition, those who dealt with the company would be charged VAT; but the company did not account to HMRC for that either. In the same period, the shortfall was just over £140,000. That was Count 2.

8. Count 5 resulted from the Appellant managing OLIL whilst subject to a director's disqualification order.

9. Count 4 related to Mr Boucher alone; and it was again in terms that he managed OLIL whilst subject to a disqualification order. He pleaded guilty to that count. The Crown pursued no further matter against him. On that single count, he was given a suspended sentence of 12 months' imprisonment, and disqualified from being a director etc for five years.

10. At the sentencing hearing the judge accepted that, whilst the Appellant took just over £13,000 out of the company each year, the frauds were committed almost exclusively to prop up an ailing business concern and her then lifestyle, rather than in an attempt by the Appellant to make herself rich quickly at the expense of others. Indeed, there is evidence that the Appellant had mortgaged her own house during this period; and had also sold, (e.g.) her wedding and engagement rings to finance the company.

11. Mr Hingston, for the Appellant, concedes that, in all of the circumstances, although stiff, no great issue can be taken with the judge's starting point that led to an aggregate sentence of three years' imprisonment in relation to Counts 1 and 2 after a plea. The counts individually, as well as collectively, fell within category 5 of the Sentencing Guideline for Tax Fraud, which defines "harm" in terms of an amount of tax withheld between £100,000 and £500,000. The judge found that the crimes, in effect, straddled culpability categories A and B, there being fraudulent activity carried out over a sustained period and an abuse of position of trust, which suggests category A, but tempered by the fact that the Appellant was at least primarily motivated not by personal financial gain, but by a wish to keep an ailing company afloat. The starting point for category 5A is four years' custody, and for category 5B is two years six months.

12. However, Mr Hingston submits that the judge erred in two ways. First, in passing a consecutive sentence on count 5 (being involved in the management of a company while subject to director disqualification), the judge failed to take into account the principle of totality. He submits that, in effect, the judge double-counted, because he took into account the fact that there had been an abuse of trust as an aggravating feature of the frauds. He submits that, in any event, in the circumstances of this case the imposition of a consecutive sentence of nine months' imprisonment was simply too high.

13. We are unpersuaded by the first limb of that argument. The breach of trust which aggravated the frauds was in respect of the Appellant's duty to ensure that tax retained by the company was paid to HMRC; and, by not accounting for the tax, she acted in breach of trust towards both HMRC and, particularly, employees. In relation to employees, by not accounting for their PAYE and income tax, she put in jeopardy their right to (e.g.) benefits and a pension. That she was operating the company while subject to a disqualification order was an entirely different matter which, in our view, warranted a consecutive sentence.

14. With regard to the length of that consecutive sentence, there is no guideline for this offence. Although the breaches of a disqualification order are necessarily fact-specific, the sentences imposed on the Appellant and Boucher for such a long-running breach as this, looked at discretely, do not appear very much out of kilter with other sentences as set by this court. Boucher was sentenced to 12 months' imprisonment, albeit suspended; and he did not play such a part in the management of the company.

15. With regard to the issue of totality, that is something to which we will return after considering Mr Hingston's second ground.

16. As his second ground of appeal he submitted that the judge failed to attach appropriate weight to the Appellant's extensive personal mitigation, and in particular, (i) the fact that she committed the offences to shore up an ailing company, rather than for her personal benefit and (ii) her poor health.

17. With regard to the latter, there was evidence (albeit limited) in the form of a pre-sentence report that her mental health had suffered significantly, primarily as a result of her offending, although it was apparently triggered somewhat earlier in 2009 when her sister unfortunately died. The Appellant had suffered, in any event, a reactive depression which had become established, and she found it difficult to cope. Her doctor had prescribed antidepressants, but she had stopped taking them because, she said, they disagreed with her. She had taken to drink to relieve her symptoms of depression and anxiety, and had been referred to a community psychiatric nurse through Drink Sense. They were just completing work in respect of her drinking at the time the author was completing the pre-sentence report. That report refers to a psychiatric report that was due to be prepared for sentence, but no such report was, in fact, produced. We are told, and we accept, that the Appellant failed to attend an appointment to see a psychiatrist because she was feeling unwell. No further appointment was arranged. She expressly told her legal representatives that she wished the sentencing hearing to go ahead, without waiting for a psychiatric report, as she wished for closure.

18. However, the court did have (i) the opinion of the author of the pre-sentence report that he believed that the Appellant would find it very difficult to cope with a custodial environment and that it was very likely to lead to an increase in the risk that she posed to herself, and that she would have to be extremely closely monitored by prison staff to that end; and (ii) a letter from a senior nurse at Drink Sense, indicating that the Appellant suffered from high levels of anxiety, in part related to the levels of alcohol she consumed, although they appear to have remained high despite a significant reduction in that consumption. The nurse said that the Appellant's emotional capacity to cope with anything other than the criminal proceedings remained "low".

19. Of course, it is not unusual for those who commit serious crimes and face prison for the first time to have an adverse psychiatric or psychological reaction, particularly in terms of symptoms of depression and/or anxiety. Mr Hingston does not suggest that it is a breach of the Appellant's human rights to keep her in custody. Any suggestion would have no force. However, as this court has emphasised from time to time, it may be appropriate to allow some reduction in sentence from an otherwise appropriate sentence, where the impact on an offender of a sentence of imprisonment would be greater than it would be on others.

20. In this case, we consider that, as a mitigating factor, the Appellant's health was of some, but no great, weight; although we accept that her motivation – to bolster an ailing company, rather than for substantial personal gain – does have some significant force as mitigation.

21. In this case, the sentencing judge had a difficult task, bearing in mind the seriousness of the offending and the considerable mitigation which the Appellant was able to advance in terms of not only her health and the fact that imprisonment for her will be somewhat more challenging than for others, but also the important fact that she committed the frauds not for personal gain, but in an attempt (albeit entirely misconceived) to keep alive her ailing company in which she had five employees, whom she treated as friends.

22. Having considered the matter with particular care, we are persuaded that, in all of the circumstances, the aggregate sentence imposed of three years nine months' imprisonment was too high, and indeed manifestly excessive. It failed properly to take into account all of the circumstances of the offending and the offender. In our judgment, for the aggregate offending, a sentence of three years' imprisonment would have been appropriate.

23. With a view to arriving at that aggregate sentence, we shall leave in place the sentence of nine months' imprisonment for the director's disqualification offence, which we consider is an appropriate length of sentence and one which should have properly been consecutive; but impose sentences on counts 1, 2 and 3 of two years three months' imprisonment, to run concurrently with each other but consecutive to the nine months. By that means, the sentence of three years nine months' imprisonment in aggregate will be reduced to one of three years' imprisonment in aggregate.

24. To that extent, this appeal is allowed.