APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 56
HCA/2018/000216/XC

Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

JANET FARQUHAR

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: G Markie; Capital Defence Lawyers
Respondent: M Hughes, ad hoc; Crown Agent

24 July 2018

[1] The appellant is 70 years old and appeared before the court as a first offender. She pled guilty to a charge of embezzlement, committed over a period of eight years, whilst she was acting as the treasurer of Chalmers Memorial Church in Port Seton. The total sum involved was £72,155.34. The sentencing sheriff imposed a period of 18 months

imprisonment, discounted from the period of 2 years which he would otherwise have imposed but for the appellant's early plea of guilty.

[2] The circumstances of the offending are these. In 1999 the appellant took on the role of treasurer of the church mentioned. In 2016 it emerged that the church appeared to be behind in the contributions which it owed to the Church of Scotland. A subsequent enquiry ascertained that over the years between 2008 and 2016 the appellant had issued cheques from the church bank account, payable to herself, totalling a little under £60,000. It emerged that a further sum in the region of £12,400 had also been embezzled, this being money which the appellant had failed to bank from the church's collection sums.

[3] By the time the appellant appeared before the sheriff for sentence she had repaid the sum of £15,000. She was also suffering from significant health difficulties. As a result of a fall in 2008 she was left with reduced mobility in her left arm and required the use of two stick to mobilise. Further associated conditions required treatment in the form of antibiotics and dressings. The sheriff was informed that the appellant had fallen into debt having attempted to secure repairs to her house which was in a poor state of maintenance. It was said that the money which the appellant began taking from the church was used to pay credit card debts and general living expenses. It was submitted that she was remorseful and embarrassed over her conduct. Barring a period of a few years after the birth of her son, the appellant had been in employment since leaving school at age 17 until her retirement aged 62. Her husband had died after a period of illness in 2016 and prior to his death she had been his carer for some time.

[4] In these combined circumstances, and bearing in mind the protection afforded to the appellant as a first offender in terms of section 204(2) of the Criminal Procedure (Scotland)

Act 1995, the solicitor appearing on the appellant's behalf submitted that the case could be dealt with by a non-custodial sentence.

[5] In support of this submission the sheriff's attention was drawn to a number of cases in which non-custodial sentences had been imposed in relation to cases of theft and fraud involving significant sums of money. As part of the overall submission it was suggested that the sheriff might defer sentence to permit the appellant's house to be sold and to allow her to repay all of the outstanding sum embezzled. The sheriff declined to give effect to the submission made on the appellant's behalf. Leave to appeal was granted challenging the imposition of a custodial sentence and, in the alternative, the length of the sentence selected.

[6] In support of the appeal it was submitted that whilst on the face of matters a custodial sentence could be said to have been warranted, certain circumstances existed which would entitle the court to interfere. Mr Markie, who appeared on the appellant's behalf, explained that the entire balance of the outstanding sum embezzled had now been repaid. He also explained that the proceeds of crime proceedings which had been operating in parallel with the appellant's conviction had now been withdrawn. The appellant had instructed solicitors to market her property and our attention was drawn to a further deterioration in the appellant's health.

[7] In these combined circumstances Mr Markie submitted that a non-custodial sentence could be imposed and, if we did not agree with that submission, that a shorter custodial sentence was appropriate.

[8] In his report to this court the sheriff explained that he selected the sentence which he did because of the gravity of the offence, which included a gross breach of trust. He took the view that the appellant's offending constituted a sustained and calculated course of conduct and that the offence was aggravated by the large amount taken and by the period of time

over which the offence occurred. He declined to accept that the appellant was genuinely remorseful given certain attempts which had been made to avoid responsibility once the church enquiry had commenced. The sheriff also explained that, in his view, there was a need to impose not only an appropriate sentence but one which deterred others. He explained that in acknowledgement of the fact that prison would not be a comfortable experience for the appellant he took a lower starting point than he would otherwise have selected. He also explained that the cases which were drawn to his attention could be distinguished on their facts, not least having regard to the large sum involved in the present case.

[9] We accept immediately that the offence to which the appellant pled guilty was a serious one. As set against that, the appellant's personal circumstances, in particular her age, her lengthy period of constructive employment and her medical conditions, constitute powerful mitigating factors. We also consider that certain errors can be identified in the sheriff's approach. On the information available there appeared to be no reason for the sheriff to suppose that a deterrent sentence was required. Nor does he explain why he arrived at that conclusion. It also appears that but for the appellant's health the sheriff would have been inclined to impose an even more severe sentence, despite the other mitigating factors available. Whilst the sum involved in the present case is, on the face of it, more substantial than the sums of £23,000 and £20,000 respectively which were involved in the cases of *Dolan* v *Her Majesty's Advocate* 1986 SCCR 564 and *White* v *Her Majesty's Advocate* 1987 SCCR 73, to which the sheriff's attention was drawn, an appropriate comparison is not gained without taking account of the effect of inflation over the years. Applying an appropriate adjustment to take account of this, the cases of *Dolan* and *White* involved sums not so dissimilar to that involved in the present case. To this extent we consider that the

sheriff may have been too hasty in dismissing the assistance which might be available from the disposals in those cases.

[10] We have also reminded ourselves of the terms of section 204 of the Criminal Procedure (Scotland) Act 1995 which provides, in sub-section (2), that a court shall not pass a sentence of imprisonment on a person of or over 21 years of age who has not previously been sentenced to imprisonment unless the court considers that no other method of dealing with him is appropriate. Sub-section (2A) provides that in determining whether any other method of dealing with such a person is appropriate the court shall take into account: (a) such information as it has been able to obtain from an officer of the local authority or otherwise about his circumstances and (b) any information before it concerning his character and mental and physical condition.

[11] The circumstances which now pertain are that the appellant has secured repayment of the entire sum embezzled. That is an important consideration. The appellant also served a period of around seven weeks in custody between the imposition of the sentence and the grant of interim liberation. Taking account of the assistance which we consider can be gained from the cases of *White* and *Dolan*, and the whole circumstances of the appellant's case, including the information provided in the criminal justice social work report, her age, her previous lengthy good character and her physical condition, we are not persuaded that the test provided for by section 204(2) has been met.

[12] In these circumstances we shall give effect to the principal submission made on the appellant's behalf and we shall quash the sentence of imprisonment imposed. In its place we shall impose a fine in the sum of £15,000, to be payable within one year of today's date to the sheriff clerk's office in Edinburgh.