**Neutral Citation: [2017] NICA 6** | *Ref:* **WEI10194**

*Judgment: approved by the Court for handing down* | *Delivered:* **27/01/2017**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**v**

**CATHERINE CONWAY**

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**Before: Morgan LCJ, Weir LJ and Colton J**

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**WEIR LJ (delivering the judgment of the court)**

**The nature of the Appeal**

[1] The appellant, a married woman now aged 49 years, appeals with the leave of the single judge from a sentence of 9 months' imprisonment imposed by His Honour Judge Lynch QC on her plea of guilty to a count of fraud by abuse of position, contrary to Section 1 of the Fraud Act 2006. We are grateful to counsel for their helpful written and oral submissions.

**The circumstances of the offending**

[2] The appellant was employed by a domiciliary agency delivering care in the community under a contract with the Southern Health and Social Services Trust. After appropriate training and vetting the appellant's employment commenced on 8 July 2012. The appellant became the carer for the victim on 17 October 2012. At this time the victim was 62 years of age and had gone to reside in a Fold in Portadown due to a severe deterioration in her health consequent upon the death of her husband. The victim asked the appellant to do some shopping for her and gave the appellant the card needed to access her post office account. The appellant then said that she would hold on to the card and pay the victim's bills by using it. The appellant never returned the card. The offending came to light on 13 January 2016 when the victim asked her brother to make an arrangement to pay in advance for her future funeral expenses using money from the account. It was then discovered that the account had been emptied. When initially challenged, the appellant told the victim to tell her brother that she had lent the appellant the money, saying that

otherwise she was going to lose her job. The victim's brother and his wife later spoke to the appellant and asked her how much she had taken. The appellant said "It will not be much, probably about £4,000" and again kept saying that she did not want to lose her job. From the statements of the victim's post office account it appears that the offending commenced in January 2013. In the three week period from 1 March 2013 to 22 March 2013 there were 15 withdrawals of £600 each totalling £9,000 which significantly reduced the balance in the account. Further repeat withdrawals of £600 at the rate of 2 or 3 times a month had by 22 April 2014 reduced the balance in the account to nil. Thereafter, the appellant repeatedly cleared the account to nil by withdrawing all money credited to the victim's account from her social security payments and this continued until the final withdrawal on 13 January 2016.

[3] The appellant was first interviewed by police on 27 January 2016 when she told them that the victim had offered to lend her the money as the appellant was in debt. The appellant stated that she took roughly £300 or £400 per month and that she believed that this came to about £12,000. She admitted that under the terms of her employment she was not permitted to handle patients' money. The appellant stated that the money was used to pay off her debts. Following this interview a further statement was taken from the victim on 4 February 2016. The victim confirmed that she had never had any conversation with the appellant about her being in debt or owing any money or giving the appellant permission to take money from the account for her own purposes. The appellant was therefore interviewed for a second time on 22 April 2016 when she alleged that the wife of the victim's brother had requested that she take withdrawals of £600 out of the account on behalf of her husband and that she gave the cash to the victim who gave it to the brother and his wife and that this had occurred in March 2013 when the large number of withdrawals of £600 each were made. Following this account further statements were taken from the victim, her brother and his wife denying that any of this had occurred. The appellant was then interviewed for a third time on 27 May 2016 and again maintained her account that her brother's wife had asked her to withdraw the money and that any money taken by her was an agreed loan from the victim. However, the appellant pleaded guilty at arraignment and at the Crown Court hearing the total amount defrauded by her was agreed in the sum of £27,000.

[4] Notably, while the appellant claimed that she took the money in order to pay debts that she had accumulated, the analysis of non-essential spending compiled by police indicate significant sums spent on matters of personal expenditure. She also paid almost £8,000 of the victim's money into her own bank account. It is plain that the appellant was using money taken from the victim's account for her own general living expenses. After the theft came to light the appellant promised that she would repay the money at the rate of £500 per month but in fact she never made any repayment until the matter came on for hearing at which point a cheque for the £27,000 was produced.

**The effect upon the victim and her family**

[5] This court can do no better than to quote from the statement made about this by the victim herself:

> "I understand from police and family members keeping me up to date that Catherine has pleaded guilty to taking my money. I am glad that Catherine has pleaded guilty as it means that I do not have to go near a court. Catherine was someone whom I had trusted. I got on well with her and I looked forward to seeing Catherine every day. When I realised what Catherine had done to me I was very hurt by it. I still ask myself the question, why did she do this on me? I do not understand why someone whom I trusted would steal from me. This last 11 months have caused me a great amount of stress. I have cried at times, worried at times about the money. I am a widow. My husband died 14 years ago. All that money taken was to support myself as I get older was in my post office account. I am slowly trying to build up my savings account again but I am having to watch what I spend my money on. In January Catherine left me with no money in my account. I had to wait for the next payment which was a fortnight away before I had any money. … I believe that I have been worrying for a long time about Catherine having my card. She never offered to give me my card back and I was worrying inside about this. This last 11 months I have put behind me. I will never trust people in the same light again. It is going to take time to get over this both physically, mentally and in a financial element."

[6] It appears however that, notwithstanding the betrayal of trust and friendship, the calculating theft over more than two years and through many transactions of the victim's life savings and the attempt when the loss was discovered to claim that the victim had voluntarily lent the money, the victim had indicated to the prosecution and it had in turn conveyed to the judge that she had no wish to see the appellant serve an immediate prison term. That must be seen as an attitude of the most extraordinary generosity by someone whose trust has been so cynically and utterly betrayed by a person whose job was, as the probation officer rightly described it, to provide personal and social care to some of the most vulnerable people living in the local community and who masqueraded as the victim's friend and helper at a stage in her life when genuine befriending and help were much needed. As the learned judge put it "you took unmerciful advantage of the situation to feather your own nest, to use the money for your own purposes".

**The learned judge's approach to sentencing**

[7] The judge correctly identified and applied the applicable authority of this court in R v Gault [1989] NI 232 which adopted the guidelines laid down by the English Court of Appeal in R v Barrick (1985) 7 Cr App R (S) 142. He noted that Lord Lane had observed in that case that "in general a term of immediate imprisonment is inevitable save in very exceptional circumstances or where the amount of money obtained is small". He then gave careful consideration to relevant examples of the matters suggested as those to which a court would wish to pay regard in determining what the proper level of sentence should be.

[8] The judge took account of the facts of the full restitution, the appellant's medical problems including anxiety and depression before, during and subsequent to the period of these offences and those of her daughter who has been diagnosed with a serious condition that, whilst presently symptom free, requires regular monitoring and of the illnesses of the appellant's parents, since deceased. He also made very generous allowance for the plea of guilty despite it being on arraignment and by no means at the earliest opportunity. He also considered references from family members, one of whom also gave evidence, and from a clergyman, a local councillor and a shopkeeper which, it must be said, all seem lacking in their appreciation of the gravity of the appellant's repeated criminal behaviour over the period of years involved.

[9] The judge concluded by asking himself whether the factors advanced by way of mitigation were sufficient to make this an exceptional case. He concluded that while they and the attitude of the victim and the appellant's erstwhile good character would serve to reduce the sentence to a great extent they were all factors by way of mitigation and did not amount to exceptionality such as could avoid the imposition of an immediate custodial sentence. The judge set out his process of reasoning in an exemplary way concluding that on a contest and without mitigating factors the offence would have attracted a sentence of at least 30 months, that allowing for the mitigating factors but without a plea of guilty it would have been in the region of 15 months and, allowing for that plea, the sentence should be reduced to one of 9 months' imprisonment.

**The case for the Appellant**

[10] The essential submission, advanced with some vigour by Mr Cairns on behalf of the appellant, is that this was one of those very exceptional cases the existence of which has been recognised by Barrick in which an immediate custodial sentence was not appropriate. He founded himself upon all the matters mentioned above that had been urged by him upon the learned judge and which the judge had expressly considered. He submitted that the sentence was manifestly excessive and disproportionate in scale to the offence.

**Consideration**

[11] This court does not accept Mr Cairn's submission. This was the calculated and systematic theft over years of a vulnerable lady's life savings by the very person employed to assist and befriend her at a time in her life when she was at a low ebb and grateful for the help which this appellant cynically pretended to be giving her by buying her a few necessaries using her post office savings card. This was a heartless and despicable crime for which, even when exposed by accident, the appellant tried to avoid responsibility by blaming the victim and her family. She dishonoured her promise to repay the money until the very last moment when her family, wisely for her, rallied round to restore the victim's life savings, every penny of which had been stolen.

[12] This court agrees with the judge's starting point in the absence of mitigating factors and on a contest. It considers that the judge then made more than ample allowance for the mitigating factors and that his further reduction of 40% for a plea not entered until arraignment and after much dishonest explanation to the police that caused further distress to the victim and her family was generous in the extreme. This court indeed considers that the sentence passed was lenient and might justifiably have been rather higher. The appeal is accordingly dismissed.

**The effect of a victim's view on the appropriate term or form of sentence**

[13] Because some stress has been placed by Counsel upon the views of the victim as to the possible sentence in this case we wish to add the following. In AG's Reference (No. 19 of 2013) [2014] NICA 6 the question of the effect, if any, of representations as to the nature of any intended sentence by interested parties or victims was considered. In delivering the judgment of the court Coghlin LJ pointed out at para [18] that in AG's Reference (No.1 of 2001) (Gerard James Rogan) [2001] NICA 31, Carswell LCJ had approved the principle articulated by Judge J who, when giving the judgment of the court in R v Nunn [1996] 2 Cr App R (S) 136 said as follows:

> "The opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for re-assessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than otherwise would be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways leading to improper and unfair disparity …"

[14] This court takes the present opportunity to reaffirm that principle.