IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOANNE CONLON

MacDERMOTT LJ(giving the judgment of the Court)

HIGGINS J

This an application for leave to appeal against sentence. The applicant, Joanne Conlon, was in 1995 employed as a clerk in the Portadown office of Toal, Bookmakers. When profits in the Portadown shop appeared unusually poor Mr Toal instructed his security staff to check the transactions in that office carefully. The check revealed that between 27 April 1995 and 22 May 1995 the applicant appeared to have completed 20 betting slips either during a race or after a race was completed and the result known. Consequently she was charged with 20 offences of theft, the sum involved was £8,566.30. The applicant was questioned and denied any responsibility. The case was heard at Craigavon Crown Court between 18-20 November 1996. She was found guilty on 11 counts involving some £6,715.10. On 6 January this year the applicant was sentenced by the His Honour Judge Curran QC to 6 months' imprisonment on each count; the sentences to be served concurrently. She has appealed to this court claiming that that sentence was manifestly excessive.

It is clear from Judge Curran's careful remarks on sentencing that he was aware that he was taking a merciful course having regard to the serious nature of this type of fraudulent theft by an employee and its persistence over a period of time. A material factor which led to this conclusion was that the applicant has since the offences given birth to a baby girl who is now 9 or 10 months old.

The final paragraph of Judge Curran's judgment when sentencing bears repetition. He said:-

"I have every sympathy with the situation you find yourself in, in the sense that you have now got a young child and to that extent if I thought it was feasible and if the case had been met in a certain way, and even at this late hour there was any evidence of remorse, I would do my very utmost not to send you to prison, but the only effect of all these matters is that I am going to reduce very substantially the

sentence that I had originally intended to impose upon you, primarily because you have a young child, and I impose a sentence of 6 months on each count, concurrent."

In this Court Mr Mallon has made a number of points in support of his claim that the sentence of 6 months was not only excessive but manifestly excessive. He centred upon the fact that we have just mentioned; that the applicant is the mother of a young child. One can appreciate how adverse the effects of a custodial sentence are on both the mother and the child. Mr Mallon has also drawn our attention to the attitude of Mr Toal who has told the investigating officer that he bears no animosity towards the accused and although this is not in terms mentioned by Judge Curran in his judgment, we do not doubt that he had it very much in mind. Mr Mallon pointed out that in the Attorney General's Reference (No 2 of 1993) [1993] 5 NIJB 71 it was accepted that a forgiving attitude by the victim can be regarded as a mitigating factor. In that case Hutton LCJ referred to the case of R v Darvill [1987] Cr.App.R(S) 225 at 227 where Lord Lane stated:-

"There is no doubt that forgiveness can in many cases have an affect, albeit an indirect effect, upon the task of the sentencing judge. It may reduce the possibility of re-offending, it may reduce the danger of public outrage which sometimes arises where the defendant has been released into the community unexpectedly early."

For our part we certainly bear that in mind. Our attention has also been drawn to the long established truism that justice should be seen to be merciful.

The starting point in this type of case, one of fraud by an employee, is to realise that an immediate custodial sentence is virtually inevitable. In the case of R v Barrick [1985] 7 Cr.App.R(S) 142 in England, Lord Lane CJ said:-

"In general a term of immediate imprisonment was inevitable, save in very exceptional circumstances or where the amount of money obtained was small. Despite the great punishment that offenders of this sort brought upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved was obviously not the only factor to be considered, but it might in many cases provide a useful guide. Where the amounts involved could not be described as small but were less than £10,000 or thereabouts, terms of imprisonment ranging from the very short one up to about 18 months were appropriate."

and that was referred to and adopted by Hutton LCJ in this jurisdiction in the case of R v Gault [1989] NI 232 where he said:-

"This Court now takes the opportunity to state that the courts in this jurisdiction should follow the guidelines in this type of case laid down by Lord Lane in Barrick's case."

Sadly the applicant is not the first mother to be sentenced to a term of imprisonment while her child is young. It is not so long ago in the case of R v Birkett [1983] in the Court of Appeal in England that Taylor J (as he then was) saw fit to say:-

"We take the view that it would be quite wrong for young mothers to believe that simply because they have young children they are in some way immune from imprisonment, or that sentences which would be proper in other cases can be expected to be reduced in theirs."

That said, to use the words of Swindow-Thomas LJ in the recent case of R v Whitehead [1996] l Cr.App.R(S) 111 at 114:-

"The courts are always very reluctant to send a mother of young children to prison. Sometimes they have no alternative."

A recent example of the application of that principle is the case of R v Urwin [1996] 2 Cr.App.R(S) 281 where for reasons of clemency a sentence of 12 months was reduced to one of 8 months' imprisonment.

Compassion and clemency must be exercised judicially. These offences warranted a custodial sentence and we are satisfied that Judge Curran did exercise much compassion and clemency in deciding that a sentence of 6 months was appropriate. The applicant is now in effect seeking to get what she has already got and got, in our view, in fair measure. We do not consider that it would be proper to reduce further this merciful sentence which is in no way excessive. The application is refused.