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(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

REGINA

-v-

WILLIAM BRADY

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ

Introduction

[1] The appellant was granted leave to appeal against sentence by the single judge on 5 January 2011. He appeals against the fine element of the sentence imposed on him in respect of four offences under the Social Security Administration (Northern Ireland) Act 1992. He was convicted of two offences of failure to declare a change of circumstances and two offences of making a false declaration with a view to obtaining income support and housing benefit. These are particularised in para [2] below. He was sentenced to four months imprisonment suspended for two years on each count and fined £12,000 on count 1 with twelve months imprisonment in default. The appellant contends that the combination of both a suspended sentence and the fine resulted in a sentence which was excessive and wrong in principle.

The factual background

[2] On 8 September before His Honour Judge Grant at Londonderry Crown Court the appellant was arraigned and pleaded guilty to the four counts against him. He was sentenced on 20 October 2010. The offences were:

- (a) Failure to declare a change of circumstances to obtain income support between 8 November 2002 and 28 April 2005 contrary to Section 105A(1A) of the Social Security Administration (Northern Ireland) Act 1992, the defendant having capital above the statutory limit.
- (b) Failure to declare a change of circumstances to obtain housing benefits between 8 November 2002 and 25 January 2003 contrary to Section 105A(1A) of the Social Security Administration (Northern Ireland) Act 1992, the defendant having capital above the statutory limit.
- (c) Making a false declaration with a view to obtaining housing benefit on 25 January 2003 contrary to Section 105A(1) of the 1962 Act, the defendant declaring on a renewal of housing benefit form that he was entitled to income support.
- (d) Making a false declaration with a view to obtaining income support on 28 April 2005 contrary to Section 105A(1) of the 1992 Act, the defendant declaring on an income support review form that the information he had given was correct and complete whereas he did not report capital in excess of the statutory limit.

[3] The amount of overpayment in respect of the benefits was £19,313.39. At the date of the hearing the amount outstanding in relation to the overpaid benefits was £17,207.39, the appellant having by deduction from ongoing payments of benefits discharged part of the outstanding debt due in respect of the overpayment.

[4] The appellant's mother left her home and moved into residential care in around 1999. Her house remained unoccupied but was sold in 2002. Out of the net proceeds of sale the appellant received £56,000. At that time he was living in accommodation with his wife who suffers from polio and he was in receipt of income support and housing allowance. The appellant spent some of the money on home improvements which he stated were for the benefit of his wife. He had spent some £18,000-£20,000

on modernising the premises with the installation of a new kitchen, bathroom and central heating together with wooden floors and a small side extension. The appellant admitted spending a good part of the remainder on alcohol for himself and his friends. In addition during interview by the investigation officers in the Social Security Agency the appellant admitted to a gambling problem.

[5] The appellant put £20,000 out of the proceeds of sale from the sale of the house into a secure saver account in a bank. That sum is due to mature in May 2012 with interest. In interview with the Social Security Agency officers the appellant gave as his motivation for so investing the funds that he did not want to have his hands on the money because of his addiction to drinking and gambling.

[6] It is not suggested that he had engaged in employment while receiving benefits. During his interviews the appellant stated that he was unaware of the content of the rules for entitlement to the benefits of which he was in receipt. It did not occur to him to notify the Social Security Agency of the change of circumstances but he expressed a desire to repay the monies to the Agency.

The sentence

[7] The judge stated that he was giving the appellant the benefit of the fact that he had pleaded guilty on that the first opportunity and had a clear record. He considered that a custodial sentence was appropriate as a deterrent to mark society's concern about offending of this type which would not be tolerated. The judge said that he took into account the appellant's special circumstances and his efforts to pay back some of the money and he concluded that it was appropriate to suspend the sentence.

He stated that in considering whether to impose a fine he had regard to the appellant's financial resources which included the £20,000 maturity value of the fund which he had invested. The judge stated that he would impose a custodial sentence of four months in relation to each charge but rather than a longer period because he intended to impose a fine in relation to the offending. He imposed a fine of £20,000 payable on or before 31 May 2012. In imposing the fine the judge observed that he was taking into consideration that the appellant had agreed to make repayments to the Department at the rate of £100 per month. The judge concluded his sentencing remarks at 11.08 am on 20 October 2010. Somewhat surprisingly within five minutes he reconvened the court and said that he had decided

with considerable hesitation to reduce the fine to £12,000. He had decided to make that reduction bearing in mind that he was going to continue to repay overpaid benefits and would have an obligation to the Department to pay. He also acknowledged that the appellant's wife was unwell and should benefit from the capital resource to some degree. In this case the manner in which the fine was initially fixed and then reduced within a matter of minutes suggests that the judge might have benefited from more measured reflection.

The pre-sentence report

[8] The appellant has adult daughters and three grandchildren from a previous marriage. He has been married to his current wife for seventeen years. She contracted polio during her childhood and is disabled. The appellant takes medication for depression and anxiety and has arthritis of the spine. He receives pension credits of £96 a week and of this sum £10 is contributed towards repaying the debt to the Income Support Office and £12 a week in respect of the housing benefit debt. He has a clear record.

Grounds of the appeal

[9] The appellant contends that the fine and sentence taken together are manifestly excessive and wrong in principle. There were no aggravating features and the appellant had made a determined effort to address his dishonesty since his detection. The judge failed to consider making a compensation or restitution order for the entirety of the amount outstanding. The appellant had made an immediate admission of guilt at interview and pleaded guilty on first arraignment. He had no history of offending and there was no evidence of an extravagant lifestyle. He remained on benefits and had made an effort to reduce the amount from current benefits which was placing considerable strain on his domestic circumstances.

Guideline decisions

[10] In R v Stewart [1987] 1 WLR 559 the Court of Appeal in England gave guidance as to the proper approach to sentencing in respect of what is commonly called benefits fraud, that is to say the dishonest obtaining of welfare benefits from state departments. Lord Lane pointed out that these offences involved the dishonest abstraction of honest taxpayers' money and were not to be treated lightly. They are easy to commit and difficult

and expensive to track down. It was to be remembered however that they were non-violent, non-sexual and non-frightening crimes. Carefully organised frauds on a large scale involving considerable sums of money required substantial sentences of 2½ years imprisonment and upwards. As to the remainder of cases the sentence would depend on a wide range of factors. It would be relevant to know what steps the Department proposes to take to recover the monies. At 562H Lord Lane said:

“Other considerations which may affect the decision of the court are:

- (i) a guilty plea;
- (ii) the amount involved and the length of time over which the defalcations were persisted in (bearing in mind that a large total may in fact represent a very small amount weekly);
- (iii) the circumstances in which the offence began (e.g. there is a plain difference between a legitimate claim which becomes false owing to a change of situation and on the other hand a claim which is false from the very beginning);
- (iv) the use to which the money is put (the provision of household necessities is more venial than spending the money on unnecessary luxury);
- (v) previous character;
- (vi) matters special to the offenders such as illness, disability, family difficulties etc;
- (vii) any voluntary repayment of the amounts overpaid.”

[11] Lord Lane indicated that the court should consider the following questions:

- (a) Is a custodial sentence really necessary?

- (b) If it is necessary, should the court suspend the sentence or impose a community order?
- (c) If not, what is the shortest sentence appropriate?

If immediate imprisonment was necessary a short term of up to 9 to 12 months will usually be sufficient in a contested case where the amount is less than £10,000. Where no immediate custodial sentence is imposed and the amount of overpayment is below £1,000 or thereabouts a compensation order is often of value usually only when the defendant is in work. The Crown should provide the relevant information to enable the court to come to a proper conclusion on the matter.

[12] In R v Graham and Whatley [2005] 1 Cr Ap R (S) 115 the court considered that the figure of £10,000 referred to by Lord Lane required upward adjustment to £20,000 because of inflation. The court expressed the view that while Lord Lane in R v Stewart felt that the element of deterrence should not play a large role in sentencing this type of offence in the Crown Court, in present circumstances there would be cases in which deterrence could play a proper role.

[13] In this jurisdiction some guidance on sentencing in this field is provided by R v Duff (5 March 1991) in which Kelly J gave the judgment of the Court of Appeal. In that case the appellant appealed against a sentence of three months imprisonment on six specimen charges of obtaining supplementary benefit by deception. The benefit was paid over five years and amounted to £7,624. The defendant failed to disclose that his wife was in part-time employment. In that case the court taking account of Lord Lane's statement that the element of deterrence should not play a large part in sentencing in such a case considered that it was implicit in that the personal extenuating circumstances of the offender should be given considerable weight. In that case the defendant had a good record, had been in steady employment and had only lost his job because the firm closed down. The money was used to help to maintain his family. He admitted his guilt and pleaded guilty. The court considered that the judge had put insufficient weight on his personal circumstances and suspended the sentence for three years.

[14] Recent disposals in the Magistrates' Court and Crown Court in this jurisdiction provide a useful comparator of sentencing in these cases. In

cases in the Crown Court involving benefits in many instances the sentences have involved the imposition of suspended sentences (15 months in the case of defalcations of £45,698; 4 months in relation to £19,539, 6 months in relation to £24,707; 3 months in the case £18,502). In others orders for community service were made (120 hours in respect of £23,353, 200 hours in respect of £22,948 and 120 hours for £11,116. Each case will of course be fact specific and the sentences do demonstrate that sentences can vary significantly. What is, however, clear is that there is no evidence to suggest that the imposition of additional fines on top of suspended sentences are imposed in practice in such cases.

Considerations

[15] In the present case the imposition of a suspended sentence and a very substantial fine resulted in a very substantial penalty overall. The judge indicated that he would have imposed a longer suspended sentence if he had not been able to impose a fine in addition. The judge did make clear in his sentencing remarks that he was imposing a fine and not making a compensation order. He did make clear earlier in his remarks that the reason he was imposing a custodial sentence, albeit suspended, was to mark the disapproval of this conduct and as a deterrent to others and it was because the defendant was making an effort to have the money repaid that he was suspending the sentence.

[16] The judge was fully entitled to impose a suspended sentence in the circumstances having regard to the amount involved and by way of deterrence which in the light of R v Graham and Whatley is now a factor which a sentencer is entitled to take into account. It cannot be said that either the length of the suspended sentence or the period of suspension was wrong in principle or manifestly excessive.

The imposition of the fine

[17] Fines are frequently provided for either as an alternative or an additional form of sentence. The relevant legislation in the present context permits the imposition of a fine as well as a custodial sentence (see section 105(3) of the Social Security Administration (Northern Ireland) Act 1992.) Article 23 of the Criminal Justice (Northern Ireland) Order 1996 amended Section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 which now provides:

“A court which passes a suspended sentence or makes an order for detention of any person shall consider whether the circumstances of the case are such as to warrant in addition the imposition of a fine or the making of a compensation order.”

As D A Thomas points out in his Principles of Sentencing:

“Fines are generally used in cases where a deterrent or punitive sentence is necessary but where the gravity of the offence is insufficient to justify a sentence of imprisonment or the presence of mitigating factors justify the sentencer in avoiding a sentence of imprisonment.”

A fine in addition to a custodial or suspended sentence may be appropriate where the aim is that of depriving the offender of benefits recovered by him from his crime. This approach is followed only in circumstances where the court has reason to believe that a substantial profit has been made from the offences and the money would be available to the offender when he has completed the sentence (Chatt (1984) 6 Cr Ap R (S) 75, Garner (1985) 7 Cr Ap R (S) 285).

[18] The Criminal Justice (Northern Ireland) Order 1994 Article 14(1) provides:

“Subject to the provisions of this article, a court by or before which a person is convicted of an offence instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order ... requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence, or to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road; and a court shall give reasons, on passing sentence, if it does not make such an order in a case where this article empowers it to do so.”

This provision, thus, makes clear that the court is required to give reasons when it does not grant such an order where it has the power to do so. This indicates that in any case where a compensation order appears to be prima facie appropriate the court must explain why it has decided not to make such an order. Since the effect of a compensation order may be to reduce the means of a defendant and would thus affect his ability to pay a fine, the question whether a compensation order should be made is a logical first question to be addressed by the court in deciding the form of any financial penalty imposed on the defendant instead of or in addition to a custodial or suspended sentence.

[19] Lord Lane in R v Stewart recognised the appropriateness of the making of a compensation order in a benefits fraud case while recognising that in many instances the defendant may not have the means to pay compensation. It is noteworthy that he appears to have envisaged that a compensation order rather than a fine is the suitable financial penalty for a defendant with the means to pay compensation.

[20] In the present case, contrary to the norm in such situations, the defendant has the means to pay full compensation for the outstanding amount due for overpaid benefits, albeit that the relevant fund available to meet such a liability does not mature until May 2012. This was thus a case which was entirely appropriate for the making of a compensation order for the defendant will have the means to pay compensation in May 2012 and the relevant Department will be fully recompensed in respect of the losses it has sustained as a result of the wrongful claim for benefits.

[21] The judge did not examine the question whether a compensation order should be made and he gave no reason why he was rejecting a compensation order and imposing a fine instead other than to indicate he was imposing a fine as a punishment and that the suspended sentence would have been longer. The result was in fact a disproportionate punishment. The judge failed to give a reasoned decision as to why he was deciding to exercise his undoubted power to make a compensation order which would have been an order well suited to the circumstances of the case. His approach to the sentence was accordingly wrong in principle.

[22] In the circumstances we shall vary the sentence to set aside the imposition of a fine of £12,000 payable in May 2012. Instead we will make a compensation order requiring the appellant to repay to the Department

of Social Development no later than 31 May 2012 such sum as represents the outstanding sum due and owing to the Department in respect of overpaid benefits as at 31 May 2012. Deductions from benefit payments in the meantime will continue to go towards reducing the outstanding balance which falls to be calculated as at 31 May 2012 giving credit for all further deductions from benefits in the meantime. Under Article 14(12) of the 1994 Order compensation order made by the Crown Court shall be enforceable in the same manner as a fine imposed by the court. The court must accordingly determine a period of imprisonment to serve in default of payment of the monies due on foot of the compensation order. We fix that period at twelve months.