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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE (Number 5 of 2019)
HARRINGTON LEGEN JACK

Before: Morgan LCJ, Stephens LJ and McCloskey LJ

Stephens LJ (delivering the judgment of the court)

[1] Harrington Legen Jack ("the offender") was sentenced by His Honour Judge Finnegan QC at Belfast Crown Court on 25 October 2019 in respect of eight counts of fraud by abuse of position in breach of section 4 of the Fraud Act 2006 which offences were committed between 2 and 8 June 2012. The total amount defrauded was £78,500. The sentences imposed were concurrent community service orders amounting to 240 hours of community service together with a compensation order of £14,000 initially in favour of an individual whom we anonymise as BS but then amended so as to be in favour of Santander. The Director of Public Prosecutions sought leave to refer the sentences to the Court of Appeal pursuant to section 36 of the Criminal Justice Act 1988 on the grounds they were each unduly lenient. On Monday 16 December 2019 at the hearing of the reference we granted leave and the application proceeded on that date. On Friday 20 December 2019 we stated the outcome of the application with reasons to follow which we now deliver. Mr McDowell QC with Mr Henry appeared for the Director and Mr Duffy QC with Mr Browne for the offender.

Background including the circumstances of the offending

[2] The offender, now 37 commenced employment with Santander on 9 January 2012 at its call centre in Belfast as a customer service adviser dealing with telephone enquiries from Santander customers in relation to their bank accounts. In order to respond to enquiries and to perform transactions at the direction of the customers the offender had online access to the customers' Santander bank accounts.

[3] The offender resigned from his employment with Santander on 8 June 2012 which was the last day upon which he committed these offences. It is apparent that he knew that the offences would be discovered so that he had to resign before that occurred. Also it is clear that he deliberately committed the offences in such a way

that another employee whom we have anonymised as BS would be the prime suspect.

[4] BS also commenced employment with Santander on 9 January 2012 as a customer service adviser. She trained and worked alongside the offender until he resigned.

[5] The customer service advisors are not restricted to individual computers or to an individual work space in the Belfast call centre. They can login on various computers but in order to do so they are required to use a password unique to that employee together with a unique employee number. The unique employee number and password is required every time an employee signs onto a computer and the unique number is required every time the employee conducts enquiries and transactions on the computer system. All the enquiries and transactions on the computer system are recorded. In this way there is not only a record of all the enquiries and transactions on the computer system but also everything can be attributed to a particular employee's unique number and in that way to a particular employee.

[6] The offender knew the unique number of BS which was only one digit apart from his number. Also the offender knew BS's password. In this way he had the ability to log onto the computer system performing transactions in her name.

[7] In May and June 2012 the offender accessed the accounts of two Santander customers without having spoken to either customer and without any valid business or banking related reason for doing so. The purpose of doing so was to gain knowledge of the balance on those customers' accounts.

[8] On three different dates namely on 2, 7 and 8 June 2012 the offender logged onto the computer network pretending to be BS using her password and her unique number. He made a total of eight fraudulent transfers from the Santander bank accounts of the two Santander customers to "mule" bank accounts from which the monies were then withdrawn by the "mule" account holders. Those "mule" bank accounts were not in the name of the offender and the withdrawals were not made by him.

[9] Evidence from Santander was that BS was on leave on the 7 June 2012, the second of the three dates when monies were transferred. Employees must use an ID card to access the Belfast call centre and Santander were able to confirm that BS's ID card had not been used to enter the building on 7 June 2012 nor could she be seen on the CCTV images for that day. Quite simply she was not at work and could not have made any of the 7 June 2012 fraudulent transfers.

[10] Also Santander were able to confirm that the offender was working every day there was a fraudulent transfer and they were able to identify that the offender had logged on at a workstation neighbouring the computer from which each fraudulent

transfer was effected. Furthermore there was no activity under his unique number at each of the times that BS's unique number was being used.

[11] On 8 June 2012 which was the third and final day the offender accessed the second customers account and after the fourth and final fraudulent transaction on that account he abruptly left an hour or so after starting his shift. He sent his line manager an email stating that he was resigning because he had been offered a job at Queens University. The University confirmed to police that whilst he had applied for a job he had not been shortlisted for interview and had not been offered the job.

[12] The total amount stolen from the two Santander customers was £78,500. Santander refunded them the full amounts so whilst they were caused concern they did not suffer any permanent financial loss. Santander recovered in total £21,000 from four banks (Barclays £44.69, Barclays £5,569.18, Danske £6,650.35, Bank of Ireland £3,637.98 and Ulster Bank £5,173.52). Accordingly the loss to Santander was £57,500 and the total loss to all of the banks was £78,500.

[13] The offender's presence in the bank was an essential component of the offending. The prosecution whilst stating that it was unlikely that he was the overall organiser, asserted that he played a central and important role. The offending also required the involvement of account holders who were willing to facilitate the quick withdrawal of cash from the "mule" accounts. The evidence was that the once the money reached each of the "mule" accounts, it was rapidly withdrawn by the account holders. This was done by making foreign currency purchases for several thousand euro at a time, by making large sterling withdrawals from their branches and by withdrawing several hundred pounds from ATMs. The objective was to convert the money to cash quickly which was normally accomplished within a few hours of it arriving in the "mule" account. The prosecution asserted that the level of culpability of the offender was higher than that of the "mule" account holders.

[14] One day after the offender left his employment and on Saturday 9 June 2012 Santander became aware of the fraudulent transfers. The initial investigations were conducted by Santander who suspected that BS was responsible given that her password and unique number had been used. She was interviewed that day by the duty manager and another manager. She states that the interview was very hostile and accusatory so that she felt that she was all but being accused of transferring the money. At the end of the interview she was told that the police would be involved and would be contacting her. She was also instructed that in the meantime she was not to discuss the matter with anyone else. BS felt that she was treated badly by Santander and that she was never free of suspicion. This ultimately led to her leaving her employment.

[15] On 16 January 2013 Santander reported the matter to the police. Initially the police considered that they had insufficient information from Santander to interview the offender. They requested further information which was not provided until over one year later when an evidence pack was received from Santander on 17 February

2014. There was then a period of some eight months before the offender was first interviewed by the police on 24 October 2014.

[16] On 24 October 2014 the offender without a solicitor voluntarily attended at Musgrave police station for interview under caution "in relation to an allegation of theft and fraud by abuse of trust by Santander." He answered questions but denied knowing anything about the transfers and denied involvement in the offending. During the course of the interview the investigating officers questioned the offender about a transfer of £9,000 on 2 June 2012 using BS's unique number. He was asked whether he carried out the transaction and he replied "definitely don't remember doing that …." The interviewing officers then stated that they did not "believe that (BS) carried out that transaction" and that they "believed that (the offender) carried out that transaction." The interviewing officers then started to put the specific times at which BS used her computer on 2 June 2012 and at that stage the offender said "I think I'll probably need to have legal, to have legal support here because I didn't realise that this was the way that this thing was going to go." He asserted that Santander was "obviously looking for a scapegoat and ah I'm not prepared to be a scapegoat." The interview then terminated so that he could obtain legal advice.

[17] On 31 October 2014 the police carried out three further interviews with the offender who voluntarily attended with a solicitor at Musgrave police station. At the start of the first interview he was cautioned and at the start of the subsequent interviews he was reminded that the interviews were under caution.

[18] In the first interview precise details were put to the offender based on the computer records of Santander. For instance the offender was asked about a transaction on 7 June 2012 at 07.43 from one of the customer's account using BS's employee ID at work station 173. The offender was asked whether he carried out that transaction and he replied "no comment." The investigating officers then informed the offender that the reason why they would be very happy to say that BS did not carry out that transfer or any of the transfers on 7 June 2012 was from records provided by Santander that BS was not in work on that day and they then gave a precise time that she left work on 6 June 2012 and a precise time that she went to work on 8 June 2012. They then stated that computer records also provided by Santander showed that the offender logged on to workstation 173 on 7 June 2012 at 07.47 and that he logged on to the workstation immediately after BS's ID was logged off. He was asked to explain that and he again made no comment. Throughout the interview points of detail were put to the offender who consistently made no comment. The questions from the interviewing officers then became assertive for instance asking "Why did you carry out those transactions?" and in relation to one of the offender's bank accounts "were you hiding *the money that you had stolen*, because that's what I believe, you were trying to keep that away from your wife and your family, what you had done, is that true?" (Emphasis added). It was clear from the tenor of the first interview on 31 October 2012 that police were not entertaining any other suspect apart from the offender and that there was overwhelming evidence implicating him in all of the fraudulent transfers.

[19] The second interview on 31 October 2014 was relatively short with no comment being made by the offender. The interviewing officers continued to be assertive with for instance the first question being "Did anyone force you to steal the money from Santander?" which was followed by "Why did you take this money?" During the course of this interview three witness statements were read out in full to the offender by the interviewing officers. The first witness statement dated 10 February 2014 was from Stephen Lomas one of Santander's investigation specialists in its special investigation unit. This was a comprehensive highly incriminating 4 page statement dealing with Santander's computer records. The second witness statement dated 6 May 2014 was from one of the two Santander customers. It identified the transactions on an account and confirmed that the witness did not carry out those transactions or authorise anybody else to carry them out on his behalf. The third witness statement dated 14 May 2014 was from the son-in-law of the other Santander customer who had sadly died. That statement also confirmed that the transactions on the account had not been authorised. After these statements had been read out the offender's solicitor requested a consultation with the offender. The second interview was terminated.

[20] At the third interview on 31 October 2014 a prepared statement was read out on behalf of the offender by his solicitor in which the offender denied (a) any involvement in the fraudulent activity (b) ever being aware of BS's Santander log-in details and (c) having any direct or indirect contact with any of the "mule" account holders. He also accounted for the money in one of his accounts as savings for fees in respect of the Bar Professional training course. After the statement was read the investigating police officer stated "I'm not going to ask you anything further on that statement today … I've spoken to (your solicitor) before the interview's commencement … and there are further enquiries that I have to make so there *may* be a further requirement for an interview but I wouldn't anticipate that that is going to be in 2014, it's probably going to be early 2015. …. I apologise that we are not in a position to dispose of this matter today but there are some outstanding enquires …" (emphasis added). It is apparent that the interview terminated without any express statement being made by the investigating officer that the matter would be reported to the Public Prosecution Service ("the PPS").

[21] There was no further police interview of the offender in 2014, 2015 or 2016. In fact it was some 2 years and 8 months before the next police interview with the offender on 25 May 2017. Again the offender voluntarily attended at Musgrave police station with his solicitor and at the start of the interview the offender was cautioned. After the offender was cautioned and having seen the pre interview disclosure the offender's solicitor enquired as to whether "there is no such ahm new evidence or anything to put to (the offender)?" The police response was "No, there'll be no surprises for you." That prediction was entirely correct. The further enquiries referred to at the conclusion of the third interview on 31 October 2014 had not related to the case against the offender. Nothing of note was put to the offender during the course of this interview and he replied no comment to all questions. At the end of the interview the offender was informed by the investigating officer that she would be reporting the matter to the PPS (with a view to prosecution). We

consider that there was no material evidential difference between 31 October 2014 and 25 May 2017 so that if it was appropriate for the matter to be reported to the PPS in 2017 it was equally appropriate to do so in 2014.

[22] In essence the police account for the period of 2 years and 8 months between the interviews on 31 October 2014 and the interview on 25 May 2017 on the basis that they were carrying out investigations into the eight destination "mule" account holders some of whom turned out to be fictitious.

[23] Criminal proceedings were commenced by way of an indictable summons dated 3 May 2018 which was served on the offender on 13 June 2018. The first appearance in court was 14 June 2018 but the offender failed to attend and a bench warrant was issued for his arrest two weeks later. A preliminary enquiry was held on 29 January 2019 which returned the offender for trial. The indictment is dated 4 March 2019. The indictment was not only against the offender but was also brought against three co-accused who were alleged to be "mule" account holders. Two of the co-accused made successful no bill applications. The third absconded in the middle of his trial and has not been arrested since.

[24] On 4 March 2019 at arraignment the offender pleaded not guilty. On 9 May 2019 he was re-arraigned and pleaded guilty to all eight counts. As we have indicated he was sentenced on 25 October 2019 to the maximum permitted period of community service which was a period of 240 hours.

[25] This reference was heard on 16 December 2019 by which stage the offender had already completed 111 hours of the community service order and had a further 129 hours outstanding. Feedback from the probation officer in relation to the placement was positive.

Antecedents

[26] The offender had one previous conviction for a road traffic offence of breach of a traffic sign. It is irrelevant to the sentencing exercise involved in this reference.

Pre-sentence report

[27] The offender is originally from Trinidad and Tobago where he has an extended family. He obtained a scholarship to study at a university in America where he undertook a physics degree. However he left after the first year after meeting his wife. They moved to Northern Ireland. They have two children. The offender completed a Law and French degree at Queen's University in 2011. Since then he has been employed by Santander and by Shorts. He is presently unemployed which arrangement is convenient as it facilitates his wife working. He acknowledged to the probation officer that his offending was a calculated risk taking act where his main aim was for financial gain. He was assessed as presenting a medium likelihood of re-offending based on his willingness to take risks, his total disregard for others and based on the fact that his actions were in full conscious knowledge of potential outcomes. The probation officer concluded that a short period of supervision would benefit the offender as within this he would be

challenged in relation to the pro-criminal thinking attitudes and risk taking behaviour that led to the commission of these offences.

Judge's sentencing remarks

[28] The learned trial judge has enormous experience. We have absolute confidence that he carefully examined the factors in the sentencing exercise however his sentencing remarks were extremely brief. It is not possible from those remarks to discern the reasoning in relation to the imposition of community service orders as opposed to a period of imprisonment nor did the learned judge analyse the question of a potential breach of the reasonable time requirement or if he found a breach what remedy was appropriate.

Sentencing for fraud and theft where the offender is in a position of trust including fraud by abuse of position

[29] The clear intention of the offence under section 4 of the Fraud Act 2006 (which section amongst others extends to Northern Ireland) is to cover the dishonest abuse of a position of financial trust or responsibility, including that of a trustee, company director or executor, but it is not confined to such fiduciary relationships but rather it extends to frauds such as involved in this case committed by employees.

[30] The maximum sentence in Northern Ireland for fraud, whether committed in breach of sections 2, 3 or 4 of the Fraud Act 2006 is (i) on summary conviction, six months' imprisonment or an unlimited fine or both, (ii) on conviction on indictment, ten years' imprisonment or a fine, or both (see section 1(3)).

[31] In England and Wales the definitive sentencing guideline, *Fraud, Bribery and Money Laundering Offences* is applicable. That guideline does not extend to this jurisdiction, see *R v McKeown, R v Han Lin (DDP's Reference Nos 2 and 3 of 2013)* [2013] NICA 28 at paragraph [25] and *R v McCaughey and Smyth* [2014] NICA 61 at paragraphs [19] – [24]. The definitive sentencing guideline does provide useful assistance in identifying aggravating and mitigating factors and useful guidance as to the two stage process for assessing harm.

[32] The first stage of assessing harm is the actual, intended or risked loss arising from the offence expressed in monetary terms. Actual loss is straightforward. Intended loss relates to offences where the circumstances prevent the actual loss that is intended to be caused by the fraudulent activity. Risk of loss involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. The sentencing range is chosen by the use of either actual or intended loss whichever is the greater. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding next category for actual or intended loss. However, that is not appropriate if the likelihood or extent of risked loss is particularly high.

[33] The second stage of assessing harm relates to the impact of the loss on the victim or victims.

[34] In this jurisdiction the applicable sentencing guidelines are to be found in *R v Barrick* [1985] Cr App R (S) 142, *R v Gault* [1989] NI 232 and *R v Clarke* [1998] 2 Cr App R (S) 137. Those guidelines apply to certain types of theft and fraud. That is the type of case where an offender in a position of trust had used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money.

[35] Those authorities make it clear that the amount stolen whilst not the only factor to be considered, might in many cases provide a useful guide. The effect of inflation since 1997 means that very approximately £30,000, £175,000 and £400,000 are the present day equivalent of respectively £17,000, £85,000 and £170,000 the figures mentioned in *Clarke*.

[36] From an examination of those authorities as adapted to take into account inflation and aspects of the definitive sentencing guideline, *Fraud, Bribery and Money Laundering Offences* we consider that the following guidelines should apply

a) The offender would usually be a person of hitherto impeccable character: it would be practically certain that he would never offend again, and he would never again be able to secure similar employment, with all that meant in terms of disgrace for him and hardship for himself and his family.

b) There is no proper ground for distinguishing between cases of this kind simply on the basis of the offender's occupation. Professionals should expect to be punished as severely as others: in some cases, more severely.

c) In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained was small.

d) The court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence.

e) The actual or intended loss (or if appropriate the risk of loss) is not the only factor to be considered, but it might in many cases provide a useful guide. We stress that this is a useful guide and that many factors other than the amount involved may affect sentence.

f) The useful guide is

    i. where the amount is not small, but is less than £30,000, terms of imprisonment from the very short up to 21 months will be appropriate;

    ii. cases involving sums between £30,000 and £175,000 will merit two to three years;

    iii. cases involving sums between £175,000 and £400,000 will merit three to four years;

    iv. cases involving between £400,000 and £2 million will merit between five to nine years;

v. cases involving £2 million or more will merit 10 years or more (subject of course to the maximum sentence for the particular offence).

vi. These terms are appropriate for contested cases. Pleas of guilty will attract an appropriate discount.

vii. Where the sums involved are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for.

g) The following are some of the other matters to which the court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; finally, any help given by him to the police.

h) In *Barrick* one of the mitigating factors identified was whether there had "been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial." As a general proposition we consider that this should now be considered exclusively by the sentencing court affording to an offender such remedy as may be just and appropriate for breach of the reasonable time requirement in Article 6 ECHR.

Community service orders

[37] 'Community Orders' are available to sentencers under Articles 8 – 17 of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order"). In his annotations of Articles 8 – 17 of the 1996 Order, Valentine makes the following comments on the principles to be applied in deciding whether to impose a CSO:

> "The factors relevant to deciding to impose a community service order (aside from the statutory conditions) are (a) offence is an isolated incident not likely to be repeated; (b) stable home and family; (c) in employment and little or no criminal record; (d) generally good character and efforts to avoid offending; (e) *offence in the nature of a crime against public order or the community*. It is not a trivial punishment; it requires the defendant to pay back to society something to make good the damage, and to

redeem himself in the eyes of the community" (emphasis added).

It can be seen that many of those factors are present in this case but not (e). Valentine then correctly repeated that "a Community Service Order should not be regarded as a trivial punishment" citing as the relevant authority *McDowell, [DPP's] Reference (No 17 of 2013)* [2014] NICA 6.

Aggravating and mitigating features

[38] The following aggravating features are present.

a) Organised offending which involved planning.

b) The central role played by the offender.

b) Several transactions; eight in total over three days. We consider that the repetitive nature of the offending involving further time for the offender to reflect is an aggravating feature.

c) More than one victim. It was contended on behalf of the offender that there was essentially one victim of the offences, namely Santander which was responsible for refunding the two customers from whose accounts the offender had made fraudulent transfers. We reject that contention. Not only was Santander a victim but so also were the two customers who were caused concern and temporary financial loss. In addition BS was a victim as were the four other banks who sustained financial losses.

d) The offender was motivated by financial gain though we accept that the amount of that financial gain which is capable of proof to the criminal standard is limited to £5,000.

e) £78,500 being the level of financial harm intended (and also in the event the level of actual financial harm). This is a feature which informs the band within which this case falls in accordance with *Barrick*, *Gault* and *Clarke*. It is an aggravating feature in the sense that it is used to identify the sentencing range and to select an appropriate starting point in that range. Thereafter it should not be used otherwise there would be double counting.

f) There was modest emotional harm caused to the two Santander customers.

g) We consider that the way in which BS was treated by Santander and the serious impact on her ability to retain her employment was caused by the offender. The impact on her amounts to a serious detrimental effect on an innocent employee. We consider this to be a serious aggravating feature.

h) The frauds were committed in breach of trust. It was suggested that as this is a constituent element of the offence under section 4 of the Fraud Act 2006 it cannot amount to an aggravating feature. We do not accept that contention but rather we emphasise that the quality and degree of trust

reposed in the offender including his rank can amount to an aggravating feature. In this way those occupying elevated positions of trust either through rank or through the nature of their position should receive an appropriately longer sentence. In this case the offender did not hold an elevated rank with Santander; he was a call service operator. We accept that Santander invested him with a substantial degree of trust in that he had access to the personal bank account details of customers but we consider that trust should have been subject to appropriate checks carried out by Santander. On the facts of this case and standing back we accept that the breach of trust, which is a component of the offence is not an additional aggravating feature.

[39] The following mitigating features are present.

a) Guilty plea (the discount for which has to be applied in accordance with the approach set out by this court in *DPP's Reference No1 of 2016 (David Lee Stewart)* [2017] NICA 1 at paragraph [28]).

b) No relevant previous convictions together with a good work record, both before and after the offending. However *R v Barrick* [1985] Cr App R (S) 142, *R v Gault* [1989] NI 232 and *R v Clarke* [1998] 2 Cr App R (S) 137 make clear that the fact that the offender is a person of hitherto impeccable character has no impact on the general requirement for an immediate custodial sentence so that this feature has limited impact.

c) Restitution of £14,000 was offered and made by the offender which is a factor of some weight.

d) Delay which is to be analysed in accordance with a potential breach of the reasonable time requirement in Article 6.1 ECHR.

The reasonable time requirement in Article 6 ECHR

[40] The offences which were committed between 2 and 8 June 2012 were discovered on 9 June 2012. Over 7 years later on 25 October 2019 the offender was sentenced with this reference being determined on 20 December 2019. The offender contends that there has been a breach of the requirement in Article 6 ECHR that in "the determination of any criminal charge against him, everyone is entitled to a … hearing within a reasonable time" ("the reasonable time requirement"). The offender also contends that the judge was entitled to afford the offender as a just and appropriate remedy or (in Convention terms) an effective, just and proportionate remedy for that breach a reduction in the penalty by imposing community service orders as opposed to a term of imprisonment.

[41] The first sentence of Article 6(1) ECHR provides that in "the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." As Lord Hope stated in *Dyer v Watson and Another* [2004] 1 A.C. 379 at paragraph [73] that sentence creates four rights which

are closely related but which can and should be considered separately. He added that "the rights to a fair hearing, to a public hearing and to a hearing before an independent and impartial tribunal established by law are separate and distinct rights from the right to a hearing within a reasonable time."

[42] The requirement is that there is a hearing within a reasonable time of any *criminal charge* against him. That raises the question as to when for the purposes of Article 6(1), does a person become subject to a criminal charge? Article 6(3) states that everyone "*charged with a criminal offence*" has certain minimum rights. In *O'Neill v HM Advocate* (No2) [2013] UKSC 36 Lord Hope delivering the judgment of the Supreme Court at paragraph [34] stated that the concept of a criminal charge in relation to the reasonable time requirement is separate from being charged for the purposes of Article 6.1 read in conjunction with Article 6.3(c). In this way we consider that the autonomous concept of a criminal charge is detachable with the potential for different dates and with the application of different tests. The test for a criminal charge in relation to the reasonable time requirement was stated by Lord Hope at paragraph [36] of *O'Neill* in the following terms:

> "It is not enough that the appellants were being subjected to questioning in circumstances that might have affected their right to a fair trial. The question is whether they were charged on that date, in the sense indicated by *Eckle v Germany* 5 EHRR 1, para 73, as explained by Lord Bingham in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 , para 27. Were they officially notified that they would be prosecuted as it was put in *Eckle v Germany*, or officially alerted to the likelihood of criminal proceedings against them as it was put by Lord Bingham, when they were being interviewed?"

That is the test that should be applied when considering the question as to when for the purposes of Article 6(1), a person become subject to a criminal charge.

[43] Once the date is identified the next question is whether the time between the criminal charge and the hearing is unreasonable. Guidance on the correct approach to that question is given in *Dyer v Watson* [2004] 1 AC 379, at [53] – [55], *Boolell v State of Mauritius* [2006] UKPC 46 and *Rummun v Mauritius* [2013] UKPC 6. In giving the judgment of this court in *R v Dunlop* [2019] NICA 72 at paragraph [29] McCloskey LJ stated that the "most important general principles to be distilled from the binding decisions of the House of Lords and UK Supreme Court" in relation to whether the time between the criminal charge and the hearing is unreasonable include the following:

> "(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.

(ii) In determining whether a breach of the reasonable time requirement has been established the court will consider in particular but inexhaustively, the complexity of the case, the conduct of the Defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.

(iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration."

Those are the most important principles which should be applied.

[44] If a breach is established then consideration has to be given to the remedy. Section 8(1) Human Rights Act 1998 provides that the remedy should be just and appropriate. In Convention terms the remedy should effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances including the rationale which is that a person charged should not remain too long in a state of uncertainty about his fate. As Lord Bingham stated in *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 at paragraph [24] "(if) the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant." The evaluative exercise as to what is just and appropriate or what is effective, just and proportionate should take into account not only the impact of the delay on the offender but also the requirement that offenders are realistically punished for their offences. Those competing private and public interests must be balanced and the balance must result in a proportionate response. In relation to the impact of the delay this must be established in evidence by the offender and must take into account that usually the offender has been at liberty throughout the period of the breach see *Director of Public Prosecution's Reference (Number 1 of 2018) Vincent Lewis* [2019] NICA 26 at paragraph [18]. If it is contended that there has been an effect on health or family life this also has to be established in evidence by the offender. Frequently a public acknowledgement of the breach will be sufficient. There will be a multiplicity of factual situations to be considered and it is not appropriate for this court to set out prescriptive guidance except to observe that in cases involving hardened recidivists who must be impervious to concern, in the case of vile and heinous crimes or in the case of dangerous criminals who pose a significant risk to members of the public of serious harm the appropriate response would be a public acknowledgment without any reduction in the penalty. The public could not have confidence in a criminal justice system that first caused delay and then as a consequence unleashed a

dangerous criminal on the public. In *Dunlop* at [34] this court referred to a practice of sentencing judges in this jurisdiction which involved making allowance for Article 6 ECHR delay by adjusting custodial sentences downwards. We emphasise that whilst previously there may have been such a practice that in future before there is any reduction the guidance in this case must be followed. We also observe that the criminal offences in *Vincent Lewis* fall into the category of vile and heinous crimes so that applying the guidance in this case the just and appropriate or effective, just and proportionate remedy would have been a public acknowledgment without any reduction in penalty.

[45] If the evaluation of the remedy is that there should be a reduction in sentence then the question arises as to whether the reduction should come before or after the discount for the plea. In *DPP's Reference No 1 of 2016 (David Lee Stewart)* [2017] NICA 1 at paragraph [28] this court stated that the proper approach in relation to aggravating and mitigating factors is to identify the impact of all of those factors to determine the starting point before applying the reduction for any plea. The question is whether the same approach should be taken in relation to any reduction in penalty for breach of the reasonable time requirement. We consider that it should. One of the mitigating factors in *Barrick* was a long delay. The breach of the reasonable time requirement brings greater focus to the question of delay as it requires for instance the identification of a starting point which is not simply being confronted by a professional body or the police. It is because of that greater focus that this aspect of mitigation should be analysed in accordance with the reasonable time requirement rather than in accordance with guidance in *Barrick*. However, that does not change the character of the balance which takes into account the mitigating impact of the breach on the offender which is separate and distinct from and should be anterior to the impact of the plea of guilty. Similarly, the seriousness of the offence which is a component part of the proportionate response to a breach of the reasonable time requirement is considered in the sentencing exercise before taking into account the discount for the plea. There is no requirement to attribute a specific period of weeks, months or years to the reduction in penalty provided that it is clear that it has been taken into account and that there is an indication in general terms as to the extent to which it has been. For instance the degree of aggravating or mitigating features can be described generally as serious or minor. There is no reason why the impact of delay cannot be described in those terms. In this way a breach of the reasonable time requirement should be considered in fixing the starting point before applying the reduction for the plea.

Whether there was a breach of the reasonable time requirement in this case

[46] Ordinarily the question as to whether there was a breach and if so what remedy is just and appropriate would be within an area of judgment left to the sentencing judge with which this court would not interfere unless the judge is clearly wrong see *R v Corr - Director of Public Prosecution's Reference (Number 4 of*

2018) [2019] NICA 64 at paragraph [36]. However the learned judge did not give consideration to these questions. We consider that we have sufficient information to form an appropriate assessment and we proceed to do so.

[47] The offender contends that he became subject to a criminal charge during the course of the police interviews under caution on 31 October 2014. The prosecution contends that the appropriate date is 25 May 2017 when at the end of the police interview the offender was informed by the investigating officer that she would be reporting the matter to the PPS (with a view to prosecution).

[48] In *O'Neill* it was stated at paragraph [37] that "it must have been obvious to (those offenders) that the reason why they were not being charged was that the police did not yet have enough evidence to do so." That is not the factual position in this case. It must have been apparent to the offender on 31 October 2014 that the police had overwhelming evidence with which to prosecute him. Furthermore, on 31 October 2014 the police asserted that the offender had committed these offences and in the context of the evidence then available to them we consider that this amounted to an official notification that the offender was likely to be prosecuted. We also consider that all the indications during the questioning to which the offender was subjected on 31 October 2014 were that the police were in a position to report the proceedings with a view to prosecution and that they did not need to obtain more evidence. Indeed, that was confirmed on 25 May 2017 at the start of the interview as when challenged by the offender's solicitor the police replied that there would be no surprises by which we take them to mean that there was no further evidence. Another factor is that during the interview on 24 October 2014 the offender responded to questions but on 31 October 2014 when presented with overwhelming evidence there were no sensible responses which he could make except to brazen it out with a pre-prepared statement. That change in attitude on behalf of the offender adds to the evidence that on 31 October 2014 there was an official notification that he was likely to be prosecuted. We emphasise that ordinarily an interview will not engage the Article 6 reasonable time requirement. However, the nature of the interview may do so in some cases and this was such a case.

[49] The next question is whether the delay to the hearing is unreasonable. The prosecution did not seek to stand over the period if the earlier date of 31 October 2014 was the start of the period. We consider that they were correct not to do so. The only explanation proffered was that the police were investigating the "mule" account holders. We do not consider that this could possibly account for a period of some five years from 31 October 2014 until the hearing though not all of the five year period was in breach of the reasonable time requirement. We consider that the period of breach is 2 years and 8 months.

[50] We turn to consider the evidence of the impact of that breach on the offender. The probation report records that he has no difficulties with his health however it records that the impact of the offence (by which we include in part the impact of delay) has taken its toll on him emotionally especially as he realises the negative impact this has had on his extended family. On the other hand he has been at liberty throughout, he has been employed by Shorts and he has enjoyed family life. We recognise a modest degree of adverse impact caused by the breach of the reasonable time requirement.

[51] Finally, we emphasise the public interest in imposing a realistic punishment for these offences.

[52] On the evidence available to us we consider that the appropriate remedy is a public acknowledgment of the breach of the reasonable time requirement which acknowledgment we give. Certainly there was nothing in the breach which would have justified the reduction in sentence from a period of imprisonment to community service orders. Such a reduction in penalty would be a significant and complete departure from established guidelines and it could not have been warranted.

Consideration

[53] The effect of the decisions in *Barrick*, *Gault* and *Clarke* is inescapable. In all but the most exceptional cases those convicted, even on their plea of guilty, of offences of this type should receive an immediate custodial sentence. In this case the actual and intended loss was £78,500 so that the application of the useful guide would indicate a sentence of two to three years. We consider that the starting point ought to have been at least two years imprisonment. Thereafter taking into account the aggravating and mitigating features (excluding the discount for the plea) we consider that the sentence ought to have been increased to at least 2 years and 6 months. We arrive at that increase primarily given the particularly serious aggravating feature of the impact of the offending on BS. The offender is entitled to discount for his guilty plea which was not at arraignment. We consider that a generous discount would be in the region of 20% so that the sentence which ought to have been imposed was one of two years imprisonment together with a public acknowledgment of a breach of the reasonable time requirement.

[54] In our judgment the offender's case was not sufficiently exceptional to warrant a non-custodial sentence. We are of the view that a sentence of imprisonment of two years should have been imposed on the offender and that the sentences passed by the learned judge were unduly lenient.

Discretion

[55] It is well settled that, even where this court concludes that a sentence is unduly lenient, it retains a discretion whether to quash the sentence imposed and

substitute a more severe penalty, see *Attorney General's reference (No 4 of 1989)* [1990] 1 WLR 41 at 46, *Dawson, Campbell and Martin (AG Ref 11,12 & 13 of 2004)* [2005] NICA 18 at paragraph [38] and *R v Corr* [2019] NICA 64 at paragraph [60].

[56] The offender has completed approximately one half of the community service order. If the sentences were quashed and this court imposed a determinate custodial sentence then there would have to be a reduction in the two year sentence for double jeopardy given that he would now be sent to prison see *R v Loughlin (Michael) (DPP Reference No 5 2018)* [2019] NICA 10 at [35]. In addition there would have to be a further reduction to take into account that he has completed approximately one half of the community service orders. The reduced custodial sentence which would then be imposed has to be balanced against the benefits to be obtained from continuing with the community service orders. We note that the probation service recognised that the offender would benefit from a period of supervision as this would challenge him in relation to his pro criminal thinking attitudes and risk taking behaviour that led to the commission of these offences. It appears to us that the offender has eagerly participated in the community service orders and that the reports back from the probation service are positive. Finally we emphasise that community service orders involve some degree of loss of liberty and it is wrong to consider them a soft option.

[57] We have taken into account the countervailing interest in an appropriate custodial sentence being passed on the offender. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. We consider that on the wholly exceptional facts of this case in the exercise of discretion we should not quash the sentences and we do not do so.

Conclusion

[58] The sentences that were imposed were unduly lenient.

[59] For the reasons we have given we do not quash the sentences.