IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL BLAIR

CARSWELL LCJ (giving the judgment of the Court)

This is an appeal against sentence. On 24 January 1997 the appellant, Michael Blair, pleaded guilty to one count of conspiracy to defraud the Revenue, and was sentenced to 3 years' imprisonment by His Honour Judge Hart QC at Downpatrick Crown Court.

The appellant sought leave to appeal against sentence on a number of grounds, which we shall summarise later in this judgment. Leave was given by Girvan J on 29 April 1997.

The offence in this case arose from the appellant's misuse of what are known as sub-contractors' tax exemption vouchers. The background to the matter, as far as can be ascertained, is as follows. The appellant left school, without any qualifications, in 1986 when he was nearly 16. He has been in employment fairly constantly since then: he initially worked as a labourer and later went to Coleman Brothers in Portaferry, where he served his time as a bricklayer. Around 1990 he became a self-employed bricklayer and as such moved from job to job, often getting other workers to assist him in doing sub-contracting work for various main contractors.

To understand how the offence of conspiracy to defraud the Revenue arose in this case it is helpful to set out how the system of sub-contractors' tax exemption vouchers is supposed to work. A sub-contractor can apply to the Inland Revenue for the issue of a sub-contractor's tax certificate and tax exemption vouchers. In the absence of a voucher the contractor would, before paying the sub-contractor, have to deduct a certain percentage in respect of tax on the wages payable by the latter. When a sub-contractor who legitimately holds a certificate and tax exemption vouchers carries out work for a main contractor, the sub-contractor is entitled on submission of one of the vouchers when he sends his account to the main contractor to receive payment of the wages element without deduction of tax. It is then the sub-contractor's responsibility, before paying his workers, to deduct a certain percentage in respect oCopyright© 2009 Contoso Corporation - All Rights Reservedf their tax.

The sub-contractor holds this money and is accountable for it to the Revenue, who take it as a credit against tax owed by the worker. In due course main contractors submit their returns to the Inland Revenue, including details of sums paid to any sub-contractors and any exemption vouchers received. As the vouchers are issued to an identifiable person, the Inland Revenue is thereby made aware of the monies which have been paid to each sub-contractor.

In May 1992 the appellant applied to the Inland Revenue for a sub-contractor's tax certificate and on 10 November 1992 a certificate, valid until the end of November 1995, was issued to him along with a book of 25 sub-contractor's vouchers. As a result of further requests from the appellant the Inland Revenue issued 5 more books (each containing 25 vouchers) to the appellant on the following dates, 7 October 1993, 25 April 1994, 4 July 1994, 22 September 1994 and 1 December 1994.

It appears that while he had the first book of vouchers the appellant was working mainly on his own and used the vouchers properly. After this a man called Taggart came on the scene as an acting foreman and appears to have had the use and control of many of the appellant's exemption vouchers, but the extent of that use and control is not at all clear. Inland Revenue records indicate that up to late 1995 many of the appellant's vouchers had been processed, representing on their face that payments totalling £1,118,500 had been received by him. Under normal circumstances this amount would be declared to the Inland Revenue and tax paid, at the appropriate rate, on the balance remaining after deduction of business expenses and personal allowances. Since the appellant had submitted no accounts to the Inland Revenue since 30 April 1991, they had to work out the tax owed on the basis that the appellant had no business expenses. The full liability therefore from 1 May 1991 to 5 April 1996 was calculated at £428,768, although this would be somewhat less if the appellant had submitted accounts and claimed legitimate expenses.

It has been very difficult to ascertain the benefit to the appellant in this case. During the police investigation he at one stage said that he had been deducting 20% in respect of tax from the workers' wages. Subsequently the appellant said that he had not been deducting amounts in respect of tax, as most of the workers were claiming unemployment benefit. He said that if he told these workers that he was going to deduct an amount in respect of tax they would not have worked for him. On another occasion he said that Taggart would tell him that he had found more work and that he (the appellant) would hand over a voucher to cover the work, although he would be ignorant as to the amount which the voucher would cover. It may be that rather than obtaining substantial direct financial benefit from handing the vouchers over the appellant received indirect benefit in obtaining more contracts. The police investigation indicated that the appellant did not have substantial sums of money going through his bank account and that he had not made large purchases or indulged in substantial expenditure.

Mr Morgan QC on behalf of the appellant has advanced a number of arguments in support of his submission that the sentence of 3 years' imprisonment imposed on the appellant was too high. He referred to the fact that the appellant, who is aged 26, has a completely clear record and comes from a very respectable family in Portaferry. He emphasised the appellant's good character and submitted to the court a number of favourable references from various members of the Portaferry community. Mr Morgan also referred to the fact that the appellant pleaded guilty at the first opportunity.

Mr Morgan advanced a number of other points, which really can be grouped together in considering the nature or quality of the offence. He submitted that the appellant did not obtain substantial profit and when he was handing the vouchers over to Taggart he did not really understand what he was getting into. If he had he would have realised that eventually the Inland Revenue would in due course demand the tax payable in respect of the amounts covered by the vouchers. Mr Morgan suggested that the appellant was used by more sinister people who took advantage of him, particularly Taggart, who arranged more jobs knowing that the appellant was so keen to get work that he would hand over vouchers. He argued that a substantial motive in relation to this offence was the appellant's wish to get more work.

In sentencing the appellant the Learned Trial Judge stated:

"I have no doubt he knew perfectly well that this was a thoroughly dishonest enterprise. It may well have been, and I am prepared to accept, that he was used by other, more sophisticated people, but that the defendant knew that what he was doing and enabling others to do was wrong, I have no doubt. The extent to which he benefited personally is an important factor when it comes to fixing the appropriate sentence, but it is not the only factor. The predominant factor is the amount of loss to the public purse ..."

A little later he went on:

"It may be that Mr Blair was not really capable, due to a limited intellectual capacity of appreciating that ultimately all of these vouchers were going to be laid at his door and that he was taking a short-term attitude and anxious to get more work. Even if one makes some allowance for that this still remains, on any showing, a very serious case."

There are 2 distinct strands of authority, which would lead to different conclusions.

On the one hand, because of the prevalence of this type of fraud and the loss to the Revenue there is a need to impose severe custodial sentences by way of deterrence. This proposition is supported by the words of Lord Lowry LCJ in R v

Walker and McColgan [1986, unreported], quoted in the judge's sentencing remarks as follows:-

"We take the opportunity therefore to say and wish to make it quite clear that the imposition of lenient, non-custodial sentences upon people who are in quite a big way of business is entirely the wrong way to deal with this very serious fraud upon the public, because that is what it is. It is to be hoped that even at this late hour some more efficient method can be found of making it difficult for this very prevalent and long-known offence to be committed, but one of the weapons available to society is a severe custodial sentence, and whatever has happened up to now, from now on that will be the only sensible way of dealing with such offences."

On the other hand, the recent tendency in many fraud cases is to impose rather shorter sentences than have been imposed in previous years, observing the "clang of the prison gates" principle referred to in R v Hayes [1981] 3 Cr.App.R(S) 205 and applied in R v Beale [1981] 3 Cr.App.R(S) 289. This principle was also applied in the case of R v Faye [1988] (unreported) where Hutton LCJ, after considering Beale and other similar cases stated:-

"We consider that these authorities clearly establish that in this type of case, even though the offence is a serious one where the offender has for all practical purposes a clear record, then the Court applies the `clang of the prison gates' principle and the Court considers that a short sentence of imprisonment serves as appropriate punishment ...."

Some cases, however, are regarded as being too serious to be suitably dealt with by the `clang of the prison gates' principle. In accepting this view, the judge relied upon R v Sivyer [1988] 9 Cr.App.R(S) 428. In that case there was a sophisticated and complex fraud, where the loss to the Revenue was estimated to have been around £400,000, an amount comparable with the amount in the present case. In that case, however, there appears to have been substantially more gain to the protagonists. The 2 prime movers in the fraud, who appear to have been ingenious and determined in their approach, were D'Archambaud and Cosgrove. D'Archambaud contested the case and was sentenced to 4 years' imprisonment, whereas Cosgrove pleaded guilty and was sentenced to 3 years' imprisonment. In dealing with D'Archambaud's appeal against sentence Kennedy J took the view that as one of the main actors in the fraud D'Archambaud could not have the benefit of the guideline cases to reduce his sentence, because of the nature and extent of the fraud and his involvement in it. He said at p 433:

"It is therefore, in our judgment, quite impossible for the main actors in a conspiracy of this scale to claim that the guidelines to which we have referred have any application to their cases, or that they are suitably punished and the public interest protected by the clang of the prison gates. But more than

that, we are of the view that this case not only stands outside the guidelines but is a case in which the Court has to consider an element of deterrence."

The learned trial judge was alive to the existence of these principles, and it was fully open to him to conclude that the need for deterrence must prevail over the approach determined by the personal circumstances of the appellant, which would have led to the imposition of a substantially shorter sentence. The judge focused on the substantial loss to the public purse and the need to discourage potential offenders, and we could not say that he was wrong in principle in doing so.

Mr Morgan, submitted however, that even if one accepts the validity of the judge's approach, the sentence is nevertheless too high, when one takes into account the levels of sentences in comparable cases. The judge clearly regarded R v Sivyer as such a case, but Mr Morgan argued that the appellant in this case was not in the same league of sophistication or dishonesty as the main actors in Sivyer, and that although the loss involved to the Revenue was comparable the quality of the appellant's act was much less blameworthy. He submitted that if Sivyer was the yardstick against which the appellant was judged, it was difficult to resist the proposition that some discount was due.

We consider that there is some substance in this proposition, which was not examined in detail by the learned trial judge. We consider that taking into account the quality of the act of the appellant and the mitigating factors in his favour, the case could properly have been met by a sentence of 2 years' imprisonment.

We accordingly allow the appeal against sentence and substitute a sentence of 2 years' imprisonment.