IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GAULT

In the Court of Appeal before Hutton LCJ, O'Donnell LJ and Higgins J: 9 December 1988, 14 March 1989.

The applicant, a man 44 years of age with a previously clear record, pleaded guilty to 7 counts of obtaining property by deception, contrary to section 15(1) of the Theft Act (Northern Ireland) 1969, which involved sums totalling £4,700. The indictment contained 13 counts and the aggregate sum involved was about £9,000, although a larger sum may have been obtained. The offences involved deception by the appellant in the course of his employment as manager of a loan company. He was sentenced to concurrent terms of imprisonment of 2 years on each of the 7 counts. On application for leave to appeal against the sentences as being manifestly excessive.

Held, granting the application and, treating it as the appeal, allowing the appeal, that -

(1) The courts in Northern Ireland should follow the guidelines laid down in the English Court of Appeal. In recent years there has been a change in the approach to sentencing for offences of dishonesty where the accused commits the offences in middle age and has had a hitherto unblemished record and where the conviction itself and even a short period of imprisonment imposes a considerable punishment on him. R -v- Barrick [1985] 7 Cr.App.R(S) 142 applied.

(2) Where the total amounts involved were less than £10,000 and the case was contested, the appropriate sentence should range from a very short one up to about 18 months. In this case, the applicant pleaded guilty and accordingly there should be a discount for the plea which would have brought the maximum sentence below 18 months.

(3) Consideration of factors such as the quality and degree of trust reposed the period over which the misappropriations were committed, the use of the money which was dishonestly taken, the impact of the offences on the public or the effect on

fellow employees did not require the sentences to be imposed to be in excess of the normal range.

(4) The effect on the offender and the life of his family, his own history, the pressure of work he was under and the strain of the long delay between the time when he had come under suspicion until the date of his conviction were all mitigating factors.

(5) The fact that the applicant's wife was about to undergo surgery was a very special circumstance and accordingly it was appropriate to reduce the sentences to terms of 9 months.

The following cases are referred to in the judgment:

R -v- Barrick [1985] 7 Cr.App.R(S) 142

R -v- Thornhill [1980] 2 Cr.App.R(S) 310

R -v- Weston [1980] 2 Cr.App.R(S) 391

APPLICATION for leave to appeal against sentence. The facts appear sufficiently in the judgment of Hutton LCJ.

M G Neeson (instructed by *J G Rice & Co*) for the applicant.

P Magill (instructed by the *Director of Prosecutions*) for the Crown.

Cur adv vult

HUTTON LCJ. This is an application for leave to appeal against concurrent sentences of imprisonment of 2 years imposed on the applicant by His Honour Judge Watt QC at Newtownards Crown Court on 1 September 1988.

The indictment against the applicant contained 13 counts charging the offence of obtaining property by deception, contrary to section 15(1) of the Theft Act (Northern Ireland) 1969 over a period between March 1985 and September 1986. The applicant pleaded guilty to the first 7 counts which involved the dishonest obtaining of sums totalling in aggregate about £4,700 and the total sums involved in the 13 counts totalled in aggregate about £9,000. The applicant having pleaded to the first 7 counts, it was directed that counts 8 to 13 were to be left on the books and not to be proceeded with without leave of the court. It appeared from the papers that the sum of £9,000 was not the total sum which had been dishonestly obtained by the applicant and that he may have dishonestly obtained over the period between March 1985 and September 1986 a somewhat larger sum than £9,000.

At the time of the offences the applicant was the manager of the Newtownards Branch of Provident Personal Credit Limited, which was a loan company which had its principal office in England. The applicant committed the offences with the help of another employee by submitting fictitious applications for loans to the company, a cheque would then be issued made payable to the fictitious applicants, this cheque would be cashed and the money received on cashing the cheque would be used by the applicant for his own purposes or to pay into the accounts of the company to represent repayments in respect of loans which had previously been made to fictitious applicants and which had been misappropriated by the applicant.

The applicant is aged 44 years and, with the exception of these offences, he has an entirely clear record. The learned judge did not have the report of the probation officer before him but the report of the probation officer dated 3 January 1989 was before this court.

Parts of the probation report read as follows:

"The appellant attended the local primary school and Coleraine Technical College studying Commerce and English. On leaving College, Mr Gault worked for various grocers in the Coleraine area and at quite a young age, he managed one of the shops. He worked as a clothes salesman for a short time before joining the Provident Personal Credit in September 1967. At this time he was employed as an agent in the Coleraine Branch. In October 1969 the appellant was made Assistant Manager. Then in March 1972 Mr Gault was promoted to Manager in Larne. Following that he was transferred to Bangor in June 1975 and in December 1977 the Bangor and Newtownards Branches merged and Mr Gault was based in Newtownards ...

When he was transferred to Larne he joined the local Church of Ireland and again formed a Youth Club. He was also Sunday School Superintendent for a period of time.

In Bangor the family joined St Columbanus Church but the appellant did not get involved in any activities of the church. Pressure of work built up when Mr Gault's 2 Deputy Managers get promotion and were transferred to other branches. They were replaced by two younger, inexperienced members of staff and the appellant spent most of his time dealing with business affairs. He became totally immersed in his work and began to drink - at first to alleviate tiredness - but then on a regular basis, until this habit escalated to such an extent that he needed to 'borrow' some money from the firm to satisfy his craving.

Mr Gault would say that at this time the stress and strain of running the office in Newtownards became too much for him, he found himself completely out of his depth and the situation continued to deteriorate.

Mr Gault married his wife in July 1967 and there are 3 children of the marriage - Dallas (20), Darwin (16) and Debbie (15). I spoke with Mrs Gault who tells me that she and her husband are happily married - he is a good husband and father. The trauma of learning of her husband's offence has taken toll on Mrs Gault's health and at the time of writing this, she is in hospital undergoing tests for severe pain. Mrs Gault said that her husband was always a happy person and she fails to understand why he should have committed such an offence. It is totally uncharacteristic of him. They have lost everything of material value and Mrs Gault is attempting to care for the family on her earnings of approximately £75.00 per week. The family were evicted from their home in Bangor after the appellant lost his job and could not afford to pay the mortgage, and are unable to get NI Housing Executive property in Donaghadee where Mrs Gault works. They have been forced to rent a small terraced house in the town and store some pieces of furniture."

The court has no reason to doubt the details contained in the parts of the report which we have set out.

It further appears that during the years 1985 and 1986 the applicant was in receipt of a salary of less than £500 per month.

In sentencing the applicant the learned judge stated:

"Stewart Gault, you are 44 years of age and I am told that you have no previous convictions but you plead guilty to a number of cases of obtaining money by deception which I am told are specimen counts.

You were in fact not only an employee of the credit company in question but you were also the manager of the branch of the company in question. It is bad enough an employee engaging in this kind of thing but it is infinitely worse to find the manager doing so.

Moreover in obtaining these monies this went on over a considerable period of time which is not a case of someone succumbing to a temptation once or maybe even twice but it went on over a considerable period of time.

It was a gross breach of trust and it was a gross fraud which you perpetrated on your employers. All of the authorities of which I am aware in the criminal law lay down clearly and definitely the proposition that offences of this type perpetrated by people in your position demand an immediate sentence of imprisonment except in the most unusual or exceptional circumstances.

There are no such circumstances in this case. I take account of your plea of guilty. I take account of your previous good record but on any view of it these offences are serious and accordingly you will go to prison for 2 years in relation to each of the counts."

We are of opinion that the learned judge was quite correct in deciding that an immediate custodial sentence had to be imposed on the applicant for the offences which he had committed, but the question is whether concurrent sentences of 2 years' imprisonment were manifestly excessive. Some years ago the sentences imposed on the applicant would have been regarded as proper and not excessive, but in recent years there has been a change in the approach of the courts to sentencing for offences of dishonesty where the accused commits the offences in middle age and has had a hitherto unblemished record and where the conviction itself and even a short period of imprisonment imposes a considerable punishment upon him. In such a case the courts now take the view that "the clang of the prison gates" is a principle which can be taken into account to some extent, although this does not mean that a very short sentence is always appropriate and, depending on the amount of money taken and the circumstances of the case, a not insubstantial sentence may have to be imposed, as appears from the judgment in R -v- Barrick [1985] 7 Cr.App.R(s) 142 to which we refer below.

In R -v- Weston [1980] 2 Cr.App.R(S) 391 an employee of a firm of estate agents, who was of previous good character, stole sums of money received by the estate agents as agents for a building society. In reducing the sentence of imprisonment imposed on her Boreham J delivering the judgment of the English Court of Appeal stated as at 392:

"The learned judge took the view, in our judgment rightly, that despite her good character, despite all that can be said in her favour, this was a matter in respect of which it was necessary to pass an immediate custodial sentence. She was in a position of trust, and the sum that she had taken was a substantial one.

Now before this court it is contended that having regard to her background and her previous good character, this is one of those cases where the punishment for her is the very fact of going to prison. It is not the duration of the term of imprisonment that is so important. It is, as it is sometimes put, the clang of the prison gates that for her will be the deterrent: for her is the punishment.

We think that the circumstances of this case allow us to concede to that contention. We hope that it is right to say that for her the true punishment and the true deterrent has been the clang of the prison gates. She has now in fact served almost 2 months in prison. We think that justice can be done now to her (and let it be said to society too) by reducing the term of imprisonment imposed upon her from 6 months to one of 3 months."

R -v- Thornhill [1980] 2 Cr.App.R(S) 310 was a case which related, not to theft from an employer, but to conspiracy to defraud the Revenue. In that case the appellant was a man of 51 years of age of previous good character, who pleaded guilty to conspiring to defraud the Revenue. Delivering the judgment of the English Court of Appeal Glidewell J (as he then was) stated:

"Defrauding the Inland Revenue is a serious offence because it means defrauding the vast body of honest tax payers. It should be generally known that an immediate sentence of imprisonment may well be the result of pleading guilty to or being convicted of such an offence. Certainly, in the view of this Court, such a sentence is entirely appropriate in this case.

But in the court's view, it is not necessary in this case for that sentence to be as much as 6 months. There are 2 reasons for that. The first is the point which has so trenchantly been made by my Lord, in Lawton LJ's words, that, with a man of this kind, it is the effect of imprisonment rather than perhaps the length of it which is of importance. Secondly, we are impressed by the point by counsel about the effect on the local community.

Accordingly, the view of the court is that a shorter sentence is sufficient, and the appeal is allowed by substituting for the sentence of 6 months one of 2 months' imprisonment."

In R -v- Barrick Lord Lane CJ, delivering the judgment of the English Court of Appeal laid down detailed guidelines for sentencing in cases of theft and dishonesty constituting a breach of trust by employees and professional persons. The appellant, a man aged 41 of previous good character, was convicted by a jury of 4 counts of false accounting, 4 counts of obtaining by deception and 2 counts of theft. The appellant was employed as the manager of a small finance company, and over a period of time stole a total of at least £9,000. He was sentenced to 2 years' imprisonment on each count, the sentences to be concurrent.

Lord Lane stated at 145:

"This case provides us with an opportunity to make some observations upon the proper sentence to be passed in respect of certain types of theft and fraud as to which there has been recently some divergence of opinion.

The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family.

It was not long ago that this type of offender might expect to receive a term of imprisonment of 3 or 4 years, and indeed a great deal more if the sums involved were substantial. More recently, however, the sentencing climate in this area has

changed, as Mr Humphrey has pointed out to us, and certainly so far as solicitors are concerned, has changed radically.

In Jacob [1981] 3 Cr.App.R(S) 298, to which Mr Humphrey referred us, a solicitor who had over a period of some 3 years stolen money from clients and his partners to the tune of between £40,000 and £57,000 had his sentence of 4 years' imprisonment reduced by this court to 18 months. In Milne [1982] 4 Cr.App.R(S) 397, this court, of which I was a member, following the decision in Jacob substituted for the sentence of 3 years' imprisonment imposed upon a solicitor who had stolen some £40,000 from his client account, the term of 18 months' imprisonment, a quarter of which was suspended, leaving some 13 and a half months to be served.

On the other hand postmen do not seem to have fared quite so well.
In Eagleton [1982] 4 Cr.App.R(S) 47, a postman had been sentenced to 5 years' imprisonment for 3 offences of theft of packets in transit by mail with 80 offences taken into consideration. A sentence of 30 months' imprisonment was substituted. Briggs [1982] 4 Cr.App.R(S) 260, was another postman case. The defendant had stolen from the mail goods worth about £1,300, most of which were recovered. On appeal a term of 2 years' imprisonment was substituted for 3 years which had been imposed by the trial judge.

We can see no proper basis for distinguishing between cases of this kind simply on the basis of the defendant's occupation. Professional men should expect to be punished as severely as the others; in some cases more severely.

In the light of these considerations and with the benefit of hindsight, it seems to us that the sentence imposed by this court in Milne to which we have referred was too lenient.

It is, we appreciate, dangerous to generalise where the circumstances of the offender and the offence may vary so widely from case to case. In the hope that they may be helpful to sentences generally, and may lead to a little more uniformity, we make the following suggestions.

In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate (see for example Weston [1980] 2 Cr.App.R(S) 391). Cases involving sums of between about £10,000 and £50,000 will merit a term of about 2 to 3 years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of 3

and a half years to 4 and a half years would be justified (see for example the case of Strubell [1982] 4 Cr.App.R(S) 300). In that case the defendant was employed as an accountant. He pleaded guilty to offences involving it seems over £150,000. A sentence of 3 years' imprisonment was substituted for the 5 years imposed at trial.

The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered however the court should give the appropriate discount. It will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence. As already indicated, the circumstances of cases will vary almost infinitely.

The following are some of the 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; where, as sometimes happens, there has been a long delay, say over 2 years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.

In this case we have an employee who, as already indicated, was implicitly trusted by those who employed him. He used his position of trust to make away with sums which cannot be accurately quantified, but certainly £9,000 or thereabouts, and may have been a great deal more. The money was stolen from private individuals who could ill-afford the loss. They were, in short, mean offences. He gave no help to the police. Indeed the version put forward to the police was as we have indicated. He fought the case over a period of some 9 days, and the fraud itself lasted overall from April 1982 to December 1983, and the worst period was the 12 months between December 1982 and 1983. The only think that we can see that can be said in his favour, apart from those we have indicated, was the fact that he did make a number of incidental admissions of fraud during the trial which the judge noted in his sentencing remarks.

It seems to us this was indeed a serious breach of trust. It was a case where no suspension of the sentence would have been appropriate. It seems again to us that the sentence of 2 years' imprisonment was in the circumstances not excessive. Accordingly this appeal is dismissed."

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.

In this case the authorities to which we have referred were not cited to the learned judge, and if he had been made aware by counsel of the recent trend of the authorities he might well not have imposed the sentences of 2 years' imprisonment.

We now apply the guidelines stated by Lord Lane to the present case. The total amounts involved, as charged in the indictment, were less than £10,000. Therefore if the case had been contested the appropriate sentence should have ranged from a very short one up to about 18 months. But the applicant pleaded guilty, and accordingly there should have been a reduction giving discount for the plea which would have brought the maximum sentence below 18 months.

We do not consider that the quality and degree of trust reposed in the applicant, the period over which the misappropriations were committed, the use of the money which was dishonestly taken or the impact of the offences on the public and public confidence or the effect on fellow employees required the sentences to be imposed to be in excess of the normal range of sentences. On the other hand a number of the mitigating factors referred to by Lord Lane apply to the applicant: the effect on the offender himself and on the life of his family, his own history, the pressure of work which he was under, and the strain of the long delay between the time when he came under suspicion and was dismissed from his position in October 1986 and the date of his conviction on 1 September 1988. We consider that these mitigating factors should further operate to reduce the sentences which should be imposed upon him.

Accordingly we grant leave to appeal and treat the application for leave as the hearing of the appeal. We consider that terms of imprisonment of 2 years were manifestly excessive and we are of opinion that the appropriate sentences should have been concurrent sentences of 12 months' imprisonment. But as we have been informed that the applicant's wife is about to undergo surgery, we consider that having regard to this very special circumstance it is appropriate to reduce the sentences to terms of 9 months so that the applicant can be released in the very near future.

Guidelines - Magistrates Court