

JERSEY / JUDGMENT

AG -v- Kitchin [2013]

JRC 054 (14 March 2013)

[2013] JRC 054

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JUDGMENT

THE DEPUTY BAILIFF: 1. You are charged with eight counts of obtaining money by false pretences or attempting to obtain money by false pretences. The Crown has asked us to take into account the case of R-v-Mills

[2002] EWCA Crim 26 , a decision of the English Court of Appeal. It is said that that case establishes some general principles for this kind of offending. For our part we are not inclined to accept that submission. First of all the facts of that case are similar to but not on all fours with the present one. The present case involves the issue of false documents which either did or were intended to result in crediting sums to the defendant's bank account. Mills concerned the telling of lies to obtain credit facilities. Secondly it is clear that the Court of Appeal in Mills were very much influenced by two factors. The first was that the defendant was a woman with the care of young children; that is not the case here. The second was the growing female prison population in England; that is also, fortunately, not the case here and we do not have the same problem. 2. On the first of those two points the policy of the Royal Court has for many years been to take into account the fact that a defendant has the care of young children. That does not mean that a custodial sentence is always avoided but it is sometimes a significant factor that is taken into account in arriving at the appropriate sentence. The issue does not arise in the present case. It is also the policy of the Royal Court not to discriminate between male and female defendants on sentencing. The gender of the offender is not a relevant factor for the purposes of sentence. If all other factors were to be the same the sentence would be the same, whether the defendant be a man or woman. 3. In this case the Court is faced with a series of cheque or bank transfer offences by way of fraud or attempted fraud. The policy of the Court is that by and large these offences attract a custodial sentence. That is not invariably the case but it is usually the case. Where the offences involve a criminal breach of trust, there is a custodial sentence unless there are exceptional circumstances, and for that one looks to the case of AG-v-Picot (1990/74), a decision of the Superior Number of this Court on 29 th May, 1990, which has been regularly applied. The only qualification to that, and it is rarely a qualification in this Court because such cases would normally be dealt with in the Magistrate's Court, is that there may be cases where, for different reasons, the

seriousness of the offending, coupled with the available mitigation, does not require a custodial sentence. The authority for that is the case of AG-v-Kirkland (2001/200) in the Superior Number unreported judgment, but it is clear that that applies only with cases at the lower end of the scale. The present case, involving as it does a total obtained, or attempted to be obtained, at some £16,000, would not fall at the lower end of the scale if a breach of trust were involved in all the offences. Although the first two counts for example, and some others indeed, do not involve a breach of trust, others do and in some cases in addition the defendant used information obtained from her employer or whilst assisting at a charity. 4. It follows from the remarks that we have made that unless the case is at the lower end of the scale, or there are exceptional circumstances, the Court would impose a custodial sentence. If the offence is at the lower end of the scale the Court will either reflect that by imposing a commensurately short custodial sentence, or in an appropriate case, find some other penalty but the policy message remains the same that offences of this kind, to the extent they involve a breach of trust, are for the most part, so serious that a custodial sentence will be imposed, unless as I say, the case falls at the lower end of the scale or there are exceptional circumstances. 5. It is clearly established that a guilty plea, previous good character and other personal circumstances which go to show the offending was out of character, are not exceptional circumstances. It seems to us that the only mitigation which might amount to exceptional circumstances in this case is the medical and psychiatric evidence. And indeed this does satisfy us that were it not for the psychiatric challenges arising from her depression, which was clinically established, this defendant would not have committed these offences. For that reason we consider there is scope for us to avoid imposing a custodial sentence if it otherwise seems right for us to do so. 6. We are satisfied that it is right to avoid a custodial sentence in this case. The offences were unsophisticated and committed out of need rather than greed. There has been a frank acknowledgement of guilt and we are satisfied there is genuine remorse. We have noted that not all the offences involve a breach of trust, although as I have said some of them involved using private information to commit the frauds or attempted frauds. It is not the case however that with every count the offence charged involved obtaining or attempting to obtain cash from a person to whom the defendant owed a duty of trust. 7. We come to consider the Crown's conclusions against that background and we think that they are right. The conclusions omit any recommendation in relation to Count 6 but we think that the appropriate conclusion would be 180 hours' community service on that particular count. 8. You have heard the remarks which I have just made. These are serious offences; we have looked at the psychiatric evidence and we are satisfied that these are offences which you would not have committed but for the psychiatric and depression challenges which are mentioned in the report, and for that reason we are not going to send you to prison. But you are sentenced on Count 1; 210 hours' community service, on Count 2; 180 hours' community service, concurrent, on Count 3; 210 hours' community service, concurrent, on Count 4; 210 hours' community service, concurrent, on Count 5; 210 hours' community service, concurrent, on Count 6; 180 hours' community service, concurrent, on Count 7; 180 hours' community service, concurrent, and on Count 8; 180

hours' community service, concurrent, and that means that you must serve a total of 210 hours' community service. If you do not act in accordance with the directions of the community service manager, you are at risk of being brought back to Court and you can be sentenced again and the custodial sentences that we would have been considering, which we think would be right, would be 15 months' imprisonment, where the count involved 210 hours' community service, and 12 months' imprisonment where the count involved 180 hours' community service. So I give you that warning, you must perform that community service or else you are liable to be brought back to Court. 9. The Crown has invited us to consider making a Compensation Order in this case; having regard to your financial circumstances we are not going to make a Compensation Order. We have noted your intentions to repay the amounts in question, which are commendable, and we think that you should make the payments if it is realistic to do so and we think that you will make them if it realistic to do so. But we are not going to make any order. Authorities Whelan on Aspects of Sentencing in the Superior Courts of Jersey. R-v-Mills

[2002] EWCA Crim 26 . AG-v-Picot 1990/74. AG-v-Kirkland 2001/200. AG-v-Byrne

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