

JERSEY / JUDGMENT

AG v McDermott 23-Aug-2019

[2019] JRC 157A (23 August 2019)

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JUDGMENT

THE lieutenant BAILIFF: 1. The Indictment in this case runs to no fewer than 43 counts of dishonesty. Over the course of some two and a half years the defendant dishonestly obtained, by simple theft and other means, the sum of £151,756.30 from two organisations that we consider to be charities, in which he occupied positions of authority and complete trust. He tried to cover up some of his dishonesty by issuing documents that he had forged. 2. Whelan Aspects of Sentencing 3rd Edition at page 207 reads as follows: "These offences may be charged in a variety of ways ranging from simple larceny to common law fraud. What they have in common is the presence of a relationship of trust which has been violated by the offender. The factual circumstances are characterised by, but not limited to, theft from an employer ... or others to whom the offender is close" And in regard to the sentencing policy Advocate Whelan says this: "Where the offence involves the violation of trust the sentencing policy of the courts has been consistently plain; such offences are punished by custodial sentences in all but the most exceptional circumstances. Taking 30 years as a sample span, a reading of the cases reveals an absolute consistency of policy about this." And then he adds: "It is one of the sentencing principles most resolutely observed by the Courts." 3. This first principle, as the Crown reminds us, was clearly stated by the Court in AG v Picot 1990/074: "A person convicted on an offence involving a criminal breach of trust will receive a custodial sentence unless there are exceptional circumstances." 4. Taking the sequence of questions as helpfully suggested in R v Barrick

(1985) 7 Cr App R (S) 142: (i) What quality and degree of trust was reposed in the offender? In this case the defendant was the only person who had online access to the bank accounts of each of the charities and he was the honorary treasurer of each institution. He had been heavily involved in the establishment of both of the charities and, most importantly, he was completely trusted by them both. (ii) The period over which the offences took place: This was 2½ years as we have said. (iii) To what use did the offender put the proceeds of his crime? The funds were used for the benefit of Professional Fulfilment Services Jersey Limited ("PFS") where the defendant was employed as its Chief Financial Officer. It is clear from the evidence we have heard that PFS was experiencing financial difficulties and whilst the Directors were unaware that the defendant was propping up the business, the money taken from the two charities enabled it to continue to trade. The Crown takes the

view that the crimes maintained the employer and thus secured the employment and salary of the defendant, and we have not heard this challenged by the defence. (iv) What was the effect of the crime on its victim? One charity has lost nearly £152,000, and although it somehow has been able to continue operating, we understand that the money was intended to provide security for staff in the event of redundancy, and that security has now disappeared, though the defence does raise a query about this. We add here that the defendant's employer is also a victim of the offending. The Directors were unaware of it, but their reputation has been impacted. (v) What effect has there been on the public and public confidence? The Court does not consider that anything significant arises in this context. (vi) What effect has there been on the offender's colleagues and partners? The staff who run the charities had to spend a great deal of time dealing with the consequences of the offending, and the breach of trust has been felt intensely by each organisation. We add here that the Directors of the employer company are clearly devastated, and will have refund substantial monies that they were wholly unaware that the business had received. This, in the words of one of the Directors, "will prove immensely difficult in the short term." (vii) What has been the effect on the offender? The defendant has been dismissed by his employer, unsurprisingly. He will no longer be able to hold himself out as a chartered accountant, probably never again. (viii) The offender's previous character? He has no previous convictions. (ix) Matters of mitigation that are special to the offender such as illness etc. There are no matters of mitigation that are special to this offender, and indeed there are no exceptional circumstances. 5. The defendant is aged 60 and, as we have said, is previously of good character. The Crown has, however, drawn our attention to the words of Sir William Bailhache, then Deputy Bailiff in *AG v Oliveira*

[2012] JRC 018 where he said this: "Breach of trust is always important and an aggravating feature of the offence of larceny and the Court's established policy is that unless there are exceptional circumstances a custodial sentence is inevitable. We do not think that there are any exceptional circumstances here. As indeed was said in the case of *AG-v-Pallot*

[2010] JRC 122, it is unfortunately the case that those who are trusted by employers nearly always do have good records, nearly always do show remorse afterwards and nearly always do leave their families suffering as a result of their offending." The Jurats share the view of the Crown that a significant custodial sentence is inevitable in this case. 6. In mitigation Advocate Brown told us of the defendant's particularly high level of cooperation. He voluntarily presented himself to the police; he gave himself up. He was interviewed several times, and on each occasion the question and answer was full and frank on the part of the defendant. We understand that he handed over all his electronic devices at the first interview. He gave his password and details of all his bank accounts. Most importantly, we think, he entered early guilty pleas; we have been asked to give full credit for that and we do so. Advocate Brown also pointed out that he has no previous convictions, and that he is of positive good character. The references were all submitted by people who are aware of the offending, and all will stand by him. Finally, she emphasised that the defendant is at low risk of reoffending. 7. Defence counsel asked us to impose a

community service order, but the Jurats are unable to do that. The offending is too serious and there are no exceptional circumstances in this case. 8. Stand up, please, Mr McDermott. To steal from two charities to prop up a commercial enterprise is not only deeply dishonest, it is also grotesquely aberrant and perverse. The Court might have had more sympathy for you had you stolen these huge sums from the commercial enterprise in order to benefit the charities, but it is the other way round. To steal in breach of trust is always a serious offence. When the victim of that breach of trust is a charity then in the view of the Court the offending becomes correspondingly more serious. In truth in this case there are many victims. First, the two charities, one of which has suffered a catastrophic loss of nearly £152,000, a loss which it can evidently ill afford. Secondly, your employer. Thirdly, the people involved in running these charities and your employer's business. Six decent, honest people have filed victim impact statements. They describe in detail their shock and the devastating impact that your deeply dishonest behaviour has had on them, and the potentially destructive consequences on the charities and indeed the business. The fact that these concerns have managed to survive is due to the admirable dedication and sheer hard work of these people, and you can claim no credit for this at all. In addition, the facilities offered to the children such as outings have been compromised because of shortage of funds, and so the children are victims too. 9. We have seen a number of references and they all speak of you in warm and supportive terms. Several of them indicate the opinion of the authors that you will not offend again, and this is consonant with the conclusions of the excellent Social Enquiry Report, that you will pose a low risk of reconviction. We do not think we shall see you here again. 10. You tell us in your letter of remorse that you are "truly sorry", and your counsel talked about errors of judgment. We accept that you are sorry, but we do not accept that what you did was an error of judgment. We would have preferred you to say that you are ashamed and acknowledge that these acts were dishonest. We think that you should be ashamed of yourself. 11. The Court has taken due account of the points so ably put by Advocate Brown, who has said all she could have said for you, but nonetheless the Conclusions of the Crown, in the view of the Court, are correct. Therefore you are sentenced as follows; on Counts 1 to 37, three years' imprisonment concurrent. On Counts 38 to 43 to two years' imprisonment concurrent, therefore making three years' imprisonment in all. 12. The confiscation and compensation applications stand adjourned to a later date. Authorities Whelan on Aspects of Sentencing in the Superior Court of Jersey 3rd Edition. AG v Picot 1990/074. R v Barrick 1985 7 Cr App R (S) 142. AG v Oliveira

[2012] JRC 018 . AG v Egge

[2018] JRC 028. AG v Jima-Otero

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[2017] JRC 093A . AG v Esnouf

[2016] JRC 108 AG v Barnett-Roberts

[2013] JRC 042B AG v Such

[2012] JRC 155 AG v Self

[2010] JRC 022 AG v Tadier

[2007] JRC 231 R v Fulton

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