[2019] EWCA Crim 1659
No: 201900830/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 16 July 2019

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE WARBY

MRS JUSTICE CHEEMA-GRUBB DBE

R E G I N A
v
PETER DAVID TUCKWELL

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

Mr J Smith QC appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. MR JUSTICE WARBY: This is an appeal against sentence with leave of the single judge in a case of fraudulent abuse of position by an executor of a will.

2. The appellant is Peter David Tuckwell, now aged 69. On 7 January 2019, in the Crown Court at Warwick, he pleaded guilty to a single count of fraud, contrary to section 1 of the Fraud Act 2006. He was sentenced, in the same court, just over a month later on 11 February 2019, when Her Honour Judge De Bertodano passed a sentence of 6 years and 3 months' imprisonment. He now contends that this sentence was manifestly excessive.

3. The facts of the case are these. In 1991 the appellant married Susan Mackinnon-Little. It was his second marriage. He had a daughter named Yolande from his first. It was Susan's second marriage as well. She had three children: Charles, Andrew, and Emily.

4. Susan and the appellant lived in the village of Ilmington in the Cotswolds, in a house called Campden Hill Cottage, a four-bedroom property.

5. In 2007, Susan was diagnosed with cancer. That year the couple made mutual wills in essentially the same terms as one another; Susan named the appellant, Yolande, her brother-in-law, Neil Shepherd, and elder son, Charles, as her executors. The beneficiaries of Susan's will included the appellant, Yolande, Susan's own children, and other relatives. One provision was for the executors to establish and become trustees of a "nil rate band discretionary trust", a common arrangement designed to take best advantage of inheritance tax allowances. The intended beneficiaries of that trust included the appellant, his daughter, and Susan's children. Susan also drafted a Wish List, making provision for her loved ones to be given items of sentimental value from her estate. She left the remainder of the estate to the appellant. But only the appellant knew all these details. Importantly, the other three executors did not know that they had been named as such.

6. Susan died in May 2009. At that time the nil rate band was £325,000 and hence that was the amount that should have gone into the discretionary trust. That never happened. The appellant did not tell his fellow executors about the provisions of the will, nor did he inform his fellow beneficiaries of their rights. He lied to the other executors by telling them that he was the sole executor and the sole beneficiary of Susan's will. He tricked his stepson, Charles, and Neil Shepherd into signing away their powers to him using a document which he told them was an innocuous tax invoice. In fact, it was a deed appointing the appellant as sole executor. He then arranged for the house to be transferred into his sole name as sole owner. To do this he deceived his own solicitor, something he was able to do because the title was unregistered, and the solicitor trusted what he was told by the appellant. The effect of these manoeuvres was to place the

entire value of the estate in the hands of the appellant, free of inheritance tax.

7. The fraud came to light when family members who had known about the Wish List asked the appellant for items which they knew that Susan had left them. By this time the appellant had a new partner and she had moved into the cottage. He proved reluctant to comply with the family's requests for sentimental items. Susan's daughter, Emily, was prompted to obtain a copy of the will from probate. This, of course, revealed that there were four executors and that the appellant was not the some beneficiary. That was in early 2012, over 2 years after Susan's death.

8. The appellant at that time, unaware of this disclosure, was still persisting in maintaining that his wife had left him the house, all its contents, and all her money, and that he had no obligation to distribute any of it to anyone else. He continued to stall. Family members were understandably reluctant to believe what had evidently taken place, and to take action. It was to take another 4 years for the matter to be reported to the police.

9. When that happened, the appellant was arrested and interviewed. He denied the offence, claiming to have acted on legal advice and blaming his solicitor. It was not until the day of his trial that he changed his position and admitted his guilt.

10. The sentencing judge had the benefit of a pre-sentence report prepared by probation a few days before sentence. This recorded that in interview the appellant had shown himself unwilling to accept responsibility for his actions, denying any knowledge of wrongdoing after his wife's death and appearing to place the blame on his solicitor. He was not willing to admit anything worse than carelessness when signing documents provided to him by the solicitor. He accused Charles Mackinnon-Little of telling lies to the police, and said that he had himself suffered financially and in his health as a result of the situation. The probation officer described the appellant as lacking victim empathy.

11. Five victims of the fraud read to the court the detailed victim personal statements they had prepared: Susan's sister, Lesley, her husband, Neil Shepherd, and each of Susan's children spoke eloquently of the impact on them of the appellant's misconduct. Mr Shepherd described the emotional impact as "immeasurable and ongoing". Charles Mackinnon-Little described feelings of anguish, being unable to grieve properly after his mother's death and the breakdown of family relationships. Andrew Mackinnon-Little told the court that the impact of the appellant's actions had been more difficulty to bear than the death of his mother. He described the stress imposed on him, his family and his own marriage by the appellant's conduct and the criminal proceedings. Emily Fosbery also described the painful impact of the appellant's abuse of trust. Lesley Shepherd described great sadness at the appellant's betrayal of the family.

12. There were mitigating aspects to the case. There were five main features of these.

First, there was the basis on which the appellant's plea of guilty had been put forward, which the Crown did not contest. The essence of this was when he married Susan the appellant had sold his own home and, from the proceeds, made contributions to the repair and refurbishment of the matrimonial home. Thereafter he had made substantial contributions over the 18 years of the marriage. Until the death of his wife he had believed the house was, as a matter of law, jointly owned by the two of them. When he found out the true position on her death, he had feared he would lose his home and many of his assets.

13. Secondly, the appellant had made significant payments by way of gift to three of those who would have been beneficiaries of the nil rate band trust. He paid £50,000 to his own daughter which he raised by way of a mortgage with HSBC; he paid £60,000 to Charles Mackinnon-Little, and £39,000 to Andrew Mackinnon-Little which came from his own resources, or from the residual estate. That was therefore a total of nearly £150,000. There were also some other small payments.

14. Thirdly, encouraged by the sentencing judge, the appellant agreed during the sentencing hearing to waive all legal and equitable rights to the house, and signed a document to give effect to that. He thereby relinquished any rights that he might have had as a result of the contributions we have mentioned and the will.
15. Fourthly, the appellant was a man of previous good character, for whom there were character references, and he was assessed by probation as posing a low risk of re-offending.

16. Finally, there was personal mitigation: the appellant had a history of depression, which had brought a premature end to his career as a teacher, and which appeared from the probation officer to have been exacerbated by the criminal proceedings against him. His age meant that prison would have a harder effect on him than it might on others.

17. Sentencing the appellant, the judge described this as a really despicable fraud of the children of the appellant's wife and his own daughter, which involved shamelessly cheating them out of their inheritance. She observed however that it was not just or even principally about money, it was a case about calculated dishonesty towards those who loved and trusted the appellant, and the effect that his behaviour had on them emotionally over a 10-year period.

18. It had been conceded that for the purposes of the Sentencing Council Guideline, this was a case of high culpability. The judge identified a number of reasons for that. They included the abuse of a position of trust and responsibility, significant planning, activity conducted over a significant period of time, and activity which affected a large number of victims. The critical factor in sentencing was however the harm caused. The judge identified the sum lost or placed at risk of loss as £325,000 (the full amount of the nil rate

band trust). That placed the case just above the starting point of harm category 2, so far as financial loss is concerned.

19. The judge then had regard to the detriment to the victims. Describing this as serious emotional trauma over 10 years, the judge found that this moved the case into category 1, the starting point for which is 7 years' imprisonment. She found no convincing remorse, and she observed that even taking into account his age and good character, she could not go below 7 years as a sentence after a trial. Allowing 10% reduction for his late plea of guilty she arrived at 75 months' imprisonment.

20. The judge stated that in passing this sentence she had taken into account what she called the "late amends" that were involved in signing over the house, but observed that a sentence below the starting point, in a case as serious as this, simply could not be justified.

21. In concise and focused written grounds of appeal Mr Devine, who appeared below, made two main points in support of the proposition that the sentence in this case was manifestly excessive. The appellant is represented today by Mr Smith QC, who adopts the majority of the written grounds.

22. The points taken in writing were first, that there was nothing that merited taking the case outside harm category 2 in the Sentencing Council Guidelines. It was submitted that the judge failed to make due allowance for the rights which the appellant had acquired as a result of his own contributions, the payments that he made and his abandonment of the rights to the property at the time of sentence.

23. Secondly, it was submitted that the other matters of mitigation which we have identified should have operated to reduce the sentence belong the guideline starting point, before reduction to allow for the plea of guilty. We were and are urged to recognise that the maximum sentence for this offending is 10 years' imprisonment. Although there is no dispute overall about the seriousness of the offence, it is said that the true value and circumstances of this offence mean that it cannot be said to fall towards the upper end of the spectrum.

24. We view this as an exceptionally difficult sentencing decision on what are thankfully exceptional facts. We agree with the judge that this was a truly despicable fraud. The passages that we have summarised from the victim personal statements do not do full justice to the expressions of grief, betrayal and other emotional harm described by the victims. This was a serious case of abuse of position, motivated by selfish considerations.

25. That said, we do see force in the submissions of Mr Devine, and Mr Smith's submissions today. First, there is the issue of categorisation. Assessment of the loss caused, intended or risked here is difficult and we do not believe the exercise can be carried out with mathematical precision. But the maximum sum that could have become subject to the trust provided for by Susan's will was £325,000. For our part, we do not consider the judge was justified in taking that as the relevant figure for harm A for the purposes of the guidelines. The house represented the major part of the estate. We understand that it was worth about £500,000 at the time of death, and unencumbered. By the time of the sentencing hearing it had increased in value and had been valued at nearer £650,000.

26. The fact that the appellant had made substantial contributions towards its repair, maintenance and upkeep, which was not in dispute below, and that he may therefore have acquired an equitable interest, was in our judgment clearly a relevant factor. Further, as Mr Smith has pointed out today, the appellant was himself one of the beneficiaries of the trust. The loss to others therefore cannot properly be regarded as the entire amount of the £325,000.

27. Then there were the six-figure sums the appellant distributed. True it is that he dressed these up as gifts. They were not the result of any discretionary exercise carried out in accordance with the will, and Mr Smith has conceded that the judge was entitled to take the view that they should not simply be deducted from the value of the loss. But the fact is that those were significant sums which did reach some of the intended beneficiaries. That was either a matter to be taken into account in assessing the loss caused, or a matter that went otherwise to mitigation.

28. The appellant's conduct in ultimately relinquishing his claims to the house was also, in our judgment, a significant factor. By doing that, on the facts that are now before us, he was giving up a substantial six-figure sum, and the outcome was that the beneficiaries may have been made good. We are not convinced that the sentencing judge gave sufficient weight to any of these factors.

29. In our judgment, this was a case that was properly categorised towards the middle or upper end of harm category 2, the starting point for which is 5 years' custody with a range of 3 to 6 years. Whatever the appellant's intentions may have been, the sum lost or put at risk is best assessed as rather below the £300,000 on which the starting point for that category is based. The impact on others was profound and Mr Smith has not sought to persuade us that the judge was wrong to conclude that this justified placing the case in harm category 1. There were other aggravating features: elaborate steps were taken to conceal the offending, and blame was repeatedly placed on others. Nonetheless, we do not consider that those factors justified an increase to as much as the 7-year starting point for a category 1 offence. We see force in Mr Smith's argument today that it is important to avoid double-counting of factors that have already been taken into account in assessing

culpability at stage 1. It is also important to note that having taken account of aggravating features, allowance has to be made for mitigating features including the appellant's good character and his age. It is not clear to us at which stage of the analysis the judge took those matters into account.

30. In our judgment, on the facts of this case, the appropriate sentence after a trial would have been no more than 5 years, or 60 months. Reducing that by 10% to reflect the guilty plea, we arrive at a sentence of 54 months, that is to say four-and-a-half years.

31. For the reasons we have given this appeal is allowed. We quash the sentence below and substitute a sentence of four-and-a-half years' imprisonment.