

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA658/2008
[2009] NZCA 26**

THE QUEEN

v

JULIA CATHERINE DAVIS

Hearing: 10 February 2008

Court: Robertson, Hugh Williams and Miller JJ

Counsel: K Clews for Appellant
K A L Bicknell for Crown

Judgment: 20 February 2009 at 10 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Hugh Williams J)

Introduction

[1] On 24 July 2008 Ms Davis, the appellant, pleaded guilty to five counts, three of theft as a servant from a company called Sealcoat Central Limited between 2000-2003 and, following amendments to the law, two of dealing with Sealcoat property between 2003-2005 other than in accordance with requirements of its directors.

[2] On 1 October 2008 Judge Wolff sentenced her to three years imprisonment on each count.

[3] She appeals on the basis the sentence was, in all the circumstances, manifestly excessive and she should have been sentenced to home detention.

Facts

[4] The agreed statement of facts showed Ms Davis worked for Sealcoat from 2000-2005 as its office manager. She had a high degree of autonomy. She was trusted by the husband and wife proprietors with administration of the company's accounts and with access to their Visa accounts. She set up moderately sophisticated systems which resulted in some \$277,826.99 being taken by her from Sealcoat by payments to camouflaged accounts set up in her name, payments by Sealcoat ostensibly to its creditors but in fact to meet personal expenses for Ms Davis and her family and disguised payments to third parties for household items. Additionally, she overpaid herself \$14,460.

[5] Following a Police investigation, she repaid \$87,991.18, but described it as a "goodwill" payment without admission of liability. An offer to pay a further sum was on conditions which were unacceptable to Sealcoat's proprietors.

[6] The audit of Sealcoat's affairs which followed Ms Davis' detection cost the company over \$30,000.

Sentencing Remarks

[7] After recounting the facts, the Judge commented on the sophistication of the systems set up by the appellant to disguise the payments to her or on her behalf and the impact on the proprietors and their family following her detection.

[8] He referred to reports from psychologists and psychiatrists diagnosing the appellant as suffering from depression, but concluded nothing in the material before him suggested any significant remorse for the victims.

[9] After referring to counsel's submissions and the principles and purposes of the Sentencing Act 2002 (which codified the sentencing principles applicable for offending before the Act came into force), the Judge noted over \$200,000 remained outstanding and there was a disinclination on the appellant's part to pay anything further, despite having interests in property from which funds might have been derived.

[10] The Judge regarded as a significant aggravating feature the abuse of trust and authority in the course of 142 dishonest transactions over five years and the premeditation involved in the setting up of the sophisticated system and its operation over that time. He noted the pleas were entered two years after the offences and followed depositions and other pre-trial procedures.

[11] From a starting point of four years imprisonment the Judge deducted one year for the pleas, the appellant's health and personal circumstances, the lack of previous convictions and the funds paid towards the amounts stolen. He declined the Crown's submission that the offending warranted the imposition of a minimum period of imprisonment.

Submissions

[12] Mr Clews detailed the history of the lengthy investigation and the issuing of numerous informations later consolidated into the representative charges to which the appellant pleaded guilty. He stressed the favourable observations concerning the

appellant's personal history adopted by the Judge and the significant depression the appellant suffered at times. Based on that material he challenged the Judge's view the appellant lacked empathy with Sealcoat's directors.

[13] Mr Clews relied on Ms Davis having been a prison inmate since 1 October 2008 and submitted the length of her incarceration was sufficient to meet the circumstances of her offending if home detention were now imposed. He submitted the starting point of four years imprisonment was too high given, amongst other matters, the appellant's mental problems and the significant sum paid in reparation.

[14] For the Crown, Ms Bicknell submitted both the starting point and the result were well within the appropriate range for offending of this magnitude and duration. She submitted the Judge was correct in his assessment of Ms Davis' mental problems and gave them appropriate weight in the sentencing discount. Home detention, she submitted, would have been an inappropriate sentence in the circumstances, particularly given the number of occasions giving rise to the representative offences and the breach of trust. She noted that, both to the Probation Officer and the health professionals, Ms Davis said she did not believe her actions were wrong. She also pointed to passages in the reports saying one result of the appellant's depression was intense anger which led to her offending because she felt she was being "used" by Sealcoat's directors.

Discussion and Decision

[15] By any account, the appellant's was serious offending. Having been given wide autonomy by Sealcoat's directors (and perhaps fuelled by her depression and resultant anger and cupidity), she set up moderately sophisticated systems and, over five years, stole well over a quarter of a million dollars which she spent on herself and her family. When detected, she repaid less than a third (though her ability to pay more was constrained by the refusal of other owners to agree).

[16] A starting point of four years imprisonment against a maximum of seven years was plainly not out of the available range for offending of that order.

[17] The Judge reduced the starting point sentence by 25 per cent to reach the sentence imposed. While such an allowance might be considered inadequate in some cases where early guilty pleas were entered, as the Judge said, the appellant's pleas were entered only at an advanced stage of the criminal process. Although the appellant had no previous convictions and unfortunately suffers from depression, the views of the report writers that her offending occurred out of anger and on a "splurge" basis when depressed nonetheless indicate a degree of insight into her offending by use of the sophisticated systems she set up, abusing her authority so to do.

[18] Standing back and looking at the matter on a totality basis, we are unpersuaded that the sentence imposed on the appellant was manifestly excessive. A sentence of home detention would have been inappropriate. The appeal against sentence is dismissed.

Solicitors:
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