APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 2
HCA/2019-602/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD GLENNIE

in

APPEAL AGAINST SENTENCE

by

THANDIWE MATIKITI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Bell (sol adv); Central Court Lawyers, Livingston
Respondent: Cameron (sol adv); Crown Agent

10 January 2020

[1] The appellant, Thandiwe Matikiti, pled guilty to a charge of fraud by pretending that she had been granted indefinite leave to remain in the United Kingdom when she had not been granted such leave, and presenting a fake visa to show that she had indefinite leave to remain, as a result of which she obtained funding from the Student Awards Agency in Scotland in the sum of about £23,000 over a period of some three years.

[2] The sheriff sentenced her to a period of imprisonment of 14 months, reduced from a headline sentence of 18 months to take account of her early plea of guilty.

[3] We should note that the sentence was backdated to 18 June 2019. In consequence, the appellant has served almost half of her sentence and is due to be released next week or thereabouts; but the appeal may nonetheless have some value, since a custodial sentence of 12 months or over will result in automatic deportation after her release under the relevant immigration rules. That is not something which this court can take into account in determining the appropriate sentence for the offence, but it explains why the appeal is being pursued notwithstanding the appellant's likely imminent release from custody.

[4] On behalf of the appellant it was submitted that the 18 month headline sentence was excessive (there is no criticism of the level of discount applied by the sheriff). It was recognised that the amount involved in the fraud, over £20,000, might well lead to a custodial sentence but, contrary to what the sheriff appeared to have thought, that was not inevitable. The appellant had no record of previous offending and had never been in custody, and she was therefore entitled to the presumption against a custodial sentence in Section 204(2) of the Criminal Procedure (Scotland) Act 1995. Her motive here was not to fund an extravagant lifestyle. It is apparent from details of the offence charged that appellant's intent was to fund her education so she could embark on a career of nursing in the United Kingdom. Contrary to the view expressed by the sentencing sheriff, there was nothing particularly sophisticated about the fraud or the manner of committing it. The false document only had to be shown once. It was clear, and this was supported by the comments in the criminal justice social work report, that the appellant recognised the error of her ways and was full of remorse. Added to which, the appellant had had a very difficult childhood and adolescence, her family having had to flee from Zimbabwe, and she herself

having been involved in an abusive marriage and then having been exploited by her aunt with whom she went to live after escaping from her marriage.

[5] The sheriff sets out all these matters very fairly in his report; but he came to the conclusion that there was no alternative here to a custodial sentence of the length mentioned.

[6] We consider that in reaching that conclusion the sentencing sheriff fell into error. It should be emphasised that, contrary to what appears to have been the sheriff's understanding, the case law does not require there to be a custodial sentence in this type of case; and any suggestion based on such case law that such a sentence will usually be appropriate has to be tempered by the presumption that now exists against sentences of less than one year. In any event the circumstances in this case are, we think, exceptional, having regard in particular to the nature and purpose of the fraud which was committed to enable her to get funding for worthwhile and necessary training with the view to a career in nursing. Having regard to this and to the statutory presumption in her case against a custodial sentence, we consider that the matter could properly have been dealt with by a community payback order.

[7] However, it is too late for that disposal now since the appellant has served all but a week of her sentence. Further, for this court simply to reduce the custodial sentence would be artificial; and it would fail to give effect to our view that a custodial sentence was not required and that a community payback order would have been the appropriate course. In those circumstances, the appellant having, as we have said, served almost the whole of her sentence, and having in consequence served a punishment significantly more severe than the community disposal which we would have considered appropriate, we propose to allow the appeal, quash the sentence and simply admonish the appellant.