

Neutral Citation Number: [2012] EWCA Crim 1346

No: 201201379/A4

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 13 June 2012

**B e f o r e:**

**LORD JUSTICE HOOPER**

**MR JUSTICE MADDISON**

**MR JUSTICE LINDBLOM**

**R E G I N A**

v

**DARREN LESLIE NICHOLLS**

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(Official Shorthand Writers to the Court)

**Mr D Lawler** appeared on behalf of the **Appellant**

**J U D G M E N T**

(As approved by the Court)

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1. MR JUSTICE MADDISON: On 4 January 2012 in the Crown Court at Guildford the appellant Darren Nicholls, now 45 years of age, pleaded guilty to an offence of fraud and on 10 February was sentenced by Ms Recorder Nice to serve 18 months' imprisonment against which sentence he appeals by leave of the single judge.
2. On 7 February 2011 he attended Sutton police station and confessed to the police that he had obtained a mortgage of a little over £700,000, forging his parents' signatures to give himself power of attorney over that their finances which he then used to set up the mortgage. The appellant was asked to leave and to bring back any paperwork that he had in relation to the matter. He returned the next day when he was arrested and interviewed.
3. The original reaction of the mortgage company was that they had not been the subject of a fraud at all but further enquiries on their part satisfied them that indeed the appellant had been telling the truth.
4. The solicitors who had arranged the power of attorney were contacted. They believed that they had been acting for the appellant's parents. They had had contact with the family by post and had had a telephone conversation with a male they believed to be the appellant's father.
5. The appellant's mother was also spoken to. She said that she was totally unaware of what had happened.
6. In the course of his interview with the police the appellant said that he had been living at his parents' home. In May 2010 he had seen a £600,000 house that he wanted to buy. He was then working, he said, as a self-employed stock broker with an average wage of £50,000, but he worked on commission and so could earn much more.
7. In May he had obtained the power of attorney by forging his parents' signatures and using their passports taken from the family home. He had not needed to obtain any medical evidence because his mother was of sound mind. He had received two loans: one of £315,000 for the deposit on the house he wished to buy and a further £450,000 to cover the balance and various fees. One of these loans had been secured against his parents' home and the other against the new property. The appellant said that he intended to live in the new house himself but it had been purchased in his parents' names.
8. The loan it appears, remarkably given its amount, was repayable in only three months. The appellant said that he believed that he would be able to do this because he had a business deal which would enable him to repay without anyone finding out about the fraud he had committed.
9. The appellant had approached the mortgage company for an extension several times, finding himself, in the event, unable to repay but eventually the company took his parents to court. The appellant had then attended the court on behalf of his mother on two occasions, his father unhappily having passed away by that stage. At no time did

he declare to the court that he had obtained the mortgage loan fraudulently. Eventually the new property was repossessed in December. It was sold at auction, leaving the appellant in deficit to the mortgage company. His parents' home was not repossessed. It was accepted at the Crown Court, and remains the case before this court, that a loss in excess of £200,000 has resulted from the appellant's activities.

10. The appellant had only one previous minor and entirely unrelated court appearance in 1997 and was for all practical purposes a man of previous good character. The Recorder had a pre-sentence report in which it was recorded that the appellant was ashamed of his behaviour. He had expressed regret for his actions. He was conscious of the anxiety and stress that he had caused to his mother who was in very poor health. There was a low risk of reconviction and nothing to suggest that the appellant posed any risk of harm. The pre-sentence report proposed a community order with an unpaid work requirement.
11. The Recorder also had a letter from the appellant's mother, stating that she had forgiven the appellant and indeed needed his care and support given her own state of health. There was, in addition, a letter from a hospice referring to the effect which the appellant's father's terminal illness and ultimate death had had upon the appellant and referring also to concerns about the illness from which his mother was now suffering.
12. When passing sentence the Recorder observed that the appellant had gone to the police himself and confessed from the outset. He had followed that with a plea of guilty at the first opportunity and would be given credit for his behaviour in that regard. The new property that the appellant had purchased had been sold. The exact extent of the loss was not known but was thought to be at least £200,000.
13. The Recorder referred to the Sentencing Guidelines Council's Definitive Guideline on Sentencing for Fraud but said that she had not found it of much assistance given, on the one hand, the very large sum actually obtained and, on the other, what was accepted to be an intention on the appellant's part to repay it all. She identified the aggravating features as the forgery of the power of attorney which she regarded as very serious, and, in addition to that, the fact that the appellant's parents to some extent were also victims. His mother had been gracious and the appellant was still living with her. Nevertheless, the anxiety and distress which she must have suffered would, said the Recorder, be taken into account. The Recorder said that she would also take into account the appellant's personal circumstances, his guilty plea at the first opportunity and his conduct in going to see the police and telling them what he had done. The Recorder considered that the custody threshold had been passed. Careful consideration had been given to a suspended sentence but in the circumstances such a sentence would not be appropriate. The Recorder went on to pass the sentence of 18 months to which we have referred.
14. On appeal against that sentence Mr Lawler has relied upon the fact that no loss was intended, that the appellant was a man effectively of good character, that he himself reported the fraud, that he had expressed willingness to make good any outstanding losses, that the appellant's mother had forgiven him, that she herself was suffering from a serious illness and that the appellant was her sole carer.

15. In addition, Mr Lawler has relied on paragraph 20 on page 6 of the Sentencing Guidelines Council's guideline. This reads as follows:

"in obtaining credit through fraud, an offender may not intend to cause any loss but to repay any sums advanced or to keep the bank account in credit. Indeed, an application that was not fraudulent may have been successful. Whilst, in such a case, the offender does not intend to cause any harm, nonetheless a loss may result."

A court should use a starting point corresponding to no financial loss and, where a loss occurs, adjust the assessment of seriousness to reflect the degree of loss."

16. In this case there are the unusual features that it was accepted that no loss was intended. In fact, however, the sum of more than £700,000 was obtained and the end result was a loss of at least £200,000, notwithstanding the appellant's original intentions. If one refers to page 24 of the definitive guideline, which deals with offences of this nature, one finds that where very small amounts are obtained, or intended to be obtained, for an offence of this kind the starting point suggested is a low community order with a range running from a fine to a medium community order.
17. If one moves along the table according to the brackets of money identified, one finds that where the amount obtained or intended to be obtained is between £20,000 and £100,000 the suggested starting point is 26 weeks' custody and the suggested range is one of six weeks to 12 months in custody. No specific guidance is provided for cases in which, arising out of a single fraudulent transaction, fraudulent from the outset, sums in excess of £100,000 are actually obtained.
18. In those circumstances, we sympathise with the difficulty which the Recorder found in applying the guideline to the particular facts of this case. But reflecting as best we can what is said on page 6 of the Guideline in the paragraph which we have cited, the guidance given on page 24, the very large amount actually obtained and, it has to be said, the substantial loss still resulting, it is our view that the appropriate starting point, before allowing for the appellant's plea of guilty, would have been one of at least 18 months. Reflecting the plea of guilty and his prior co-operative attitude, our conclusion is that proper sentence in this case would in fact have been one of 12 months' imprisonment. As a result we allow this appeal to the extent of quashing the sentence passed by the Recorder and substituting for it one of 12 months.