

LexisNexis Report

*R v McQuoid

Court of Appeal, Criminal Division

Lord Judge CJ, Collins and Owen JJ (judgment delivered extempore)

10 June 2009

Sentence – Imprisonment – Length of sentence – Insider dealing – Defendant convicted on basis of single transaction generating total profit of nearly £50,000 – Judge sentencing defendant to eight months' imprisonment – Whether sentence wrong in principle – Whether sentence manifestly excessive – Guidance.

The defendant, aged 45, was a solicitor and former General Counsel for TTP Communications Plc (TTP). In May 2006, he became party to inside information relating to a takeover of TTP by Motorola Plc. He passed that information to M, his father-in-law, and through M procured 153,824 shares at 13 pence each, on 30 May 2006, representing a total outlay of £20,310.60. On 1 June 2006, the takeover was made public. The offer price of the shares was 45 pence; the profit on the shares purchased by M was therefore £48,919.20. On 1 September 2006, M made out a blank cheque for 50 per cent of that amount and gave it to the defendant, who paid it into his own account. Both men were subsequently arrested and charged with insider dealing, contrary to s 52(1) of the [Criminal Justice Act 1993](#). They pleaded not guilty but were convicted after a trial. The judge imposed a sentence of eight months' imprisonment on the defendant. A confiscation order in the sum of £35,000 was also made, and he was ordered to pay £30,000 towards the prosecution's costs. Considering the appropriate sentence in respect of M, the judge took into account his age and personal circumstances and passed a sentence of eight month's imprisonment, suspended for twelve months, with a residence requirement. The defendant appealed against his sentence.

He submitted, inter alia, that the sentence was wrong in principle, in that his case had been used by the regulatory body, the Financial Services Authority (FSA), to mark a change in its policy and to send a warning to the market that tighter sanctions could or would be used in future. He contended that there was no rational basis for the FSA to have singled his case out for prosecution from all the other cases which were dealt with by way of financial penalty. He further submitted that the sentence was manifestly excessive, contending that regard should have been had to the facts that the offence was a one-off transaction and that he was of previous good character. He contended that account should also have been taken of the consequences of the offence on his professional career and of the need for parity with his co-defendant, M. Consideration was given to the case of *R v Clark* (see [1998] 2 Cr App Rep (S) 95)) and chapter E, paragraphs ten and eleven of the Sentencing Guidelines Council Definitive Guidelines – Theft in Breach of Trust.

The appeal would be dismissed.

(1) When identifying the appropriate sentence in cases such as the instant one, the following considerations would be relevant: (i) the nature of the defendant's retainer and involvement which enabled him to participate in the insider dealing; (ii) the circumstances in which the defendant came into possession of the confidential information and the use which was made of it; (iii) whether the defendant was behaving recklessly, or acting deliberately and dishonestly; (iv) the level of planning and sophistication involved, the period of the trading and the number of individual trades; (v) whether the defendant was acting alone or with others and, if acting with others, his relative culpability; (vi) the amount of anticipated or intended benefit (or loss avoided) and the actual benefit (or loss avoided); (vii) the impact on any identifiable victim, if there was one, although the absence of an identifiable victim would not give rise to mitigation; (viii) the impact of the offence on overall public confidence in the integrity of the market. It was more than likely that offences committed in a group would be dealt with more severely than those committed by individuals because of the impact on public confidence; (ix) the defendant's age and plea, which would always be relevant; and (x) good character, although it was often because the defendant was of good character that he was trusted with the relevant information and it was by using the information that the trust reposed in him because of his good character was breached. Further valuable assistance to sentencers might be found in the case of *R v Clark* and the Sentencing Guidelines Council Definitive Guidelines - Theft in Breach of Trust.

R v Clark [1998] 2 Cr App Rep (S) 95 considered.

(2) Insider dealing was not to be seen or treated as a victimless crime. Moreover, such conduct did not merely contravene regulations and any impression to the contrary, if it existed, had to be dissipated. When done deliberately, insider dealing was a species of fraud or, to use an old-fashioned expression, cheating. Prosecution of offenders in open and public court would often be appropriate. Although the perpetrators might hope, if caught, to escape with regulatory proceedings, they could have no legitimate expectation of avoiding prosecution and sentence. Those who involved themselves in such conduct were criminals, no more, no less. Overall, insider trading was a serious matter. On a large scale it corrupted the whole of the market in capital. The principles of confidentiality and trust, essentials of the commercial world, were betrayed by insider dealing and the public confidence which was essential to the function of the market was undermined. Takeovers were kept secret and those entrusted with advance knowledge were entrusted precisely because it was believed that they could be trusted.

In the instant case, although there had been only one transaction, it had generated a profit of almost £50,000. In respect of the defendant's contention that his sentence should be reduced because his case happened to have been under consideration by the FSA when it decided to change its policy as to whether to proceed by prosecution rather than under regulatory measures, the answer was simple: those involved in earlier investigations may, assuming a different approach had been adopted at that time, have been fortunate, but that could not have misled the defendant into thinking that insider dealing was not a criminal offence. Further, the defendant's contention that his prosecution was unfair, or that any sentence, if the prosecution succeeded, should have reflected the financial penalty

which would have followed regulatory proceedings, could not be sustained. Moreover, there was no improper disparity between the sentences imposed on the defendant and M; M's sentence had been assessed for reasons specific and personal to him. The judge's approach to sentencing in the instant case had broadly accorded with the principles to be applied when sentencing for offences such as the instant one and the sentence passed had not been manifestly excessive; since the matter went to trial in the absence of a plea, there could have been no complaint had the outcome been twelve months' custody. The sentence had been as merciful as it could have been and it was clear that the judge had made every allowance he could for the defendant's circumstances and the consequences of his conviction.

R v Spearman [2003] EWCA Crim 2893 adopted.

Jonathan Caplan QC (instructed by Crowell Moring solicitors) for the defendant.
Michael Bowes QC (instructed by the Financial Services Authority) for the Crown.

Alison Pryor Barrister.