THE COURT OF APPEAL

Edwards J.
McGovern J
Kennedy J

Record No: 0167CJA/2019

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

- V -

CLIVE KAVANAGH

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 27th day of January 2020 by Mr Justice Edwards

Introduction

1. On the 5th of March, 2019, in Naas Circuit Court, the respondent pleaded guilty to one count of Money Laundering contrary to the section 7(1) (a) (ii), 7 (1) (b) and 7 (3) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. Evidence of the circumstances of the crime and concerning the respondent's antecedents was heard, and sentence was handed down, on the 4th of July, 2019. The respondent was sentenced to three years' imprisonment with the final eighteen months thereof suspended for a period of eighteen months following his release on the accused entering into a bond in the sum of €100 to keep the peace and be of good behaviour during that period.

Background Facts

2. The court heard evidence from Detective Garda Declan O'Reilly of the Drugs and Organised Crime Bureau in relation to the offence. Based on intelligence gathered, the gardaí expected that a large sum of cash was to be transferred between two parties at Tougher's Garage, Naas on the 1st of September, 2017. A surveillance operation was accordingly mounted at that location on that date. At around 8.15 pm, gardaí observed a white Scania lorry parked in the parking area at that premises. At 8.25 pm, a man who is co-accused, but who was not before the court on the same date as the respondent, was observed exiting the driver's side of the lorry and heading for the garage. He returned to the lorry at 8.50 pm before leaving again for the restaurant, and returning at 9.25 pm. He was observed walking around the car park, having left the door of the vehicle open, and speaking on his phone.

3. At 10.15 pm, a grey Volkswagen Passat, driven by the respondent, pulled up and positioned itself beside the driver's side of the lorry. The boot of the Passat was then remotely unlocked. After brief conversation, the co-accused and the respondent went to

the boot, where a purple holdall bag was removed by the co-accused, and placed in the driver's side of the lorry. The two men then engaged in further conversation, and whilst they were so engaged gardai intervened, arrested both men and searched the lorry. The purple holdall was located in the driver's side foot-well of the lorry and was seized.

4. The respondent had been arrested for an offence contrary to s.7 of The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. He was then conveyed to Naas Garda Station and was detained there pursuant to s.4 Criminal Justice Act, 1984 for the proper investigation of the offence for which he had been arrested.

5. Upon examination by gardaí, the purple holdall bag was found to contain €829,265, in 17 plastic-wrapped bundles. A subsequent search of the respondent's vehicle yielded a Blackberry phone, an iPhone, and an Alcatel phone, as well as envelopes containing money bags, and rubber gloves and the car's keys. Following the respondent's release from s.4 detention a file was sent to the DPP who directed that he be charged with the offence to which he ultimately pleaded guilty.

Respondent's Personal Circumstances

6. The respondent is now a 37 year old man who is a native of Dublin. At the time he was residing in Lucan with his wife and two children. He had been self-employed in the construction industry since leaving school and was the sole provider for his family. He still benefits from the support of his family. A large number of testimonials were handed in to the court from various persons, including family members, friends, work colleagues and business associates attesting to the good character of the respondent, expressing shock at learning of his involvement in this crime and suggesting that his involvement was out of character.

7. The respondent has nine previous convictions, all relating to minor road traffic regulatory offences, such as failure to have an NCT, with the exception of one previous conviction before the Circuit Court on indictment in 2004, when he was 21, for possession of controlled drugs for sale or supply contrary to s.15 of the Misuse of Drugs Act 1977. This matter had been dealt with non-custodially, with the respondent receiving a two-year suspended sentence and an €800 fine.

8. It was accepted by Garda O'Reilly in cross-examination that the respondent entered an early plea which had been of some assistance and that he had complied with his bail conditions. Garda O'Reilly further confirmed that the respondent was not the owner of the money seized. While the crime to which the monies related was not identified, and under the relevant legislation it does need to be, Garda O'Reilly further remarked *"we don't believe he stole all the cash"*, implying at least that the crime at issue involved some form of theft.

Sentencing Judge's Remarks

9. In sentencing the respondent, the sentencing judge stated the following:

> *"…it appears that the accused was involved in the transfer of monies at the garage to someone else in the chain, so to speak, and the gardaí intervened and arrested*

him. It is a very large sum of money - in cash, I note - and clearly the proceeds of criminal conduct and organised crime. It is a fair point which has been raised by the defence that I cannot make any presumption that it is drugs money with the particular difficulty that that would cause the defendant in terms of sentence. But, equally, organised crime remains a problem for the State and for communities within the State, and I have to deal with it therefore in a serious manner.

The involvement of this particular accused is that he appears to be some form of conduit for the monies in that the monies were not his own, but he's part of a link, or chain, which these monies which were the proceeds of criminal conduct were being moved around. And unfortunately for him, he has to take the responsibility for that. The amount involved would suggest that I have to take it seriously, and in terms of the first problem, namely where is it on the scale of harm and moral turpitude, it seems to me that the correct sentence for this amount of cash in the circumstances, having regard to the background of the accused and the facts that I've heard, would be six years' imprisonment. That is my view of where the case lies in terms of its seriousness and on the scale it's somewhere, it seems to me, towards the higher end of the mid-range, certainly in the mid-range. I note in the Cunningham case there was over 4 million involved and clearly with serious crime there are large sums of money involved. But, I note that when the Cunningham matter was dealt with, and also the Trimble case, they were cases where the sum was in or around a quarter of a million euro. It's not really an enormous difference, but it's a significant difference between that and €829,000. The circumstances, therefore, are, if one starts with a tariff of six years, what mitigating features can be applied to the case to reduce that. It's sometimes not clear from the reporting of cases that the headline sentence is what the Court deems the crime justifies in terms of the sentence, and the application of mitigating features is something that the law requires of a trial judge, and there are plenty of authorities to suggest so, and they apply then in reduction of the sentence. And what tends to happen is it gets reported that the judge gave the reduced sentence, but that's not necessarily the judge's view of the seriousness of the crime.

So, what are the mitigating features of this case? Well, first of all, he entered a guilty plea and an early plea, and the authorities suggest that that must be taken into account. Secondly, I do accept the submission which has been made on his behalf that the plea of guilty in a case of this nature with the number of witnesses involved is of considerable assistance to the State, and that ought to be taken into account in assessing punishment. He's a gentleman who has been compliant with his bail and I accept that, and I also accept he wasn't the owner of the proceeds of the crime involved.

I have no doubt, and it's not particularly pleasant for me, I have no doubt that sentencing this man to a term of imprisonment which I'm afraid I have to do is going to have a devastating effect on his family. And he obviously comes with very good references which I will pay more attention to now in a minute, but he's a self-

employed builder, he's the sole provider for his family, and he is obviously a good family man, I note what it said in his support in that regard, and I accept that he is, and I accept therefore that this is not going to be easy for his family, and it's going to have financial consequences for them. I am entitled, and I do take that into account when constructing a sentence, because I think this is fair that where there is an impact on innocent people, from a custodial sentence, that a court should take that into account.

I also accept that he has been remorseful and to some extent it's out of character, certainly from his friends and those he works with, this is something that they're surprised by, and they don't believe is normal behaviour for him, but he does come with, albeit, quite historical, albeit back in 2004 when he was a much younger man, a previous Circuit Court matter which is a section 15 which I have to take into account. He has a number of previous RTAs which I don't think are significantly relevant to the sentencing here. But, the position in relation to the references which were handed up to me, I have read through them and they obviously speak very well of him, and as I've indicated and tried to summarise, I accept that this is going to have a deep impact on his business, on his family life, on the life of his children, and his wife. And there's no pleasure from my perspective in doing that, but I have to mark the seriousness of the offence with an appropriate sentence.

What I'm going to do is I'm going to reduce, having regard to the mitigating features, the sentence to one of three years. I'm also having regard to the matters that I have outlined, and I believe this is a case where a suspension of a portion of the sentence would, a) assist his family, but also b), assist him in rehabilitating, because he's clearly a working man who has allowed himself to get involved through a mistake in a significant and serious criminal activity and who pays the price for that now, but I am prepared to suspend the last 18 months of the sentence for a period of 18 months on his bond to keep the peace and be of good behaviour. It's not a case, I think, where I need to involve the Probation Services, so I'm not going to do that. But, he's on the bond to keep the peace and be of good behaviour, so, he's to keep out of trouble for those 18 months.

So, essentially, what it comes down to is that he will serve 18 months and if he keeps himself out of trouble, he won't serve any further time, and that's the best I can do."

Grounds of Application

10. The appellant seeks a review of the sentence on the grounds of undue leniency. The Notice of Application in that regard complains:

    I. The sentencing judge erred in principle in the manner in which he structured the sentence imposed by applying undue weight to the mitigating factors present which resulted in him failing to adequately reflect the seriousness of the offending behaviour before him.

II. Further, or in the alternative, the sentencing judge erred in principle in circumstances where the sentence imposed failed to adequately reflect the principles of specific and/or general deterrence.

III. Further, or in the alternative, the said sentence did not adequately reflect the nature of the charges and the consequences of the acts of the respondent

11. Notwithstanding these formal grounds it was conceded both in written submissions and in argument before us at the oral hearing that no complaint can be pressed with respect to a six-year headline sentence nominated by the trial judge, or with the three years discounted in the first instance to reflect mitigation. The real complaint on the Director's part was with respect to the suspension of 50% of the remaining three-year post mitigation sentence. The Director contends that this was unjustified, that it represented a double counting of mitigating factors, and that it was outside the norm, thereby rendering the sentence unduly lenient.

12. We were referred by way of comparators to *The People (DPP) v. Ted Cunningham* [2013] IECCA 62; *The People (DPP) v. Trimble* [2016] IECA 309; *The People (DPP) v Warren*, unreported Court of Criminal Appeal (Murphy, Carroll and Kelly JJ.), July 5, 1999; *The People (DPP) v. Carew* [2019] IECA 77; , *The People (DPP) v McHugh* [2002] 1 I.R. 352; *The People (DPP) v Meehan* [2002] 3 I.R. 139; *The People (DPP) v John Duffy*; The Irish Times, October 2, 2015 and *The People (DPP) v Michael Co*le, The Irish Times November 5, 2019, although it has to be said that none of these were of any assistance concerning when the discretion to part suspend a sentence in a money laundering case might be appropriately exercised, or whether any different considerations exist in that regard in such cases as opposed any other kind of case.

Discussion and Decision

13. The jurisprudence in relation to undue leniency appeals is by now so well established that it is unnecessary to refer to it in any detail. It is sufficient to say that the onus of establishing undue leniency rests on the applicant who must establish that the sentence complained of represents a departure from the norm to a significant extent. Usually such a deviation will be the result of a clear error of principle. Moreover, a reviewing court is required to attach great weight to the stated reasons of the sentencing judge at first instance.

14. In this particular case the sentencing judge decided to suspend eighteen months of his post mitigation sentence of three years on the basis that:

> *"I believe this is a case where a suspension of a portion of the sentence would, a) assist his family, but also b), assist him in rehabilitating, because he's clearly a working man who has allowed himself to get involved through a mistake in a significant and serious criminal activity and who pays the price for that now, but I am prepared to suspend the last 18 months of the sentence for a period of 18 months on his bond to keep the peace and be of good behaviour."*

15. Although the sentencing judge spoke in terms of rehabilitation, this was not in truth a case in which rehabilitation, in the positivist sense, was required. The respondent had no underlying condition, or addiction or problem which required to be treated or addressed and which if treated or addressed would enable him to avoid committing crime in the future. Rather, the sentencing judge's objective was to facilitate the reformation of the respondent in the interests of society, by imposing an appropriate prison sentence (3 years) to mark society's deprecation of what he had done, while at the same time suspending a significant proportion of that sentence (50%) so that only eighteen months of the indicative three year term needed to be actually served, so as to promote desistence and incentivise the respondent to stay out of trouble in the future in circumstances where there were grounds to be hopeful that if given a further chance to turn away from crime that he would do so.

16. In addition to offering a positive incentive, such a sentence also has the effect of holding a Sword of Damocles over the offender for the duration of the period of suspension. It therefore seeks to achieve future behaviour modification primarily through incentive, but also to some extent through deterrence, while at the same time still requiring the offender to spend some time in custody both as censure and as punishment by way of hard treatment in the hope of inducing in him as a presumed moral actor recognition of the unacceptability of his conduct and that his punishment is deserved.

17. There is well established jurisprudence that recourse can be had to imposing a partially suspended sentence for that purpose and in that regard, I would refer by way of illustration to two such instances specifically referenced by Professor Thomas O'Malley in his seminal work, *Sentencing Law and Practice*, 3rd Edition. The first arises in circumstances where the accused either has no previous convictions or very little in the way of previous convictions. Professor O'Malley says, at para 6-42, that:

> "Courts are often willing to treat a person with a small number of convictions for minor offences committed some considerable time in the past as being, in effect, a first-time offender. Certainly a record of that nature is most unlikely to be treated as an aggravating factor. A reasonably long interval since the latest of the previous convictions may reflect a genuine effort by the offender to reform and lead a law-abiding life. This will not necessarily be deemed the equivalent of a clear record but it is a factor which the court may take into account."

18. Professor O'Malley then continues at para. 6.43:

> "The rationale for treating the absence of previous convictions as a mitigating factor has been variously expressed but the so-called lapse theory attracts a good deal of support". It has been described by Von Hirsch in the following terms:-
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> > *'Our everyday moral judgments include the notion of a lapse, a transgression even if a fairly serious one should be judged less stridently when it occurs against the background of prior compliance. The idea that even an ordinary well-behaved person can have his or her inhibitions fail in a moment of*

weakness, wilfulness or regression. Such a temporary breakdown of self-control is the kind of human frailty for which a degree of understanding should be shown.'"

19. Professor O'Malley continues:-

> "For those who have lived a good part of their lives without coming into conflict with the law a conviction alone and the stigma attaching to it will often be punishment enough and more than adequate deterrent. Appeal Courts have therefore been willing to accept that a first offence, unless it is a particularly serious one, need not attract anything more than a short prison sentence assuming the custody threshold is crossed. The possibility of a community-based sanction should always be seriously considered unless the offence by virtue of its nature or gravity clearly calls for imprisonment."

20. The second instance instanced by Professor O'Malley in which this type of approach had been adopted is in the case of what is referred to as the 'one last chance' or "Jennings Principle" and Professor O'Malley deals with that at para. 8-118 of his work. He says:-

> "Desistence research may not often be cited by or to the courts but its main conclusions have long been intuitively understood and occasionally applied. A court faced with sentencing a recidivist offender may have reason to believe that the offender has reached a point where for one reason or another he seems intent on desisting from further crime. Obviously any measure that will encourage the offender along the path of desistence should be considered seriously even if it means imposing a more lenient sentence than the offence would otherwise deserve. In *The People v. Jennings*, which has given its name to the principle under discussion, the Court of Criminal Appeal said:-
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> *'But there comes a time in everyone's life, and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this, his last chance, perhaps he will hopefully take it and rehabilitate himself, get employment and become a useful member of the community.' "*

21. Now, we do not suggest that either of the illustrations cited represents a perfect analogue for the circumstances of the present case, or that the considerations arising in those cases apply four square in this case. But they do demonstrate the existence of considerable judicial discretion in the choice of the appropriate sentencing objective to prioritise in the circumstances of a particular case, and as to how it might be achieved.

22. The sentencing judge in this case was influenced by the fact that this was a man in his mid-thirties, with a stable family which he had been supporting, with a good employment record and about which numerous people had spoken in positive terms. Admittedly some of those people were his family and friends, but not all of them were. They all spoke in terms of this offence being out of character for the respondent. While it is true that the respondent has one previous conviction of significance, it dated back thirteen years before

this offence and had been dealt with non-custodially. The appellant had acquired no new convictions in the meantime and had stayed out of trouble until he had become involved in the present, undoubtedly serious, case.

23. The question for the trial judge was whether society would be better served by a sentence tailored towards the reformation of this individual, involving an appropriate sentence of imprisonment but with a part of that sentence suspended as an incentive towards reform; or by a sentence involving no suspended element directed towards prioritising one or more of the alternative recognised objectives of sentencing, e.g., retribution and/or possibly deterrence. It was a matter within the trial judge's discretion as to which of these legitimate objectives of sentencing he saw fit to prioritise in the circumstances of the case. There was certainly an evidential basis for seeking to promote reform.

24. It does require to be emphasised in relation to the former option, and more than mere lip service requires to be paid to it, that a sentence of imprisonment suspended in whole or in part is still a sentence of imprisonment, albeit that the term to be actually spent in custody is less than it would otherwise be (assuming the beneficiary keeps to the conditions of the suspension).

25. The question for us has been: was the extent to which the sentencing judge sought to incentivise reform excessive in all the circumstances of the case? His ultimate sentence was undoubtedly lenient, and indeed very lenient. We have found this to be a finely balanced case. In the final analysis however, although we regard the sentence at issue as being very lenient we are unable to conclude that it is so lenient as to be significantly outside the norm. We are satisfied that the sentencing judge acted within his legitimate discretion in seeking to prioritise the reformation of the respondent and have concluded that the partial suspension albeit very generous was not excessive.

26. For the avoidance of doubt. we do not accept that there was double counting of mitigating factors in this case. The discount from six years to three years was for true mitigation. However, a judge is entitled to promote desistence and offer an incentive towards rehabilitation or reformation over and above the discount that must be afforded for true mitigation, if the circumstances of the case merit it and there is an evidential basis to justify it. The respondent was not being rewarded twice for mitigating circumstances already taken into account, rather he was being incentivised to reform. The judge was, as it is sometimes referred to, "going the extra mile" to promote desistence in circumstances where the available evidence did not render it disproportionate to do so, but rather permitted of it. It is a jurisdiction that requires to be exercised with care having regard to the need to achieve proportionality both with respect to the gravity of the offending conduct and with respect to the personal circumstances of the offender, and it is perhaps to be availed of somewhat sparingly on that account. Nevertheless, it is clear to us that the sentencing judge in this case exercised the required care and that it was an appropriate case in which to seek to do so.

27. We therefore dismiss the application.