THE COURT OF APPEAL

[199/20]

The President.
Mr. Justice McCarthy.
Ms. Justice Ní Raifeartaigh.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

JOHN GALLAGHER

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 27th day of July, 2021 by Mr. Justice McCarthy

1. This an appeal against the severity of a sentence of two and a half years imprisonment imposed by His Honour Judge O'Sullivan on the 13th of October 2020 in respect of the offence of handling stolen property contrary to section 18 of Criminal Justice (Theft and Fraud Offences) Act namely, a lawnmower worth €3,850, on the 9th of October 2018. The appellant's home was searched under warrant on the latter date and the lawnmower was found in his van. He works as a landscape gardener. The lawnmower's theft was conceived by the owner to have occurred on the 5th and 6th of October and it was returned to the owner shortly afterwards.

2. The appellant was born on the 3rd of March 1993. He has 16 previous convictions, four for what are described as "theft related" matters. The remainder were described as "mainly road traffic matters and three public order". Of particular relevance are convictions at Dublin Circuit Criminal Court on the 19th of April 2013 contrary to section 18 of the same Act for which he was fined €300 and also for theft at Naas Circuit Criminal Court on the 6th June 2011 – details are not given about the other two under that Act. His partner was expecting their first child at the time of sentence.

3. The DPP had originally consented to summary disposal of the charge. The District Court refused jurisdiction. The appellant pleaded guilty at the first opportunity after his return for trial.

4. The Grounds of Appeal are as follows:-

   (i) The Learned Sentencing Judge erred in fact and in law in locating the offence in the mid-range;

   (ii) The Learned Sentencing Judge erred in fact and in law in conflating the within offence with the offence of theft, and/or failing to adequately distinguish between those offences;

   (iii) The Learned Trial Judge erred in fact and in law in failing to have sufficient regard to the mitigating factors in the case and to the objective of rehabilitation;

   (iv) The Learned Trial Judge erred in law in imposing a sentence that was excessive and disproportionate in all the circumstances.

5. We think they can be dealt with together. Effectively three points have been advanced, *viz* – firstly, that the judge was wrong when he concluded that the offence was in the mid-range - counsel effectively contends that it lay in the lower range, giving rise to the erroneous identification of the headline sentence at four years (with consequent "knock on "effects on the post mitigation sentence of two and a half years); secondly, that he conflated the offence with theft, a more serious offence, using that word in his judgment on a number of occasions; thirdly, that a portion of the sentence ought to have been suspended to encourage rehabilitation. Counsel did not criticise the reduction for mitigation of one and a half years- indeed such a generous reduction could not be open to criticism.

6. Firstly, we do not think the judge was wrong in his conclusion that this offence lay in the mid-range, granted, it was at lower end of such range. This was a valuable piece of machinery. Heavy reliance has been placed by the appellant on *DPP v Tache* [2020] IECA 115, in which the accused's appeal against severity of sentence in respect of a handling offence was allowed. The accused handled some 49 stolen mobile phones. The Circuit Court judge had identified the appropriate headline sentence as one of six years and having reduced the sentence imposed a term of imprisonment of four years. Evidence was apparently available of the significant adverse effects upon the victim who was the owner of a shop which sold mobile phones. It appears that the phones were taken in the course of a burglary. The value of those phones was given at €17,383.90. This Court took the view that an appropriate headline sentence would have been one of four and a half years but imposed a sentence of three years after taking into account relevant factors in mitigation.

7. By comparison it is suggested that having regard to the lesser value of the item of stolen property here, that, in effect, it was merely one item and that there was nothing to

suggest any ill effects upon the victim at least to the extent in *Tache* the headline sentence was too high. It was rightly conceded that sentence in cases of this type is not in some sense determined by the value of the stolen property but nonetheless submitted that the decision is a valid comparator. Each case must be decided on its own facts and whilst this comparator is of assistance that is not the end of the matter; indeed it certainly does not preclude a conclusion as reached by the judge that the offence fell within the middle range. It must also be borne in mind that when discussing the question of ranges the boundaries cannot be precise. The absence of a Victim Impact Report is not to be taken to mean that there were no adverse effects on the ultimate victim.

8. In the context of addressing the headline sentence, counsel referred to the fact that the Director had initially taken the view that this was a case for summary disposal. In reality he could not go much further than say that this was a pointer to where on the range the offence might lie. He relied upon it to support the proposition that the offence fell in the lower range having regard to the maximum jurisdiction of the District Court. We do not think that this approach is well-founded as a matter of principle. In any event, a judge of the District Court decided that it was not a case where summary disposal was appropriate. Judicial intervention accordingly occurred after the initial decision of the Director. The Director's view is subject in a case such as the present at all times to the view taken by the courts, whether that be the District Court when adjudicating on the issue of jurisdiction or otherwise.

9. With respect to the second point, we do not think that any fair reading of the transcript can give rise to the situation against which the authorities warn, namely, the imposition of responsibility upon the handler of stolen goods for the offence of theft (or kindred offence) which must by definition have preceded it. Thus, for example, if the theft occurred in the course of a burglary of a dwelling house in the course of which the householders' privacy and well-being was adversely affected, the handler could not be treated in the same way as the burglar. It is plain that the burglar's offence in those circumstances would be more serious. Nothing of that order arose here. It is plain that the judge sentenced only on the basis of the facts before him; there was no reference whatsoever to the circumstances of the theft either in evidence otherwise. The height of any criticism which can legitimately be made of the judge is the use of the term theft; the penalty in respect of theft simpliciter and handling is the same. Both are offences of dishonesty as pointed out by the judge when his error was raised. The judge must have been fully conversant with the facts. It was a legitimate case for him, as he ultimately did, to make no distinction in his sentence notwithstanding his error. Both were offences of dishonesty. It does not affect the substance.

10. Thirdly, the question of suspension of a portion of the sentence for the purpose of rehabilitation has been raised. There is no evidence here that this is appropriate for the purpose of rehabilitation. No excuse or explanation of any kind has been given for this offence. There is no suggestion, for example, that the appellant was a person who was addicted to drugs and handled the goods for the purpose of seeking to pay off a drug debt. There is no suggestion that he was in some sense a person with a desire to turn

over a new leaf against a background of criminality. Indeed, he was afforded opportunities for rehabilitation on previous occasions especially in the case of the suspension of the sentence of eighteen months. It was also suggested, effectively, that he was not someone who should be regarded as having enjoyed a previous opportunity to rehabilitate by the imposition of a suspended sentence. This proposition was advanced having regard to the lapse of time between the present offence and his previous conviction. We see no logic in this proposition.

11. We have also borne in mind that a margin of discretion must be and is vested in every trial judge; even if we might have approached the matter differently, an error in principle will not in general arise unless the judge strays outside that margin. This is not such a case.

12. We accordingly reject all grounds of appeal and dismiss it.