



THE COURT OF APPEAL

[186/2019]

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN

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

RESPONDENT

AND

DAINIS RUBENIS

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 13th day of July 2020 by Mr Justice McCarthy

1. The appellant was sentenced in the Circuit Criminal Court, Mullingar on July 24th 2019 having pleaded guilty to 20 charges of theft and deception contrary to s. 4 and s.6 respectively of the Criminal Justice (Theft and Fraud Offences) Act, 2001. He had been charged with in excess of 100 counts having regard to the repetitive nature of his offending, but by agreement between the parties he was indicted on 20 counts to which he pleaded guilty on a full facts basis. He was sentenced on counts 1 and 2, the remainder marked taken into consideration.
2. The offences occurred between the 11th of September 2007 and the 8th of September 2009. The court determined a headline sentence of three years on Count 1, and a consecutive sentence of three years on Count 2, making a total of six years. The Court proceeded to reduce the sentences to two years on each count backdated to the 30th of April 2019, which is the date that the accused went into custody. The Court then proceeded to suspend the sentence on the following conditions: -
 - (1) That the accused enter into a bond of €500 to keep the peace and to be of good behaviour for a period of 10 years;
 - and;
 - (2) That the gross proceeds from the sale of the lands in Latvia, less any sales expenses and taxes are lodged, with official vouching documentation which confirms that the monies lodged are in fact the proceeds of sale with the Court for transmission to the Department of Social Protection.
3. The appellant does not raise any issue with the cumulative four year sentence imposed. The appellant unsurprisingly accepts that the cumulative sentence of four years, wholly

suspended, is proportionate to the crime. The sole issue about which he complains in the appeal relates to the condition on which the sentence was suspended.

Background

4. The appellant used the social welfare card of Mr Yazems, another individual, to unlawfully claim unemployment assistance between the 11th of September 2007 and the 8th of September 2009. The appellant maintains that the fraud was undertaken with the consent of this individual and that the illegally obtained monies were shared between them. The Gardaí investigating the matter could find no evidence that Mr Yazems derived any benefit.
5. In any event, the total amount of the money stolen from the Department of Social Protection by the accused is €37,635. On discovery of the fraud, the appellant was initially interviewed by a representative of the Department. He indicated that a social welfare card had been lost and that he believed another party had made the false claim. He was charged he was charged and the Book of Evidence was served on the 7th of April 2011. On the 12th of April 2016, a bench warrant issued and the accused was arrested. The appellant was granted bail on the 24th of April 2016 and on the 5th of July 2016 he pleaded guilty to the charges. He was again granted bail and failed to comply with his bail terms by failing to turn up at the sentencing hearing on the remand date. Ultimately, he was arrested for an offence in the District Court in Formoyle on the 18th of April 2019 and at that stage the outstanding bench warrant in respect of the index offences was executed. The accused has been in custody since 30th of April 2019 since he has not complied with the condition imposed on foot of the suspended sentence.
6. The accused had two previous convictions for burglary dated on the 5th of September 2007, for which he received an eight-month sentence in respect of these offences. The Probation Report has assessed him at low risk of reoffending within the next twelve months.

The appeal

7. The appellant gave evidence that he was the owner of lands, part, at least, afforested in Latvia, and was prepared to sell those lands or the growing timber in order to reimburse the Department of Social Protection. Very considerable detail was given as to how the sale might take place and at no time was any potential difficulty because of some third-party right to the lands and, in particular, no reference was made to the fact that the appellant's mother lived upon them thus preventing a sale.
8. At a later stage, the appellant apparently indicated he was not willing to do this for reasons which are not in evidence. We are told this was because of the fact that his mother is living upon the lands. In passing sentence, the judge held that the refusal to reimburse the State was an aggravating factor but the appellant does not accept that the lack of restitution is such. Instead, it is submitted that it does not enable the appellant to avail of the mitigation afforded to those who provide restitution and this is of course the case. As outlined in the sentencing court, there are many mitigating factors in the case: the plea of guilty, co-operation with the authorities, the positive Probation Report, the

unlikelihood of re-offending, the lack of subsequent offending and his good work record, and his status as a non-national (though that is of no real significance, since he has lived here since 2001 and has good English). Reference is also made to his family circumstances.

Submissions

9. Counsel for the appellant submits that when sentence was imposed, the appellant had been in custody for just under three months (i.e. since 30th April 2019). It is submitted that this increased period of time could be "offset" against the sale-of-land aspect of the suspended sentence. It is submitted that the Court could meet the requirements of imposing a just sentence by suspending the balance of the sentence but without that particular condition attached.
10. The respondent submits that insofar as it is asserted by the appellant that he is unable to meet the terms of the suspended sentence since it is said that his elderly mother resides in his Latvian property the whole idea of selling property in Latvia emanated from the appellant himself. Therefore, the Court sought to structure a sentence which accommodated the appellant's suggestion in order to facilitate him otherwise serving a significant custodial sentence. However, the appellant subsequently indicated to the Court that contrary to a previous impression given, he was not contemplating selling a house in Latvia, but rather 21.7 Hectares of lands with forestry on it. He even explored in his evidence the possibility of retaining the lands while selling of the timber on the lands to a company and paying over the proceeds. There was never mention made of his mother residing on the subject lands.
11. Leaving aside the option given to the appellant to achieve a suspension of this sentence, it is submitted that one could not argue that the four year prison sentence imposed in this case constituted an error in principle. In fact, this is accepted by the appellant – he merely complains about the condition imposed.
12. There was never any indication during the hearing that the appellant was experiencing any financial distress which caused him to succumb to temptation when he came upon his associate's social welfare card. Insofar as the basis of this appeal is the removal of the condition thereby yielding a wholly suspended sentence (save for time served to date), it is submitted that such a sentence would represent a significant error in principle and would be unduly lenient. Simply because the Courts have repeatedly stated that a suspended sentence is a real sanction, that of itself does not remotely establish the proposition that it is the appropriate sentence or sanction for this particular case, and a failure to suspend the sentence *simpliciter* in this case represents an error in principle.

Discussion

13. While no issue is taken with the headline sentences nominated by the judge, the argument is advanced that the judge erred in taking as an aggravating factor the absence of restitution. While the judge did so, this error has no effect since we are not persuaded that the headline sentences are outside the margin of appreciation to the judge.

14. It must be said that no excuse or explanation for the lengthy series of criminal acts is advanced, which if advanced, may serve to extenuate the appellant's moral culpability.
15. Whilst in employment, the appellant supplemented his income by in excess of €18,000 per annum, indeed, at a time when the State was in the midst of a financial emergency. Significant premeditation was required in this case. The appellant's moral culpability is high and there is no rational explanation for his conduct other than one of pure greed.
16. There are mitigating factors present; however, we are not persuaded at all that the judge failed to take proper account of those factors, even prior to suspending the sentence. Moreover, in suspending the entirety of the sentence, the judge sought to give effect to the appellant's own wish to sell property and thus repay the State.
17. We accordingly see no error in principle in the imposition of a cumulative sentence of imprisonment of four years. The sentence of four years is in itself a proportionate one, however, when there is provision for suspension of the entire sentence if the appellant follows through with his original proposal, it could even then be said that this is a lenient sentence. We think it right to emphasise in a case of this kind the importance of the principles of general deterrence.
18. Since we are not the persuaded that there is any error in principle we accordingly dismiss this appeal.