THE COURT OF APPEAL

Record Number: 164/20
Neutral Citation: [2021] IECA 208

Birmingham P.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PATRICK MCDONAGH

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 23rd day of July 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. The appellant pleaded guilty to a count of deception contrary to section 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001. On the 22nd July 2020 he received a sentence of three years' imprisonment.

Background

2. On the 11th March 2014 the appellant approached a man at a petrol station in Co. Mayo and offered him the opportunity to purchase a quad bike from him. The witness

contacted his friend, the injured party in this case, who agreed to the offer and arrangements were made to meet later in the day.

3. At 5pm on the same day the injured party met with the appellant at a business park in Tuam and handed over €1350 in cash for the purpose of purchasing the quad bike. Arrangements were made to collect the bike from two different locations later on that evening but the appellant did not show up. The injured party contacted the gardaí and gave a description of the vehicle and its registration number and a description of the appellant.

4. On the 1st May 2014 both the injured party and the witness identified the appellant in an informal identification parade and the appellant was subsequently arrested and interviewed. The appellant made no admissions and he was charged later on that day.

5. Subsequently, the appellant did not appear and two District Court warrants and two Circuit Court warrants were issued in relation to the matter. On the 29th June 2020, the fourth bench warrant was executed at Castlebar Circuit Criminal Court and the appellant was remanded in custody on this matter.

Personal circumstances of the appellant

6. The appellant has 131 previous convictions. The majority are road traffic offences. He has convictions for public order offences, criminal damage and two convictions for assault. Significantly, he has four convictions for offences contrary to the Criminal Justice (Theft and Fraud Offences) Act 2001, namely forgery, deception, robbery and theft.

The sentence imposed

7. The Circuit Court judge sentenced the appellant as follows:-

> "Well, the defendant conned his victim out of his €1,350. When he was arrested and detained, he did not cooperate and then he failed to appear. Eventually, he was arrested on foot of this bench warrant, and possibly others. He has 131 previous convictions, mostly for road traffic with multiple convictions for crimes of dishonesty

and a variety of other offences. His previous offences, and the manner in which he dealt with this prosecution, by effectively deferring it for years by his own conduct aggravate the gravity of the offence. That the offence was clearly premeditated in circumstances that are apparent from the book of evidence. This also aggravates the gravity of the offence. The headline sentence for this offence which, to my mind, stands at a high point on the scale of gravity is four and a half years' imprisonment. I note as well that there's no offer of compensation, and the victim is still out of pocket for his €1,350.

In mitigation, he pleaded guilty, eventually. The report of Mr Bogue which I've seen today, details a difficult enough upbringing, a problem with alcohol and drugs. And you don't have to even read between the lines of this report to see that drugs and alcohol, and possibly a lack of education are the principal factors that have caused him difficulties in his life. But again, this is nothing new. These are problems that existed at least at a time when he was committing these offences, and possibly before, and certainly thereafter. But there's relatively little evidence of any determination on his part or intention on his part, to tackle these problems. At least until recently. So, it seems to me in the circumstances that there's little else that I can identify that mitigates the gravity of these offences and, likewise, there's little alternative to the imposition of an immediate custodial sentence. There isn't any evidence other than the submission based on instructions, quite properly taken and quite properly articulated to the Court, that it is the intention of this defendant to rehabilitate. I hope for his own sake and for the sake of society and for the sake of people he comes in contact with that that's true, but only time will tell. So, the appropriate sentence in this case is three years' imprisonment. He should be afforded whatever treatment he seeks out and is available for them during the period in custody.

In the absence of any evidence that convinces me that he is determined to embark on in a course of rehabilitation, I don't see any grounds for suspending any portion of the sentence."

Grounds of appeal

8. The appellant puts forward three grounds of appeal:-

(1) The learned sentencing judge erred in setting a headline sentence of 4 and half years in circumstances where the maximum period for the offence is five years;

(2) The learned sentencing judge erred when he imposed a net sentence of three years' imprisonment in that he did not sufficiently take into account or balance the mitigating factors against the aggravating factors, and therefore the sentence in its totality and structure amounted to an error in principle;

(3) The learned sentencing judge failed to adequately consider the unique personal circumstances of the accused, with specific reference to the psychological assessment and the related issues contained therein and referenced at the sentence hearing.

Submissions of the appellant

9. The appellant takes issue with the headline sentence of four and a half years where the offence carries a maximum sentence of five years. The appellant submits that the aggravating factors identified by the sentencing judge do not individually or cumulatively reach a threshold to place this offence into the high point of gravity.

10. The appellant argues that the failure to cooperate is not an aggravating factor *per se* and when an accused invokes his/her right to silence it merely deprives an appellant of the credit he/she would have gotten from a sentencing judge had he/she co-operated.

11. It is said that failing to appear is itself an offence, and should not be characterised as an aggravating factor to such an extent that elevates the severity of the offence itself. The

appellant makes a similar argument in respect of the aggravating factor of deferring his prosecution by his own conduct.

12. The appellant submits that the sentencing judge gave the bare minimum amount of credit for the guilty plea and associated mitigation.

13. The appellant argues that the sentencing judge erred in failing to suspend any part of the sentence and despite being asked to do so he did not address the issue of rehabilitation in the actual structure of his sentence at all.

Submissions of the respondent

14. The respondent submits that in terms of the aggravating factors considered by the sentencing judge, it is not quite clear that the appellant's failure to cooperate with the investigation was a factor taken into account. However, the failure to cooperate meant that potential mitigation was not available to the appellant.

15. In terms of the appellant's previous convictions, the respondent refers *to The People (DPP) v. Mahoney* [2016] IECA 27 where the Court noted that previous convictions can be an aggravating factor although the better view of previous convictions is that they should be taken into account in leading to a progressive loss of mitigation.

16. The respondent submits that the sentencing judge was entitled to find the deferral of the prosecution by the appellant's conduct an aggravating factor. The respondent refers to *The People (DPP) v. Judge* [2018] IECA 242 where the trial judge was entitled to find that breaches of bail were somewhat aggravating.

17. It is said that the judge had regard to all mitigation present and a reduction of one and a half years was fair and within the range of discounts available to the sentencing judge.

18. The respondent submits that the sentencing judge considered the contents of the report before the Court and it must be noted that there was no evidence proffered by the appellant to support his claim that he was 12 months sober.

19. With regard to the appellant's argument that a portion of the sentence should have been suspended for the purposes of rehabilitation, the respondent refers to *The People (DPP) v. Judge* [2018] IECA 242 where the Court considered a similar argument but refused it in circumstances where there was no track record of rehabilitation, the appellant had previously breached undertakings given to the Court and there were no specific proposals put forward in terms of treatment. The respondent further refers to *The People (DPP) v. McAuliffe* [2018] IECA 100 where the appellant has numerous previous convictions and the risk of reoffending was high and the chance of rehabilitation low. The respondent submits that similar arguments can be made in the instant case.

Unusual Circumstances

20. It is accepted by the parties that this matter is now complicated by virtue of the fact that the appellant has acquired additional convictions of a similar kind which we detail hereunder. We refrained from giving judgment in this appeal without first having sight of the transcripts of the sentence hearings before Cavan Circuit Criminal Court on the 26th November 2020 and the 3rd December 2020 which sentence relates to the additional convictions. It is apparent from the sentencing remarks of Judge Aylmer that he considered the totality principle in the imposition of sentence on the matters before him.

21. In our view the real issue in the present case concerns the nomination of four and a half years as the pre-mitigation sentence, we do not believe there is any merit in the argument that the judge failed to take adequate account of the mitigating factors.

22. On the facts of this appeal the sum of money of which the injured party is at a loss is an aggravating factor, as are the appellant's previous convictions for offences of dishonesty. Moreover, it was without doubt a premediated offence.

23. However, as stated the matter is now complicated by the more recent convictions arising from the offences committed by the appellant in 2012 and 2013.

24. These convictions arise from offending of a similar nature in 2012 and a conviction for criminal damage in 2013. The appellant was sentenced before Cavan Circuit Court on the 3rd December 2020 in respect of those two bills of indictment. The offence of criminal damage occurred on the 29th November 2013 and a sentence of 18 months' imprisonment was imposed with further counts on that indictment taken into consideration.

25. The second bill of indictment concerned offences of demanding money with menaces which occurred between October and November 2012. The appellant pleaded guilty to four of nine offences, a sentence of three years' imprisonment was imposed on each count relating to demanding money with menaces with the final 12 months suspended, the balance of the counts were taken into consideration, and, significantly the sentence was imposed consecutively to this sentence of three years, giving an overall sentence of six years with the final year suspended on terms.

26. We understand that the sentencing judge in Cavan was unaware this matter was under appeal. Unusually, we found it necessary to consider the transcript of the sentence hearing dated the 3rd December 2020 where the sentence was imposed after the sentence the subject of this appeal in circumstances where we were of the view that His Honour Judge Aylmer (Cavan Circuit Court) must have been influenced in imposing sentence by the fact that a three year sentence had been imposed in respect of the matter now under appeal before this Court. Having considered the transcript of the hearing and imposition of sentence before Cavan Circuit Court, we were confirmed in this view.

27. In imposing sentence on the two bills of indictment before him, Judge Aylmer considered the totality principle before arriving at the sentence of three years with the final 12 months suspended. Mr Hennessey BL for the appellant very properly accepts that the sentence imposed on the appellant in respect of the Cavan offences was a proportionate one and therefore is not the subject of appeal.

28. This is an unusual case due to the convictions from offending in 2012. In sentencing the appellant for these offences, Judge Aylmer was alive to the fact that the appellant was serving a sentence of three years on the matter now before this Court and imposed a very fair sentence on the two bills of indictment with which he was concerned.

Conclusion

29. If this Court were dealing only with the single count of deception which occurred in 2014, relating to the purported sale of a quad bike for the sum of €1,350.00, we would be of the opinion that the judge erred in the nomination of a pre-mitigation sentence of four and a half years' imprisonment, where the maximum sentence is one of five years. In our view, the appropriate headline sentence in the circumstances would lie in the upper end of the mid-range of sentence. However, while that remains our view, we cannot ignore the fact that the appellant was subsequently sentenced to three years' imprisonment with the final 12 months suspended for a series of similar offences which occurred prior to this offence, which sentence was imposed on a consecutive basis. We cannot leave to one side that Judge Aylmer considered both this offence and the sentence he was initially minded to impose before applying the totality principle when sentencing for the offences in Cavan Circuit Court.

30. The totality principle required Judge Aylmer to stand back and consider whether cumulatively the sentences imposed for each individual offence gave rise to a total figure that was still proportionate to the gravity of the accused's overall offending conduct. If he concluded that the cumulative figure would be crushing in the circumstances, he was obliged to moderate that figure so as to achieve an overall sentence that was proportionate. The transcript from Cavan Circuit Criminal Court confirms that Judge Aylmer was conscious of, and indeed expressly adverted to, the need to apply the totality principle in this case. It further suggests to us that the suspension of the final 12 months was made both in the interests of adjusting for totality and to incentivise continued rehabilitation, although the transcript does

not identify any breakdown as between the two. It seems likely to us, however, that the greater part of it was intended to adjust for totality, as the actual evidence, as opposed to assertions, of the accused's progress towards rehabilitation was quite modest. Be that as it may, we regard it as significant that that sentence has not been appealed and that the appellant accepts that it was proportionate.

31. In circumstances, such as in the present case, where we have found an error in principle leading to an incorrect sentence, what would normally occur is that we would quash the incorrect sentence and proceed to re-sentence. However, in circumstances where another sentence was made consecutive to that incorrect sentence, and the incorrect sentence formed part of the totality assessment carried out by the judge in imposing the subsequent sentence, we are obliged to look at the overall picture in considering whether it would in fact be appropriate to intervene.

32. The appellant clearly received a significant reduction for totality in relation to the sentence imposed by Judge Aylmer, in circumstances where the sentence now under appeal, which was too high, was taken into account by him in assessing whether it was appropriate to make a reduction for totality. If a correct sentence had been imposed in this case it seems to us unlikely that Judge Aylmer would have felt it necessary to make any adjustment for totality. Accordingly, while the sentence under appeal was too high, the sentence he received from Judge Aylmer was almost certainly too low, although this was no fault of Judge Aylmer's.

33. In those circumstances, we are not persuaded that it would be appropriate for us to quash the present sentence and to re-sentence the appellant. We consider that having regard to the overall gravity of this appellant's offending conduct as between the offences giving rise to the sentence under appeal and the offences for which he was sentenced by Judge Aylmer, the total sentences that he received were at the end of the day fair and just, even

though some of the individual components were determined erroneously. If the appellant had been sentenced on a correct basis the likely result would be that the appellant would remain in a similar or possibly worse position than he is at present given the fact that the additional convictions are relevant convictions and thus aggravate this offence.

34. Therefore, while our approach is unusual, the circumstances mandate such an approach.

35. Accordingly, we will not interfere with the sentence imposed and we dismiss this appeal.