THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Record No.: 148/2016

In the Matter of an Application pursuant to Section 2 of the Criminal Justice Act 1993

Between/

The People at the Suit of the Director of Public Prosecutions

Appellant

- and –

Naila Zaffer

Respondent

JUDGMENT of the Court (ex tempore) delivered on the 28th day of October 2016 by Mr. Justice Mahon

1. This is an application for a review of a sentence pursuant to s. 2 of the Criminal Justice Act 1993.

2. The respondent pleaded guilty to ten counts, of which three were of making a false instrument contrary to s. 25 of the Criminal Justice (Theft and Fraud Offences) Act 2001, three were of using a false instrument contrary to s. 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001, three were of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and one was of attempted theft contrary to common law.

3. On 11th May 2016, the respondent was sentenced to concurrent terms of imprisonment of two and a half years on each of the counts. The sentences were suspended on the appellant entering into a bond in the sum of €1,000 on conditions, including that she would keep the peace and be of good behaviour for a period of two and a half years from the 11th May 2016, that she would place herself under the supervision of the Probation Service for the duration of the bond and attend all appointments with the Probation Service, and that she would keep the Probation Service fully informed of her contact details and follow all lawful instructions from the Probation Service, and that she would fully engage with the Probation Service in dealing with her addiction issues and attend all therapeutic treatment recommended, and that she would undergo treatment at a residential treatment centre.

4. The offences were committed during the period 2007 - 2012 while the respondent was employed as a senior insurance claims official for the Irish Public Bodies Insurance Company. The offences involved the forging of insurance claims by adding an additional claimant to each of seventeen insurance policy claims paid by the Irish Public Bodies. The additional claimant in each case was always one of five persons, all known to the respondent. Cheques then issued in the names of the five persons, and these cheques were then lodged into a number of bank accounts. The total amount of the fraud was €221,600.

5. It is submitted on behalf of the appellant that the imposition of a wholly suspended sentence was erroneous. In particular it is contended that:-

> (i) The learned sentencing judge erred in principle in failing to properly formulate and structure the sentence in accordance with approved sentencing practice as enunciated by the Court of Appeal;
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> (ii) the learned sentencing judge erred in principle in failing to adequately reflect the seriousness of the offences by imposing a sentence of two and a half years imprisonment and suspended it in its entirety;
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> (iii) the learned sentencing judge erred in principle in failing to attach sufficient weight to the evidence that the respondent failed to make restitution to the injured party;
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> (iv) the learned sentencing judge erred in principle in giving undue weight to the mitigating factors in the case and in particular evidence of the respondent's drug habit;
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> (v) in all the circumstances the sentences imposed by the learned sentencing judge were unduly lenient.

6. In the course of his detailed sentencing judgment, the learned sentencing judge suggested that the appropriate approach to sentencing in this case was to treat the eighteen separate transactions which went to make up the total sum defrauded of €221,685 as a single act of offending, rather than as ten separate offences. He expressed the view that the offending was in the middle range *"in terms of its gravity"* and that *"ordinarily it would carry with it a five year term of imprisonment, being somewhere in the mid-range, taking into account the value, the harm and moral blameworthiness"*. He noted that the money defrauded had not been recovered.

7. The learned sentencing judge went on to note the mitigating factors including the plea of guilty, and the fact that a complex trial had been avoided. He remarked on the fact that the respondent had no previous convictions and the fact that the respondent had a drug addiction problem. He asked rhetorically, was there any point imprisoning her? He noted that:-

> *"She has lost her job. While that's not of itself a feature of mitigation, it is definitely a feature or a consequence of what she did, and it is obvious now that she has no reliable source of income. I am told she is no longer employed. She has very good educational qualifications and hopefully she will be able to get employment in the future. But she presents as somebody who needs to get to grips with the issues which are raised in the report, and if she does not get to grips with them, is a candidate for possibly relapsing at some stage in the future. She has indicated and expressed a willingness to attend addiction treatment in order to address the propensity and the detail in the report towards addiction and curtail any possibility of reverting to substance abuse."*

8. The appellant points to a number of relatively recent decisions of this Court, including *DPP v. Walsh* (Court of Appeal, 26th February

2016) in which a two and a half year sentence with the final ten months of that sentence suspended for fraudulent activity committed over a period of fifteen months, at a cost to the victim of €200,000. Reference was also made to the case of *DPP v. Martin Reilly* (Court of Appeal, 19th February 2016) in which this Court upheld a four and a half year sentence for a fraud on an insurance company to the extent of €1m. in order to fund a gambling habit. In general terms, a perusal of these decisions indicate clearly that an actual custodial term is the common outcome in respect of cases of fraud involving substantial sums of money. Counsel for the appellant has suggested that the appropriate sentence in this case falls somewhere between the sentences imposed in *Walsh* and *Reilly*.

9. For her part, the respondent maintains that there was no error of principle in the sentence imposed by the learned sentencing judge. It is contended that the learned sentencing judge gave careful consideration to the possibility of imposing an immediate custodial penalty, but decided against it for the reasons stated. Heavy reliance is placed on the fact that the appellant had a serious drug addiction, and that this makes this case somewhat unusual. It was not a case of the appellant acting from pure greed, but rather, an attempt to cope with her addiction problem. It was also emphasised that the respondent had pleaded guilty at an early stage, was co-operative, showed genuine remorse and had had a difficult childhood. It was also pointed out that the victim was a corporation rather than one or more individuals, and that there was therefore no personal financial loss resulting from the fraud.

10. Section 2 of the Act 1993, so far as it is relevant, provides:-

> *"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.*
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> *(2) An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed.*
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> *(3) On such an application, the Court may either:-*
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> > *(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
> >
> > *(b) refuse the application."*

11. In *DPP v. Byrne* [1995] 1 ILRM 279, O'Flaherty J. indicated that the following principles should apply in relation to a review of a sentence on the grounds of undue leniency:-

> • The onus of proof rests on the appellant to show that the sentence is unduly lenient.
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> • A court should afford great weight to the trial judge's reasons for imposing the challenged sentence, as it is he or she would have received the evidence at first hand. In particular, if the trial judge has kept a balance between the particular circumstances of the offence and the offender, in other words, if he has observed the principle of proportionality, the sentence should not be disturbed.
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> • It is unlikely to be of help for the Court of Criminal Appeal to ask if it would have imposed a more severe sentence itself. The inquiry must always be of the sentence if the sentence was unduly lenient; and
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> • since a finding of undue leniency is required, nothing but a substantial departure from what would be regarded as the appropriate sentence justifies intervention by the Court.

12. In *DPP v. McCormack* [2000] 4 I.R. 356, Barron J., in giving the judgment the Court of Criminal Appeal stated:-

> *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."*

13. A sentencing judge usually enjoys a wide discretion as to the sentence he or she feels is appropriate for an offence and for the offender in question. It is a discretion that this court will not wish to interfere with in the absence of a clear indication that, having regard to all the circumstances including the offenders' personal circumstances, the sentence imposed was significantly lenient or excessive. The fact that this court might consider a different sentence to have been more appropriate will not in itself warrant intervention.

14. The meaning and effect of s. 2 of the 1993 Act is clear. Intervention by this Court pursuant to s. 2 requires a finding by the Court that a sentence is not just lenient, or very lenient, but rather, unduly lenient.

15. In this case, the level of offending is very serious, given that it involved a sum of well over €200,000, and that it was a pre-meditated, well planned and carefully orchestrated fraud undertaken over a fairly prolonged period. There are obvious similarities between this case and the facts in *Walsh*. Even allowing, to the greatest possible extent, for the appellant's strong mitigating factors, including her guilty plea and previous good record and her own difficult personal circumstances, the imposition of a wholly suspended prison sentence is not justified. Serious pre meditated fraud will almost always merit a custodial sentence. The fact that the victim of the fraud is a large corporation rather than an individual may justify a more lenient sentence than would otherwise be the case, but, normally, only the existence of exceptional circumstances should result in an entirely non custodial sentence where there are hundreds of thousands of euro involved. The Court is satisfied that the sentence imposed by the learned sentencing judge was not only lenient but unduly lenient. The Court will consider a replacement sentence in due course.