



THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 270/2017

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

DANIEL POLANSKI

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 29th June 2018

by Mr. Justice Edwards .

Introduction

1. On the 14th of November 2017, the appellant pleaded guilty to one count of possession of articles contrary to s.15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001. On the 28th November 2017, he entered a plea of guilty in respect of one further count in respect of the same type of offence.

2. These guilty pleas were entered on the basis that the full facts of the incident would be given at the sentence hearing.

3. On the 28th of November 2017, the appellant was sentenced to three years and three months imprisonment in respect of counts one and two on the indictment, with both sentences to run concurrently. It should be noted that, in sentencing the appellant, the sentencing judge took into consideration counts 3 and 4 on the indictment, both being offences contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

4. The appellant now appeals against the severity of the said sentences.

Background facts

5. At the sentence hearing, Garda Michael Parry Jones gave evidence of the incidents which are the subject matter of the present case. On the 14th of January 2017, a Ms. Patricia O' Connor parked her car in the driveway at her house at about 3 pm. She locked the car and, upon returning to her car the following day, she noticed that the boot was open. Ms. O' Connor also noticed that some items were missing from her car, including a black USB memory key containing work files.

6. Garda Jones also gave evidence that, on the 5th of March 2017, at approximately 6 am, a Mr Kevin Long parked his car in the underground car park beneath his apartment block. He returned to the car at 2 pm and found the doors were unlocked. Upon entering the car, Mr. Long noticed some items were missing, namely a gate buzzer for his apartment complex car park and a black 64 gigabyte iPod which had his name engraved on the back.

7. On the 7th of March 2017, Garda Jones was on duty with his colleague, Garda Geraghty. At some point during the morning, Garda Jones received information regarding a black Skoda Octavia. He subsequently became aware that the car was parked in Finglas and, subsequent to observing the car, Garda Jones and Garda Geraghty ultimately stopped the car on St. Margaret's Road, Finglas, Dublin 11. The appellant was in the car. Garda Jones gave evidence that he observed a large quantity of property inside the vehicle and, upon searching inside, Garda Jones located three electronic devices, which he described as being capable of being used as signal jamming devices for the purpose of breaking into vehicles. Garda Jones also found a number of other items which he believed to be stolen property.

8. Subsequently, the appellant was arrested and he was informed by Garda Jones that his vehicle and its contents were being seized under s. 7 of the Criminal Justice Act 2006. The appellant was then brought to Finglas Garda Station where he was detained under s. 4 of the Criminal Justice Act 1984. A thorough search of the vehicle was carried out and, as well as the signal jammers previously referred to, Garda Jones also found three torches, two crowbars, an electronic gate buzzer, a pair of binoculars, three penknives, a 64 gigabyte iPod, an electronic gate buzzer and a black and purple USB key.

9. The appellant was ultimately charged in the presence of Garda Jones by Sergeant Nugent. He provided the following replies after caution – in relation to count no. 1, he stated *"It's not a signal blocker, you can buy it on eBay"*; in relation to count no. 2, he stated *"I used most of the stuff for work?"*. In terms of Count No. 3, the appellant replied: *"I didn't know it was stolen when I bought it"*?, and when asked about the contents related to count No. 4: he stated *"I didn't know it was stolen"*?

Impact on the victims

10. Mr Long did not wish to provide a victim impact statement. However, Ms. Patricia O' Connor's statement was provided to the sentencing court. In her statement, Ms. O Connor indicates that since her car has been stolen she is much more cautious as to where she parks her car. She further states that the files contained on the USB contained around 10 years of work. She works herself as a youth worker and, as she receives funding from an external institution, she had to explain to her funders and her colleagues why the files were missing. She was also due to be audited and so had to redo two weeks' worth of accounts due to the USB going missing. She concludes by stating that, had the USB not been recovered by the Gardaí, vital records would have been lost in relation to her work and she would have had to redo most of it herself.

Appellant's personal circumstances

11. The appellant was born on the 28th of May 1984 and was 33 years of age at the time of these offences. He is originally from the south of Poland, a city called Bielsko Biala. He lived there with his parents; his father passed away in 2011, but his mother is still alive

and residing in Poland. The appellant attended primary and secondary school in Poland up until the age of 17, when he went onto study catering and mechanics until he was 21. He arrived in Ireland in or around 2010, at which time he learnt the English language in Dundrum College. He completed a welding course, a FETAC security course and also obtained a licence as a forklift driver.

12. Under cross-examination, Garda Jones accepted that *"slowly but surely, things began to go off the rails for Mr. Polanski and in spite of his employment, by the 26th of December 2015....he found himself evicted from his accommodation and began to live in a car"*. The sentencing court heard that, notwithstanding these difficulties, the appellant has maintained a 5 year relationship whilst in Ireland.

13. The appellant has 72 previous convictions, 56 of them occurring in this jurisdiction. 40 of these convictions are for theft and related offences, with the remainder being road-traffic offences. All of these convictions have been recorded in the District Court. On the 29th of August 2017, he was convicted of numerous offences in the District Court and was sentenced to a cumulative sentence of seventeen months in respect of these offences. At the time of the sentence hearing, he was serving this sentence firstly in Mountjoy Prison before being transferred to Wheatfield Prison.

14. It also came to light over the course of the sentencing hearing that some of the previous convictions in Poland were for burglary and one was for an assault of a peace officer. It was also confirmed during the hearing that the first conviction in this jurisdiction was on the 8th of May 2013, and the most recent offence was committed on the 15th of March 2017 (whilst out on bail).

15. It appears that the appellant does have a pretty consistent work record in Ireland. He worked in the "French Bakery" shop in Finglas until he was made redundant. He also worked in Musgraves as a general operative and worked in one of the German discount supermarkets in Terenure. In 2015, he was working in a "low-cost shop" in Coolock, before injuring his knee whilst working, something which his counsel submitted to the sentencing court led to him being in financial trouble and *"dabbling with amphetamines"*.

16. This dabbling is said to have developed into full blown addiction and the appellant attributes his recidivism to his need to feed his addiction. However, he contends that, since he was apprehended on this occasion and remanded in custody, he has formed a determination to address his addiction issues and to get off the carousel of criminal offending. To that end he has engaged in various substance abuse and other programs offered by the Prison service. These are available to him due to the fact that, in addition to being on remand for the matters with which this Court is presently concerned, he has also been serving overlapping sentences for earlier offences. The sentencing court was provided with a letter from Mr. Keith Brennan, an addiction counsellor from Mountjoy Prison. This letter, dated the 27th of July 2017, confirms that, whilst in Mountjoy, the appellant by that point attended ten counselling sessions with Mr Brennan since the 25th of May 2017. He was said to have attended twenty one such sessions by the date of sentencing. The letter further states that Mr. Brennan has found the appellant to be *"a motivated individual willing to look at and address his addiction issues"* and that he now recognises that *his "addictive behaviour has a destabilising impact upon himself and he has developed his knowledge around both his triggers and cognitive distortions"*.

17. A governor's report was also presented to the sentencing court which indicated that while the appellant had been the such of two p-19's (prison disciplinary charges) in July 2017, apparently when he was still in Mountjoy, but that since being transferred to Wheatfield Prison, the appellant has not had any disciplinary problems, and that he enjoyed "enhanced status" and was working in the print shop in prison.

Sentencing judge's remarks

18. In imposing sentence in the terms outlined at the outset of this judgment, the sentencing judge made the following remarks:

"This Court has heard of Mr Polanski's arrest and in relation to the investigation of this matter, he is a person with 72 previous convictions, 56 of which occurred in the Republic of Ireland and it is noteworthy that 40 of the previous convictions are for theft offences. The offending in Ireland appears to have occurred between the 24th of April 2011 and the 15th of March 2017. Mr Polanski attends before this Court today with a significant number of previous convictions from a separate jurisdiction, but it is noteworthy that the previous convictions in a separate jurisdiction in Poland include theft, robbery, burglary, two burglary offences and assault on a peace officer and these are it is the case that he stands before this Court with a very considerable number of previous convictions."

The Court has heard from Mr Rea that he has details in respect of him having studied until 17 and then continued with his studies until 21. In Ireland, he attended the Dundrum College and studied English language skills. He went on to carry out a welding course and also to receive a forklift driver licence which was useful to him when the economy was in a better condition. In 2015, he was evicted and was living in his car, and during the course of the cross examination of Garda Parry Jones, Garda Parry Jones was of the view that he could not dispute this. Mr Polanski had received a work accident causing damage to his knee and the Court has also heard details in respect of work he carried out in the French Bakery in Finglas. He is somebody who has substance abuse issues and the Court has heard in respect of his misuse of amphetamines. And I have had the benefit of a Governor's report. He has attended 21 sessions, according to the Governor and he has also, I have the benefit of a letter from Mr Brennan, from Merchants Quay, Mr Brennan from the prison in which Mr Polanski is detained. He has been in a long standing relationship and he is somebody who has encountered serious housing difficulties over the years. I should just say in relation to the prison officer's the Governor's report, he is a person who has enhanced status. In relation to his addiction, he has attended 21 sessions in the past year in this and another prison and has linked in with the addiction services in Wheatfield Prison where he is currently incarcerated. I have already referred to the letter I have received from Mr Brennan."

Now, in relation to these matters, the aggravating circumstances are the fact that the nature of the offending, this is the type of offending facilitates criminality, the impact on the victim and on society is also considered to be an aggravating factor. This no doubt caused distress to the two victims this Court has heard of. And I should also say that it is noteworthy that he has a considerable amount of previous convictions, and I say that not, in circumstances where it is this Court's intention to sentence Mr Polanski in relation to matters for which he has already received sentences. However, the fact that he has such a significant amount of previous convictions and in this jurisdiction also, dilutes the mitigation available to him by way of previous good character. With regard to mitigation, he has pleaded guilty and that is always of assistance. It is noteworthy, however, that the items I have referred to, some of which were found in his vehicle, and in those circumstances, he was caught somewhat red handed. He is an enhanced prisoner and he is clearly using his time in prison in a very productive fashion, engaging with the addiction services, and he has skills and he has worked in the past, which I also regard as mitigation, and he is in a long term stable relationship."

Grounds of Appeal

19. The appellant's grounds of appeal, dated the 7th of December 2017, assert that the sentences were excessive, unduly severe and not in accordance with the principles of sentencing in that the learned sentencing judge failed to have any or any adequate regard to:

- i) The plea of guilty entered by the appellant
- ii) The unusual and deprived living conditions of the Appellant at the date of offending
- iii) The social and domestic circumstances of the Appellant at the date of the offending
- iv) The efforts made by the Appellant to deal with his addictions in the prison system as evidenced by the Prison Governors Report presented on the 28th of November 2017 and by the Report from the Addiction Counsellor from Merchants Quay Ireland Services dated 27th July 2017
- v) The addictions of the Appellant at the time of offending
- vi) Further or in the alternate the sentencing judge notwithstanding her comments to the contrary gave undue weight to the previous convictions of the appellant.

Appellant's submissions

20. Despite the various grounds put forward in the appellant's notice of appeal, it seems that they can be divided up into three broad arguments: Firstly it is the appellant's case that the trial judge failed to adequately incentivise the rehabilitation of the appellant on account of his efforts at reform whilst in prison, in line with the principle enunciated in *People (DPP) v Jennings (Ex tempore)*, Court of Criminal Appeal, February 15th, 1999). Secondly, it is submitted on behalf of the appellant that insufficient weight was given to the appellant's personal circumstances, namely his living conditions and social and domestic circumstances at the time of the offending. Finally, the appellant argues that undue weight was afforded to the previous convictions of the appellant and thus too severe of a sentence was ultimately imposed upon him. In advancing this final proposition, the appellant relies on the dicta of the old Court of Criminal Appeal in *DPP v GK* [2008] IECCA 100, whereby it was held that "*the applicant cannot be sentenced again for past offences*"

Respondent's submissions

21. In respect of ground of appeal no. (i), counsel for the respondent relies on the dicta of Finnegan J in *DPP v Kenny* [2011] IECCA 16, as authority for the proposition that a guilty plea is of less merit when the accused person is "*caught red-handed*". In terms of the present case, the sentencing judge noted that the appellant's guilty plea was "*of assistance...it is noteworthy, however, that the items I have referred to, some of which were found in his vehicle, and in those circumstances, he was caught somewhat red handed.*" Thus, the respondent submits that the mitigation afforded to the appellant on account of his guilty plea was properly reduced.

22. In response to grounds of appeal no's (ii) and (iii), it is argued on behalf of the respondent that the sentencing judge did make explicit reference to the appellant's personal circumstances in mitigation and thus no error of principle has been established by the appellant in this regard.

23. Grounds no. (iv) and (v) relate to the asserted failure of the sentencing judge to take into account the appellant's addiction issues and his efforts to deal with these problems whilst in prison. Again, the respondent highlights that these issues were referred to in the sentencing judgment and thus argue that it is difficult to see how the sentencing judge failed to have regard to these grounds.

24. Finally, in responding to the appellant's argument that the sentencing judge placed too much emphasis on the previous convictions of the appellant, the respondent points out that the sentencing judge very properly had regard to the appellant's number of previous convictions, as well as the nature and timing of these offences. Counsel for the respondent seems to argue that the sentencing judge adopted the progressive loss of mitigation approach in terms of the appellant's previous convictions. The sentencing judge, it is submitted, clearly stated that it was not her intention to sentence the appellant in relation to matters he had already received sentences for, in that the previous convictions "*dilutes the mitigation available to him by way of previous good character*". Further, counsel for the respondent also relies on the decision of *DPP v Ulrich* [2011] IECCA 30, as authority for the proposition that previous convictions of a similar nature to the present one can "*be taken into account in the proper construction of sentence.*"

Discussion and Decision

25. At the oral hearing of this appeal, counsel for the appellant indicated that while she was relying on the written submissions filed on behalf of her client, her main complaint was in substance that the sentencing judge failed to sufficiently reward the appellant for his efforts to date at rehabilitation, and failed to sufficiently incentivise his continued and future efforts at rehabilitation.

26. There is no doubt that the offending behaviour in this case was serious, and that the appellant has a bad previous record. He presented as a chronic recidivist, motivated by drug addiction and living a somewhat chaotic lifestyle. By the same token, unlike so many nuisance recidivist criminals motivated by the need to feed their addiction, and who generally commit burglaries, and petty thefts on an opportunistic basis, these crimes were anything but opportunistic. They were pre-planned and executed with some sophistication, the appellant clearly making use of technical skills gained by him in his earlier days when he acquired some impressive technical qualifications and skills. At one time or another he was a welder, a mechanic and a forklift driver, and he is clearly mechanically and technically minded, and indeed gifted in that respect. Regrettably, due to the scourge of drug addiction he has deployed those excellent vocational skills to criminal ends.

27. Counsel for the appellant does not seek to gainsay any of this, and sensibly does not quarrel either with the pre-mitigation headline sentence nominated by the sentencing judge, or with the discount of a year as being appropriate to reflect the mitigating circumstances in the case other than the appellant's efforts at rehabilitation. However, she maintains that this is one of those relatively rare cases where an appellant has done more than simply assert an intention to address his addiction issues. She says that he has at this stage a demonstrated track record of some accomplishment in that regard. There is independent evidence of the high level of his engagement and of the ostensible genuineness of his commitment. He has at this stage gone through many months of drugs counselling, and has impressed his drugs counsellor with his progress. Counsel contends that the progress to date should be rewarded, and its continuation incentivised, and that the sentencing judge's failure to adequately do so represented an error of principle.

28. In the first instance we consider that this was a case where custody could not have been avoided. Moreover, while the appellant was entitled to some discount by way of mitigation for his plea (albeit in circumstances where the case against him was strong) and to take account of his personal circumstances (but ignoring for the moment his efforts at rehabilitation), any such discount was going to be relatively modest. Approached on that basis the trial judge's discount of twelve months from her initial headline sentence of four years and three months is hard to quarrel with.

29. The issue for this Court is whether the discount was in fact adequate when progress towards rehabilitation is factored in. It is very common that persons with drug addictions appeal for leniency on the basis that they claim to have reached a point where they are determined to address their addiction issues and turn their lives around. Regrettably, there is frequently a failure to live up to the promise. In these circumstances judges are right to approach claims of that sort with a healthy degree of scepticism and to look for some indication that these are not just fine words, but that there is some concrete basis for believing that the asserted commitment will be followed through on. However, at the end of the day it is in the interests both of society, and of individual offenders, that they be encouraged to tackle their addiction issues and turn away from crime, and if there is objective extrinsic evidence to support an evinced intention to reform, this should be rewarded and its continuation incentivised. Though this was a finely balanced case, we have concluded that objective extrinsic evidence of a genuine intention to reform did exist in this particular accused's case, and that being so the sentencing judge could and should have done more to reward and support his laudable efforts at rehabilitation.

30. In the circumstances we will vary the sentence imposed in the court below to the extent of suspending ten months of it on condition that the appellant enters into a bond and is of good behaviour for two years following his release. The Court has been made aware that this appellant faces a removal order following his release. We wish to state expressly that the fact of partial suspension of the sentence should in no way inhibit the implementation of that order.