THE COURT OF APPEAL

[190/2017]

Peart J
Mahon J
Hedigan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OR PUBLIC PROSECUTIONS

APPELLANT

AND

JOSEPH WALSHE

RESPONDENT

JUDGMENT of the Court delivered on the 28th day of June 2018 by

Mr. Justice Hedigan

The Appeal
1. On the 10th of May 2017, the respondent was convicted after a 12 day trial in the Circuit Criminal Court on 10 counts of theft that took place over a period of approximately two years. The appellant now appeals against the sentence imposed on the respondent on the basis that it was unduly lenient.

Background
2. The respondent was brought before the Circuit Criminal Court in respect of a charge of 10 counts of theft that were committed between November 2009 to December 2011. The respondent was found guilty of stealing the goods from his employer which had a cost price of €181,532 and had a retail value of €728,494.

3. The respondent was working as a general manager responsible for the stock control of Nevinar Cosmetics Limited from December 2006 until his resignation from the company in December 2011. Nevinar is a company responsible for the distribution of cosmetics in Ireland, including for the high-end French brand Clarins. While Nevinar imported Clarins products from France, the products were stored and distributed on the company's behalf by Pemberton Limited in the United Kingdom. It was part of the respondent's role to oversee the management of the stock held in Pemberton. The respondent had considerable freedom in how he ran the company's business, and he held the complete trust of the Managing Director, Mr Gerry Hickey, who granted him full autonomy in his role and attested to this in evidence.

4. A certain percentage of Clarins goods would be distributed free of charge for marketing purposes, and discontinued or out of date stock would be distributed free of charge to staff or else disposed of. This practice occurs by way of a Free of Charge order or a Purchase Credit Release order. The theft was carried out by the respondent instructing the Pemberton warehouse to remove large quantities of Clarins goods under the guise of these orders. The goods came into the possession of Mr Trevor Bond in the United Kingdom, who paid the respondent for the products. Mr Bond believed he was dealing with Nevinar, as opposed to the respondent personally. Counts 1, 2 and 4 related to Free of Charge orders and the remaining seven courts relates to goods ordered by way of Purchase Credit Release orders. It became clear from the evidence that the stock that was released was not genuinely unsaleable or stock that qualified for Purchase Credit Release of Free of Charge orders. This was apparent from the volume of stock released.

5. The respondent utilised the services of couriers, paid for by his employer, and sent false documentation and emails to secure the release of the goods to Mr Bond in the UK. When the goods where delivered to the UK, instructions were issued to the purchaser, apparently from Nevinar, to provide payment to an Irish bank account. The purchaser was under the impression that payment was being made to Nevinar when in fact the payments were being lodged to the respondent's personal bank account. Nevinar lost the sale of the goods, which had a total retail value of €728,494. During this period of time, €205,000 was lodged into the respondent's bank account.

6. This all came to light after the respondent resigned from his role in Nevinar in December 2011. An audit was carried out investigating suspected excessive Free of Charge orders and Purchase Credit Release orders.

7. The respondent was arrested on the 30th of May 2013 and questioned in Dún Laoghaire Garda Station pursuant to s.4 of the Criminal Justice Act, 1984.

Personal Circumstances
8. The respondent was born on the 5th of August 1967, making him 49 years old at the time of conviction. The respondent lived in Carrickmines, County Dublin when he was convicted and is married with a family. He worked as a general manager for Nevinar Cosmetics Limited from December 2006 to 2011. Prior to that, he worked as a general manager in Pemberton Limited from approximately 1994 to 2006. He had no previous convictions.

Sentence
9. The respondent was sentenced on the 15th of June 2017 after a 12 day trial in the Circuit Criminal Court to 2 ½ years' imprisonment on each count of theft to run concurrently with the final year suspended on the condition that he repay the sum of €181,532 within one year. The court also imposed that the appellant enter into a bond of €100 and to be of good behaviour for the period of his imprisonment and for a further year post release.

10. The court held that the most significant aggravating factor was the breach of trust involved in carrying out the offence. The respondent breached the trust of Mr Hickey, the company Nevinar Cosmetics Limited, and his former employer Pemberton Limited. Further aggravating factors included the degree of extensive planning involved in carrying out such an offence over a two year period. The court also considered the large amount of money involved and the loss suffered by the company.

11. In terms of mitigation, the court considered the respondent's previous good character, absence of previous convictions, his charitable work, and the numerous testimonials provided attesting to the respondent's good nature. The court recognised that the respondent has previously suffered due to the relatively early loss of his father and the ill health of his mother. The court took the respondent's personal circumstances into account and the impact that the sentence would have on his family.

Grounds of Appeal
12. The appellant puts forward the following grounds of appeal that the trial court:

(i) erred in failing to attach appropriate weight to the aggravating factors in this case.

(ii) erred in law in failing to have any or any sufficient regard to the principle of general deterrence in imposing an effective sentence of eighteen months imprisonment.

(iii) erred in law and in principle in giving undue weight to the personal circumstance of the respondent and the other mitigating factors advanced on his behalf.

(iv) erred in law and in principle in deeming a sentence of 3 ½ years to be the appropriate headline sentence for the offending in this case.

Submissions of the Appellant
13. The appellant submits that the trial court did not give appropriate weight to the aggravating factors in this case, in particular the following factors:

(a) The quantity of the goods involved which had a retail value of €740,000 and which were sold by the respondent for €205,000. The appellant refers to O'Malley's Sentencing Law and Practice (3rd edn) which states that:

> *"the harm caused by an offence is one of the principle factors to be considered when assessing gravity and that in turn is the first matter to be considered when determining a proportionate sentence."*

O'Malley also notes that in England and Wales, the amount that is stolen is a key factor in sentencing.

(b) The abuse of trust involved in that the respondent was the general manager from whom the goods were misappropriated and had previously been general manager of the company which warehoused and distributed the goods.The appellant quotes O'Malley who states that:

> *"we are entitled to assume, for example...that employees will act honestly in the discharge of their duties."*

It is submitted that the respondent was in a position to commit such offences due to the high level of trust that his employer had in him and because of the trust reposed in him by his previous employer Pemberton. O'Malley goes on to say that:

> *"Heavy prison sentences are commonly imposed where there has been a persistent pattern of fraudulent conduct and especially where is involved a breach of trust."*

(c) The premeditation and planning involved in the commission of the offences. It is submitted that there was a high degree of planning and premeditation involved in the commission of the theft. The offences involved the deception of a number of people in Pemberton Limited, the courier and freight companies involved, and the purchaser who was under the impression that he was dealing with Nevinar. O'Malley states that:

> *"Planning or premeditation adds to the gravity of an offence because it reflects a higher level of culpability than that of an offender who acts impulsively or opportunistically."*

(d) The length of time, January 2010 to December 2011, over which the offending continued and the frequency of the offending. The offending in this case took place over a period of two years, and only ceased with the respondent resigned from the company. Reference is again made to O'Malley who suggests that the following factors are relevant in sentencing:

> *"1. [Was] it an elaborate fraudulent scheme? 2. To what extent was it practiced on others and with what result? 3. How long did it continue with impunity? 4. How many people were defrauded and how much did they lose? 5. With what degree of skill and contrivance was the fraud conducted?"*

It is submitted that by considering these factors in this case, a high degree of gravity would be suggested.

14. It is submitted that trial court erred in law by failing to have any or sufficient regard to the principle of general deterrence in imposing the sentence that it did. The appellant relies on the case of *DPP v James O'Reilly* (Unreported, CCA 11th December 2007), whereby the court emphasised the requirement for general deterrence in sentencing. It is submitted that in this case, involving large scale theft from an employer, it is difficult to identify some element of general deterrence in an effective sentence of 18 months.

15. It is submitted that the trial court erred in law and principle by giving undue weight to the personal circumstances of the respondent and the factors pleaded in mitigating on his behalf. It was put forward that the respondent had no previous convictions, was of previous good character, and has a family, including a wife and daughter with health difficulties. The respondent also agreed to repay the money that he had unlawfully accumulated. However, it is submitted that undue weight was granted to these factors. The respondent comes from a background of relative privilege, including private education, and was in a secure, well paid position of employment, in which he was granted a high level of autonomy. Some element of addiction or financial need to explain the respondent's motive is absent.

16. The obvious mitigating factor of a guilty plea is not present in this case. A guilty plea is desirable in cases of fraud and in this case would have prevented the need for Mr Hickey, an elderly man, to give evidence over the course of a number of days.

17. It is submitted that the trial court erred in law and principle by applying a headline sentence of 3 ½ years in this case. The maximum sentence for the offence of theft is 10 years. Given that the nature of the theft in this case would fall at the upper mid-range, it is difficult to see how a headline sentence of 3 ½ years is appropriate. The court is referred to the judgment in *DPP v Hawkins* [2014] IECCA 36 whereby it was held that in relation to fraud:

> *"The final sentencing band involving the imposition of a sentence imprisonment of close to the maximum sentence, or the maximum sentence, might justifiably be imposed on similarly serious offenders where the victim or victims are left in real financial distress."*

18. It is submitted that the sentence given in this case does not reflect considerations made by the court in other cases involving theft of large sums from employers, including *DPP v Reilly* [2016] IECA 43, whereby the appellant appealed a 4 ½ year sentence imposed for the theft of approximately €800,000 from insurance clients over a 9 year period. It is therefore submitted that in all of the circumstances of the case the sentence of 2 ½ years with the final year suspended imposed on the respondent was unduly lenient.

Submissions of the Respondent

19. The respondent submits that while, for the most part, he does not take issue with the summary of his offences and the evidence outlined by the appellant, there are a number of points that the respondent wishes to submit:

20. The respondent submits that the appellant's references to the retail value of the goods in question in this case are misplaced. Reference is made to the case of *Johnson & Johnson (Ireland) Ltd. v CP Security Ltd* [1985] IR 362 whereby it was held that the damage caused by theft from an employer is measured by the cost to replace the goods. In this case the relevant sum is €181,532.

21. The respondent submits that the appellant's reference to an "effective sentence" of 18 months imprisonment in their submissions is misleading. This disregards the condition that the respondent must repay the substantial sum of €181,532 within just one year.

22. It is submitted that the appellant's submissions fail to adequately convey the respondent's personal circumstances. At trial, a number of testimonials were made attributing to the respondent's charitable efforts, kindness, and overall good character. The respondent also points out that he had also obtained further employment with a company, which was aware of his offending, but nevertheless provided him a character reference.

23. With regard to undue leniency, the respondent submits that an appellate court should be reluctant to interfere with the ruling of the trial judge. The respondent refers to the case of DPP v Byrne [1995] 1 ILRM 279 whereby it was held that:

> *"the Court should always afford great weight to the Trial Judge's reasons for imposing the sentence that is called in question. He is the one who received the evidence at first hand…he may detect nuances in the evidence that may not be as readily discernible to an appellate court."*

24. It is submitted that the approach of the trial judge was careful, considered and in accordance with law. It is submitted that the trial judge followed the correct approach as outlined in *DPP v Davin Flynn* [2015] IECA 290, by identifying the appropriate headline sentence and then identifying the relevant aggravating and mitigating factors present in the case. The trial judge correctly identified the relevant aggravating factors, those being the breach of trust, the degree of planning, the period of time, and the actual loss together with the loss of potential profits to the company. The trial judge also took the absence of a guilty plea into account. This is not disputed. Having considered these factors, the trial judge came to a headline sentence of 3 ½ years for an offence at the "higher end of the mid range" in this case. The trial judge then moved onto the list of mitigating factors relevant to the respondent, those being the respondent's good character and the extent of the testimonials attributing to this, his family circumstances, in particular the health of his wife and daughter, the emotional difficulties suffered by his family, his continuing employment, his remorse and his acceptance of the Jury's verdict. Having taken the various mitigating factors into account, the trial judge came to a sentence of 2 ½ years with one year suspended. The respondent argues that there is no error in this regard.

25. With regard to the appellant's inability to identify "some element of general deterrence", it is submitted that the sentence imposed was well thought out by the trial judge and that the sentence imposed is a result of balancing the relevant factors in this case. The respondent refers to the case of *DPP v Gordon O'Rourke* [2016] IECA 32, where the court did not feel that the interests of general deterrence always require a custodial element to a sentence. Furthermore, in this case, it is submitted that the appellant is disregarding the significant condition of the suspended sentence that the respondent repay Nevinar in full within one year.

26. The respondent refers to the case of *DPP v McAuley* [2016] IECA 173, where the respondent pleaded guilty to stealing over €100,000 from her employer over a 7 month period. The court imposed a wholly suspended sentence. On appeal, the court held that:

> *"While the sentence imposed was lenient, it was not so lenient as to be outside of the norm, particularly having regard to the fact that this was a first offender who was offering to make full restitution. A sentencing judge must be afforded a significant margin of appreciation in the selection of what is the appropriate penalty in any particular case and we are satisfied that the sentencing judge in this case acted within the margin of appreciation properly to be afforded to him."*

27. In the circumstances of the case, it is submitted that the respondent was entitled to receive a high degree of mitigation, and that the trial judge was entitled to exercise the discretion, in line with sentencing principles, that she did.

28. Thus, it is submitted that the appellant failed to identify any error in law or principle to support the argument that a headline sentence of three and a half years was inappropriate in this case, and therefore, the imposed sentence of the trial court should not be interfered with.

Decision

29. This was clearly a serious case of fraud by an employee against his employer company. It was thus a serious breach of trust. It was planned and executed with considerable skill and ingenuity. It was carried on over a period of over two years. It involved very substantial sums of money being stolen by the respondent from his employer. The company is at a loss of €181,532. The respondent was convicted after a 12-day trial. During its course, Mr Hickey, an elderly man, was forced to give evidence over a number of days.

30. The principles which should guide the Court in an application by the DPP of this nature are well established. In *DPP v. Byrne* [1995] 1 ILRM 279, O'Flaherty J. stated at pp. 286 – 287 as follows:

> *"In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.*
>
> *… it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."*

Later, in DPP v. McGinty [2007] 1 IR 633 Murray C.J. at para. 35 stated as follows:

> *"In [a s. 2 appeal] it is not for this court to decide what sentence it would have imposed in the circumstances but whether the trial judge so erred in principle that his sentence should be quashed as being unduly lenient. The onus is on the prosecutor to establish that this was the case."*

Thus the appellant bears the burden of establishing that the sentence imposed was unduly lenient. The Court does not decide what sentence it would have imposed. It must be satisfied the sentence that was imposed was unduly lenient before it can intervene.

31. It is clear that the learned sentencing judge followed carefully the recommended approach as outlined in *DPP v. David Flynn* [2015] IECA 290. She identified a headline sentence of three and a half years and then discounted for the mitigating factors detailed above. Doing this, she arrived at a sentence of two and a half years and suspended one year on condition primarily of paying restitution in the full amount stolen of €181,532 within one year. We have been referred to quite a number of judgments by the appellant and the respondent but consider the most helpful to be that of this Court in *DPP v. MacAuley* [2016] IECA 173. The facts are quite similar to this case and we note that the sentence appealed was one involving a wholly suspended sentence. The respondent had pleaded guilty to stealing over €100,000 from her employer over a seven month period. On appeal by the Director of Public Prosecutions this Court held that:

> *"While the sentence imposed was lenient, it was not so lenient as to be outside of the norm, particularly having regard to the fact that this was a first offender who was offering to try to make full restitution. A sentencing judge must be afforded a significant margin of appreciation in the selection of what is the appropriate penalty in any particular case and we are satisfied that the sentencing judge in this case acted within the margin of appreciation properly to be afforded to him."*

32. In the Court's judgment the sentence in this case was a lenient one. However we can identify no error of principle in the learned sentencing judge's approach and bearing everything in mind as outlined above, we are not satisfied that it was unduly lenient. The appeal is dismissed.