THE COURT OF APPEAL

Record No. 120CJA/2017

Birmingham J.
Mahon J.
Hedigan J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND–

PATRICK MAHONY

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 5th day of March 2018 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted at Ennis Circuit Criminal Court on the 3rd November 2016 of five counts, three for offences of delivering incorrect returns contrary to s. 1078(2)(a)(iii) and (iv) of the Taxes Consolidation Act 1997, as amended by s. 211 of the Finance Act 1999 for the period January / February 2006, one of failing to file value added tax returns contrary to s. 1078(2)(g)(ii), (iii) and (iv) of the Taxes Consolidation Act 1997, as amended by s. 211 of the Finance Act 1999 and s. 133(a) of the Finance Act 2002 in respect of the taxable period January / February 2008 and one of failure to remit income tax pay related social insurance and levies contrary to s. 1078(2)(i), (iii) and (iv) of the Taxes Consolidation Act 1997, as amended by s. 233(2) of the Finance Act 2001 and s. 160(1) of the Finance Act 2003 in relation to income tax year 2006 on or before the 15th January 2007 being the specified payment date provided by Regulation 28 of the Income Tax (Employments) (Consolidated) Regulations 2001. On the 25th April 2017 the respondent received concurrent sentences of three years imprisonment but which were suspended entirely for a period of three years on certain conditions, and he also was fined the sum of €10,000 with twelve months allowed for payment. This is the appellant's application for a review of the said sentences pursuant to s. 2 of the Criminal Justice Act 1993 on the grounds that they were unduly lenient.

2. Section 2 of the Criminal Justice Act 1993 provides as follows:-

> "2(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 (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
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> (b) refuse the application."

3. The maximum penalty for conviction in respect of each count is a term of imprisonment not exceeding five years and a fine not exceeding €126,970.

4. The respondent was at all material times a director of Boxform Limited, a company based in Ennis, County Clare and involved in the construction industry. In the calendar year of 2007 the company had a turnover of €8.6m. and a workforce of 326. A revenue investigation was prompted by discrepancies in the details of employees seeking social welfare benefits and the end of year p. 35 return from the company. Following contact from the Revenue the company's accountants submitted an amended P35 return with an additional 137 employees named thereon and which carried an additional PAYE / PRSI liability of €861,179 for the year 2006. In respect of the year 2007 the balance due for PAYE / PRSI by the company was €1,072,859. These figures represented, for the most part, deductions made from employees' gross pay, payable to the Revenue by way of monthly returns, but which had not been paid over to the Revenue in accordance with the regulations.

5. A VAT audit was then undertaken by the Revenue in respect of the period January 2006 to April 2008 whereupon additional VAT was found to be due by the company in the sum of €673,024.

6. Therefore, the total unpaid taxes in respect of all five counts amounted to €1,224,339. On a *full facts basis* the loss to Revenue was €2,594,446 excluding statutory interest and penalties.

7. Boxform Limited went into liquidation with an expected deficit to the Revenue in the sum of €2.8m. Subsequent proceedings taken against the company and the respondent by the liquidator saw the respondent and his fellow directors being barred from acting as company directors for a period of five years and being made personally liable for the company's substantial debts. In the course of the liquidation, a sum of €366,000 was paid to the Revenue which went towards offsetting legal costs incurred by Revenue in related proceedings.

8. The appellant contends that the learned sentencing judge erred in principle in:-

> (i) Failing to impose appropriate sentences to reflect the nature of the said offences and the magnitude of the deliberate fraud involved concerning approximately €2,594,000;
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> (ii) failing to reflect in the said sentences the level of culpability of the respondent;
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> (iii) failing to reflect in the said sentences that the fraud involved was detected by officials of the Revenue Commissioners as opposed to a voluntary disclosure by the respondent;
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> (iv) failing to reflect in the said sentences the breach of trust involved in the fraudulent use of value added tax, pay related social insurance and PAYE, being taxes of trust;
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> (v) failing to reflect in the said sentences the fact that no restitution was made by the respondent;
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> (vi) suspending the entirety of the sentences imposed on the counts, the subject matter of the indictment;
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> (vii) given excess credit to the respondent for the perceived mitigating factors present in the case;
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> (viii) give excess credit for the respondent's personal circumstances, and
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> (ix) failing to tailor sentences in accordance with comparative jurisprudence outlined to the court.

9. The aggravating factors identified to the court on behalf of the appellant were as follows:-

> (i) The respondent engaged in wilful fraud of an amount of approximately €2.5m.;
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> (ii) the taxes concerned were taxes of trust namely VAT, PRSI and PAYE;
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> (iii) the fraud was initially discovered in March 2008 by officials of the Revenue Commissioners when former employees claimed on their PRSI contributions to find no appropriate payment records in respect of themselves;
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> (iv) that the respondent directed the company accountant to under declare returns;
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> (v) no restitution was made;
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> (vi) the co-operation by the respondent in the investigation of matters was not to the extent of that reflected in the judgment of the sentencing court, and
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> (vii) the respondent appeared to be the registered owner of at least six properties. This was incompatible with the assertion that there had been no personal gain.

10. In the course of his lengthy and considered sentencing judgment the learned sentencing judge referred to the offences as amounting to *a deliberate act of fraud* which could not be *excused*. He explained the basis on which he intended sentencing the respondent in the following terms:-

> *"There are no separate sentencing regimes for tax or social welfare offences and I refer to DPP v. Begley [2013]. The sentence must be proportionate to the circumstances of the offence and the offender, and due credit must be given for any mitigating factors. I am obliged to take into account any civil penalties already paid or in the course of being paid by instalments. No payments have been made in this case, and no arrangement put in place by you to make any recompense. The court has no role in commenting upon accounting for or reflecting on the fairness or unfairness or otherwise of such tax systems which we are subjected to in this jurisdiction. Therefore the relevant principles to be considered are as follows: the sentence must be proportionate to the claim. A grave offence must be reflected by a severe sentence therefore I must assess the seriousness of the offence to which you have pleaded. I must assess the particular circumstances of the convicted person… I must also consider whether there are any mitigating factors. I have to consider whether there are any aggravating factors…"*

11. It would appear from the sentencing judgment that paramount in the learned sentencing judge's mind in reaching the decision to entirely suspend the three year prison term was the fact that the respondent's source of income from his full time employment in the U.K. would cease if he received a custodial sentence and that this might lead to the loss of his home with dire consequences for his family.

12. The offences in question were very serious. They involved a serious breach of trust on the respondent's part in that substantial sums paid by third parties in VAT and sums deducted from employees' wages were not passed on to Revenue. These funds were never the property of the respondent or his company, and were intended to be paid over to Revenue and it was assumed by those who contributed them to have been so paid. The fact that the funds were used to shore up the company in difficult times are were not used personally by the respondent can in no way excuse the fraudulent activity engaged in by him.

13. A sentencing judge has, in general terms, a wide discretion in relation to sentencing. This court will not normally interfere in the manner in which that discretion is exercised save in circumstances where an error of principle is established. An application for a review of sentence pursuant to s. 2 of the Criminal Justice Act 1993 requires, if it is to be successful, proof that the sentence sought to be reviewed was not simply lenient, but was unduly lenient. In *DPP v Stronge* [2011] IECCA 79, McKechnie J. usefully summarised the principles to be applied when considering a s. 2 application. They are:-

> "(i) the onus of proving undue leniency is on the D.P.P.;
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> (ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;
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> (iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless

the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose; sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different; on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between the sentence imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally.

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

14. It is on the basis of applying those principles that this court has considered the Director's application. It is of the view that the decision to suspend the entire three year term of imprisonment was indeed unduly lenient. A significant element of that term ought to have involved custody, particularly having regard to the substantial sums involved and because the taxes had in effect been paid in trust. The Court is nevertheless satisfied that the headline sentence of three years was appropriate, and was within the discretion available to the learned sentencing judge.

15. That error of principle having been established, it is necessary for this Court to re-sentence the respondent as of today. It does so on the basis of a full recognition of the undoubtedly strong mitigating factors present, particularly the plea of guilty, the lack of previous convictions and the fact also that the respondent is effectively the sole breadwinner for his family and is working hard in the U.K. to provide for them. The Court has also noted that the respondent has now put together the €10,000 to discharge the fine imposed in the lower court and which cannot have been easy for him and his family to do.

16. An appropriate sentence in this case would have been three years imprisonment with up to half suspended. In line with its normal practice, however, the Court will suspend an even greater period in recognition of the fact that the respondent has had to face a second sentencing and that having enjoyed his liberty between the sentencing date in the court below and today he must now cope with losing that liberty for a period of time.

17. The sentence now imposed is one of three years imprisonment with the final two years suspended for a period of two years on similar conditions to those imposed in the court below. In ease of the respondent's family and having regard to the fact that the respondent is now facing a period in custody and the consequential loss of financial support of this dependents the requirement to pay the fine of €10,000 is vacated.