



THE COURT OF APPEAL

Ryan P.
Mahon J.
Edwards J.

Record No 52/16

Bill Nos CW 18/15, CW 19/15, & CW 20/15

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

BETWEEN:

THE PEOPLE OF THE SUIT DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

JAMES McMULKIN

RESPONDENT

Judgment of the Court delivered 10th of November, 2016 by Mr. Justice Edwards

Introduction:

1. In this case the respondent pleaded guilty before Carlow Circuit Criminal Court to two counts of theft, contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on Bill No CW 18/15; one count of theft, contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on Bill No CW 19/15 and one count of theft, contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on Bill No CW 20/15.
2. The respondent was sentenced to two years imprisonment, but conditionally suspended for two years, on each of the counts in Bill No CW 18/15, to run concurrently. In addition, he was further sentenced to two years imprisonment, but conditionally suspended for two years, on the count in Bill No CW 19/15, to run concurrently with the sentences imposed on the counts in Bill No CW 18/15. In addition, the count on Bill No 20/15 was taken into consideration.
3. The applicant now seeks a review of the sentences imposed on the counts in all three Bills pursuant to section 2 of the Criminal Justice Act 1993 (the Act of 1993) on the grounds that the said sentences were unduly lenient.

The Facts

4. The facts of the case can be very simply stated. The modus operandi of these crimes was the same in each and every case. The respondent would attend at a hardware shop, or power tool shop or other equipment retailer and express interest in buying a power tool or piece of equipment on behalf of an absent third party principal such as his son, or his son-in-law, or an elderly neighbour, for whom he was supposedly acting as agent. He would then say he could not complete the purchase without first of all ringing his principal, and would then make a telephone call in the presence of the retailer to the supposed principal, in the course of which the person at the other end would ostensibly agree to the purchase and provide with him with credit card details which he would then furnish in turn to the retailer. The retailer would then process a credit card transaction for the appropriate amount and the respondent would then leave with the goods.
5. In all cases the credit card transaction was provisionally authorised by the credit card company, indicating that the details provided to the retailer related to a legitimate credit card, but was later countermanded following the cardholder discovering, and reporting to the credit card company, that he or she was being billed for a purchase that they didn't make. While the cardholders were re-imbursed, the retailers were in each instance left carrying the loss in circumstances where they had each failed to request and obtain from the respondent the appropriate three digit card security code that would have appeared on the back of the relevant credit card.
6. The losses in the case of the counts on Bill No CW 18/15 were € 380 for a Milwaukee drill and €699 for a Stihl chainsaw respectively. The loss in the case of the count on Bill No CW 19/15, was €1250 for a Stihl chainsaw and the loss in the case of the count on Bill No CW 20/15 was €900 for a Stihl petrol consaw.
7. Following detection of these crimes the respondent claimed at interview, and indeed later in evidence at the sentence hearing, that his accomplice, i.e. the supposed principal at the other end of the telephone, was a Romanian gentleman called "Joe", by whom, following some initial chance encounters, he had been recruit. He said that this Joe has asked him "would you do a few jobs" and that he had simply agreed.

The respondent's personal circumstances

8. The respondent was born on the 23rd of January 1950 and accordingly was just over 66 years of age at the date of his sentencing, and was 64 years of age when the offences were committed.
9. The respondent is married since 1973 and he has two adult daughters. His wife is presently in a nursing home, but was well enough to give evidence on his behalf at the sentencing hearing and did so. The respondent is estranged from his daughters as a result of his acquiring criminal convictions in recent years in these matters, and a number of other matters in Northern Ireland.
10. The respondent worked for more than thirty years as a digger driver and has an impressive employment history with a number of large and well known contractors engaged in motorway and road construction. He had risen to the rank of foreman and was seemingly

trusted and was well regarded by his employers. He worked continuously on a variety of civil engineering projects up until 1989 when he suffered a devastating accident at work. It seems that an iron bar penetrated his skull from a height going through his left eye and out the back of his skull. After treatment of his acute injuries, in the course of which he underwent several surgeries and was fitted with a prosthetic eye at the Royal Victoria Eye and Ear Hospital in Dublin, he seemingly spent a lengthy period of further time recovering from his head injury at the National Rehabilitation Centre in Dun Laoghaire. He has never returned to his former work, the accident precipitating an enforced retirement.

11. Up until his retirement the respondent had never been in trouble. However, all of sudden in 2012, 2013 and 2014 he began committing theft offences across Ireland, including Northern Ireland, identical to, or very similar to, the offences the subject matter of the present proceedings. His involvement was readily detected by police on both sides of the border. In that regard, and for example, the transcript in the present case indicates that on one of the occasions in question he arrived by car at the retailer's premises and parked the car he was driving outside in full view of a CCTV camera. It was then a simple matter for the Gardaí to ascertain to whom the car was registered and to track him down in that way. In this way he rapidly was charged with, and ultimately pleaded guilty to, 52 charges of fraud by false representation in Northern Ireland and was sentenced by Dungannon Crown Court to two concurrent terms of nine months imprisonment, one of those being suspended for three years.

12. The appellant served the nine month custodial sentence (less normal remission) and by his own account found prison to be very hard and unpleasant. Yet within a short time of his release he had become involved again in committing similar offences in this jurisdiction.

The medical evidence before the sentencing court

13. The sentencing judge had before her some notes, but not a report, from the respondent's G.P. who is based at Kill Medical Centre. These indicated

14. In addition, the sentencing judge had before her a report of a Dr C.E. Cassidy, Consultant Psychiatrist dated the 10th of November 2015 concerning the respondent. In the course of that report Dr Cassidy described taking a detailed history from the respondent which included the following history concerning a previous serious head injury:

"Previous Serious Head Injury :

He also reported that in 1989 he suffered a head injury. He had an accident in work. An iron bar penetrated his skull from a height going through his left eye and out the back of his skull. He lost his left eye as a result and has a prosthetic left eye currently. He pops this in and out during the consultation with some inappropriate mirth. He explains that he was in the Eye 85 Ear Hospital in Dublin under the care of surgeon Ms Geraldine Kelly. He explains that he was told that the bar had fortunately missed his optic nerve and jugular vein otherwise he would have died. He was also under the care of a Dr Moriarity there. Following the surgical procedures he spent a significant amount of time in the rehabilitation centre in Dun Laoghaire. He says he had to learn to walk again there. He reports that he received compensation for his injuries. He says that he continues to have constant headaches and pain in his left temple and jaw since the accident. He describes this as "phantom pain".

15. In his quite detailed report Dr Cassidy remarks as follows on the respondent's presentation:

"Current Mental State:

He presents as an elderly man of short stature dressed neatly in a suit and shirt, which he explained were all second hand. He was talkative even garrulous, constantly jocular and inappropriately humorous about quite serious matters in his life. There was no evidence of anxiety, depression or psychotic symptoms. His cognitive function was unimpaired on basic testing. There was no evidence of any dementing process. He had a reasonable knowledge of current affairs and the news.

Insight;

He stated that his problem was "that he had run into these difficulties since he retired from work and meet the wrong type of people and could not say 'no' to them".

Summary & Opinion;

This 65 year old married retired digger and plant driver has been charged with a number of fraudulent offences involving credit cards since 2012. His wife has been seriously ill in a nursing home for several years. His family or origin and his daughters have ostracised him since he was charged with fraud and imprisoned in Northern Ireland.

He himself is one of a family of ten born near Tempo in Co Fermanagh. He has worked all his life in digger and plant works and in motorway construction. He achieved the position of General Foreman in these companies and says he was never sacked or disciplined. He also reports no previous forensic history. He reports that in 1989 he suffered a serious head injury in the course of work when an iron bar penetrated the left side of his skull going through his eye and the back of his skull. He lost his left eye as a result. Following this he required rehabilitation in the rehabilitation centre in Dun Laoghaire.

On assessment and examination there is no evidence of mental illness in the form of depression, anxiety or psychotic symptoms. However, he displays personality characteristics similar to that described in ICD 10 F07; Frontal Lobe Syndrome. In particular he exhibits altered emotional behaviour i.e. shallow and unwarranted cheerfulness (euphoria, inappropriate jocularity). He also exhibits a history of expression of needs and impulses without consideration of consequences or social conventions. He also exhibits circumstantiality and over inclusiveness in his speech.

In my opinion , in view of this presentation of personality in conjunction with a history of serious head injury in 1989, and the onset of offending apparently occurring since he retired in 2010 ; there is a strong possibility that this man suffers from a 'Frontal Lobe Syndrome ' The consequences of his head injury in 1989 needs to be further investigated."

16. Dr Cassidy helpfully provided a note or postscript at the end of his report reproducing the description of Frontal Lobe Syndrome in the section on personality and behavioural disorders due to brain disease, damage and dysfunction in the WHO (World Health Organisation)'s ICD (International Classification of Diseases) version F07. This note was in the following terms:

"This disorder is characterised by a significant alteration of the habitual patterns of pre-morbid behaviours. The expression of emotions, needs, and impulses is particularly affected. Cognitive functions maybe defective mainly or even exclusively in the areas of planning and anticipating the likely personal and social circumstances, as in the so call Frontal Lobe Syndrome. However, it is known that this syndrome occurs not only with frontal lobe lesions but also with lesions to other circumscribed areas of the brain.

In addition to an established history or other evidence of brain disease, damage or dysfunction, a definitive diagnosis requires the presence of the following features;

- Consistently reduced ability to persevere with goal directed activities, especially those involving longer periods of time and postponed gratification;*
- Altered emotional behaviour, characterised by emotional lability, shallow and unwarranted cheerfulness, euphoria, inappropriate jocularity, and easy change to irritability or short lived outbursts of anger and aggression; in some instances apathy maybe a more prominent;*
- Expression of needs and impulses without consideration of consequences or social convention (the patient may engage in dissocial acts, such as stealing, inappropriate sexual advances, or voracious eating or may exhibit disregard for personal hygiene);*
- Marked alteration in the rate and flow of language production with features such as circumstantiality, over inclusiveness, viscosity and hypergraphia;*
- Altered sexual behaviour."*

17. The sentencing judge found the report of Dr Cassidy to be "quite unhelpful", characterising it as "a report that anyone in this room could have written themselves" The trial judge felt it was impossible to reconcile his report with the contents of the notes that she had received from Kill Medical Centre, which had portrayed "a man who is on the brink of suicide, who is having difficulty dealing with day to day things in his life". The sentencing judge expressed the view that "They don't marry".

18. While we do not have to determine for the purposes of this appeal whether or not that was a fair assessment on the evidence, it bears remarking upon that Dr Cassidy was only seeing the respondent for the purposes of a medico-legal report and not with a view to treatment. He had not been the respondent's treating doctor at any time and his report made clear that he was operating solely on a history given to him by the respondent. In circumstances where he did not have full information he could offer no more than a provisional diagnosis and was not prepared to go further than saying that "there is a strong possibility that this man suffers from a 'Frontal Lobe Syndrome'" and that "[t]he consequences of his head injury in 1989 needs to be further investigated" However, and with a view to trying to firm up on the provisional diagnosis of a likely frontal lobe syndrome that he was offering, Dr Cassidy had gone on to recommend that the respondent's G.P. notes be requested to obtain a detailed account of the head injury, and also that any reports on radiological investigations following on from that head injury should be requested. In addition, he had recommended that a collateral history be obtained from a relative who knew the respondent well both before and after the head injury in 1989.

19. Where Dr Cassidy's report was perhaps legitimately to be criticised is that it does not indicate what the relevance of a diagnosis of frontal lobe syndrome, assuming it was capable of being firmed up on, might have been in terms of the accused's moral culpability for the offences that he had committed. It seems implicit in Dr Cassidy's report that frontal lobe syndrome has the potential to diminish a person's responsibility for certain of his or her actions, but the extent or degree to which that might be true, even in the abstract and without reference to the particular case, was not discussed or indicated.

20. Regrettably, the issue of possible frontal lobe syndrome, and its implications, does not appear to have been further progressed over the next two months, beyond a letter being written to the G.P., which had not yet yielded a full copy of the clinical records, and the obtaining of an appointment with another doctor, a Dr Brassil of Southern Health Social Care Trust. Accordingly no further information was available to the sentencing judge.

21. Counsel for the respondent addressed the sentencing judge when the case was called and was candid about that deficiency. Referring to the fact that no further report had yet been obtained, he canvassed with the court the possibility of the case being put back for some weeks to a date in March 2016 to be dealt with before a different judge when the court would be sitting in Cavan. He said:

"The 1st of March we're back in Cavan before Judge Aylmer and I have no doubt that at that stage I should at least have at least the period between today and March I should have some formal report dealing with the medical reports and his condition in subsequent to the injuries. It's a bit of a mess. I'm sorry, Judge, that if I I should really be in a better prepared position but unfortunately I'm not in a position to fully outline what the plea in mitigation should be in the absence of that report"

22. The sentencing judge was not disposed to put the matter back and she proceeded to deal with the matter.

The sentencing judge's remarks

23. In the course of sentencing the respondent the sentencing judge commented as follows, and there were the following exchanges:

JUDGE: Well, this is firstly a very unusual case in that this man having reached the age of 65 years of age and has had no criminal convictions up to in or around well, the first before 2014 when the first offence was 2012, actually the end of 2012, and since then he's gone on to have 52 previous convictions and now before me there is a number of counts from different counties all charged here he was arrested here and charged in this jurisdiction in this circuit. All each and every one of them are the same sort of offence and each one is using a credit card which he receives the number over the phone and a PIN number isn't given. I take into account his family circumstances, the fact that this man has never been in trouble before 2012, he made admissions to gardai and his early plea, and his indication that he is always going to plead to matters which will come up in Cavan next week or the week after. Hard on his family, [for] who[m] this man was a trusted member of society, a trusted father, a trusted husband and then he turns into a thief and a fraudster. His wife gave heartrending evidence that he was a great father, a great worker and that this has had a terrible effect on each and every one of them. He's ostracised by his family and she says he's easily led and that's the worrying part of this, that he is easily led. He seemed to have an awful time in prison and he's terrified of going back to prison. Yet

MRS McMULKIN: Can I say something, Judge?

JUDGE: Yes, you may.

MRS McMULKIN: He has said that if he again has to go to prison he'll commit suicide before he'll go back to prison.

JUDGE: "Yes. I have before me a report of Dr Cassidy, which I have to say I find quite unhelpful. It's probably a report that anyone in this room could have written themselves. It wasn't very helpful and then I look at the reports from Kill Medical Centre and as a the complete opposite is portrayed in these reports where it portrays a man who is on the brink of suicide, who is having difficulty dealing with day to day things in his life. They don't marry. They don't marry and the reports from the psychology services are dated 2012. This is made in 015. It's hard to balance them. However, I think I have to give the accused the benefit of the doubt and in doing so it appears he does know he's probably suffering from some psychological dysfunction on which up or down, I don't know. He doesn't appear to me to be a man with heightened emotional, as in that he's over exuberant. He certainly didn't appear that way to me today and there was no inappropriate actions at all in this Court. However, I'm not a doctor so I'm not going there. I have to look at the offences. The offences are on the lower end. However, then when you marry them with the fact that there are 52 previous offences, they go into a higher status. The amount of money involved is not huge in these three offences. Luckily, he didn't get the chainsaw valued at €2,000. There's a 900, 380, 215, 699 oh, and there is 1,250. So, they're on the lower end of the scale. However, society has to be protected from this and in the circumstances it appears to me, taking all the mitigating and aggravating matters into account, the appropriate sentence in this case is two years' custodial sentence. However, pursuant to section 99, having considered all that the matters and in particular the fact that his wife said, "I need him" and she is a woman who hasn't been well and who is living in a home, I'm going to give him a chance and I'm going to suspend that custodial sentence for two years on condition he be of good behaviour and keep the peace, that he attend at the probation and welfare services, do all matters directed by them, including treatment, counselling, and any other matters they recommend. A bond of €100."

The grounds of appeal.

24. The appellant, in contending that the sentences were unduly lenient, makes two main complaints.

25. It is complained first of all that the sentencing judge erred in placing the offences at the lower end of the scale. In doing so, the appellant says, the sentencing judge failed to adequately take into account the significant aggravating factors in the case. The appellant points in that regard to the fact that the offences occasioned not insignificant losses to the retailers concerned; to the fact that the sheer number of identical offences both here and in Northern Ireland is indicative of a systemic type of offending i.e., that the crimes were the subject matter of a certain amount of pre-planning and organisation and were not opportunistic; and to the fact that the respondent has previous convictions in Northern Ireland for 52 similar instances of offending and had served a sentence of nine months imprisonment there.

26. Secondly, it is complained that the sentencing judge attached undue weight to mitigating factors. In particular, it is suggested, the court was swayed by the claim that the respondent's wife "needed him". It was submitted that where the respondent's wife resides in a nursing home in Kildare and the respondent resides outside the jurisdiction, in Northern Ireland, the extent to which it can be said that the respondent is a carer for his wife is very limited. Moreover, it is said, the claim that he is needed to care for his wife was not supported by any medical evidence or documentary evidence from her day to day carers. It is also complained that the court erred in approaching mitigation as a separate and distinct matter to rehabilitation.

Discussion

27. The assessment of the seriousness of any offence is a complex process as this Court has previously outlined in its judgment in *The People (Director of Public Prosecutions) v Shaun Kelly* [2016] IECA 204. Seriousness is to be measured with reference to culpability and harm done. Moreover, in the assessment of culpability a court must be concerned both with intrinsic moral culpability and the extent to which that is increased (or, occasionally, diminished) by the actual behaviour and circumstances of the accused in committing the offence.

28. The intrinsic moral culpability inherent in theft as a crime is always significant in circumstances where it cannot be committed recklessly or negligently. Rather a theft is always intentional and committed with deliberation. That having been said a theft, albeit intentional and deliberate, can be committed opportunistically and without premeditation. However, in this case the appellant is right to point to the planning and pre-meditation involved in the present offences, and indeed the systemic nature of the repeated commission of similar offences, as *prima facie* aggravating the intrinsic moral culpability associated with them.

29. Moreover, the appellant also rightly points to the harm caused to the retailers who suffered financial losses, which were appreciable.

30. We agree therefore that in the normal course of events it would not be correct to characterise offences of this variety committed with the aggravating features ostensibly present in this case, and involving the harm done in this case, as being at the lower end of the scale of seriousness.

31. However, this might not be correct if there were other circumstances tending to reduce the accused's moral culpability. If, for example, the evidence established the existence of a medical condition tending to significantly diminish the accused's responsibility for his offending behaviour then a court would also be required to take those circumstances into account as something tending to move the needle on the notional scale of seriousness in the other direction.

32. The sentencing judge in this case was faced with situation where she had some medical evidence before her, but less than satisfactory medical evidence, that the respondent's responsibility for his actions in this case might have been diminished by a possible Frontal Lobe Syndrome as classified in the W.H.O.'s ICD 10 FO7. While, had the judge been minded to do so, she would have been justified in acceding to the defence's application to adjourn the sentencing pending receipt of further and better medical information, she opted not to do so and to proceed instead by giving the respondent "*the benefit of the doubt*" on the basis that "*he's probably suffering from some psychological dysfunction on which – up or down, I don't know.*" She added: "*However, I'm not a doctor so I'm not going there.*"

33. Once the judge had decided to give the respondent that "*benefit of the doubt*", there were three possible ways in which she could have reflected that. First, she could have treated the factor as bearing solely on culpability and determined on a lower headline

sentence than she might otherwise have done. Secondly, and in the alternative, she could have treated the matter as pure mitigation and have given a greater discount for mitigation than she would otherwise have done. Thirdly, she could have treated this factor as operating both as somewhat reducing culpability and also as somewhat providing mitigation, and reflected this by a combination of a somewhat lower headline sentence and a somewhat greater allowance for mitigation. Regrettably, from the perspective of a reviewing court, the sentencing judge did not indicate her preference and intentions in that regard. Rather, without indicating her thinking, or how she was intending to give effect to her stated intention of giving the respondent "the benefit of the doubt" on the medical issue, the sentencing judge proceeded immediately into a consideration of gravity of the offences.

34. The sentencing judge did initially characterise the offences as being "on the lower end" of the scale, but seems to have been basing her assessment at that point solely on the intrinsic moral culpability they attracted, because she then went on to add "*However, then when you marry them with the fact that there are 52 previous offences, they go into a higher status.*"

35. She then proceeded to consider harm done and commented "*The amount of money involved is not huge in these three offences.*"

36. After careful consideration we find no error in the trial judge's approach to the assessment of the seriousness of the offences. The scale of available penalties ranged from non-custodial options to a maximum sentence of ten years imprisonment plus a fine. The sentencing judge determined that the offences, before any allowance for mitigating factors, merited a headline sentence of two years imprisonment in the particular circumstances of this case. This determination, while arguably a lenient assessment, was not so lenient as to have been outside of her legitimate margin of appreciation.

37. The sentencing judge then proceeded to take account of the mitigating factors that she had earlier identified in her judgment. Principal amongst these were "*his family circumstances, the fact that this man has never been in trouble before 2012, he made admissions to gardaí and his early plea, and his indication that he is always going to plead to matters which will come up in Cavan next week or the week after.*" The judge went on to note that it was "*[h]ard on his family, [for] who[m] this man was a trusted member of society, a trusted father, a trusted husband and then he turns into a thief and a fraudster. His wife gave heartrending evidence that he was a great father, a great worker and that this has had a terrible effect on each and every one of them. He's ostracised by his family and she says he's easily led and that's the worrying part of this, that he is easily led. He seemed to have an awful time in prison and he's terrified of going back to prison.*" The judge said that having considered all matters "*and in particular the fact that his wife said, 'I need him' and she is a woman who hasn't been well and who is living in a home, I'm going to give him a chance*"

38. While the sentencing judge's decision to reflect the mitigating circumstances in the case by suspending the sentence of two years that she had otherwise determined upon, and thereby in her words to "*give him a chance*", was unquestionably lenient, and indeed very lenient, we are not satisfied that it was so extraordinarily lenient as to represent a clear divergence from the norm and an error of principle as such. We are not therefore prepared to uphold the complaint that the judge gave too much weight to the mitigating factors in the case.

39. Moreover, in circumstances where the sentencing judge had considered it appropriate that the respondent should have the benefit of some degree of doubt on the issues raised in the medical evidence, unsatisfactory though that evidence was, we consider that the lenient headline sentence determined upon, and the lenient ultimate sentence imposed, can both be more readily be justified than if those circumstances had been absent.

40. We therefore dismiss the application for a review.