THE COURT OF APPEAL

Ryan P.
Birmingham J.
Sheehan J.

314CJA/12

In the matter Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

v

Patrick Monaghan (Drogheda) Limited

Respondent

Judgment delivered on the 17th day of November 2014 by Mr. Justice Sheehan

Introduction
1. This is an application by the Director of Public Prosecutions for a review of the sentence imposed on Patrick Monaghan (Drogheda) Limited pursuant to s. 2 of the Criminal Justice Act 1993.

2. On the 1st May, 2012, the respondent pleaded guilty to an offence contrary to ss. 12 and 77(9)(a) of the Safety, Health and Welfare at Work Act 2005, namely failure as an employer to manage and conduct his or her undertaking in such a way as to ensure so far as was reasonably practical that, in the course of the work being carried on, individuals at the place of work (not being his or her employees) were not exposed to risks to their safety, health and welfare.

3. The respondent was fined €25,000 and directed to pay the sum of €5,290.55 by way of expenses with distress in default.

4. The maximum penalty for this offence on a body corporate is a fine of €3 million.

Background
5. The accident which gave rise to the prosecution in this case happened at Town Quay in Drogheda, Co. Louth on the 10th November, 2009. Town Quay is a port area which at that time had a long established public right of way. The respondent, a stevedoring company, was loading timber for telegraph poles onto a lorry from four separate stacks which had been unloaded from a ship and left on the quay close to each other.

6. The Court was told that there were various sightings of a man with his three year old child walking along the quay and coming to stand in the vicinity of one of the stacks of timber beside a single pole lying on the ground. Initially, the child held his father's hand as he walked down the length of the pole, but then wanted to walk on his own. As he got close to the end of the pole the stack beside him was accidentally tipped by a company employee who was trying to load poles from another of the stacks. The intertwined stacks began to collapse and the poles rolled forward. One of these poles hit the child on the legs before rolling on to his chest and crushing him. The child was taken to hospital but tragically did not survive the accident.

7. An inspector from the Health and Safety Authority told the Court at the sentencing hearing that the practice of having poles overlap from one stack to the next was dangerous as was the lack of chocking or wedging of the outermost poles of the stack using chocks. He said that only one of the four stacks on the quay had vertical stacks to prevent the stack from collapsing.

8. The Inspector went on to say that while the respondent had carried out a risk assessment for the stacking and unloading and carrying of timber poles at a second premises from which it also worked and which was a closed quay, it had not done so in this situation to take account of the public area associated with Town Quay. He said no exclusion zone had been established and enforced by the respondent while the loading operation was being undertaken and he outlined a number of suitable systems that could have been employed by the respondent.

9. The respondent was described as a substantial company with a long history of stevedoring but one which had been obliged because of the recession to reduce its workforce from 40 employees in 2006 to 10 in 2012.

Grounds of appeal
10. The Director of Public Prosecutions submitted that the sentencing judge had erred in law and in fact by imposing an unduly lenient sentence which represented less than 1% of the court's jurisdiction. In particular, the trial judge erred in failing to give sufficient weight to the aggravating factors and in giving excessive weight to the mitigating ones. The Director outlined the following matters as aggravating features:-

> 1. The failure to put in place an exclusion zone effective to ensure that members of the public did not gain access to the area where these works were undertaken.
>
> 2. The failure of the respondent to employ chocks while carrying out the works in question.
>
> 3. The failure to put in place, by way of a supervisory employee designated for that purpose, the use of signage, the use of barriers or by way of a combination of the foregoing the exclusion zone in question.
>
> 4. The failure of the respondent to manage and conduct the work then being undertaken by the provision of adequate and proper stacking methods and techniques to include the use of barriers/chocks and the avoidance of the intertwining

of stacks of poles.

5. The failure of the respondent having extensive lengthy and particular knowledge and experience of the works being undertaken to take the measures in question or any of them.

6. The fact that the failures in question both severally and in combination led in this case to physical injury which in turn led to the death of a child of tender years.

7. The nature, quality, extent, duration and consequences for the family of the victim of the injuries suffered by him as a consequence of the offending.

11. The Director submitted that excessive weight had been given to the following mitigating factors:-

1. The plea of guilty.

2. The level of cooperation offered by the respondent.

3. The expression of remorse offered by the respondent.

4. The fact that a public liability policy was in force and that proceedings had been settled indicating the respondents' attitude to the matter.

5. The fact that the respondent had no previous convictions.

12. While the respondent filed detailed replies to each of the appellant's grounds of appeal, it also raised a preliminary issue contending that the application to review was made outside the permissible time limit and was therefore statute barred.

13. The preliminary point arose in circumstances where the Director of Public Prosecutions purported to effect service of the notice of application for a review of sentence by serving same on the respondent solicitor who declined to accept service of same. The issue that arises for this Court's consideration is whether the respondent had been correctly served with a notice of the application within the prescribed time limits and in accordance with ss. 2 and 10 of the Criminal Justice Act 1993. Section 2 of the Criminal Justice Act 1993 (as amended) provides:-

"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 Criminal Appeal to review the sentence.

(2) An application under this section shall be made, on notice given to the convicted person, within 28 days [or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine,] from the day on which the sentence was imposed.

(3) On such an application, the Court may either –

(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.

(4) Section 6 of the Prosecution of Offences Act, 1974 (which prohibits certain communications in relation to criminal proceedings), shall apply, with any necessary modifications, to communications made to the persons mentioned in that section for the purpose of influencing the making of a decision in relation to an application under this section as it applies to such communications made for the purpose of making a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings."

14. Section 10 of the Criminal Justice Act 1993 provides:

"10(1) a document required by section 2 or 4 of this Act to be given to a convicted person may, subject to subsection (3), be so given –

(a) by delivering it to him or to his solicitor,

(b) by addressing it to him and leaving it at his usual or last known residence or place of business or by addressing it to his solicitor and leaving it at the solicitor's office,

(c) by sending it by registered post to him at his usual or last known residence or place of business or to his solicitor at the solicitor's office, or

(d) in the case of a body corporate, by delivering it, or sending it by registered post, to the secretary or other officer of the body at its registered or principal office.

(2) For the purposes of subsection (1) the solicitor retained to appear on behalf of the convicted person at his trial shall be deemed to continue to be retained on his behalf unless he is discharged by the Court of Criminal Appeal.

(3) A document required by section 2 or 4 of this Act to be given to a convicted person shall be given personally to him if he was not represented by a solicitor at his trial or if his solicitor has been so discharged."

15. The respondent submits that the key question to be determined is whether s. 10(1)(d) which provides for service in the case of a body corporate is to be read as directing the one and only manner of service in respect of a body corporate or ought to be read as merely prescribing an additional manner further to service in line with s. 10(1)(a) to (c) of service in respect of a body corporate.

16. The respondent noted that s. 18(c) of the Interpretation Act 2005, provides that:-

> "Person shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly."

17. The respondent submitted that such a contrary intention was evident in s. 10 of the Criminal Justice Act 1993, which specifically prescribes the manner in which a body corporate is served, stating "in the case of a body corporate..." Therefore the other methods of service outlined in s. 10 pertaining to a person or the relevant pronoun cannot be interpreted as including a "body corporate". Therefore where the respondent is a body corporate, service of the notice of application must be made to the body corporate's registered or principal office. In circumstances where the notice of application was not served on the respondent at its registered or principal office within the time period allowed for in s. 2(2) of the Act of 1993, the application is statute barred.

18. The Director maintained that there were four modes of service available for service on a convicted body corporate and further maintained that even if this was not correct then the Court had a discretion arising out of its inherent jurisdiction to deem the service good and the Court should exercise this discretion in favour of the appellant.

Conclusion

19. The Court has considered the submissions made on behalf of the appellant and the respondent and also notes the correspondence between the solicitor for the respondent company and the Director. The Court notes that the solicitor for the respondent company declined to accept service at a point when there was still time for the Director to affect service in accordance with s. 10(1)(d) if that was deemed prudent.

20. It appears to the Court that the structure of s. 10 of the Criminal Justice Act 1993 provides for different modes of service in respect of a convicted human person as opposed to a convicted body corporate. Section 10(1) of the Act of 1993 provides three modes of service for a convicted human person and one for a person convicted as a body corporate.

21. The Director submits that there are four methods available for service on a body corporate. The Court is unable to agree with that view and in light of s. 4 of the Interpretation Act 2005, it cannot be said that s. 18(c) overrides the clear meaning of section 10(1). Accordingly the Court's view is that the service of the notice of application for review of the respondent's sentence does not comply with s. 10(1)(d) of the Act of 1993 and holds that the application on behalf of the Director is statute barred.

22. The Court also wishes to point out that it is not ruling definitively on the question of whether or not it has a discretion in this matter arising out of its inherent jurisdiction. The Court is of the view that it would appear to be questionable whether in light of specific statutory provision which the Court has held to apply, that there is a capacity for it to waive that aside by relying on or invoking an inherent jurisdiction. However, whether inherent jurisdiction exists or not, is something that this Court is not going to now endeavour to rule on definitively. It is sufficient for the Court to say that, having regard to its ruling, it would not be appropriate even if there were some such jurisdiction for the Court to apply it in the particular circumstances of this case and accordingly the application falls to be dismissed on the ground of inadequate service.