THE COURT OF APPEAL

Birmingham
Mahon J.
Edwards J.

199/12
234/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V
Derek Floyd

Appellant

Judgment of the Court (ex tempore) delivered on the 16th day of December 2014, by Birmingham J.

1. In this case the appellant appeals against the severity of two sentences of imprisonment that have been imposed upon him. The first sentence that the court is concerned with was imposed on the 21st May, 2012 and on that occasion in the Circuit Court he was sentenced to a term of six years imprisonment with one suspended. That was on the basis of two sentences, each of three years which were to be consecutive to each other with as I say, the last year to be suspended. That sentence was imposed following a conviction of the appellant on fifteen counts of making incorrect VAT returns and twelve counts of claiming VAT rebates to which he was not entitled. The sentencing process followed a lengthy trial which concluded on the 21st March, 2012, with the jury bringing in verdicts of guilty on the count to which I have referred.

2. The maximum sentence on each of the counts was one of five years imprisonment. The facts of the case can be summarised as follows:

> "The applicant obtained registration as a sub contractor getting a C2 card from the Revenue. This enabled him to be paid by principle contractors in full that is without deduction of relevant contract tax by principle contractors. However, during the period in question, 2001 to 2003 …."

and I pause to say that that represented fifteen VAT periods, each of two months in respect of which the offending continued,

> "…. he allowed his C2 card to be used by others so that unregistered subcontractors could be paid gross, that is to say without deduction of tax by the principle contractor. These principles paid Mr. Floyd in his invoices. He then cashed the cheques, took his agreed cut and then passed the balance over to the intermediaries.
>
> After the first six months of the enterprise, he opened a bank account and put the payments and the receipts through his bank account. The withdrawals from the intermediaries were also reflected in the bank account. As he was obliged to account for VAT on these sales, he arranged to be provided with, or he was provided with, fictitious invoices in respect of fictitious supplies to him so that he could claim input credit to offset the VAT Liability of sales. In a number of instances he went further than merely offsetting the sales liabilities and claimed refunds. The amount of credits claimed resulted in him obtaining refunds which were very significant in some instances."

3. This summary is taken from the judge's remarks when passing sentence. However, it is helpful to read on a little for reasons which will become apparent as it is relevant to one of the arguments relating to the principle contention made as to the appropriateness of sentence imposed.

> "For example in the period May/June 2002 he claimed a refund of €156,136 and in September/October 2003, a sum of €143,683. The accused's fee for his involvement in the scam was VAT plus 10%. I recall some evidence from the trial that he complained that others in Dublin were in fact getting 15%. In evidence this morning, the Revenue Investigating Officer Mr. Downey said that the total refunds claimed amounted to €684,000 in respect of which Mr. Floyd received €415,536 broken down in terms of actual cheques received of €388,951 and offset against other tax liabilities of €26,585 and that refunds claimed of €267,000 were actually refused by the revenue. Mr. Downey said that close to €16 million went through the accused's bank account in July 2001 and 2004 and that, taking into account he was not using the bank account for the first six months for the operation and adjusting for VAT, he estimated that the loss to the Revenue into the black economy was in the region of €5.25 million."

4. The summary was read on beyond what was actually required because the last sentence that was read there, with its reference to €16 million through the accused's bank account and the reference to €5.25 million going into the black economy, is central to one of the major arguments that it presented.

5. A number of arguments are advanced on behalf of the appellant as to why the sentence should be regarded as too severe. It is said that he was not the instigator or prime organiser and it is said that a Revenue witness accepted that to some extent he was left as the fall guy in all of this. It is said that misleading figures were relied upon at the sentence hearing and that is with reference to the €15/€16 million going through the accounts. It is this point that is really the core of the appeal on this first sentence and certainly that is the point that is pressed to day in oral submissions.

6. It is the case that here we are dealing with VAT refunds wrongfully claimed amounting to €684,000 and that the VAT element of the transaction was €1.65 million. Counsel on behalf of Mr. Floyd has said that what has happened here is that he is being sentenced for offences other than those that he was convicted of and that the sentencing judge was wrongly led to have regard to these figures by the way in which evidence was adduced by the prosecution.

7. The question of confining the trial judge to the specifics of the convictions or the pleas was a matter that was in issue in *DPP v Gilligan* [2003] 11 JIC 1202 and there, at p. 91, McCracken J. commented:

> "While this court accepts the reasoning in *Reg. v. Kidd* [1998] 1 W.L.R. 604, quite clearly a sentencing court cannot act in blinkers. While the sentence must relate to the convictions on the individual counts, and clearly the applicant must not be sentenced in respect of offences with which he was neither charged nor convicted and which he has not asked to be

> taken into account, nevertheless the court in looking at each individual conviction is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction. Indeed, if that were not so and these were treated as isolated incidents occurring at six month intervals, it might well be that the proper course for the court to adopt would be to impose consecutive sentences. The court does, therefore, accept the basic principle behind the argument of counsel for the respondent. However, the court does think it important to emphasise that in many cases there may be a very narrow dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, which may include evidence of other offences, in determining the proper sentence for offences of which there has been a conviction. It is important that courts should scrupulously respect this dividing line."

8. In this case, it was always clear that the actions of Mr. Floyd formed part of the wider picture and always clear that he did not act alone and did not act for his own purposes only. It seems to this Court that the sentencing judge was entitled to have Mr. Floyd's offending put in context and that is what occurred here. Insofar as the Court of Criminal Appeal in *Gilligan* spoke about the dividing line, it is the view of this Court that on this point the sentencing judge stayed very definitely on the correct side of the line. So the argument in that regard is rejected.

9. There is however one matter that causes the Court concern in relation to this sentence of imprisonment imposed in respect of what might be described as the VAT offences.

10. When it came to the operative part of the sentence, the sentencing judge had this to say:

> "The appropriate way that this sentence should be structured having considered all the factors, the gravity of the offence, the circumstances, mitigating and aggravating, the personal circumstances of the accused, the testimonials which I have read, it seems to me that the appropriate way of looking at these 27 offences is to treat them in the round as a totality and assess the sentences in terms of the totality of those 27 offences arriving at a proportionate sentence and it seems to me that the appropriate sentence is a sentence of five years imprisonment and what I propose to do is in relation to count 17 which is the highest repayment claim on €56,136 to impose a sentence of three years on that and in respect of count 27 which is a repayment claim of €143,682 to impose a sentence of three years on that, suspending the final year and making it consecutive on count 17."

He then, in respect of the remaining counts, imposed a sentence of three years in respect of all of counts and made them concurrent.

11. The trial judge thus had indicated that he regarded the appropriate sentence as one of five years imprisonment, but having said that proceeded to impose not a sentence of five years imprisonment, but one of six years imprisonment albeit then proceeding to suspend the last year.

12. It is the Court's view that that does constitute an error in principle. It has to be recognised that the suspended sentence is a real sentence and one has to consider this. Suppose it were the situation that in the future for some reason, the suspended portion were to be reactivated, if that was the case, then the effect of this would be that the individual would find themselves serving a sentence longer than the sentence that had been identified as the appropriate one and in the Court's view, that cannot be correct. For that reason the court will substitute for the sentence of six years with one suspended, a sentence of five years imprisonment, but also with one suspended. It seems to be the situation that the trial judge took the view that it was desirable that a portion of the sentence should be imposed as a suspended sentence so that it would be in place following the appellant's release. That was the ambition at the time and it was felt that that would achieve a desirable objective, so for that reason, and following that logic, the court will substitute for the sentence of six years with one year suspended, a sentence of five years with one year suspended.

13. Coming then to the second offence, in this case on the 3rd October, 2013, a sentence of three years imprisonment was imposed and that was consecutive, as it had to be by statute, to the sentence then being served. That sentence of three years imprisonment was imposed in respect of the offence of handing stolen property. It was an offence where the maximum penalty available to the sentencing court was one of ten years imprisonment.

14. The facts may be briefly stated. The gardaí were aware that silage wrap was being sold at what seemed to be below market price in east Clare in mid 2011. The silage was traced back to ITW, a company in Gorey in Wexford. Initially, when contacted, the company was not worried because it believed that it had been dispatched to established clients, Roche Limited in Limerick.

15. However it subsequently turned out that what purported to have been an order from Roche & company that had been placed with the Gorey Company was not really from Roche at all and what had happened was that the person placing the order requested that the consignment be sent to an address in Co. Meath and from there the load was transferred to Tulla in Co. Clare.

16. It emerged that the appellant was involved in selling the diverted stolen silage wrap. He was arrested and interviewed and he said he had bought it from Seamus Lavin. That was the name used when the order was placed. The consignment involved was valued in excess of €45,735 of which only €2,500 was recovered.

17. So far as the appellant's personal circumstances are concerned, he is a 35 year old man, a married father of children and the Court, in a situation where it was proposing to interfere with the sentence imposed in respect of the VAT offences, has had regard to the additional material that was submitted today and in particular has read the very powerful, and one has to say, moving letter from the appellant's wife and has taken that into account.

18. The argument in relation to the sentence on the handling matter really comes down to the suggestion that insufficient attention was paid to the requirement to have regard to the totality principle. It is the situation that the judge does not in terms say that he was addressing the totality principle, but it is also the case that the question of totality had been to the forefront of the plea that had been presented to him, so it is impossible to believe but that he was concerned with that and that he was very conscious of the fact that the sentence he was imposing was going to be a consecutive one and that it was required to be consecutive by statute.

19. The operative part of the sentence is dealt with in these terms:

> "I am bound by the legislation that any sentence which I impose must be consecutive to the sentence which he is currently serving. I have been asked to consider the length of that sentence for the tax situation on the tax case and the length of it and that the only way that the accused can escape serving a sentence beyond I believe was 2016, I cannot recall exactly what month, would be by a suspended sentence. I cannot in all justice say that there should be a suspended sentence. There must be a custodial sentence in this case and it must run from the date of the expiration of

the current sentence which he is serving."

20. The reference to 2016 was prompted by the fact that counsel for the appellant had indicated that the VAT sentence left him with a release date in 2016. It appears to the court that the trial judge there seems to have focused on the question of whether he should impose a sentence or whether he should suspend a sentence in its entirety so as not to interfere with the existing release date in 2016 and not to put back that release date.

21. If those were the only options available to the judge, then it is clear that he was correct in saying that a custodial sentence was called for. This was a serious offence. It obviously involved significant preplanning and even if there were aspects of it that were not executed with particular efficiency, there was premeditation and preplanning.

22. However, the Court is of the view that those were not the only options and that it was open to the trial judge to consider the question of a partly suspended sentence. Insofar as he was being required to impose a consecutive sentence on somebody who was already serving a substantial sentence, and who was serving that sentence as a first time offender and was in prison for the first time, it appears to the Court that it would have been appropriate that the question of suspending a portion of the sentence to give effect to the totality principle should have been given active consideration and it is not clear from the transcript whether that in fact happened or whether, as the transcript would seem to suggest, consideration was confined to the question of whether there could be a total suspension.

23. All in all, given that the sentence was going to be made consecutive to a significant sentence being served by someone who is in custody for the first time, and having regard to the mitigating factors that had been advanced, the Court's view is that it would have been appropriate to suspend a portion of that sentence and the Court will therefore do so at this stage because of the failure to impose any element of a suspended sentence. The court will suspend the last eight months of the handling sentence.

24. In summary then, the sentence of six years with one suspended, will be varied to one of five years with one suspended while the handling sentence remains at three years, but the final eight months are to be suspended.