



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

Record No.: 271/2015

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

Kenneth Shanny

Appellant

Judgment (ex tempore) of the Court delivered on 8th July 2016 by Mr. Justice Mahon

1. The appellant pleaded guilty to eight counts of a twenty four count indictment in respect of offences under the Taxes Consolidation Act 1997 and the Finance Act 1999 at Trim Circuit Criminal Court on 3rd June 2015. He was sentenced on 11th November 2015 to three years imprisonment in respect of each of the eight counts. The sentences were directed to be served concurrently from 11th November 2015, but with the final eighteen months of each sentence suspended on the accused entering into his own bond of €200 to keep the peace and be of good behaviour for a period of eighteen months post release.

2. The offences were committed between November 2008 and May 2010. The appellant was an accountant and tax advisor who processed VAT returns for clients. In doing so he falsified VAT returns for two clients for the purposes of fraudulently obtaining exemption from VAT or the repayment of VAT. Money recovered in this way was then divided between the appellant and his clients. The total involved was approximately €52,000. The two clients concerned received entirely suspended sentences for their involvement in these frauds.

3. The appellant had previously worked for Gel Technologies as a Financial Controller. He was convicted of theft while working for that company by transferring company money into his own account. He served a sentence of imprisonment between April 2011 and September 2012 in respect of that offence.

4. The appellant's grounds of appeal can be summarised as follows:-

- (i) The appellant's co-accused, and who were his clients in relation to the matters with which he was charged, received ten month and three years suspended sentences. The appellant maintains there was an unfair disparity between his sentence and the entirely suspended sentences imposed on his co-accused.
- (ii) The learned sentencing judge wrongly placed the offences at the higher range in terms of gravity.
- (iii) The learned sentencing judge failed to provide appropriately for rehabilitation.
- (iv) The sentences imposed were not proportionate.

The appellant's personal circumstances

5. The appellant was thirty nine years old at the date of sentence. The appellant left school with his leaving certificate in 1994. He trained as an accountant / accountant technician. He worked for a number of accountancy firms and eventually set up his own practice in Dunshaughlin, Co. Meath. He developed a serious drug habit from the age of fifteen progressing to heroin addiction by the age of twenty two. By his late twenties he had embarked on the use of crack cocaine while spending up to €1,000 per day on this habit at the height of his addiction. Subsequent to the commission of this offence the appellant ceased working as an accountant and tax advisor.

Probation Report

6. The probation report refers to what it terms "corrective action" taken by the appellant in relation to his personal difficulties since his release from prison in relation to the earlier offence arising from his employment with Gel Technologies. At the time of assessing the appellant (in October 2015) it was noted that he was involved with Job Bridge, was in stable accommodation, and was free of debt. He had addressed his drug dependency while serving his prison sentence. It was apparent to the probation officer that he was then drug free. He had not come to garda attention since his release from prison in 2012. He was deemed to have a low risk of re-offending.

7. The learned sentencing judge identified the aggravating factors in the case to include the position of trust held by him in his capacity as an accountant making VAT returns on behalf of clients. He described the offences as "*systematic and substantial dishonesty and fraud in respect of the VAT returns and the claiming of VAT repayments*". He also referred to the substantial loss to the Revenue Commissioners.

8. The learned sentencing judge also referred specifically to a number of mitigating factors including the appellant's pleas of guilty, his remorse, his co-operation with the probation service and the rehabilitation steps already taken by him. He identified as distinguishing features as between the appellant and his co-accused the fact that the appellant had a very serious previous conviction, while neither co-accused had any previous convictions. He also identified as a distinguishing factor the fact that the appellant was acting in the capacity of an accountant dealing with the Revenue Commissioners, and therefore was in a position of trust, and had abused that trust.

9. The manner in which the learned sentencing judge proceeded to arrive at his sentences is criticised by the appellant on the basis

that best practice as explained in the Court of Criminal Appeal judgment of Finnegan J. in *DPP v. Farrell* [2010] IECCA 116, and which was referred to with approval in this court's judgment in *DPP v. Flynn* [2015] IECA 290, was not followed in this case. The relevant passage from the judgment in *Flynn* states:-

"A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered."

10. While this criticism may be well made in this case, it is nevertheless appropriate to note that the learned sentencing judge did identify, and quite accurately so, the relevant aggravating and mitigating factors in the case. A failure to strictly follow best practice (as per *Flynn*) is not necessarily a reason to interfere with a sentence, and this court sees no reason to so do for that particular reason in this case.

11. Leaving to one side for a moment the headline sentence of three years on each of the accounts, the suspension of 50% of those sentences for the mitigating factors, described by counsel for the appellant as *exceptional*, a description that might be reasonably described by some as a little exaggerated, was generous. It was never a case for an entirely suspended sentence and the offence involved, given the appellant's professional position as an accountant and tax advisor, were significantly more serious than those committed by the appellants' two clients.

12. In relation to the headline sentences of three years, the court is satisfied that these were within the range of sentences appropriate for these particular offences, and again particularly because of the fact that the appellant was in a position of trust with the Revenue Commissioners, and breached that trust, and that he facilitated the commission of offences by others, and also because of his previous conviction for a not entirely dissimilar type of offence. The appeal is therefore dismissed.