THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

11CJA/14

The People at the Suit of the Director of Public Prosecutions

Applicant

V

Samuel Campbell

Respondent

Judgment of the Court (ex tempore) delivered on the 16th day of December 2014, by Mr. Justice Edwards

1. This is a case in which the respondent pleaded guilty on the 27th September, 2013 to nine counts, representing revenue offences of various varieties. Pleas to these nine counts were acceptable to the Director of Public Prosecutions on the basis that they were sufficiently representative samples of the offending conduct complained of in a 42 count indictment which was then before the court.

2. The pleas recorded were in respect of counts 1, 2, 3, 12, 19, 23, 25, 26 and 35 and these may be grouped or characterised in the following way.

3. Counts 1, 2. and 3 were pleas to offences contrary to s. 1078 (2)(g)(i) of the Taxes Consolidation Act 1997, as amended, and in simple language those are offences of failing without reasonable excuse to make a revenue return, in this instance a return of income for income tax purposes.

4. The plea in respect of Count 12 was to an offence contrary to s. 1078 (2)(i) & (3) of the Taxes Consolidation Act 1997, as amended, which involved failure without reasonable excuse to make a VAT return.

5. The plea in respect of Count 19 was also to an offence contrary to s.1078 (2)(i) & (3) of the Taxes Consolidation Act 1997, as amended, and in this instance it involved failure to remit a sum in respect of VAT.

6. Finally the four pleas entered to Counts 23, 25, 26 and 35, respectively, were in respect of offences contrary to s. 1078(2)(a) and 3 of the Taxes Consolidation Act 1997, as amended, and in each instance consisted of knowingly or wilfully delivering an incorrect VAT return.

7. In respect of each of those nine offences the learned trial judge had available to him a penalty of up to five years imprisonment and/or a fine of up to €127,000. Having heard the evidence in the case, and having considered the aggravating and mitigating circumstances of the case, the learned trial judge determined on a sentence of three years imprisonment on all counts, these sentences to run concurrently, but on the basis that each sentence would be suspended for a period of three years. The net effect of this was that it allowed the applicant to be released immediately following the hearing in the Circuit Court, on the basis of having received suspended sentences in respect of all of the counts to which he had pleaded.

8. The matter comes before this Court by way of an undue leniency type appeal brought at the behest of the applicant. The applicant makes a number of complaints about the sentences imposed by the learned trial judge, and contends that the sentence was unduly lenient on six main grounds. (1) It is complained that the learned trial judge's characterisation of the case as being "a marginal case" amounted to an error in principle. (2) It is suggested that the learned trial judge failed to give sufficient and due weight to the deliberate nature of the offending conduct. (3) It is suggested that the learned trial judge gave undue weight to the limited cooperation that had been rendered by the respondent. (4) It is suggested that the failure of the appellant to cooperate with the revenue authorities was in itself a significant aggravating factor which had not been properly marked by the learned trial judge. (5) It is complained that the learned trial judge failed to have sufficient regard to the fact that monies held by the respondent in his possession, consisting of VAT that was liable to be remitted to the Exchequer, were held by him in a fiduciary capacity as bailee for the Exchequer, and that there was a breach of trust involved in his failure to remit those monies; and finally, (6) there is a general complaint that in the manner in which the learned trial judge approached the sentencing of the respondent in this case he failed to have sufficient regard to the principle of deterrence.

9. The facts of the case may be stated as follows. The background was that the respondent was very experienced in the car trade, that at the time that the relevant offences were committed he was a self employed car dealer and that for some time had been running a very successful business. He first came to the attention of the revenue authorities in 2004 when he decided to register for VAT. He indicated to the revenue authorities that he had commenced business on the 1st of July 2004, and that he had opened up a bank account with AIB in that connection. In July 2005, the Revenue Commissioners carried out a routine revenue audit in respect of his VAT and income tax affairs. In the course of this audit it was discovered that the respondent had an additional bank account with Ulster Bank, which the revenue had not been told about previously, and that he was also using this account in connection with his business. There was a substantial amount of money in it and it appeared that this account had been used by the respondent in connection with the buying and selling of cars. A witness from the revenue told the Court that the account in question was concerned with 150 car sale transactions.

10. The revenue continued their probing and they requested the respondent to provide them with his bank statements relating to the Ulster Bank account. Having had some initial difficulty in getting the respondent to furnish this material, they eventually received some seven pages of faxed documentation purporting to be the bank statements in question. However, the contents of these bank statements were not clearly legible and they aroused suspicions in a number of respects.

11. The revenue authorities ultimately obtained documentation directly from the Ulster Bank and it was found that the faxed documents had been altered or interfered with in a way which meant that various lodgements and transactions which ought to have been apparent on the bank statements in question were not readily apparent and revenue officials suspected that there had been a deliberate attempt on the part of the respondent to conceal income that would be potentially taxable both under the headings of income tax and VAT.

12. The full picture was in fact ascertained, and the revenue's suspicions were confirmed, once statements relating to this account had been procured directly from Ulster Bank.

13. The evidence before the court was that the amount due to the revenue was €1.1 million, one third of which approximately was comprised of income tax and value added tax due, and two thirds of which approximately was comprised of interest and penalties.

14. The learned trial judge heard the submissions of both parties with respect to the aggravating and mitigating circumstances of the case. Having done so, and having taken into account a significant number of testimonials of a very positive nature put before the court in respect of the respondent, and having further taken into account evidence from the respondent's father, and also evidence elicited in cross-examination of the prosecution's witness, concerning the respondent's personal circumstances, the learned trial judge resolved to deal with the matter in the following way. He imposed custodial sentences of three years in respect of each offence and then he said

> "It is an extremely marginal case. What I propose to do, Mr. Campbell, I'll put you out of your misery or your tension. You are an extraordinarily lucky man and I'm going to give you the balance of the marginal case. There is very little in it, but there is – there is enough, I believe, I'm satisfied on the mitigating and personal circumstances just about to take the course that I'm taking. So in respect of all the sentences, I'm suspending them on the following terms: that you enter into a bond of €200 to be of good behaviour for a period of three years from today's date."

15. The learned trial judge had had opened to him a number of authorities that were also opened to this Court, and in particular he had had drawn to his attention the decision of this Court's predecessor, the Court of Criminal Appeal, in the case of *Director of Public Prosecutions v. Murray* [2012] IECCA 60, to which allusion has been made in the course of submissions to this Court. In *Murray* the Court of Criminal Appeal held *inter alia*, that in most cases involving significant and systemic revenue or social welfare frauds an immediate and appreciable custodial sentence is called for.

16. It was common case that the jurisprudence in respect of the sentencing principles applicable to revenue and social welfare frauds area has undergone some refinement since the *Murray* case. In particular, it has been urged upon this Court that while the statement of general principle enunciated in *Murray*, and alluded to in paragraph 15 above, is valid and correct in so far as it goes, the manner in which it is to be applied in any individual case has been nuanced and elaborated upon in a number of subsequent judgments of the Court of Criminal Appeal.

17. In that regard the Court was referred to *Director of Public Prosecutions v. Begley* [2013] IECCA 32. Counsel for the appellant submitted that the judgment in the Begley case identifies five important features of which particular account should be taken by the sentencing court in considering a case in which there has been significant revenue fraud. In delivering the judgment of the Court of Criminal Appeal in *Begley*, McKechnie J stated (at para 46):

> *"…this Court would have significant concerns in advocating any blanket approach in tax fraud cases. Such type offences are totally dissimilar to many others, including the more serious crimes against the person. Secondly, the variation within such cases is great and whilst we note the self stated limitations of Murray, nonetheless factors with little, if any, probative value to crimes against the person, such as restitution, may have a level of high legal significance in fraud cases. Thirdly, at least in a broad sense, it is common public knowledge that in a great number of evasion cases many defaulters are never prosecuted and frequently for good cause; instead their behaviour is dealt with on the civil side of the law or by some Revenue scheme, involving as it might the payment of penalties and interest, as well as public disgrace via media identification. Fourthly, factors such as admissions and pleas are a crucial part of the process, without which the prosecution of white collar crime would be even more retarded than what it is presently. Fifthly, incentivising cooperation must never be lost sight of. Therefore, it seems to this Court that in the absence of a wide ranging review on sentences, the current approach, which should continue is that, individual cases must be dealt with individually."*

18. As is apparent from the passage just cited, the Court of Criminal Appeal laid emphasis, *inter alia*, on the fact that restitution, where it can be made, may represent a very important factor to be taken into account. In the present case the applicant has sought to place some emphasis on the fact that no restitution has been made by the respondent and on the fact that there would seem to be little prospect of him being able to do so.

19. It was also emphasised by McKechnie J., in his judgment in the *Begley* case, that in many cases defaulters or debtors can be dealt with using the civil law's process, and that this should be borne in mind by a sentencing court. However, counsel for the appellant in the present case has submitted that where there has been deliberate tax evasion and a failure to make voluntary disclosures and to cooperate in a voluntary way, the revenue must retain the power and the option of proceeding to deal with the matter by initiating a criminal prosecution. They have sought fit to do that in this case. This Court takes due note that the circumstances of the present case were such that prosecution was considered necessary in this case.

20. The importance of admissions and the pleas was also emphasised in the *Begley* case. There was a plea of guilty in the present case. The learned trial judge alluded specifically to this in his ruling and some significant credit was afforded to the respondent in respect of that and the other mitigating factors in the case. However, counsel for the applicant points out that there had only been what the learned trial judge characterised as "a degree of cooperation" with the revenue investigation. There was far from full cooperation and the point is made by counsel for the appellant that, while a plea of guilty is always useful, sight should not be lost of the fact that there was a strong case against this respondent. There was, in reality, no, or certainly very limited, co-operation with the revenue investigation itself. Rather there was an attempt to obstruct the revenue investigators in what counsel for the appellant has characterised as "a brazen fashion". The court sees no reason to disagree with that characterisation. Moreover, the respondent did not avail of the opportunity afforded to him to make a voluntary disclosure at the commencement of the revenue audit, notwithstanding that the benefits of doing so were explained to him. That having been said, once he was charged with the offences with which this Court is presently concerned, the respondent offered to plea guilty and did so on arraignment. Counsel for the applicant submitted that the learned trial judge attached more weight to the respondent's supposed co-operation than was justified on the evidence and that this also amounted to an error of principle.

21. A further precedent that was drawn to this Court's attention, and particularly relied upon in the written submissions of the respondent, was the case of the *People (Director of Public* Prosecutions) v. Hughes [2012] IECCA 85, in which a sentence of four years imposed by the trial judge for six offences involving failure to make returns in respect of VAT, or to pay VAT, was reduced by the Court of Criminal Appeal to two years. However, counsel for the applicant has made the point, which the court accepts as being correct, that in that case very substantial restitution had been made.

22. The court is satisfied that the learned trial judge did err in principle in attaching more weight to the respondent's limited co-operation than was justified on the evidence. Indeed, the respondent's attempt to obstruct revenue investigators was more aggravating than mitigating. Moreover, the Court considers that this is a serious case that in accordance with the line of

jurisprudence represented by the *Murray, Begley and Hughes* cases merits in its circumstances a custodial sentence, and that the failure to impose a custodial sentence in this instance was also an error of principle. That having been said, the court does acknowledge significant mitigating factors also exist in this case. The respondent is entitled to some credit for the fact that he pleaded guilty. These type of cases are always difficult to prosecute and to present and the plea of guilty inevitably assists in that regard. He has made significant attempts at rehabilitation and there are some very positive testimonials that have been put forward in his favour and the court is impressed by the fact that he was offered a job in the event of a non custodial outcome being achieved in this case. The court was further impressed by the fact that his colleagues in the motor trade seemingly hold him in high regard. In addition, this court was impressed with the testimony of his father which is recorded in the transcript, as indeed the learned trial judge had been.

23. The Court accepts that the respondent took up work in the motor trade in circumstances of educational disadvantage, that he had not been a high achiever in school and that he had had a problem with dyslexia. It accepts that he has experienced other adversities in his life, including making an unfavourable investment with his former partner and falling into financial difficulties on that account. The Court accepts that he is at the moment doing his best to try and support his family in circumstances of financial adversity with a significant mortgage over the family home.

24. Be that as it may, the court considers that notwithstanding these significantly mitigating circumstances there must still be a custodial sentence in this case.

25. The court feels that a sentence of eighteen months would have been merited in the circumstances in this case upon each count, those sentences to be served concurrently and, but for one additional feature of this particular case, the court would not have been disposed to suspend any part of those sentences. However, this court accepts that for the respondent to have to go into custody now, in circumstances where he has been at liberty since the matter was dealt with approximately this time last year, would be particularly burdensome for him. The court is entitled to take that into account. We consider that taking into account all the circumstances of this case, including this additional factor, it would be appropriate to reduce those eighteen month sentences to sentences of twelve months in each instance. Accordingly, the respondent is sentenced to twelve months in respect of each count, and all sentences are to run concurrently.