



THE COURT OF APPEAL

CRIMINAL

Record Number: 130/2018

Birmingham P.

Whelan J.

Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

- AND -

RESPONDENT

PETER KERNAN

APPELLANT

JUDGMENT of the Court delivered on the 5th day of July 2019 by Ms. Justice Máire Whelan

Introduction

1. This is an appeal against severity of sentence. On 23rd February, 2018 the appellant entered a guilty plea in respect of one count of trafficking illegal immigrants contrary to s.2 of the Illegal Immigrants (Trafficking) Act, 2000. Subsequently, he pleaded guilty to seven further counts of facilitating the entry of illegal immigrants into the jurisdiction. There were thirteen other counts on the indictment which were taken into consideration. On the 23rd March, 2018 the facts were heard by His Honour, Judge Martin Nolan at the Dublin Circuit Criminal Court and a sentence of four years was imposed. A like sentence had on a prior date been imposed on the co-accused Mr. Frederick Chan, a Chinese national. An order was made for the confiscation to the State of €10,000, STGE790 and USD\$284 as the proceeds of criminal conduct.

Background facts

2. Mr. Kernan was a trusted employee with Aer Lingus at Dublin Airport and he held that position for ten years prior to the incidents in question. He worked in the catering loading department loading aircraft with food and beverages. As such, he enjoyed extensive access to all areas of the airport. A criminal enterprise was detected at Dublin Airport on or about the 10th January, 2017 in circumstances where a foreign national sought to travel from Dublin to the United Kingdom. He was detained and questioned at Coolock Garda Station. Gardaí established that on the previous day he had travelled from Madrid to Dublin but there was no record of his having sought to enter the State through passport and customs control at the airport. A significant volume of CCTV was examined, as a result of which it became apparent that the individual had illegally entered Ireland with the assistance of two Aer Lingus employees, one of whom was the appellant.

3. The appellant was availing of his security status with Aer Lingus and his staff access permit to facilitate diverting certain individuals via a route which enabled them to bypass immigration control. The *modus operandi* involved escorting the foreign national into a lift prior to entering the long hall and the Garda National Immigration Bureau (GNIB) immigration control. The lift was activated by use of his staff permit. He engaged in the enterprise with his co-accused, Mr. Frederick Chan. When the men emerged from the lift together with the illegal immigrant, all three were wearing Aer Lingus high visibility vests. Mr. Chan then drove them to an aircraft hangar but remained with the truck at all times. The appellant disembarked with the illegal immigrant, guiding them to a staff exit turnstile which enabled the illegal immigrant to gain direct access from airside to landside, circumventing the GNIB immigration control and customs control in the process.

4. Enquiries carried out by the gardaí indicated that a travel agent based in Rome was involved in the operation. Following the events of the 10th January, 2017 the gardaí undertook an extensive investigation and on the 22nd January, 2017 garda surveillance at Dublin Airport observed the appellant and his co-accused effectively operate the same mechanism with an illegal alien who was again diverted by the intervention of Mr. Kernan and his co-accused from having to go through immigration and customs control. The illegal immigrant was driven by the co-accused to the vicinity of a staff turnstile and was escorted by Mr. Kernan through a turnstile and gained access land side at the airport. Thereafter, Mr. Kernan and the illegal immigrant were observed going into a car park and entering a motor vehicle; the appellant intending to drop off the foreign national at a taxi rank. Their high visibility jackets were put into the boot and thereupon the vehicle was intercepted.

5. The appellant pleaded guilty to the trafficking of seven individuals into the State during the period from the 29th December, 2016 to the 22nd January, 2017 by this methodology. He had admitted to involvement in respect of fourteen entries of foreign nationals into the State in this matter and by this mechanism; and the said entries corresponded with fourteen Western Union money transactions made to him totalling €40,366 during the relevant period of time.

Appellant's personal circumstances

6. The appellant was born on 4th August, 1960. At the date of sentence, he was a 57-year-old separated man with two adult sons. He had a good work record and was highly respected in his community. He did a great deal of voluntary work in the community and many – both inside and outside of his family – wrote testimonials testifying to his good character and charitable activities.

The sentence

7. The sentence imposed was of four years to date from the 23rd March, 2018. A like sentence had previously been imposed on his co-accused. It was contended on behalf of Mr. Kernan that substantial mitigating factors in his case warranted a more lenient sentence and that parity of sentence with Mr. Chan, the co-accused, was not warranted in the instant case.

Mitigating factors

8. Amongst the factors raised in respect of mitigation are following:

- (a) Mr. Kernan has no previous convictions;
- (b) he made full admissions in respect of the offences prior to his appearance in court and admitted receipt of substantial sums of money for his participation in the enterprise;
- (c) he had voluntarily presented himself at Lucan Garda Station to make additional admissions as to having facilitated the entry of illegal immigrants into the State;
- (d) he had encountered considerable health difficulties in respect of which there were medical reports, and had undergone a quadruple heart bypass operation from which he was recovering at the date of sentence on the 23rd March, 2018;
- (e) it was contended that regard ought to have been had to the fact that he was more co-operative than his co-accused Mr. Chan in terms of his admissions made at interview;
- (f) the appellant had provided material assistance to the GNIB and had met with immigration gardaí to provide information which was intended to assist in enhancing airport security;
- (g) it had been accepted that the appellant was not the mastermind behind the enterprise;
- (h) that at the time he initially became involved in the enterprise he had experienced some domestic issues and financial problems;
- (i) It was contended that his age at the time of sentence being fifty-seven years was also relevant.

Approach of the sentencing judge

9. The sentencing judge observed that the appellant had committed these crimes for monetary profit. He had received substantial profit from his engagement in the enterprise of bringing foreign immigrants, mainly of Chinese origin, illegally into the country. He noted that it was a very serious matter for an employee of Aer Lingus to assist in this type of wrongdoing. The Court observed that the offending had continued over a reasonably long period. The Court noted in mitigation that he had made full admissions and had co-operated fully. The Court took account of the fact that he had a long work history and that he came from a very good family and that many people spoke highly of him. It was noted that he had certain medical problems which were taken into account. With regard to the co-accused, Mr. Chan, the Court observed that there was equal involvement by the two men in the scheme and that in sentencing Mr. Chan on an earlier date the Court had taken into account certain specific matters unique to him, including that he was a foreign national and that a prison sentence would be more difficult for a non-national person in such circumstances by reason of lack of any family or connections in this jurisdiction. The Court was urged to impose a lesser sentence on the appellant by reason of his extra co-operation and medical issues but declined to do so. He concluded that 4 years was the appropriate sentence for the appellant's misbehaviour.

Grounds of Appeal

10. In the notice of appeal of the 19th April, 2018 five grounds were advanced: -

- (1) Failure to take full and proper account of the personal circumstances of the appellant.
- (2) Failure to adequately distinguish between the appellant and his co-accused.
- (3) That the sentence was unduly severe in the circumstances.
- (4) The sentence was excessive and disproportionate in all the circumstances.
- (5) That the Circuit Court judge had failed to have due regard to the mitigating factors and/or had failed to correctly balance the mitigating factors against the severity of the offence.

In substance, there is but a single ground of appeal advanced in the submissions, namely, that the sentencing judge erred in imposing identical sentences on the appellant and his co-accused.

Parity

11. In detailed arguments made on behalf of the appellant in written submissions and at the appeal hearing, it was contended that many of the mitigating factors he was in a position to advance at the sentencing hearing had not been present in the case of his co-accused. These included that he had considerable health difficulties, had undergone a quadruple heart bypass operation from which he was recovering, had been identified as a carrier of the BRCA2 gene which made him more susceptible to developing cancers and in particular prostate cancer and that he suffers from Dupuytren's disease, being a build-up of calcium in his tendons, ligaments, hands and feet which has previously necessitated surgery.

12. It was argued that the principle of parity of sentencing did not preclude the judge from imposing a lighter sentence on Mr. Kernan, where the difference in the sentences was capable of being justified. Reliance was placed on the decision in *The People (DPP) v. Duffy* [2003] 2 I.R. 192 and also the later decision of *The People (DPP) v. Daly* [2012] 1 I.R. 476 which is authority for the proposition that the underlying basis for the rule of parity is rooted in justice being equal in equal circumstances. Rarely would that be found to exist without some adjustment; but if correction could legitimately be made, the rule should apply. Therefore, co-accused persons whose personal circumstances were similar and whose legal liability for the crime under sentence was on a par, should normally receive comparable sentences. On the other hand, where such circumstances were different, it was contended that the authority in *Daly* supported the principle that it would be patently unjust not to have different sentences. It was contended that parity is normally a factor which must be considered by the Court when sentencing co-accused persons for like offences; it should not operate regardless of principle or context. It was contended that the sentencing judge had erred in applying a strict parity in his approach to the two accused individuals, particularly in circumstances where the appellant had provided greater co-operation than his co-accused, had made more comprehensive admissions and should have expected to serve a lesser sentence in all the circumstances.

The DPP

13. The DPP opposed the application contending, in essence, that the sentencing judge had taken the appellant's circumstances into consideration and had arrived at identical sentences for each of the co-accused having regard to separate and distinct factors which operated in mitigation in the case of the co-accused; including his foreign nationality status and the fact that he had no connections in this jurisdiction.

Discussion

14. The principle of parity is well established in the jurisprudence. As was stated by Keane C.J. in *The People (DPP) v. Duffy* [2003] 2 I.R. 192 at p. 200: -

"There appear to be two reasons underlying the principle that an appellate court will interfere where there is a significant and unjustifiable disparity between the sentences imposed on two or more persons involved in the same criminal offence. The first, identified by Finlay C.J. in *The People (DPP) v. Conroy* (No.2) [1989] I.R. 160 is the substantial sense of grievance at unfair treatment which may be caused by apparently unequal sentences. It could be added that the appellate court should only take into account a grievance which, objectively viewed, could be reasonably entertained by the accused person: a person who has received what appears to him/her to be a severe sentence may be unable or unwilling to recognise that the disparity between that sentence and a lighter sentence imposed on his/her co-accused is, in the particular circumstances, justifiable. The second reason is the harmful effect on public confidence in the administration of justice resulting from a significant disparity in the sentences which seems incapable of being justified: see *R v. Fawcett* (1983) Cr. App. R. (S) 158."

15. It is clear from the jurisprudence that the parity rule is not a rule of law which required that Mr. Kernan and his co-accused be given the same sentence, even had no material distinction been established between them. Parity, when the principle is engaged, is a factor which must be considered by the Court along with all other relevant considerations. Insofar as reasonably practicable, equality should be achieved but not in a manner which undermines context, equity or fairness. The principle of parity stems from the proposition that justice ought to be equal, in equal circumstances. As the courts have noted, rarely will that be found to exist without some adjustment; but if correction can legitimately be made the rule ought generally to apply. Two co-accused persons who, when all material considerations are taken into account, have similar personal circumstances (including age and background) and whose legal liability for the crime under sentence is substantially relative, should normally receive comparable sentences.

Mitigating elements unique to the co-accused

16. In addition to the lesser number of money laundering offences, the co-accused, Mr. Chan, was a foreign national and it is well established that the court takes into account the added hardships and difficulties encountered by a convicted individual in serving a sentence far from home; particularly where they have no roots in this jurisdiction, no family or persons connected to them. The difficulties experienced by foreigners can in appropriate circumstances warrant positive consideration and mitigation of the term of imprisonment.

Observations on the additional mitigating factors contended for

17. The mitigating factors which it is contended ought to have resulted in a lesser sentence for the appellant include: -

(a) That he had no previous convictions. The DPP asserts that the appellant has a conviction for Road Traffic offences in the past. It is not disputed that his co-accused has no previous convictions. He made full admissions. His co-accused also pleaded guilty.

(b) He voluntarily presented himself at Lucan Garda Station and made further admissions which were of assistance to the authorities in relation to addressing the aspects of security.

(c) He has considerable health difficulties;

(i) He has been diagnosed positive for the BRCA2 genetic mutation. The report furnished states "This mutation may also confer up to six percent risk of male breast cancer by age seventy and twenty percent risk of prostate cancer by aged eighty... as well as increased (albeit low) risks of some other cancers." (emphasis added) Mr. Kernan is now fifty-eight years old.

(ii) Whilst the appellant underwent cardiac bypass surgery in late 2017 some months prior to sentence he appears to have made a good recovery and there is no suggestion that in serving a sentence he will be precluded from receiving appropriate treatment should the need arise. The medical evidence suggests that he was reviewed by the cardiology department of Connolly Hospital on the 20th February, 2018 where his clinical examination was unremarkable. He was asymptomatic. He was due to be reviewed after a year and had been strongly advised to give up smoking.

(iii) He had in the past been diagnosed with bi-lateral Dupuytren's disease which had been operated on by a plastic surgeon ten years before. He underwent a fasciectomy procedure to alleviate the condition in or about 2015.

Should any medical issues arise during the currency of the sentence there is no suggestion that it would impact adversely on him receiving the appropriate treatment. Thus, on careful analysis of the medical evidence before the Court it appears that his health conditions are well under control.

(d) It was contended that far greater co-operation had been afforded by the appellant than by his co-accused. However, it is noteworthy that it was advanced on behalf of the DPP that the co-accused had also made certain admissions which would have formed an important part of the prosecution case had the matter gone to trial. This was not disputed.

(e) It is clear from the sentencing remarks that the appellant was sentenced in respect of twenty-one separate matters. Along with his co-accused, he was dealt with on the basis of having committed seven human trafficking offences contrary to s.2 of the Illegal Immigrants (Trafficking) Act, 2000. However, the co-accused was sentenced for two money laundering offences, whereas the appellant was sentenced in respect of fourteen separate money laundering offences pursuant to s.7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. It will be recalled that the maximum sentence pursuant to the said Act is fourteen years. The monetary value of the money laundering offences of the co-accused Mr. Chan was €7,258.16, whereas in the case of the appellant the value amounted to €40,366.06.

Conclusions

18. The maximum sentence for trafficking in illegal immigrants as provided by s.2(1)(b) of the Illegal Immigrants (Trafficking) Act, 2000 on conviction on indictment is imprisonment for a term not exceeding ten years. The maximum sentence on conviction on indictment for money laundering is a term of imprisonment not exceeding fourteen years.

19. The primary objective of Illegal Immigrants (Trafficking) Act, 2000, as its title suggests, was to ensure that trafficking in people for profit should be made the subject of a criminal offence.

20. The appellant was an experienced employee of Aer Lingus of ten years' standing. He enjoyed a trusted status with the company. Given his maturity and experience he knew and understood the risks to public security of the conduct. He was an equal partner with Mr. Frederick Chan in the enterprise. His involvement was repeated – in the case of money laundering counts between November 2014 and January 2017 and in regard to immigrant trafficking between December 2016 and January 2017. It is clear from the evidence that a carefully planned scheme had been put in place with his co-accused to circumvent and defeat the immigration and customs control in place at the airport.

21. However, despite that, the enhanced level of co-operation afforded by Mr. Kernan to the authorities is noteworthy. There is acknowledgment by the gardaí that the assistance regarding security issues was voluntarily provided and was helpful to the airport authorities and the GNIB.

22. Making all due allowances for distinguishing features in each case, we are satisfied that the sentence imposed by the Circuit Court judge ought to have incorporated a tangible element of enhanced mitigation in acknowledgment of the significantly greater co-operation freely and willingly given by Mr. Kernan and which has gone some way to atone for the harmful effect of the offences. The level and degree of co-operation was a distinct and discrete mitigating factor specific to Mr. Kernan which warranted being acknowledged in the sentence imposed. The Court was informed at the appeal hearing that Mr. Kernan has been diagnosed and successfully treated for squamous cell carcinoma in early 2019. The Court was informed at the conclusion of the appeal hearing that the appellant has been a model prisoner during his incarceration and has been moved to Shelton Abbey since June, 2018.

23. Ordinarily, this Court is very slow to intervene to such a limited degree in circumstances where sentencing was well within the margin of appreciation of the highly experienced sentencing judge. In particular, we are influenced by Mr. Kernan's exceptional and voluntary assistance and helpful inputs regarding security improvements at Dublin Airport. Its exceptionality, comprehensiveness and extent warranted the "slight deviation from the sentence the Court has in mind" or "slight suspension" which counsel for the appellant had contended for. We would allow this appeal and set aside the sentence of the Circuit Criminal Court and impose in lieu a sentence of three and a half years to date from 23rd March, 2018.