



THE COURT OF APPEAL

Birmingham P
Edwards J
Hedigan J

The People (at the suit of the Director of Public Prosecutions)

And

Mark Hehir

39CJA/18

Respondent

Appellant

JUDGMENT of the Court delivered on the 17th day of July, 2018 by Mr. Justice Hedigan

1. This is an application brought by the Director of Public Prosecutions pursuant to section 2 of the Criminal Justice Act 1993 (the 1993 Act) seeking a review of sentence on grounds of undue leniency. The applicant pleaded guilty to ten sample counts of theft contrary to section 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001 on 30th May, 2017. On 19th January, 2018, the learned sentencing judge imposed 240 hours community service on the respondent in relation to the first count, and imposed two years' imprisonment on the balance of the counts which was suspended in its entirety for five years on certain conditions.

Background

2. On 3rd October, 2016, Louise Niemann of City Bin Company reported a theft to Gardai of €305,072.64 from the company's accounts. The respondent had been an employee of City Bin Company and had been in full control of the company accounts. Between 20th April, 2016 and 22nd September, 2016, the respondent transferred money electronically from the company's accounts to his own personal bank account on 71 separate dates.

3. The local bank manager contacted the respondent regarding irregularities in his personal account. The respondent went to the bank and there admitted to having committed the offences herein. The bank manager contacted the respondent's father and informed him of what the respondent had done. He in turn alerted the City Bin Company to the fact of the missing money. The respondent made full admissions to the Gardai. He stated that he had stolen the money to fuel his gambling addiction with online bookies. He made a payment to the company of €29,000 by way of restitution, having received financial aid in this regard from his parents. Ms Niemann stated to the Gardai that €259,072.64 was now owing to the company.

Personal Circumstances of the Respondent

4. The respondent was a 26 year old man when he was interviewed by the Gardai. After making full admissions, the respondent received treatment for his gambling addiction in Hope House, Foxford, County Mayo. He has no previous convictions. At the time of sentencing, he lived with his parents in Tuam and was in full time employment with a multinational medical devices company in Galway, who retained the respondent despite his previous offending. The respondent is currently repaying City Bin Company €100 per week by way of direct debit. He was assessed by the Probation and Welfare Service who stated he was at a low risk of future offending. He has engaged in restorative justice work with the Probation Service and has substantial support from friends, family and community. He is heavily involved with the GAA and is described as being of good standing in the community.

Sentence

5. The learned sentencing judge delivered his sentence as follows:

"[I]n respect of count 1, I am -- I will, in lieu of a two year sentence, require him to perform 240 service, which is the maximum I can require him to perform. In respect of the balance of the sentences, I will impose a two year sentence in each to run concurrently and suspend them in their entirety for five years on a number of conditions. The first condition is that he remains of good behaviour. He will remain gambling free. He will continue to attend aftercare with Hope House and follow all directions by the probation and welfare service, under whose care he will remain for the next two years. In addition, he will not open, either directly or indirectly, any account with any bookmaker, either in person or online, and will close or arrange to be closed any accounts that exist. He will continue to pay €100 per week to his former employer and the sum of €3,000, which as I understand he has and that will be paid over. Is there anything else? That concludes this sentence hearing."

6. The learned sentencing judge stated that the breach of trust involved in the offending was an aggravating factor in the case. Mitigating factors included the following: the fact that the respondent cooperated fully in the investigation; his acceptance of responsibility; his guilty plea at the earliest opportunity; his good character; the fact that compensation had been made; his attendance at gambling aftercare; the fact that he had been assessed by the probation services as being at low risk of reoffending; his remorse for his actions; his engagement with restorative justice work; his new job and attempts to rebuild his career.

Grounds of Appeal

7. The learned sentencing judge erred in principle in the manner in which he structured the sentence imposed by applying insufficient weight to the aggravating features of the case and/or undue weight to the mitigating factors present.

8. The learned sentencing judge erred in principle in failing to attach any or any sufficient weight to the evidence as to the circumstances of and surrounding the commission of the offence, and in particular the aggravating factors in the matter.

9. The learned sentencing judge erred in principle by imposing penalties which failed to adequately reflect the principle of general deterrence.

Submissions of the Appellant

10. Many cases have come before the courts where those in positions of trust have stolen large amounts of money, and appeared at sentencing with significant mitigation available to them. Despite this, the courts have consistently held that custodial sentences ought be imposed.

11. In *DPP v Lisa Lynch* [2018] IECA 1, the accused was sentenced to eighteen months' imprisonment for falsifying invoices resulting in a loss of €460,000 to a financial services firm. Whilst it was acknowledged that significant mitigating factors were present in the case, including the fact of the accused's plea and full cooperation, the fact that she was a mother of two young children, the fact that she was the main breadwinner of her family and the fact that her family home was due to be repossessed, this Court held that a custodial penalty was warranted in the circumstances. The Court varied the eighteen month custodial sentence by suspending the final six months of the sentence.

12. In *DPP v Jacqueline Durcan* [2017] IECA 3, this Court reduced a twelve month sentence to a six month sentence in circumstances where the accused, a former solicitor, had co-operated and pleaded guilty to a €250,000 fraud where the defrauded sum was ultimately paid back in full. Whilst acknowledging how difficult a prison sentence would be for a mother of five children, who lived in Belgium, it was held that a custodial sentence was appropriate in the circumstances.

13. In *DPP v Nalia Zaffer No.1* [2016] IECA 321, this Court replaced a two and a half year suspended sentence with a two and a half year custodial sentence, the final eight months of which were suspended. The accused in that case was a senior insurance claims official who had stolen €221,600 over a six year period which was not recovered. The accused had pleaded guilty, co-operated with the Gardaí, had no previous convictions, had lost her job and had a drug addiction problem. Mahon J stated:

"In this case, the level of offending is very serious, given that it involved a sum of well over €200,000, and that it was a pre-meditated, well planned and carefully orchestrated fraud undertaken over a fairly prolonged period [...] Even allowing, to the greatest possible extent, for the appellant's strong mitigating factors, including her guilty plea and previous good record and her own difficult personal circumstances, the imposition of a wholly suspended prison sentence is not justified. Serious pre meditated fraud will almost always merit a custodial sentence."

14. Whilst none of the above cases establish a binding precedent, it is submitted that many of the factors found in the instant case are very often found in cases of this type. In many of these cases, this Court varied suspended sentences imposed by either imposing short custodial sentences in lieu of suspended sentences or by reducing the length of custodial sentences. Considering the aggravating features in this case, it is submitted that a custodial sentence is warranted in circumstances where: the accused stole from his employer; the accused held a position of trust within the company; the offending behaviour encompassed more than seventy separate acts of theft; the offences were premeditated; and the fact that in all likelihood, the full sum will never be repaid.

15. Further, it is submitted that the learned sentencing judge erred in principle in failing to adequately reflect the principles of deterrence to society at large by imposing a fully suspended sentence on the facts of the instant case. Counsel for the Appellant cites *O'Malley Sentencing Law and Practice* (Roundhall, 2009) at page 43; *"where there is a high degree of planning and premeditation and where the offence and its consequences are highly publicised"*, sentencing denounces or *"serves to deter possibly like-minded persons"* from similarly offending". The learned sentencing judge failed to adequately consider the importance of deterrence in sentencing the respondent to community service.

Submissions of the Respondent

16. Counsel for the Respondent highlights the factual matters relevant in this appeal: the relatively short period of offending behaviour commencing on the 20th April 2016 and continuing until 20th September, 2016; the lack of sophistication in the offending and the failure of the respondent to take steps to conceal his offending behaviour; the fact that the respondent's father brought the offending behaviour to the attention of the owner of the company; the respondent's full cooperation with the Gardaí; the entering of a plea at the earliest opportunity; the respondent's gambling addiction; his efforts at rehabilitation and restitution; the impact the conviction has had on the respondent in terms of his own previous good character and standing in the community.

17. In *D.P.P. v. Byrne* [1995] 1 ILRM 279, it was stated that in order for a sentence to be shown to be "unduly lenient", the following criteria must be established:

"In the first place, since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called into question was "unduly lenient."

*Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case ... he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person concerned, what Flood, J. has termed the 'constitutional principle of proportionality' (see *People (D.P.P.) v. W.C.* [1994] 1 ILRM 321) his decision should not be disturbed.*

Thirdly, it is in the view of the court unlikely to be of help to ask whether, had a more severe sentence been imposed, it would have been upheld on appeal as being right in principle....., the test to be applied under the section is not the converse of the inquiry which is made by an appellate court where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was "unduly lenient."

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the reviewing court."

18. Counsel for the respondent relies on the case of *DPP v Anne Marie Byrne* [2017] IECA 97, where a wholly suspended sentence was imposed on the Respondent who had pleaded guilty to an offence causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act, 1997. Similar to the present case, in *DPP v Anne Marie Byrne*, it was submitted that the sentencing judge in effect had allowed too great a discount for the mitigating factors in the case. Edwards J stated that the offence in that case was subject to discretionary punishment, and cited *R .v. Zamagias* [2002] NSWCCA 17 with approval:

"It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate."

19. It is submitted that the learned trial judge had all information before him such that he could determine the appropriate sentence. No issue is made as to the fixing of a headline sentence by the learned sentencing judge. The substance of the Appellant's appeal centres on the fact that the learned sentencing judge decided to suspend the sentence in full and impose 240 hours of community

service in lieu of that sentence. On the facts of this case, the learned sentencing judge was entitled to suspend the entirety of the sentence.

Decision

20. The DPP takes no issue with the headline sentence identified by the learned sentencing judge. The appeal is focused only on the suspending of the entire sentence. In an appeal taken under s. 2 of the 1993 Act the Court should be guided by the principles articulated in the Supreme Court by Hardiman J in *DPP v. de Paor & Zdanowski* [2008] IECCA 137 at p. 10 as follows:-

"In DPP. v. Byrne [1995] 1 ILRM 279, said to be the first application brought under s.2 (1) of the Criminal Justice Act, 1993, this Court, per O'Flaherty J., set out the relevant principles as follows:-

"In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.

*Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand... He may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular sentences of the commission of the offence and the relevant personal circumstances of the person sentenced what Flood J. has termed the 'constitutional principle of proportionality' (see *People (DPP) v. WC* [1994] 1 ILRM 321) his decision should not be disturbed.*

Thirdly, it is in the view of the court, unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle?...

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this court."

In the later case of Clerkin Mr. Justice McCracken had the following to say:

"What the Director of Public Prosecutions in this case has to show is that the sentence was unduly lenient. It may well said that it was a lenient sentence, and it may well be that if any of the members of this Court had been the trial judge a custodial sentence would have been imposed. However, that is not the test. A trial judge is entitled to be lenient if he considers that it is just to do so in all the circumstances of any particular case, and in the present case the learned trial judge spelt out the reasons for his leniency and we can see no error in principle in applying those reasons to the present case and in suspending the sentence on the respondent."

21. In the later case of *DPP v. Adam Fitzgibbon* [2014] IECCA 12, Clarke J. (as he then was) stated as follows:

"It must be emphasised that there may always be special or unusual factors which properly influence the assessment by a sentencing judge of the severity of an offence and the culpability of the offender on the facts of any individual case. The analysis which follows should not, therefore, be taken as in any way excluding the entitlement of and, indeed, requirement on a sentencing judge to take into account any factor which may be material in the legitimate consideration of how to characterise offences of this type by reference to their severity and the culpability of the accused."

22. The courts have taken a particular view on sentencing in respect of fraud offences, notably social welfare fraud and employee fraud. In the case of *DPP v. Nalia Zaffer (No. 1)* [2016] IECA 321 the court dealt with the case of a senior insurance claims official who had pleaded to the theft of €221,600 over a 6 year period. The stolen money was not recovered. The accused had pleaded guilty, had cooperated with Gardaí, displayed genuine remorse, had no previous convictions, had lost her job, had a drug addiction problem, was psychologically vulnerable and had remained out of trouble for two years since the offending took place. The Court of Appeal replaced the sentence imposed with a two and a half year sentence but suspended the final eight months. Mahon J. delivered the judgment of the court as follows:-

"In this case, the level of offending is very serious, given that it involved a sum of well over €200,000, and that it was a pre-meditated, well planned and carefully orchestrated fraud undertaken over a fairly prolonged period. There are obvious similarities between this case and the facts in Walsh. Even allowing, to the greatest possible extent, for the appellant's strong mitigating factors, including her guilty plea and previous good record and her own difficult personal circumstances, the imposition of a wholly suspended prison sentence is not justified. Serious premeditated fraud will almost always merit a custodial sentence. The fact that the victim of the fraud is a large corporation rather than an individual may justify a more lenient sentence than would otherwise be the case, but, normally, only the existence of exceptional circumstances should result in an entirely non custodial sentence where there are hundreds of thousands of euro involved."

23. Thus the point of departure for a sentencing judge in cases of serious fraud must always be a custodial one. From that point the sentencing court should consider whether there are present exceptional circumstances that would justify a fully suspended sentence. In doing so, the court should bear in mind that frequently such offenders will have previously been persons of exemplary character. Frequently also the victim will be a large company reasonably capable of recovering from the fraud and invariably the offender will have been in a senior position of trust.

24. This Court in an application under s. 2 of the 1993 Act must consider as per *DPP v. Byrne* whether the court in its determination of sentence made a substantial departure from what would be regarded as the appropriate sentence. It should place great weight on the sentencing judge's reasons. There must be found by this Court a clear divergence from the norm. It must be remembered that it was the trial judge who received the evidence at first hand. It was he/she who was in the best position to detect nuances in the evidence that are not so readily discernible to an appellate court which is limited to the reading of what has often been described as an "arid" transcript. Thus the Court of Appeal must allow a substantial margin of discretion to the sentencing judge. Disagreement with the sentence imposed is not sufficient to justify this court's intervention. It should only intervene where there is evidently a substantial departure from the norm.

25. Turning to the facts of this case; it certainly does involve a very serious fraud by an employee who was in a position of trust. The

learned sentencing judge heard that the company in question is at the loss at the moment of over €250,000. Full restitution is improbable, although €29,000 and a further sum of €3000 has been repaid and €100 per week is currently being paid. 71 separate acts of theft occurred albeit over a relatively short period of time. As noted above, the respondent having been called into the bank concerning irregularities in his account, confessed his ongoing fraud to the manager. He in turn contacted the respondent's father who alerted the respondent's employer as to what had been happening. The judge heard how he made full admissions as to what had occurred. He hid nothing. He cooperated fully. The judge also heard about his involvement with the GAA. He was a talented player. He heard how his offending was caused by an addictive gambling problem. He was gambling extensively, mostly online.

26. The learned sentencing judge heard that with the assistance of his father the respondent had paid €29,000 to his former employer. He was now in full-time employment and was paying €100 per week to his former employer. He had saved €3,000 and was prepared to pay that as well. The learned sentencing judge had the benefit of a probation report which detailed the shame and remorse felt by the respondent. He heard that he is dealing with his gambling problem. He is attending Hope House and will be doing so for some time. He heard that he had no previous convictions and is at a low risk of reoffending.

27. The learned sentencing judge gave his decision on sentencing starting at p. 8 of the transcript of the 19th January 2018. He considered the nature of gambling and the danger of its online form. He identified a headline sentence taking account of the special employer – employee relationship and the breach of trust involved in this kind of crime. He found it was one of four years. He then went on to consider the mitigating factors that were present; the full cooperation, his full acceptance of responsibility, his early plea, his otherwise good character and his efforts at making compensation. He considered the offence should be viewed in the light of the addiction of gambling which is a recognised psychological affliction and he noted with approval his apparently successful efforts at dealing with the problem. He considered that he had shown real remorse and insight into the effect on others of his offending. He noted that he was engaged in restorative justice work with the Probation Service who stated that he had engaged well in this regard. He noted the substantial support of his family and the community of his friends and sporting colleagues. The learned sentencing judge noted that he was now working, that he was a person possessed of skills, talent and education, all of assistance in rebuilding his life and career. He noted that he had been assessed as suitable for community service. He seemed unlikely to offend again provided he continued his involvement with the addiction services.

28. Bearing all this in mind the learned sentencing judge concluded that the interests of justice did not make an immediate custodial sentence either necessary or desirable. He therefore imposed 240 hours community service in respect of count 1 and a two year sentence on all other counts to run concurrently. He suspended them each for five years on stringent conditions of good behaviour, remaining gambling-free, attending Hope House and following all directions of the Probation and Welfare Service. He also ordered that he do not open any account with a bookmaker and continue to pay €100 per week to his employer and the sum of €3,000 that he had saved.

29. Had the judge decided that custody could not be avoided completely and so decided to structure the sentence by requiring part to be served but providing for suspension in part, it may well be that there could not have been a successful appeal against severity of sentence. However as the authorities make clear, that is not determinative of the issue. The question for this Court is whether the sentence was unduly lenient in that it was a substantial departure from what would be regarded as the appropriate sentence. In this regard we consider the judgment of Mahon J. in *DPP v. Zaffer*, cited above, to be of great assistance. The point of departure for employee fraud is an immediate custodial sentence. Only the existence of exceptional circumstances can justify a departure from that default sentence. We are obliged to allow a substantial margin of discretion to a sentencing judge in this regard. He was the judge who heard the evidence at first hand. Here, in what is a model of its kind, the learned sentencing judge's decision set out carefully, succinctly but comprehensively a list of factors that led him to the conclusion that a custodial sentence was neither necessary nor desirable. He carefully balanced all factors involved and missed nothing in his outline of these. Allowing the learned sentencing judge a substantial margin of discretion in identifying and balancing the special circumstances of the case, it appears to us that there is no basis upon which this court can intervene. The appeal is dismissed.