THE COURT OF APPEAL

[180/2017]

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

- AND -

GAVIN LYONS

APPELLANT

JUDGMENT of the Court (*ex-tempore*) delivered on the 4th day of March 2019 by Mr. Justice McCarthy

1. This is an appeal against the severity of a sentence of four years' imprisonment, the last twelve months of which was suspended on a plea of guilty, on one count of handling stolen property contrary to s.17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The accused was on bail for an offence of burglary as and from the 3rd March, 2016. A sentence of imprisonment of ten months was imposed in respect of that offence on the 21st June, 2016, and accordingly the sentencing judge made the present sentence consecutive upon that for which he was on bail; in fact, that sentence had expired in or about February 2017.

2. On the 21st March, 2016 thirty-four kayaks, paddles and a trailer were stolen from the South East Outdoor Educational Centre in Shielbaggan, Ramsgrange, Co. Wexford sometime between 12.30 a.m. and 2.00 a.m. Gardaí in Clonmel came into possession of a mobile phone belonging to the appellant which contained photographs of the kayaks, taken on the 21st March between 4.00pm-4.30pm. A statement was also made by the appellant's girlfriend to the effect that he was attempting to sell them on the 21st March. A member of the public who had become aware of the theft, found thirty-two of them and the other items in Carrick-on-Suir. Two kayaks were missing and were not recovered. The appellant was arrested on the 4th May, 2016 and detained in New Ross Garda station, where he made admissions in relation to the offence.

Grounds of Appeal

3. The appellant submits that the sentencing judge erred in: -

> (1) imposing a four-year custodial sentence (with the final year suspended) in respect of the possession of stolen goods, and as such, was unduly harsh and not proportionate in the circumstances;
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> (2) placing the offence too high on the scale of gravity in light of the evidence;
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> (3) law in failing to properly assess the mitigating factors as argued by counsel;
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> (4) failing to take proper account of the relative young age and personal circumstances of the accused when considering rehabilitation.

4. It seems to us that ground one in practice encompasses the other three.

5. The judge placed the offence in "the top range of such offences"; on this basis he considered that it would "warrant a sentence of four years' imprisonment having regard to what the maximum sentence for such offences is".

6. It is apparent that the judge took into account as mitigating factors the appellant's cooperation with the Gardaí (including his admissions made in custody), a relatively early plea of guilty (the judge rightly pointed out that it had not been entered at the earliest possible time by means of a signed plea in the District Court), that he was a consumer of the controlled drugs cannabis and cocaine. (There is no evidence that he fuelled his habit by means of his criminality, still less that he suffered from any serious addiction), that he was desirous of participating in the rearing of his young child (apparently born a short time before the sentence was imposed), his rehabilitation in prison (including participation in a drug treatment course) and the fact that he is on an enhanced status: he also, plainly had regard to his efforts at drug rehabilitation and his remorse (as evidenced by a written apology furnished to the court).

7. A number of errors in principle, however, crept into the case (through no fault of the judge). First he was not apprised of the details of the sentence to which he was required to make the prison sentence consecutive which rendered it which compromised his capacity to apply the totality principle of sentencing by looking at the total period of imprisonment, to put it shortly, in the round. He also proceeded upon the basis that the maximum sentence was one of five years and possibly this was one of the reasons why he conceived that the appropriate headline sentence should be four years. The failure to identify the offence for which the appellant was on bail at the time of commission of the present offence, it has now been established, gave rise also to an error because the

sentence had been served.

8. His previous convictions are forty-three in number, including road traffic offences (ten of which are for unauthorised taking of mechanically propelled vehicles), nine for theft, five for handling stolen property and eight for burglary. Furthermore, he was also convicted of possession of a number of bullets and of a threat to kill. The judge rightly regarded the fact of these previous convictions, especially those pertaining to dishonesty, as a serious aggravating factor.

9. Having regard to the errors which we have identified, we quash the sentence. We think, however, that the offence falls within the higher end of the middle range, and accordingly we think that the appropriate headline sentence is one of six years. Allowing for mitigating factors as set out above (and the apparent continued progress of the appellant whilst in prison), we mitigate the sentence to one of four years and make provision for rehabilitation by suspending the last year thereof on the same terms as those fixed by the Circuit Court. The sentence will be backdated and for a period of two years from his release from prison to the 16th March, 2017.