



THE COURT OF APPEAL

**Birmingham P.
Edwards J.
Hedigan J.**

188CJA/2017

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

AND

GERARD LAWLOR

RESPONDENT

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

The Appeal

1. This is an application brought by the Director of Public Prosecutions pursuant to s.2 of the Criminal Justice Act, 1993 on the grounds of undue leniency in relation to the sentence imposed on the respondent in the Dublin Circuit Criminal Court on the 15th of June 2017.

Background

2. The respondent came before the court on charges in relation to significant social welfare fraud. Following an early guilty plea, the respondent was given a wholly suspended three year sentence for the offences involving 11 counts of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The offending took place over a number of years; December 2005 to May 2015.

3. The offences came to light after a company owned and operated by the respondents' former wife was subject to a standard Revenue audit. Over the course of the audit, the respondents' former wife provided Revenue with certain information, including that she had been separated from her partner, the respondent, for approximately five years. According to Revenue she was treated as a single assessment for income tax purposes.

4. The computerised system connecting the Revenue Commissioners and the Department of Social Protection showed however that the respondent was receiving a payment that required him to be living with his partner. It transpired that the respondent was in receipt of Jobseekers Allowance, although it appeared that he was in business until sometime in 2008. He was also receiving the Adult Dependant Allowance in respect of his former wife, despite the fact that he was not living with her during this time, and that she was receiving a separate income. The respondent also claimed the Pre-Retirement Allowance, a benefit which may be available to those aged 55 or over and have left the work force, despite his being self-employed during some of this period. During this time, the respondent also received rent payments from the Department of Social Protection on behalf of tenants who lived in a property in Ballycullen which he owned. Further investigation showed that the respondent sold and purchased properties during this period.

5. It was calculated that the respondent had fraudulently obtained €167,873.90 from the Department of Social Protection.

Personal Circumstances of the Respondent

6. The respondent was 67 years old at the time of sentencing. He had no previous convictions. He had been self-employed, by way of running businesses including a garage and repairs workshop.

7. The respondent is separated from his former wife and has three grown up children. He was a co-owner of a property in Ballycullen, County Dublin, but fell into arrears and repossession proceedings of the property had commenced at the time of conviction. He has been living in a house owned by his sister. Evidence was heard and accepted that the respondent has been a carer to his sisters, one of whom, Elizabeth, suffers from a serious disability. His other sister, who also has health issues, stated that they rely on him greatly. The respondent himself has also had periods of ill health, having suffered from prostate cancer, depression, and hypertension.

8. The respondent cooperated with Garda investigations surrounding the offence and entered an early plea of guilty. At the time of sentencing, the respondent provided €11,000 which he had raised to repay the Department of Social Protection. He has been living on the State pension, reduced by €28.20 per week by way of repayment to the Department.

Sentence

9. The court identified a headline sentence of four years. The respondent received a wholly suspended sentence of three years for counts 1, 3, 5, 7, 9 and 11 on the indictment, on condition that he enter a bond of €300, keep the peace, and be of good behaviour for that period. He was considered to be at low risk of reoffending, and was not placed under the supervision of the Probation Service.

10. In terms of aggravation, the court noted that the offending took place over a long period of time, the first count in respect of a date in December 2005 and the last count in May 2015. The respondent claimed a number of social protection payments, resulting in a significant loss of funds to the Department of Social Protection during this time. Furthermore, the respondent was described as "less than fully candid" in his response to questions put to him by the Probation Service.

11. In mitigation, it was pleaded that the respondent was 67 years of age with no previous convictions, had offered an early plea of guilty, and accepted full responsibility for his offences. It was accepted that the respondent has made efforts to reimburse the exchequer by borrowing the sum of €11,000 and was living off a reduced State pension. The court was very conscious of the impact that a custodial sentence would have on the respondent's sisters, who are reliant on the respondent for their care. The court also acknowledged the previous ill health of the respondent himself. With regard to his specific personal circumstances, the court held that

a custodial sentence would not be appropriate.

Grounds of Appeal

12. The appellant submits the following grounds of appeal in that the sentencing judge:

- a) erred in principle in failing to attach sufficient weight to the fact that the respondent had provided inaccurate information to his probation officer on a matter of importance relating to his financial circumstances during the period within which the offences were committed.
- b) erred in principle in the manner in which she structured the sentence imposed by applying insufficient weight to the aggravating features of the case and/or undue weight to the mitigating factors present.
- c) erred in principle by imposing penalties which failed to adequately reflect the principle of general deterrence.

Submissions of the Appellant

13. The appellant submits that the court failed to attach sufficient weight to the fact that the respondent had provided a significant amount of inaccurate information to the Probation Service and came before the court with a series of dishonesty offences committed over a number of years. The appellant submits that the respondent had been untruthful to the Probation Service about:

- a) The fact that he was operating a business between 2005-2008.
- b) That approximately €300,000 had been entered into his accounts between 2005-2008.
- c) That tenants had been living in a property of which he owned and had been receiving rent from the Department of Social Protection on behalf of the tenants while simultaneously receiving social welfare payments in respect of himself.

It is submitted that the wilful misleading of a probation officer and a long series of dishonest offences is a significant aggravating factor which was not reflected in the sentence imposed and amounted to an error in principle.

14. The appellant submits that the court applied insufficient weight to the aggravating factors and/or undue weight to those of mitigation in this case. With regard to aggravating factors, the appellant refers to the cases of *DPP v Paul Murray* [2012] IECCA 60, whereby the accused made fraudulent claims for €249,000 by using a number of aliases while living in Thailand. A sentence of 12 ½ years was reduced to nine years by the Court of Criminal Appeal, on account of the offenders' cooperation with the investigating authorities and his offer of a guilty plea. Finnegan J, after emphasising the seriousness of the consequences of such an offence, stated:

"We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue - whether illegal tax evasion on the one hand or social security fraud on the other - should generally meet with an immediate and appreciable custodial sentence, although naturally the sentence to be imposed in any given case must have appropriate regard to the individual circumstances of each accused".

The appellant accepts the mitigating factors that apply to the respondent identified by the court, those being the sum of money that the respondent has offered to repay the exchequer, and significantly the detrimental impact imposing a custodial sentence would have on his family members. However, it is submitted that excessive weight was applied to the respondent's family circumstances. It is submitted that, as a matter of principle, family responsibilities should not result in the non-imposition of a custodial sentence in circumstances where a such a sentence is otherwise appropriate. This principle is supported by the rulings in *DPP v Campbell* [2014] IECCA 15, *DPP v Jacqueline Durcan* [2017] IECA 3, and *DPP v Lisa Lynch* [2018] IECA 1.

15. It is submitted that the court erred in principle by imposing penalties which failed to adequately reflect the principle of general deterrence. The importance of deterrence as a sentencing principle is emphasised by O'Malley:

"General deterrence is premised on the empirical assumption that punishment, if sufficiently severe, will dissuade people from committing crime... The moral premise is that the state is justified in imposing such punishment, which may or may not be strictly proportionate to the offence, if it will deter offending by others".

O'Malley goes on to explain that denunciation is also an important factor to consider, in that:

"The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined in our substantive criminal law."

Furthermore, in *DPP v Paul Murray*, Finnegan J stated that:

"In the context of frauds upon the public revenue, deterrence is an important consideration, in that it is a necessary quid pro quo of social solidarity. It gives an assurance to the hard-pressed bona fide taxpayer that the State will both collect and distribute its revenue fairly and that those who defraud will be sternly dealt with."

Therefore, it is submitted that the court failed to give adequate consideration to the general principle of deterrence by imposing a non custodial sentence in this case.

16. It is therefore submitted that in all of the circumstances of this case, a wholly suspended sentence of three years as imposed by the sentencing court erred in principle and in law and was unduly lenient.

Submissions of the Respondent

17. The respondent submits that the sentence imposed by the court was entirely within the jurisdiction of the sentencing judge and did not err in law or principle.

18. With regard to sentencing, the respondent refers to Kearns J (as he then was) in the case of *The People (DPP) v RMCC* [2008] 2

IR 92, who stated:

"any sentencing court should conduct a systematic analysis of the facts of the case, assess the gravity of the offence, the point on the spectrum at which the particular offence or offences may lie, the circumstances and character of the offender and the mitigating factors to be taken into account:- all with a view to arriving at a sentence which is both fair and proportionate. This form of approach was approved by this court in The People (DPP) v M [1994] 3 I.R. 306, when Egan J. stated as follows at p. 315:-

"It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made."

The respondent also relies on the case of *DPP v Cullen* [2013] IECCA 47, where with regard to reviewing a sentence, Murray J sitting in the Court of Criminal Appeal stated:

"Certainly mitigating factors may lead a judge to simply impose a sentence lower than that which would otherwise be imposed, absent any such mitigating factors. But counsel for the DPP was correct in submitting that suspending a sentence, in whole or in part, may also be an integral part of mitigating a sentence which might otherwise be imposed".

19. The respondent submits that even if this Court considers any particular aggravating factor as advanced by the appellant, the sentence imposed in this case was still the appropriate one. The respondent also refers the court to Finnegan J in *The People (DPP) v Fitzpatrick* [2010] IECCA 31 who stated:

"In all the circumstances of the case while it may well be that some errors were made by the learned trial judge, the overall effect of the sentence is that it is an appropriate one, if anything at the lower end of this scale for offences of this nature. In those circumstances it is open to this court, notwithstanding that there has been an irregularity in the course of sentencing, if it is satisfied that there has been no injustice caused not to interfere with the sentence."

It is therefore submitted that no error was made in this regard.

20. With regard to the appellant's submission that the respondent had provided inaccurate information to his probation officer and that the court failed to apply sufficient weight to this, it is submitted that the respondent was always aware that the probation officer would gather information from all prosecuting sources, including the prosecuting Garda and was not deliberately attempting to mislead the probation officer. The respondent had provided the correct information at interview with the prosecuting Garda and was aware that the prosecuting member had all the facts.

21. In response to the appellant's submission that the sentencing court inadequately balanced the aggravating and mitigating factors in this case, the respondent submits that this is a case of exceptional circumstances, whereby decisions made in the cases of which the appellant relies may not necessarily apply in this instance. It is submitted that an important contrast must be drawn between this instant case and of *DPP v Jacqueline Durcan* [2017] IECA 3, on which the appellant relies, as the latter was an appeal against severity and had additional aggravating factors than those present in this case. It is submitted that the sentencing judge gave due consideration to the possibility of imposing a custodial sentence but refrained from doing so due to *"the very particular personal circumstances"* of this case, which was in her discretion and she was entitled to do.

22. With regard to the appellant's submission on the principle of general deterrence, the respondent refers to the case of *DPP v Begley* [2013] IECCA 32, where McKechnie J stated:

"..this court would have significant concerns in advocating any blanket approach in tax fraud cases, such type of offences are totally dissimilar to many others, including the more serious crimes against the person...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."

It is therefore submitted that the sentencing judge was not obliged to impose a custodial sentence as seems to be suggested by the appellant.

23. Although it is submitted that the sentence imposed in this case was appropriate, in the event that this Court finds the sentence was unduly lenient, the respondent submits that a custodial sentence would still be unwarranted. The respondent refers to the case of *DPP v Robert Jones* [2017] IECA 113. While the Court of Appeal found that the sentence imposed in Jones was unduly lenient, it went on to say that:

"The question is, in circumstances where time has moved on, where the respondent has not re-offended, where he is gainfully employed, and where there has been significant undue delay, does the justice of this case still require that he should have gone into custody? We consider the issue to be a finely balanced one. While we reiterate that, in most cases of egregious violence such as herein, a custodial element is likely to be required, principally to reflect the overall gravity of the offence, and in the interests of deterrence, both general and specific, we have come to the conclusion that the message in that regard will, in the circumstances of this case, be sufficiently promulgated by the Court's finding that the initial sentence was unduly lenient, but that it is not necessary at this point to require the respondent to go into custody."

The respondent submits that the rationale for refraining to impose a custodial sentence in Jones would also apply in this instance case.

24. It is therefore submitted that with regard to the exceptional circumstances that apply to the respondent in this case, the sentence imposed by the court of three years wholly suspended was not unduly lenient and was not made in error of law or principle and therefore should not be interfered with.

Decision

25. 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 O'Flaherty J. in *DPP v. Christopher Byrne* [1995] 1 ILRM 279. These were set out by Hardiman J.

in *DPP v. de Paor & Zdanowski* [2008] IECCA 137 at p. 10 as follows:-

"In DPP. v. Byrne [1995] 1 ILMR 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 ILMR 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 be 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."

26. 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."

27. 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 Gardai, 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."

28. 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.

29. 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.

30. Turning to the facts of this case; we consider the case involved a serious offence of fraud. In our judgment, cases involving a fraud on the public purse should almost always meet with an immediate and custodial sentence. We reiterate the statement made by the Court of Criminal Appeal in *DPP v. Paul Murray* cited above;

"We therefore suggest for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue - whether illegal tax evasion on the one hand or social security fraud on the other - should generally meet with an immediate and appreciable custodial sentence, although naturally the sentence to be imposed in any given

case must have appropriate regard to the individual circumstances of each accused."

31. The facts of the fraud perpetrated on the social welfare are set out above in paras. 2 to 5. They are fully set out by the learned sentencing judge at p. 5 and 6 of the transcript of the 15th June 2017. The personal circumstances of the respondent are also dealt with there. It was noted that he was 67 years of age and that he has no previous convictions of note. He is recovering from prostate cancer. In what was very sad evidence, the learned sentencing judge heard how the respondent's two sisters are both ladies of advanced years and in poor health. One of the sisters, herself partially paralysed on her left hand side, cares for her older sister who suffers from severe intellectual disability and other serious ailments. She heard how the younger sister simply could not manage on her own. The respondent provides home care support for his sisters. In this regard the judge had the benefit of a detailed probation report based on a home visit to the Lawlor sisters. It appears that if it were not for his help, it is probable the older sister could not remain at home.

32. The judge outlined the aggravating factors in the case. She noted the significant loss to the exchequer. She also noted the apparent lack of candour in the respondent's dealing with the Probation Service. We think the learned sentencing judge wisely did not make any finding in this regard as the lack of candour allegation was not accepted. Save for having a trial within a sentencing on that issue, it would not be possible for the court to rely on apparent dishonesty. In any event, since the offences to which he pleaded show that the respondent is a dishonest man, there is probably little further to be said on that score. The learned sentencing judge further noted the early plea and that €11,000 had been borrowed from family members in order to make some redress. She considered his own ill-health and that he was now living on the state pension.

33. Taking all these matters into account, the learned sentencing judge considered that a term of imprisonment would be appropriate. Considering the maximum sentence was 10 years she identified a headline sentence of four years on each count. Taking account of mitigation she then reduced that to 3 years. The learned sentencing judge further decided that she would suspend the entire of that sentence. She explained carefully why she was doing this. The factor that most pressed her to suspend was the detrimental effect a prison sentence would have on the respondent's two sisters given their personal circumstances. She relied upon the probation report which detailed their difficulties at home and the necessity to have their brother available to help care for them.

34. As with *Hehir*, also delivered today, 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 for the particular offence involved here was unduly lenient in that it was a substantial departure from what would be regarded as the appropriate sentence. Were there exceptional circumstances present that could justify such a departure from the norm which is custody? The point of departure for the learned sentencing judge was a custodial sentence and she clearly recognised that. She then explained why she considered there were exceptional circumstances justifying her departure from the norm. They are very clearly based upon the extremely difficult circumstances of the respondent's two sisters. One is partially paralysed and cares very loyally but with great difficulty for her badly disabled older sister. The imprisonment of their brother who cares for them would almost certainly end, at the very least, the older woman's ability to live at home. Allowing as we must a substantial margin of discretion to the learned sentencing judge we can find no basis for intervening in this case. The appeal is dismissed.