THE COURT OF APPEAL

Record No. 92/2018

Birmingham P.
McGovern J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

KATHLEEN STOKES

APPELLANT

JUDGMENT of the Court delivered on the 30th day of October 2018 by Mr. Justice McGovern

1. On the 10th November 2017 the appellant was convicted of the offence of possession of stolen property contrary to s. 18 of the Criminal Justice (Theft and Fraud) Offences Act 2001. On the 21st November 2017 she was sentenced to three years imprisonment which was to run from the 1st May 2017. She has appealed against the severity of the sentence.

2. The appellant is a forty-three year old married woman with three sons who at the date of her sentence ranged in ages from twelve to twenty years. Her husband is currently serving a prison sentence and this is relevant to one of the issues pleaded in mitigation.

3. On arraignment the appellant pleaded not guilty. Before sentencing, evidence was given that she had thirty-two previous convictions including some involving burglary, theft and receiving stolen goods.

4. Her most recent conviction was on the 23rd December 2015 when she received a €50 fine for a theft offence. Prior to that her last conviction was on the 24th October 2005 before Waterford Circuit Court when she received a three year sentence, suspended for three years, in respect of an offence of burglary. This could be termed her last conviction for a serious offence and was referred to by the sentencing judge.

5. The appellant has raised four grounds of appeal, namely:-

> (i) The learned trial judge failed to take into account adequately or at all the various mitigating factors in the case;
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> (ii) the learned sentencing judge failed to attach sufficient weight to the public interest in rehabilitating the appellant;
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> (iii) the learned sentencing judge took into account matters which were extraneous or were not appropriate to consider in the circumstances of the case and passed sentence accordingly, and
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> (iv) the learned trial judge erred in that he passed a sentence which was in all of the circumstances disproportionate to the offence, the circumstances of the case and the personal circumstances of the appellant.

Ground (i): The learned trial judge failed to take into account adequately or at all the various mitigating factors in the case;
6. At the sentencing hearing the following factors were proffered in mitigation on her behalf, namely:-

> (i) at the time of sentencing she was suffering from anxiety and depression as well as a history of self-harm and suicidal ideation;
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> (ii) she is a mother of three and her incarceration was having and would continue to have a significant impact on the family;
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> (iii) she has expressed remorse to the injured party and her family during the course of her sentencing hearing;
>
> (iv) she has remained free of convictions for serious offences of a similar nature since 2005.

7. So far as her expression of remorse is concerned little weight can be attached to that because it was given after she was convicted by a jury having pleaded not guilty. The appellant complains that while the trial judge referred to the fact that her most recent burglary conviction was recorded some twelve years earlier and that accordingly "she is capable, when she wants to, of avoiding conviction", this was not taken into account when passing sentence.

8. But she also complains that when a report was provided on her behalf by Mr. John Walsh of Healthy Minds, which is a traveller suicide and mental health project under the aegis of the HSE, the judge expressed the view that the author was not qualified to make the conclusions set out in the report.

9. The appellant complains that the trial judge gave the appearance of dismissing the report out of hand and of refusing to consider it

at all. A reading of the transcript creates the impression that the judge was quite disparaging and at one point the judge said:-

> *"…I mean I am sorry for laughing but John Walsh is a mental health co-ordinator and he is making diagnosis of PTSD and suicidal ideation."*

10. While counsel subsequently made reference to this report in the course of her plea in mitigation particularly insofar as the report's contents related to the appellant's children and the affect that her conviction and impending sentence were having on them the following exchange took place:

> *"[COUNSEL]: I think the opinions were primarily about her children and how they are coping, Judge. I think it has had a big impact on her family life, as well as herself. She has been in prison in respect of these matters since the 1st May. She, I think, has been a big –*
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> *JUDGE: Sorry, are they the people who were shouting at her from the gallery during the trial?*
>
> *[COUNSEL]: Well…*
>
> *JUDGE: Her family, is it?*
>
> *[COUNSEL]: Her family were there, Judge.*
>
> *JUDGE: So that is the big effect the trial had on them…"*

11. It is difficult to read the above exchange and the judge's dismissal of the "Healthy Minds" report without at least forming the impression that the judge was not engaging as he should have done with submissions made on behalf of the appellant in mitigation of sentence. While, of course, a judge is entitled to take a sceptical view of any evidence adduced for the purpose of mitigation it is important that he does not, either by his words or actions, create an impression that he is prejudiced against the accused. This Court is of the view that the trial judge's observations could certainly have been better phrased.

12. The appellant relies on the principles set out by the Court of Criminal Appeal in *DPP v. Jervis and Doyle* [2014] IECCA 14 where the Court stated:-

> *"It is, of course, the case that the personal circumstances of the individual and the effects of a sentence on his family are relevant considerations in sentencing. In her judgment in DPP v. M [1994] 3 I.R. 306, Denham J. as she then was, said:-*
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> > *'However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court.'*
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> *The effect of the breaking up of a family unit by separating children from one or both of their parents is a highly material consideration in sentencing. The proposition is so obvious that it only has to be stated for it to be accepted. There are, however, some crimes so serious that this necessary consequence follows from the commission of the crime itself. Everything will depend on the circumstances of the case."*

13. On the other hand, due regard must be had to the public interest in punishing crime and serious crime in particular. One of the aggravating factors in this case was the fact that at the time when the accused was arrested in close proximity to the premises from which the safe had been removed she had with her two children, one who was her son and the other a nephew. Another aggravating factor was her thirty-two previous convictions. The respondent in this appeal argues that at the end of the day if the final sentence imposed was correct and there was no serious error of principle this sentence may be upheld. The Court will come back to that later in this judgment.

14. At the time of the commencement of her sentence the appellant's husband was serving a prison sentence and this is undoubtedly going to have an additional impact on the three children. However the judge heard evidence that the eldest son was 20 years old and the younger children were being taken care of by an aunt and uncle.

Ground (ii): The learned sentencing judge failed to attach sufficient weight to the public interest in rehabilitating the appellant

15. The transcript shows that the sentencing judge expressly considered the principle of rehabilitation as follows:-

> *"In my view and in view of her previous convictions, I am obliged under the 2015 case of the DPP v. Dent to look for and inquire into any plausible grounds for incentivising a sentence for the accused to be rehabilitated; look for it, do not rule it out. But where, in my view, the first driver of rehabilitation is the defendant themselves, so where do I find in this defendant, who made no admission, no co-operation, no sense of remorse and a belated half-hearted sense of apology today, where do I see grounds for rehabilitation or incentivising her sentence? In my view, there are none, therefore, I do not propose in this lady's case to structure a sentence."*

16. It seems to this Court that the trial judge did address the public interest in rehabilitating a convicted person. It cannot be said that he did not give sufficient weight to that public interest having regard to the matters he outlined in the transcript set out above. While she may have expressed remorse and apologised to the owner of the property which had been stolen and which was found in her possession this was after a trial in which she fully contested the allegations made against her, as was her entitlement. An apology given in such circumstances, while it may be better than nothing, could reasonably be perceived as self-serving and is of limited value.

Ground (iii): The learned sentencing judge took into account matters which were extraneous or were not appropriate to consider in the circumstances of the case and passed sentence accordingly

17. This ground arises out of exchanges between counsel and the judge which took place after there was a change of the appellant's legal team. It appears that the appellant's preferred counsel was engaged in another trial being heard in Cork Circuit Court during the same sessions as the appellant's trial and late in the day the brief had to be handed over to another barrister. During the course of her trial the appellant expressed displeasure as to how the case was being run and the fact that she was to be represented by counsel who had come into the case recently. An application was made by the appellant's solicitor to come off record and for counsel

to be discharged. It seems that the trial judge perceived this application as an attempt by the appellant to abort her trial. The transcript shows that the judge stated:

> *"JUDGE: During that absence your client made a conscious and deliberate effort to abort the trial."*
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> He later stated:
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> *"So, you see the position now is, am I to take it that this lady's attempt to abort the trial was her own vindictiveness and your being missing had nothing to do with it?"*
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> The solicitor making the application then said:
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> *"Unfortunately, Judge, I can't speak for her, I'm not in her mind set and normally it would tend to be…*
>
> *JUDGE: I got the same guff from her as I got from Mr. Hayes; that she was his preferred counsel or he was her preferred counsel and I was a bit worried about the similarity in the phrasing."*
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> Later the judge said:
>
> *"So then I may take the view that her attempting to abort the trial in the manner in which she did was entirely malicious and I will take that into account at the trial, so you'd better explain that to her."*
>
> The solicitor replied:
>
> *"Yes, Judge, I'd ask you not to punish Ms. Stokes for any, I suppose, misgivings or encumbrances on behalf of her legal team. We endeavoured to …*
>
> *JUDGE: Sorry, you are not deaf, that is not what I said. If you explained, as you have said to me, the change in the team properly to her, which I will accept you did, then her interventions during the trial, in an effort to get the jury discharged, are from her own doing and they're, accordingly, malicious."*

18. The appellant complains that while the judge was entitled to make enquiries of the appellant's solicitor as to why he was not personally present when the application was moved, his remarks to the effect that the making of the application by the appellant was "malicious" and something he would "take into account" in sentencing her, were improper. To be fair to the judge the transcript does not suggest that he indicated he would take this matter into account in sentencing her but rather something that he would "…take into account at the trial…". But one way or the other it was clear that the judge had taken the view that the principal fault for the attempted collapse of the trial lay with the appellant herself. The trial judge was entitled to make legitimate enquiries of the appellant's solicitors as to the reasons for the purported dismissal of counsel during the trial. It is clear that the solicitor was not present when this arose and that an apprentice from his office was attending counsel. It is not necessary for the Court to express a view on whether or not the solicitor himself should have been present or whether it was sufficient for his apprentice to be there (assuming the apprentice was properly informed as to the position so as to instruct counsel). But a neutral observer of these exchanges between the solicitor and the judge might have found the tone of what was said somewhat disquieting. But such a neutral and objective observer in full possession of the factual background would also have appreciated the offence was a very serious one committed by someone with a poor record and so the case was always going to have to involve a custodial sentence.

Ground (iv): The learned trial judge erred in that he passed a sentence which was in all of the circumstances disproportionate to the offence, the circumstances of the case and the personal circumstances of the appellant.

19. The appellant argues that the sentence should be proportionate to both the level of the severity of the offending and the particular circumstances of the appellant. See judgment of the Court of Criminal Appeal in *DPP v. McCormack* [2000] 4 I.R. 356 at 359 where the Court stated:-

> *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused."*

20. The appellant does not take issue with the judge's assessment of the offence in itself as meriting a nominal sentence of three years but complains that he failed to balance that against other factors such as her mental health, the fact that she was a mother of three dependent children and that she had not been convicted of a serious offence since 2005.

21. The trial judge set a headline sentence of three years and counsel for the appellant argues that when other mitigating factors were taken into account this should have been reduced and the failure to do so amounted to an error in principle. The maximum sentence for an offence of possession of stolen property is one of five years imprisonment and the respondent submits that the sentence of three years was well within the discretion of the sentencing judge in the light of the gravity of the offence, the circumstances in which the offence was committed and the absence of significant mitigating factors such as a plea of guilty and a prior clean record.

22. Having considered all the circumstances and notwithstanding the concerns which the Court has expressed about certain aspects of the sentence hearing, this Court is satisfied that the sentence of three years is proportionate and does not propose to interfere with it.