



## THE COURT OF APPEAL

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

**[No. 275 of 2017]**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**And**

**Lisa Lynch**

**Appellant**

**JUDGMENT of the Court (ex tempore) delivered on the 11th day of January 2018 by**

**Mr. Justice Birmingham**

1. This is an appeal against severity of sentence. The sentence under appeal is one of 18 months imprisonment that was imposed on 12th December, 2017 in the Dublin Circuit Criminal Court. After sentence was pronounced, the judge ceded to a request on behalf of the appellant to defer the commencement of the sentence until the new year. The result is that the appellant has appeared before this Court on bail and in a situation where she has not been in custody at any stage.

2. The background to the sentence hearing in the Circuit Court, which was a sentence hearing that took place on foot of a plea of guilty, is that the appellant was a director of a company called AGL Logistics. This was a company involved in the transport business, based in rural Kildare, though it has a number of depots around the country, and it employed some 70 people. That company had a relationship with a financial services company called Billy Financial Services and that relationship saw the financial services company paying 80 per cent of invoices that were issued by AGL Logistics by way of a loan or an advance.

3. The situation is that AGL Logistics was a struggling company and, with a view to keeping it afloat, Ms Lynch issued 93 false invoices and on foot of those false invoices payments were made by Billy Financial Services. They ended up at a loss of €460,662.

4. By way of further background, it should be explained that the circumstances in which the appellant effectively found herself in charge of the company, and therefore in a position to do what she did, were unusual. In June 2010 the appellant gave birth to her son by Caesarean section. Two days later, her husband was diagnosed with a rare form of mouth cancer. He became seriously depressed and he withdrew from the running of the company – he had previously been the mainstay of the company having, it seems, inherited it from his father. Some ten days after giving birth, the appellant took over the entire running of the company. It was accepted during the course of the sentence hearing by the investigating Gardaí that she was ill-equipped for this task and that she was really quite out of her depth. The company struggled to survive. The appellant invested a sum of €100,000, her own money, with a view to keeping the company in business and borrowed a further sum of €100,000 from her father for this purpose before resorting to the criminal activity which led to the charges before the Court.

5. In terms of her background and circumstances, she was born on 6th June, 1984 and she was 33 years of age therefore at the time of the sentence hearing. At the time of the offending which occurred over a period of approximately six months between May and October, 2011, she was 27 years of age. She is the mother of two children, two sons, aged three and seven. Because of her husband's difficulties she is, and is likely to remain, the main breadwinner in the family. The family financial situation is a very difficult one, her husband is now on a back-to-work scheme, they have substantial debts and the family home is due to be repossessed in April. The plea of mitigation in the Circuit Court stressed the co-operation that was forthcoming, the appellant was questioned about what was happening, by a representative of Billy Financial Services and in their words, she "talked them through" what had occurred. When the matter was investigated by Gardaí she made immediate and elaborate admissions to them and then, when the matter came before the Courts, entered a very early plea of guilty. In the period between the matters coming to light, the failure of the company as a consequence and the matter coming to court, the appellant had secured work with her brother-in-law and, although the salary was a relatively modest one, she had, on a weekly basis, put money aside by way of assembling a compensation fund.

6. In the Circuit Court her counsel pressed for a non-custodial disposal. The judge however felt that the offending was of such seriousness that he could not accede to this and he proceeded to impose the sentence that he did. Although requested by the prosecution to nominate a headline sentence, he declined to do so, though making it clear that the sentence would have been a much longer one had it not been for the substantial mitigating factors that were present.

7. In the course of this appeal emphasis has been placed on the failure to nominate a headline sentence and it is said that, particularly in the circumstances of this case, that this amounted to an error in principle which would justify, indeed require, the Court to embark on the task of resentencing.

### **The judge's approach to sentencing in the Circuit Court**

8. The judge, first of all, put matters back for consideration overnight. Then, in the course of his prepared sentencing remarks, he referenced the extent of the loss, which he described as quite large. He described the criminality as serious criminality. He referred to the duration of the misconduct. He then referred, on the other side of the coin, to the mitigating factors such as the plea, the cooperation that was forthcoming, the admissions that were made and the absence of previous convictions. He commented, and this is a point on which the appellant places emphasis in the course of this appeal, on the fact that the offences were committed for the best of motives, in order to secure the survival of the company in a situation where the appellant felt an obligation towards the employees. He said he was satisfied that she was very, very unlikely to reoffend and to be before the courts again. He addressed specifically the request that had been made that the case would be dealt with in a non-custodial manner. He said he had considered non-custodial options, because of the mitigating factors that were present and the general circumstances, but that while he had considered it, he could not accede to the suggestion in a situation where the defendant had engaged in a course of wrongdoing, duplicity and criminality. It was not, he added, a one-off offence. It had happened over a reasonably substantial period. He then concluded his sentencing remarks as follows:

"Now, I think I must impose a custodial sentence and by reason of the mitigation and the circumstances, I am trying to be as lenient as I can with Ms Lynch, but I think the appropriate sentence, taking all the factors in the case, is a term of imprisonment of 18 months. I feel but for the circumstances of the case, the particular circumstances, the imprisonment would have been substantially longer by reason of the seriousness of her misbehaviour and it was a huge error of misjudgement in this case."

9. At that stage, counsel for the prosecution asked the judge to nominate a headline sentence before mitigating it down to the net sentence of 18 months. The judge indicated that he was not going to do that but did not give a reason as to why he would not. This Court would have liked to have seen a headline figure identified. This Court has consistently said it regards this as best practice, while also making clear that failure to follow best practice will not necessarily see a sentence quashed. The Court would observe that the identification of a headline sentence is particularly desirable in cases where there are significant mitigating factors present. This was a case where there were significant mitigating factors present. As already stated, the failure to nominate a headline sentence is a significant element of the appellant's case in this appeal. Counsel links to that what he says is a failure to advert to a number of matters that were advanced in mitigation. He instances the loss of reputation that the appellant and her husband, indeed, have suffered. The appellant and her husband were substantial business people in a long-established family business. He refers to the fact that the appellant has had to live with this matter over a period of four years, though counsel acknowledges that this last point was not one on which he had laid great emphasis in the court below. The Court feels it is unrealistic in those circumstances to criticise the judge for not specifically referring to this as an issue. However the Court does agree that the issue of delay, the fact of having a pending prosecution hanging over one's head, is a matter of substance. For someone who has not previously come before the courts, the fact that a prosecution is pending is likely to be the cause of stress, worry and anxiety.

10. The other issue highlighted by counsel is the failure to refer to the efforts of the applicant to recompense. The amount that has been saved, €8,000, while very small when set against the amount that was stolen, is a significant sum indeed for a family in straitened circumstances, such as this family are. Counsel for the respondent says that it was likely that the judge was taking the view that he saw this as a case where a custodial sentence was required and so was taking the question of compensation out of the equation. That may be so, but the efforts involved in raising the sum, putting an amount aside weekly, over a four year period, certainly indicates an awareness of the seriousness of the misconduct that had occurred and is indicative of genuine remorse.

11. There is one other matter that this Court would refer to, though it is not a matter that was listed by counsel when setting out his list of complaints. Counsel for the appellant had concluded his plea in mitigation in the Circuit Court as follows:

"I do know, Judge, just from my own knowledge and from dealing with cases and the Dóchas Centre, that there is a significant difference in the regime that one is subjected to, depending on whether the sentence is one in excess of a year or less than a year. And that may be something that's irrelevant to the Court's considerations, but I'll bring it to your attention."

12. This Court has invited counsel to elaborate or particularise and he has not really been in a position to do so. However, given that the issue was raised in the way that it was with the judge, it is a matter that might have been addressed in the course of his sentencing remarks by the judge. Had a headline sentence been nominated, it might well be that this Court would have been satisfied that full and appropriate credit for the significant mitigating factors that were present had indeed been given. However, in the circumstances the Court was left with a degree of uncertainty as to what credit was given for mitigation, though in that regard we recognise the judge's comments that the sentence would have been substantially longer, or much longer – he used both phrases – had it not been for the presence of the mitigating factors.

13. The failure to identify a headline sentence coupled with the fact that there was no mention of the pattern of working and saving compensation, and the failure to address the assertion that if there had to be a custodial sentence that the appellant would be advantaged by a sentence of 12 months or less, and disadvantaged by one of 12 months or more, has persuaded the Court, not without considerable hesitation, that it should intervene, though it must be said, the scope for intervention is limited.

14. The Court is in agreement with the judge in the Circuit Court that this was a serious case. The judge's words referring to a course of wrongdoing, duplicity and criminality are apt. It cannot be forgotten that this case involved the theft in a systematic fashion, over a significant period, of almost half a million euro. Absent the mitigating factors that were present, the case would in the Court's view have merited a sentence of five years imprisonment. However it is the case that very significant mitigating factors were present. These were those that were referenced by the trial judge and that have been referred to earlier in the course of this judgment. What should also be taken into account are the conscientious efforts towards assembling a sum by way of recompense over a four year period. In resentencing, the Court, in accordance with its usual practice has had regard to additional material that was furnished to the Court today in the form of a letter from Ms Lynch as well as two documents from the school in relation to Alex, the appellant's seven-year old son.

15. The Court recognises that Ms Lynch's husband may have particular difficulties in coping in the period ahead and that is a factor to be recognised and of which account should be taken. The Court proposes to deal with the matter as follows. Having identified the mitigating factors, it will mitigate the sentence to one of 18 months imprisonment. However, given the combination of the really powerful mitigating factors that are present in the case, and so that there can be no room for doubt but that those factors are recognised and are being given full credit, the Court will suspend the final six months of that 18 months.