THE COURT OF APPEAL
(CRIMINAL)

Record Number: 100/2018

Birmingham P.
Whelan J.
McCarthy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

respondent

- AND –
paul carew

appellant

JUDGMENT of the Court delivered on the 25th day of March 2019 by Ms. Justice Whelan

1. This is an appeal against severity of sentence. The sentence was imposed on the 15th March, 2018 by His Honour Judge Martin Nolan in Dublin Circuit Criminal Court. There were two separate indictments, bill number DU1092/2017 and DU262/2018 before the court. The offences in question concerned two counts of money laundering contrary to s.7 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The evidence before the court was that both offences were committed during the currency of a three-year suspended sentence imposed for a prior similar offence of money laundering contrary to s.7 of the said Act which had been imposed on the 14th April, 2016 by Her Honour Judge Sheahan at Dublin Circuit Criminal Court. Accordingly, a third issue for consideration by the circuit judge at the sentencing hearing on the 15th March, 2018 was bill number DU976/15 which was re-entered by the Director of Public Prosecutions pursuant to s. 99(13) Criminal Justice Act 2006.

2. It is noteworthy that the maximum penalty for an offence contrary to s.7 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 is fourteen years. The sentencing judge imposed a "global sentence" on the appellant of a term of eight years' imprisonment backdated to the date he was first taken into custody on the 24th June, 2017.

Background facts
3. In terms of his background and personal circumstances the appellant was born in 1976 and was aged about thirty-seven years at the date of the first offence in July 2014. He has a good work record and has been in employment mainly as a haulage driver from about the age of fifteen. He is now aged forty-two years. Prior to his involvement in the first of this series of three money laundering offences he had no previous convictions. He is legally separated and in a long term relationship. One of his children suffers from a significant medical condition. His employment history is good and includes spending ten years with one transport company.

4. On the 14th April, 2016 the appellant received his first conviction for money laundering before the Dublin Circuit Criminal Court. The offence came to light when the appellant was apprehended travelling to the Citywest area in Dublin from Limerick on the 22nd July, 2014. At the time of his apprehension the appellant was found to be in possession of €67,900.00, subsequently determined to be the proceeds of criminal conduct. The sentence of three years imposed by the Circuit Criminal Court was suspended for a period of three years.

Events during service of the suspended sentence
5. Four months after the said suspended sentence was imposed, on the 27th August, 2016, Gardaí from the National Drugs and Organised Crime Bureau were conducting a surveillance operation at Liffey Valley Shopping Centre in Clondalkin. A Ford Focus van was observed. A Volkswagen Golf approached it, handing over two bags. An armed intervention team intercepted the Volkswagen van which was being driven by the appellant. On inspection, the vehicle was found to have been adapted with a concealed compartment which was opened by means of a concealed lever. Upon the concealed compartment being found underneath the rear of the vehicle internally, two bags containing €191,160.00 in cash were recovered by the Gardaí. The appellant was charged on the 26th October, 2016 and entered a plea of guilty on the 6th December, 2017. The said offence is comprised in bill number DU1092/2017.

6. The third money laundering offence occurred on the 24th June, 2017, fourteen months after the three-year suspended sentence was imposed. It is specified in bill number DU262/2018. The evidence before the sentencing judge was that the appellant was arrested during the course of an operation tackling a large organised crime group operating inside and outside the State. The appellant was one of the main targets of the operation along with two other individuals. On the said date the appellant was observed at a car wash in Walkinstown, Dublin 12. He exited a van in which he had been travelling as a passenger carrying a large box. He walked to the back of the car wash and opened the passenger door of another van which was parked there and got in. He remained inside for approximately fifteen to twenty seconds and then exited the van without the box. The vehicle was then intercepted and €351,000.00 in cash was recovered from the box. he appellant was arrested and charged with money laundering. He entered a plea of guilty on the 9th March, 2018.

7. The uncontested evidence before the trial judge was that the appellant was a trusted person within the organisation in question and was highly involved in the organisation. The evidence was that Mr. Carew was the main focus of the armed intervention team and surveillance operation on the 24th June, 2017.

8. Since the latter date the appellant has been in custody. Two other individuals were also separately before the courts in relation to the events of the said date. The appellant pleaded guilty.

Mitigating arguments advanced on behalf of the appellant

9. At the sentencing hearing it was contended in mitigation as follows: -

(a) That the appellant's plea of guilty was of value to the prosecution;
(b) Personal financial difficulties had led him into money laundering in the first place;
(c) Following his first conviction on the 14th April, 2016 his life had been threatened the criminal enterprise for whom he worked, and as a result he was incapable of resisting the pressure;
(d) At the date of the second offence for money laundering on the 27th August, 2016 the appellant had been in significant financial difficulty;
(e) His role was that of a courier and he was unaware of the actual contents of the packages he delivered;
(f) His motivation was not based on avarice or greed;
(g) He was expendable to the criminal gang he worked for;
(h) His work record was significant;
(i) He had a positive record of doing charitable works, and good testimonials and letters were submitted in evidence;
(j) One of his children had ill health and a custodial sentence would have an impact on his ongoing capacity to provide care for his family including this child and;
(k) The appellant had been of exemplary conduct whilst on remand and had been placed in the Progression Unit of Mountjoy prison, and had engaged in charitable and volunteering work there.

Approach of sentencing judge

10. In imposing sentence, the circuit judge noted that he was dealing with three separate matters, including the two new bills and the re-activation of the suspended sentence pursuant to s. 99(13) Criminal Justice Act 2006. The court noted that the offences engaged in involved laundering of money for an organised crime cartel or organisation. He observed that money laundering is a very serious offence. He considered that the only purpose of money laundering is to move money so that it arrives eventually in a place where it can be used and put into a legitimate economy. He noted that whilst the appellant did co-operate when arrested, he did not make any admissions in relation to his part in the crimes. The court had regard to the key mitigating elements including his plea of guilty, as well as his positive work record. The judge observed that he was doing well in prison and was a person who can be reformed.

11. The sentencing judge considered that until the first offence, which occurred on the 22nd July, 2014, the appellant had led a blameless life and had taken his responsibilities towards his family seriously. The sentencing approach adopted by the judge was to impose a global penalty, taking into account also the re-entered matter. With regard to the money laundering offences committed on the 27th August, 2016 and on the 24th June, 2017, the court noted that the headline penalty for the offences comprised in these two bills was in the region of nine to ten years. The court observed that the appropriate sentence in relation to the offences was a term of imprisonment of eight years –

> "I am sentencing him globally, I am going to make no order in relation to the suspended sentence. So his effective punishment for these three bills is a term of imprisonment of eight years."

Notice of appeal

12. The appellant relies on twelve separate grounds of appeal which assert that the sentencing judge erred, including, either in law and /or in principle as follows: -

(i) In imposing a sentence of eight years' imprisonment same was excessive/unduly severe/disproportionate;
(ii) In terms of the structure of the sentence which he imposed in respect of the two later offences;
(iii) As regards where the offences lay on the scale of offending behaviour;
(iv) In failing to properly assess and determine the role of the appellant in the offending behaviour, and to impose a sentence commensurate with this level of culpability;
(v) In failing to properly take into account the background circumstances to the offending behaviour;
(vi) The judge erred in law in failing to structure a sentence balancing the punitive, deterrent and rehabilitative elements and in failing to structure a sentence proportionate to the circumstances of the particular offender;
(vii) In failing to have any regard to the punitive nature of a suspended sentence or community sanction as an alternative to a custodial sentence;
(viii) In failing to have adequate regard to the absence of relevant previous convictions prior to the first money laundering offence set out in bill number 976/2015;
(ix) In failing to take adequate account of the significant mitigating factors submitted on his behalf;
(x) In failing to provide a sentence that appropriately reflected the personal circumstances of the appellant and the difficulties he would have serving a term of imprisonment, and the effect of his absence on his family;
(xi) In failing to have adequate regard to the ancillary penalty suffered such as (but not limited to) the loss of employment and ability to maintain his family since going into custody and;
(xii) In failing to have adequate regard to the contents of the documentary evidence and the testimonials submitted on behalf of the appellant.

Comparators

13. In detailed written submissions the appellant advances as comparators a number of decisions including *DPP v. Trimble* [2016] I.E.C.A. 309, *People (DPP) v. McHugh* [2002] 1 I.R. 352 and *DPP v. Cunningham* [2013] I.E.C.C.A 62, and contends that the sentence imposed was out of line for the offences. It was argued that the judge had failed to identify where the offence correctly lay on the scale of offending. Further, it was claimed that in so far as the circuit judge held that the pre-mitigation headline sentence for the two new matters before him would be in the region of nine to ten years' he fell into error. It was argued that the sentencing judge failed to accord adequate weight to the mitigating factors, in particular the presence of duress and the appellant's limited role and the benefit of his early plea. It was further argued that the personal circumstances of the appellant were not adequately taken into account, resulting in a disproportionate sentence being imposed. It was contended that the circuit judge fell into error in failing to include a suspended element in the sentence he imposed.

Position of DPP

14. For the DPP's part she contends that the appellant was providing a vital service for the gang and that the role he played within it was a significant one. She asserts that in considering the approach taken in the circuit court regard must be had to the decision not to re-activate the suspended sentence which she contends is a highly relevant consideration.

Determination

Family and financial circumstances
15. It was contended that the sentencing judge failed to accord weight to the mitigating factors which included a sick child and the impact that the sentence would have on his family in light of the role he played in the care of his younger son. Further, that he had become involved in offending due to financial insecurity, and feared that he would be unable to care for his family. However, it is clear from the transcript that the sentencing judge did advert to and take into account the various mitigating factors including the appellant's family circumstances. The sentencing judge noted crime free status until his first offence for money laundering in 2014. Doubtless many of those mitigating factors played a central part in securing for him a wholly suspended sentence in relation to the first offence in April, 2016.

16. As was stated by O'Malley in "*Sentencing Law and Practice*" 3rd. Edn. 6 - 69:-

> "Humane considerations may point towards leniency but due regard must also be had to the public interest in punishing crime, and serious crime in particular. The governing principles on which there is a fair degree of consensus across common law jurisdictions, are the impact of a custodial sentence on vulnerable dependents, especially young children, is a relevant factor at sentencing, that it will not save a person from imprisonment where the offence is sufficiently serious."

17. It was readily and fairly accepted that the appellant was an important cog in moving money from "A to B". Thus, we are satisfied that the global headline sentence identified by the trial judge reflected the totality of the offending behaviour and was proportionate to the gravity of the totality of the offending conduct, and no more than that.

Duress
18. It was contended that duress as to circumstances existed which amounted to a mitigating factor. In submissions at the hearing on the 15th March, 2018 his counsel stated:-

> "…He found himself in a position where he simply could not walk away, having lost €67,500.00 belonging to other individuals in circumstances where there are consequences for his actions. He is entirely expendable in the context of what is taking place."

19. In the decision of *DPP v. Gleeson* [2018] IESC 53, Charleton J. held that a plea of duress must be considered from the vantage point that every person is required to obey the law. He stated at para. 39:-

> "If any reasonable opportunity exists for the person who claims to be under duress to take any lawful evasive action, particularly seeking the assistance of law enforcement authorities, it must be taken. If resort to lawful authority, or any other lawful means of not committing a crime, is not taken when it is reasonably open to an accused, the defence of duress does not apply."

20. Charleton J. continued:-

> "Duress operates on the will of the subject, constraining choice through the overwhelming compulsion of threat that puts a greater evil in the way of the accused. Hence, in terms of circumstance, it can be excused by society for a person to engage with those who impose their will on the accused whereby a worse event is forestalled. That is the essence of the defence. But, that defence is not there to be available as a ready excuse. The essence of the defence is the placing of the accused in circumstances that offer no reasonable choice. Since the law regulates society and requires the adherence of all who live within the rule of law, the circumstances of the constraint, how the constraint came about, and the availability of resort to other avenues apart from breaking the law, place boundaries to the deterioration of social structures."

21. At para. 24 Charleton J. stated:-

> "Duress is only available as a defence to an accused on three conditions which are based on reasonableness. These are that:
> - He or she reasonably believes that a threat has been made that will be carried out unless an offence is committed; and
> - There is no reasonable way that the threat can be rendered ineffective; and
> - The conduct is a reasonable response to the threat."

22. Any such threat was made in the aftermath of his initial arrest on the 22nd July, 2014 when a sum of €67,900.00 or so was confiscated. Following the confiscation of the monies in July 2014 it has to be taken that the appellant was an individual who, in the language of Charleton J. in *DPP v Gleeson* (above) was "of reasonable firmness" with regard to his age and maturity and was a person with "relevant fixed and permanent characteristics" that had ample opportunities between 2014 and the commission of the subsequent offences - in August, 2016 and June, 2017 - where he could have resorted to law enforcement authorities and sought assistance from the Gardaí in addressing his security concerns and any threats that were made against him. Accordingly, we are satisfied having due regard to the jurisprudence that a plea in mitigation based on duress is not made out in this case.

A limited role
23. It was said that the appellant had played but a limited role in the money laundering operations, receiving and transmitting boxes but playing no part in generating the monies in question, and not having any interaction with the contents of the package. However, we are of the view that such a characterisation of Mr. Carew's involvement substantially understates the significance of the appellant's part in the gang's money laundering operations the subject of the charges. The uncontested evidence at the hearing was that he was very much a trusted person and highly involved in the organisation. His extensive experience in the haulage business was of particular value to the gang in question. He drove and operated vehicles with secret compartments and his work and involvement was intrinsic to the operations of what was described as a "large organised crime group operating both inside and outside the State." It was acknowledged that he was providing services for a "sophisticated organisation from top to bottom." Without such complicit expertise at their disposal, the underlying criminal enterprise, of which he was an integral part, would not be in a position to perpetuate its endeavours.

24. Further, the judge's observations that he should infer that most of the money came from drug dealing of some type was neither disputed nor contradicted. Hence, the appellant was an important facilitator for a crucial aspect of the business of an organised crime gang. In our view, the evidence does not support a characterisation that the appellant had merely a limited role, and whilst the precise aspect of his undertaking for the gang may have been focused on the movement of financial assets which were the proceeds of crime, it was critical to the viability of organised crime since laundering was the process whereby criminal proceeds could be dealt with so as to disguise their illegal origin.

Previous convictions, guilty plea and suspended sentence

25. It was contended that the sentencing judge ought to have had greater regard to the absence of previous convictions prior to the initial money laundering offence committed in July, 2014. The court is of the view that the sentencing judge did have regard to Mr. Carew's previous good character and expressly noted that there were no previous convictions of any relevance prior to 2014. Likewise, the guilty plea was expressly adverted to by the sentencing judge as one of the mitigating factors which reduced the appellant's sentence from a headline figure of nine to ten years down to eight years.

26. The appellant argued that the sentencing judge ought to have included a suspended element in the sentence imposed, it being in the public interest to do so in order to incentivise rehabilitation. However, in the instant case significant factors weighed against suspension of the sentence or any part of the sentence imposed. This is so since as recently as the 14th April, 2016 the Circuit Court had suspended the entirety of a three-year sentence for an identical offence. That suspension, based undoubtedly on all the mitigation pleas that were presented in the later sentencing hearing of March 2018, was demonstrably ineffective in circumstances where two, even more serious offences of money laundering were committed within four months and fourteen months respectively of the wholly suspended sentence being imposed. Had any part of the sentence the subject of the appeal been suspended, it would have substantially undermined the deterrent value of suspended sentences in our courts as a sentencing option and debased its currency inappropriately. By his subsequent conduct Mr. Carew indicated that the risk of reactivation of the 3 year sentence imposed mattered little to his calculations. Those facts affirm the correctness of the exercise of his discretion by the sentencing judge in the instant case in determining that a suspension of any part of the sentence being imposed was inappropriate.

Global headline sentence

27. In undertaking a review of the sentence imposed, this court considers that it is important to have regard to the fact that the sentencing judge adopted a global approach with respect to the three separate offences that were before the court. Each concerned a different offence pursuant to s.7 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Each of the three offences was serious in itself.

28. At p. 20, lines 10-11, the sentencing judge stated: "I have come to a global punishment for Mr. Carew, taking into account his involvement in all of these crimes." He reiterates that position in the context of submissions that he might suspend an element of that sentence where he states: "I have taken that into account… in global sentencing. If I started off with, as he should, I think, three years' re-activation, it wouldn't take long to get up to eight years."

29. The appellant contends that this approach fails to achieve proportionality and to address the question of rehabilitation. It was contended that the sentencing judge ought to have structured a sentence which, given the personal circumstances of the appellant, would deter others, but simultaneously would provide for greater encouragement for the appellant personally to continue with his own rehabilitation.

30. The approach to be adopted in the nomination of a global headline sentence was considered by this court in *The People (Director of Public Prosecutions) v. Casey and Anor.* [2018] IECA 121. The court in that case indicated that the global headline sentence approach may be most effective in sentencing for multiple offences. At para. 28, the court concludes:-

> "The advantage of the global headline sentence approach is that it is arguably the approach to sentencing multiple offenders that may be most effective in achieving a degree of general deterrence. The nomination of a global headline sentence, which may well be highlighted in any media reporting of the case, will communicate very clearly how the court views the overall gravity of the offending conduct ……. This is what the DPP believes was required in the present case. The disadvantage of the approach is that it is complicated to give effect to correctly.

At para. 29, the court continues:-

> "[I]t is a matter for individual sentencing judges to adopt the approach with which they are most comfortable, and which seems to them most appropriate in the circumstances of an individual case."

31. This court is mindful that the goal of organised crime is to generate significant profit for those who carry out such acts. Money laundering is the processing of such criminal proceeds and funds to disguise their illegal origin. The laundering of the proceeds of crime is of critical strategic importance because it enables criminals to enjoy these profits without jeopardising their source. A significant proportion of the financial proceeds that are laundered are availed of to advance further criminal projects and enterprises. By facilitating the commission of further criminal offences, money laundering is an essential component of a criminal organisation's capacity to perpetuate the carrying out of serious criminal activities.

32. The potential public harm caused by money laundering is heightened in the case of serious organised crime such as the drugs trade. Sight must not be lost of the fact that for money laundering to take place there must be a predicate offence or offences, since the money being laundered is the proceeds of criminal conduct.

33. The court is satisfied that in identifying the headline sentence at nine to ten years, after having expressly adverted to the maximum sentence of fourteen years available, the sentencing judge correctly placed the two later offences on the medium to high end of the scale. Thereby, he correctly identified where the offences lay on the scale of offending in the particular circumstances of this case. We are satisfied that there were sound reasons for doing so. He correctly noted that money laundering is a "very serious offence." In adopting this approach, the judge adverted to the harmful effect of the offences and the personal culpability of the appellant. There was clear evidence before him, as the transcript records, of the role and status of the appellant and that the court was dealing with a sophisticated organisation.

34. In the instant case, having regard to the fact that each of the three offences concern money laundering and had been

committed within a relatively close time period and involved ever increasing sums of money, it was open to the sentencing judge to adopt a global approach which brought the principle of totality into play. We are satisfied that from an overall consideration of the sentencing judge's remarks, the principal of proportionality was observed. We are satisfied that the global sentence reflected the totality of the offending behaviour. Had the sentencing judge disaggregated the offences in the three bills before him it is clear on the basis of the available evidence that the commission of two further, progressively more serious, money laundering offences in succession during the currency of the suspended sentence would have warranted activation of the three year suspended period of the initial sentence of April 2016 in its entirety pursuant to s. 99(13) Criminal Justice Act 2006. At the sentencing hearing, were the three bills to be dealt with separately by the judge, the probationary entry matter 262/2018 pursuant to s. 99(13) Criminal Justice Act 2006 on its own would have resulted in the imposition of a three-year term of imprisonment (p. 21 of sentencing remarks). Had both of the subsequent offences been approached on their own, it is reasonable to anticipate that the sentence for each offence would have been progressively greater and the latter two sentences would each fall to be served consecutively. Thus, it could be anticipated that the aggregate of consecutive sentences to be served would, in all likelihood, be significantly greater than 8 years.

35. Professor O'Malley in his text "*Sentencing Law and Practice*", 3rd. edn. considers at para. 31.55, s.8 Criminal Justice Act 1951 - the statutory provision on foot of which other offences may be taken into consideration at a sentencing hearing. He observes that:-

> "In all probability, it was intended solely to allow defendants to ask for uncharged offences to be taken into account in order to forestall the possibility of a later prosecution for those offences. Yet, it is not uncommon for courts to take into account offences of which a defendant has actually been convicted. They impose a sentence for one offence and take the rest into consideration. Strictly speaking, a sentence should be imposed for each offence of conviction, thought the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive."

36. Given the gravity of the offence and the fact that the evidence before the court clearly demonstrated that the offences were planned and pre-meditated, and that the appellant was the member of a group organised for crime, and that the later offences formed part of a campaign of money laundering offences, there were a number of significantly aggravating factors, including that the appellant's offending had escalated in terms of gravity and frequency and both offences were committed during the currency of a suspended sentence. As mentioned previously, it was apparent that the appellant was a trusted person within a criminal organisation and his skill set and knowledge of the haulage business was of critical importance and especial value in benefitting a large sophisticated and apparently dangerous gang. Whereas the appellant did cooperate when arrested, he made no admissions.

Relevance of comparators

37. The appellant offered a series of sentencing comparators to support his proposition that the sentence imposed on him for money laundering was unduly severe.

38. We find that the decision in *People (D.P.P.) v. Trimble* [2016] IECA 309 is distinguishable on a number of material respects, including that the appellant had pleaded to one count of money laundering; three similar counts being taken into consideration. By contrast, in the instant case the appellant had a previous conviction for a similar serious offence, for which he had received a suspended sentence, a mere four months prior to the commission of the first of the subsequent offences for which he was being sentenced. Furthermore, the provisions of s.99(13) Criminal Justice Act 2006 had been invoked for the purposes of reactivating a sentence of three years' imprisonment. A further distinguishing feature was the commission of a further separate money laundering offence ten months' later, also during the currency of the suspended sentence and at a time when he had not yet pleaded guilty to the offence where he had been caught red-handed on the 22nd August, 2016. A further distinguishing feature is that in the instant case the evidence pointed to the appellant enjoying a trusted status within the organisation, and it was accepted that he was a person "highly involved" in the organisation.

39. The sentence imposed in *People (DPP) v. McHugh* [2002] 1 I.R. 352 does not appear to assist the appellant and is distinguishable in a number of material respects. It will be recalled that ultimately, on appeal, the entire conviction was quashed. However, the sentence originally imposed in the Circuit Court compares with the sentence imposed on Mr. Carew on the 14th April, 2016. In the case of *McHugh*, a sentence of four years with the final twelve months suspended had been imposed.

40. We are of the view that comparators are of somewhat limited value or assistance, particularly when coming to consider repeat money laundering offences committed during the currency of a suspended sentence imposed for a similar offence.

Conclusion

41. This court is satisfied that the global sentence imposed by the learned circuit judge was properly constructed and was proportionate to the crimes committed by the appellant. Further, the said two crimes were committed during the currency of a three-year suspended sentence for a like crime of money laundering. The global pre-mitigation sentence was reflective of the overall gravity of the offending conduct. The structure of the global sentence was effective to achieve a degree of general deterrence. Further, this previous conviction was in respect of a money laundering offence.

42. Accordingly, in the instant case having regard to the material facts there is no error of principle by the sentencing judge and the global sentence was imposed was no longer than the relevant offences objectively merited. This court would dismiss this appeal and affirm the order of the sentencing judge.