



## THE COURT OF APPEAL

[107CJA/18]

The President

Edwards J.

Kennedy J.

### SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

#### BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

FINBAR BOYLE

RESPONDENT

#### JUDGMENT (Ex tempore) of the Court delivered on the 13th day of May 2019 by Birmingham P.

1. This is an application brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review on grounds of undue leniency sentences that were imposed on the respondent. The sentences in question are sentences of two years imprisonment, but suspended, which were imposed on each of the counts to which the respondent, Mr. Finbar Boyle, had entered pleas of guilty imposed on 15th March 2018. He had appeared before the Court on an indictment which contained twenty-three counts and had entered pleas of guilty to five counts of theft and two counts of forgery on a representative basis.
2. There is no real dispute between the parties about the legal principles applicable to reviews such as these, and indeed, the principles that should be applied have not been in any dispute since the first such case, that of *DPP v. Byrne* [1995] 1 ILRM 279 when the judgment of the Court of Criminal Appeal was delivered by O'Flaherty J.
3. The evidence in relation to the offending in issue here was given to the Circuit Court on 2nd December 2015. On that occasion, the Court heard that Mr. Boyle had been the school Principal at Kilnaleck National School. It is a small school with five teachers and 70 pupils. In January 2012, a recently-elected Treasurer to the school Board of management became concerned when Mr. Boyle seemed slow to respond to some queries that were raised with him. An audit was undertaken and uncovered theft and fraud activity on the part of Mr. Boyle amounting to some €204,118.
4. The irregularities uncovered fell into a number of different categories. The respondent had been provided with a Visa card to use for school purposes, but he had used it on his own behalf. This included meals in restaurants, weekends away, golf equipment, and other purchases. The irregular transactions on the Visa account amounted to €66,492. Cheques were improperly drawn on a school account with the Ulster Bank in the amount of €29,277. Cheques were improperly drawn on a school account with AIB Bank in the amount of €32,199. A sum of €2,850 was misapplied from a school Post Office account and there was a sum of €73,300 in respect of payments from the Department of Social Protection. These payments related to the School Meals Scheme. At one stage, the school had participated in that scheme, but in October 2008, the Board had a change of policy and decided to withdraw from participation in the scheme. The last meal was supplied to the school on 31st October 2008. However, thereafter, the respondent continued to submit claims to the Department, and when the Department adopted a policy of electronic transfer, he opened an account, a second account, with AIB in Cavan in order that the payments could be made into that account. The existence of this second account came to light when the school authorities sought to close the one account that they knew of with AIB Cavan and were asked by the bank what they wanted to do about the second account. The pattern of offending that was reported to the Court occurred between 2007 and 2012.
5. At the sentence hearing, the Court heard character evidence from a number of witnesses called on behalf of the defence and there were also a number of very positive testimonials before the Court. This established that prior to the offending coming to light, that Mr. Boyle was a very highly regarded figure in his local community. It also emerged that he gave very generously of his time in supporting a number of sports clubs, both GAA and soccer. There was also evidence that he was a very positive figure in encouraging children with sporting talent, to the extent that one of his primary school pupils was later capped for Ireland at soccer at underage level and had gone on to sign a professional contract with Stoke City. This pupil's father, who was one of the character witnesses, was clear that his son would never have enjoyed the success he had achieved without the support and encouragement that was forthcoming from Mr. Boyle.
6. At the end of the sentence hearing, the Judge indicated that, while making no promises, he was giving consideration to the question of a non-custodial disposal, but, if he was to consider that, the Court would require payment of compensation or restitution in the amount of €25,000. The question of part-restitution had been canvassed in the course of the plea in mitigation and it had been indicated that a period of twelve to eighteen months would be required to raise that sum with the assistance of friends and family members. The appellant was unemployed at the time of the sentence hearing, his career as a teacher having come to an end.

7. The sentence hearing was put back for a period of twelve months, but in fact, as it happened, there were a number of further listings when matters did not proceed for a variety of reasons before finalisation of the matter in the Circuit Court in March 2018. In the course of his sentencing remarks, the Judge had indicated that he saw the headline sentence as one of three and a half years. In the course of this review, the DPP has explicitly accepted that she has no issue with that identification. Likewise, the Director says that she has no issue with the Judge's decision to reduce the sentence from a starting point of three and a half years to one of two years, having regard to the mitigating factors that were present. However, she says that the decision to suspend the sentence in full was an error. While noting the position taken by the DPP, the Court is of the view that a higher starting or pre-mitigation sentence would have been justified. A starting pre-mitigation sentence of five or even six years would not have been inappropriate. Any such sentence would, of course, have to be adjusted for the substantial mitigating factors that were present.

8. In terms of the respondent's background and personal circumstances, he was approximately twenty-eight years of age when the offending began. When matters came to light in 2012, his marriage broke up and he suffered what was described as a mental breakdown. He is the father of four children from that marriage, and while he has continued to have access to three of the children, the three youngest, his eldest; a teenage girl, has discontinued contact with him. By the time the sentence proceedings concluded in the Circuit Court, he was in a new relationship, and at that stage, he had returned to living with his parents in County Donegal. His mother had died during the course of the protracted sentencing process. The Court has been told that he has now remarried and he and his wife have a baby.

9. Given the approach of the DPP, the net issue for this Court is to address the question of whether it was open to the sentencing Court to deal with matters on a non-custodial basis. Quite a number of cases involving significant theft and fraud activity by persons in positions of trust and responsibility without previous convictions have come before this Court in recent times. A comprehensive review of the decisions in this area was undertaken in the case of DPP v. Siobhan Maguire. In the course of the judgment of the Court delivered by Edwards J. at p. 24, he made the following observations having reviewed a large number of cases:

"[i]n no case was the starting point a non-custodial sentence, though in some cases that was the eventual outcome. Our review tells us that for the majority of cases, that is to say those in the hump of the bell, the starting point is typically a custodial sentence of between two and four years. The majority of such cases involve six figure sums, some level of planning or premeditation, or alternatively, continuation of what began as opportunistic offending over a lengthy period and significant breaches of trust. Zaffer was one such case where it will be recalled Mr. Justice Mahon stated that 'the headline sentence of two years and six months was the appropriate sentence in this case and are, in general terms, consistent with sentences imposed in broadly similar cases in recent years...[s]erious premeditated fraud will almost always merit a custodial sentence and that normally, only the existence of exceptional circumstances should result in an entirely non-custodial sentence where there are hundreds of thousands of Euro involved'...

Insofar as final outcomes are concerned, there is still a bell curve, but it is somewhat flatter. This is only to be expected in circumstances where individual circumstances will vary greatly, and must be taken into account as part of the proportionality requirement. What is striking, however, is that in almost every case, there was an early plea of guilty, cooperation, no previous convictions and, indeed, previous good character. In addition to those common denominators which were deserving on their own of significant discount in mitigation, there were further individual mitigating circumstances. Accordingly, in almost every case, there require to be a significant discount for mitigation such that we see eventual outcomes in the hump of the bell ranging between eighteen months and three years' imprisonment to be actually served. However, a reasonably significant number of cases typified by Perry, Maguire, Zaffer, and Durcan, resulted in final sentences of less than eighteen months to be actually served. Moreover, exceptional circumstances in Lawlor and in Hehir resulted in wholly suspended sentences."

The approach of Edwards J. reflects the trend in sentencing we have reviewed.

10. In the Court's view, this was by any standards serious offending. The amount involved, €204,000, is significant. The level of deception, planning and premeditation was very considerable indeed. Forged documents were submitted in support of the claims for refunds under the School Meals Scheme. The signatures of two different individuals were forged on a number of occasions. A bank account was opened to receive payments anticipated from the Department in respect to false claims. In this case, there were really two injured parties. There was, first of all, the public purse in the guise of the Department as the sponsor of the School Meals Scheme, but there was also the small, rural school and the impact on that school must have been significant.

11. It seems to the Court that in those circumstances, the starting point had to be a substantial custodial sentence. It is true that there were significant mitigating factors present including, but not limited to, the early plea, the absence of previous convictions, the fact that he was previously of exemplary character and the fact that he had contributed to society through voluntary and community-based activities. The question is whether there were exceptional factors present permitting an entirely non-custodial disposal as had occurred in Hehir and in Lawlor. Counsel for the respondent has submitted that the Judge found such exceptional circumstances in a number of reports that were available to him at the sentence hearing. There were three such reports, those of Dr. Dymna Gibbons, consultant psychiatrist at the Dean Clinic in Galway, of Mr. Charles McHugh, a cognitive behavioural therapist and of Mr. James Sweeney, a counsellor at Tabor House in Donegal. The Court accepts that the reports are of significance. It is of note is that each refers to traumatic incidents and events during the respondent's childhood.

12. The Court, however, feels that this was a case where the offending was of such seriousness that a custodial sentence was required. In the Court's view, the sentence actually imposed was, therefore, unduly lenient. Had the Judge imposed the sentence of two years, which he had arrived at having discounted from the headline or starting sentence, that, in the Court's view, would have been an appropriate sentence. However, in resentencing at this stage, following a finding of undue leniency, the Court feels that it should impose a somewhat lesser sentence. There are a number of factors that lead us to that view. First of all, we are sending someone to prison today, three and a half years after the original sentence hearing. We are obliged to incarcerate someone who avoided a custodial sentence in the Circuit Court and finding himself now jailed must be deeply disappointing for him. We also take into account the fact that a sum of €25,000 was raised by way of partial restitution with the help of family and friends. While that sum of €25,000 is modest viewed against the total amount stolen and defrauded, it cannot have been an easy sum to raise and it no doubt was a stretch for the respondent and his supporters to come up with that sum.

13. In order to give effect to those factors, we will limit the sentence that Mr. Boyle will be required to serve to one of 15 months imprisonment. Accordingly, we will quash the sentences of the Circuit Court and substitute therefor sentences of fifteen months in respect of each count.