



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

259/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Dadibaku Ngkupumu

Appellant

Judgment of the Court (ex tempore) delivered on the 10th day of December 2014, by Mr. Justice Birmingham

1. In this case the appellant appeals against the severity of a sentence of five years imprisonment that was imposed upon him in the Circuit Court on the 26th November, 2013. The sentence has been backdated to a date in May 2013. The sentences were imposed in respect of seventeen counts on indictment and the sentences were all to run concurrently.

2. The factual background is that the appellant is a former employee of Avery Dennison, and he began employment with them back in July 2012. The appellant has a background in IT and as an employee in October 2012, he joined the payment and banking team and his role there included dealing with what is described as rejected payments, that is to say responding to situations where there was an error, perhaps as a result of incorrect account details being furnished or something of that nature.

3. Members of that team were, by use of personal issue cards and pin numbers, able to make alterations. Alterations for example, as to payment destinations, account details and so on. In very simple terms, perhaps overly simple terms, the appellant used his pin number and his authorisation to alter mandates so as to cause loss to his employer. The total loss to Avery Dennison was €336,814.27. While the total amount of unsuccessful attempts was something over €304,000.

4. It is the case that the system apparently was designed to involve two employees that would seem to have been designed as a form of safeguard, so that two employees each with their own passwords and pin numbers were required to be involved in a transaction. However, the appellant in this case had access to the details of a former employee who had played her role in training him when he moved to joining this particular team.

5. His activities came to light when one of Avery Dennison's clients informed the company that they had not received payment on foot of an invoice that was due to them, while the Avery Dennison records were showing that the client in question had in fact been paid and this provoked an audit which disclosed the irregularities that the appellant had been engaged in. In essence what he was doing was he was dealing with rejected payments and routing them to illegitimate accounts in Belgium, Luxembourg and Germany.

6. In terms of his personal circumstances, he is originally from Kinshasa, the Democratic Republic of the Congo, and he came to Ireland in 1999. He has acquired status here as the parent of an Irish born child, he is the father of three children and he is separated from his wife and he is now in a second relationship. One of the documents that was submitted to the court was a letter written by the appellant which refers to the fact that his daughter is now studying pharmacy in Trinity and that is obviously a matter in which he very understandably takes pride and satisfaction.

7. Again in the Circuit Court, his pastor came to court and spoke on his behalf and spoke as to the positive role that he plays in his congregation. It is the situation that he has no previous convictions.

8. The judge in the Circuit Court indicated that he saw the offences as falling at the higher end of the scale. The offences, it should be explained fell into three categories, offences involving the use of a computer, the use of a false instrument and false accounting. He saw a number of aggravating factors present: the use of the details of a colleague with the possibility of causing difficulty for her, the fact that the offences occurred over a period of time, the fact that there were overseas accounts involved, which he saw as being indicative of a degree of planning and, as he pointed out, the breach of trust involved, the defrauding of an employer by the employee of a very substantial sum of money, which had not been recovered.

9. The judge recognised that there were factors present in mitigation and he saw those as being: the fact that in the later interviews that were conducted with the appellant following his arrest that he was forthcoming and that he answered questions, the fact that a plea was entered at an early stage and it was recognised and specifically commented upon, that it was a plea that was of value because it obviated the necessity for a complex trial and of course the fact that there were no previous convictions.

10. In the course of the sentence hearing, assertions were put by counsel on behalf of the appellant to the prosecuting garda, to suggest that the appellant had been acting under duress and that was a theme that was taken up in the letter to the court already mentioned. However, it is the case that there was no formal evidence put before the court in relation to any degree of duress.

11. The appeal is now brought to this Court against the sentence imposed. The jurisprudence of this Court and more specifically of its predecessors clearly establishes that this Court cannot intervene, simply because it would have been the case or might have been case that had it been involved in sentencing that a different sentence would have been imposed. Neither would it justify an intervention if it were the situation that individual members of the court would have imposed a different or indeed a more lenient sentence.

12. Something more than that is required. What is required is that an error in principle be established and that it be established that the approach taken by the sentencing judge was impermissible and that the sentence represented a departure from the norm and from what was to be expected.

13. In this case it seems that the judge in the Circuit Court approached the task of sentencing with considerable care. That is evident from the way in which he engaged with the details of the manner in which the offence was committed. He addressed his mind to the various factors that served to aggravate the offence, which gave the offence its seriousness of character and he addressed his mind carefully to the factors that mitigated the offence and which were in ease of the appellant.

14. In these circumstances the court cannot see that any error in principle has occurred. The sentencing judge was entitled to approach the matter in the way he did and the sentence that he imposed was one that was certainly well open to him. In the

circumstances the court must dismiss the appeal.