



**THE COURT OF APPEAL**

**Birmingham J.  
Mahon J.  
Edwards J.  
312/16**

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

**Respondent**

**V**

**Jacqueline Durcan**

**Appellant**

**JUDGMENT of the Court delivered on the 23rd day of January 2017 by**

**Mr. Justice Birmingham**

1. This is an appeal against severity of sentence. The sentence under appeal is one of twelve months imprisonment imposed in the Dublin Circuit Criminal Court on the 8th December, 2016.
2. The background to the case is that the appellant was a solicitor, since this matter came to light she has been struck off the Roll of Solicitors, who practiced as a sole practitioner in a long established family firm in Co. Mayo.
3. In February, 2011, the Law Society moved to conduct a routine practice audit. On learning that her practice was about to be the subject of an audit, Ms. Durcan contacted the Law Society and told them that there was a deficit in her client account. Subsequent analysis identified that the deficit was in the region of €250,000. At a later stage, the Garda Bureau of Fraud Investigation was contacted by the Law Society, and when it became involved it was ascertained that there had been a number of transactions between 2008 and 2011. All but one of the transactions saw the sums taken from the client account deployed for purposes related to the practice, including on occasions the payment of professional indemnity insurance. The one exception relates to a transaction in 2010, when a sum of €51,500 was withdrawn from the account, the purpose being to pay stamp duty in respect of the purchase of the appellant's family home.
4. It is accepted that once the appellant learnt that there was a prospect of an audit, she was cooperative in every way, making contact with the Law Society and fully cooperating with it in the first instance, and then cooperating with the GBFI (Garda Bureau of Fraud Investigation) when it became involved.
5. In the course of interviews with the GBFI officers, she explained that she had made a number of property investments which had gone wrong resulting in debts of €6.5 million. However, it is of note that when the garda investigator was summarising the facts of the case for the Circuit Court, he volunteered the fact that when the appellant's home was searched as part of the investigation, it became apparent to the gardaí that the appellant's circumstances were "fairly basic".
6. The cooperation with the Law Society involved identifying the individuals who were potentially at a loss. All were compensated through the Solicitors' Compensation Fund, but of note is that the fund in turn has been reimbursed in full by the appellant with the assistance of her mother. Part of the reimbursement came from funds available to the appellant's mother, but another part was as a result of the appellant remitting fees that came through after she had ceased practice to the Law Society. Full reimbursement was made to the Law Society Compensation Fund by the end of 2014.
7. In terms of the appellant's background and circumstances, she is now 48 years of age. She had practiced as a sole practitioner, having inherited the family practice from her father, the practice had been established by her grandfather. She is a married lady and the mother of five children aged between seven years and thirteen years. When these matters came to light, she was, as was inevitable, struck off as a solicitor. She and her husband moved with their children to Brussels, where she teaches English as a foreign language and her husband also teaches.
8. The sentencing court received documentation in relation to the fact that she had worked as a volunteer for a year with refugees from Rwanda in Tanzania. Other documents among an impressive booklet of testimonials submitted referred to her active involvement in the affairs of her home parish of Balla & Belcarra, Co. Mayo.
9. The plea in mitigation in the Circuit Court emphasised the level of cooperation, including complete reimbursement, which was then followed by an early plea, a plea that was of considerable value as this would otherwise have been a difficult and complex case. Counsel referred to his client's family situation, and to the background of massive debts. Counsel also referred to the enormous loss of reputation, professional and otherwise. Ms. Durcan had at one stage occupied a senior position in the Mayo Solicitors Bar Association, and the court proceedings had received enormous coverage in the local papers – there had in fact been an earlier sentencing hearing which did not proceed to a conclusion because the judge dealing with the case became aware that there was some distant family connection.
10. The Circuit Court judge took time to consider the matter and decided to defer sentence until the 8th December, 2016. In the course of those sentencing remarks, the judge referred to the fact that Ms. Durcan had contacted the Law Society and informed them that there would be a deficit in her accounts, that Ms. Durcan cooperated fully with both the Law Society and the garda investigation, and that full admissions were made at all times. She referred to the fact that all of the transactions bar one saw the monies taken put back into the practice. The judge referred to the fact that the court had been told that the then accused's living standards were basic, that she and her family had got into significant debt, and that the person before the court was the mother of five young children. She confirmed that she had read the testimonials and would be taking them into account.
11. The court then turned to what it described as the aggravating factors and the mitigating factors. So far as the aggravating factors were concerned, reference was made to the serious nature of the charge and to the fact that Ms. Durcan was a solicitor, and

so this was a very serious breach of trust. The court was taking into account as an aggravating factor the amount of monies involved, that it had happened over a period of time, over two years and three months between October, 2008 and January, 2011, and that it was not just one transaction, but involved a number of transactions.

12. On the mitigation side the court was taking into account the plea, the early plea, the value of the plea, the full and substantial admissions made, and the cooperation given to the gardaí in the prosecution of the offence. The court was also taking into account, and had to take into account, the effect that this has had on her occupational activity. She had been struck off the Roll of Solicitors. The court also stated that it was taking into account the fact that only one of the transactions related to the accused herself and the rest saw the money going back into the practice. The court was taking into account the loss of professional reputation and the loss of a practice founded by the accused's grandfather in the 1920s. The court had to take into account the fact full reparation was made to the Law Society and that the reparation was possible because of monies given to her by her mother and the allocation of fees that became due to the practice after the practice was dissolved. The court also had to take into account the personal circumstances of the person before it and the fact that she had five children. The court then concluded by saying:-

"The Court has carefully considered the matter and deems that this matter merits a custodial sentence and the Court has been advised that the penalty for this matter is ten years' imprisonment. The Court, taking into account the aggravating factors and the mitigating factors, will impose a prison sentence of one year imprisonment."

### **The arguments on appeal**

13. In moving the appeal senior counsel on behalf of the appellant, Mr. Patrick Gageby S.C., took as a starting point that there was no definitive statement from the Supreme Court that there was a mandatory requirement for a custodial sentence even when significant sums of money were involved in a theft or fraud. He acknowledged the observations of this Court in the case of *The People (Director of Public Prosecutions) v. Naila Zaffer* [2016] IECA 321, where Mahon J. had observed at para. 15 that "[s]erious pre meditated fraud will almost always merit a custodial sentence". Later in that case Mahon J. had commented:-

". . . normally, only the existence of exceptional circumstances should result in an entirely non-custodial sentence where there are hundreds of thousands of euro involved."

14. On behalf of the appellant it is submitted that even if, contrary to counsel's submissions, some element of exceptionality is required if custody is to be avoided, that this is a case which meets any such threshold.

15. Counsel is critical of the fact that the judge's sentencing remarks do not specifically address the question of whether this was a case that could have been dealt with by a non custodial sentence. He draws attention to the fact that the judge spoke of a custodial sentence being "warranted" and says that that was not really the issue, but what the court should have been concerned with was whether a custodial sentence was necessary.

16. The Court does not see a great deal of substance in these criticisms. The live question in this case always was whether the sentence would be a relatively short custodial sentence or whether it was a case that could or should have been dealt with by way of a non custodial disposal. The way in which the sentence hearing proceeded could have left no one in any doubt about what the real issue was. While the judge did use the word "warrants" the Court feels that there can be little doubt but that what she meant was that a custodial sentence was "necessary" or "required".

### **Discussion**

17. This cannot have been an easy case for the Circuit Court judge, and this Court has not found it an easy case to deal with. There were factors present, most obviously the large sum of money involved as well as the fact that the offending went on for a period in excess of two years and the fact that the offender occupied a position of trust as a solicitor, which meant that it had to be regarded as a serious offence. On the other hand there were undoubtedly very significant, indeed powerful mitigating factors present, including the level of cooperation, the reimbursement in full, the early plea, and the fact that the appellant was already suffering grievously for her transgressions as well as the very basic fact that the appellant was the mother of five young children. In that regard in the course of the appeal, Mr. Gageby S.C. reminded us of the constitutional provision in relation to the position of the mother in the home.

18. The Court is unable to conclude that the judge erred in taking the view that the case required a custodial sentence. Certainly, the Court is quite unable to say that the custodial sentence amounted to an error in principle. However, if there had to be a custodial sentence, there remained for consideration what the duration of that sentence should be. The court was being called on to sentence somebody of previously impeccable good character. This went beyond a mere absence of previous convictions. The accused was somebody who had made a positive contribution to society both at home and internationally.

19. In the course of my judgment in the case of *The People (Director of Public Prosecutions) v. Aoife Maguire* [2015] IECA 350, delivered on the 21st December, 2015, I commented at para. 19:-

"If the judge felt that custody was inevitable and could not in fact have been avoided, it was appropriate then that the judge would remind himself that he was being called on to sentence someone without previous convictions and not just someone without previous convictions, but someone of positively good character, who had made a real contribution to society by her role as a volunteer and as a carer, stepping away from her career to take on the role of caring for her mother. In those circumstances the focus should have been on identifying the minimum period that could be specified which would meet the situation."

I continued:-

"In the case of *DPP v. Doherty*, the Court of Criminal Appeal, the predecessor of this Court was dealing with a garda who had been convicted of an offence of corruption. In passing a sentence following a successful undue leniency application, the Court, (per Hardiman J.) the judgment commented as follows:-

'We also bear in mind the factors which were recited on several occasions yesterday and acknowledge in the case of *DPP v. Egan* that is to say that in dealing with a person without previous convictions and indeed of positive previous good character, if the court considers as we do, that a custodial sentence is required in the public interest, such a sentence need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principal effect.'

In the earlier *Egan* case there referred to the, the Court of Criminal Appeal had quoted with approval remarks by Lawton L.J. in the English case of *R. v. Sargeant* (1974) 60 Cr. App. R. 74 [citation corrected] where he had commented:-

"For men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time."

20. I dealt with the same issue again in *The People (Director of Public Prosecutions) v. Prior* [2016] IECA 375, a decision of the 5th December, 2016. At para. 13, I, rather clumsily, commented:-

"In a case such as this when a judge has identified a sentence which he regards as potentially appropriate, it may be helpful for him to ask himself the question whether the sentencing objective can be met with a lesser sentence. That exercise may not be expressly undertaken and indeed it rarely if ever is."

21. What I was attempting to do there was to say that a judge sentencing a person of previous good character, who has decided that a custodial sentence was necessary and not capable of being avoided, and having decided on what seems an appropriate sentence, should then ask himself or herself whether in fact a sentence less than the one initially contemplated could properly meet the situation.

22. In this case the Circuit Court concluded that a custodial sentence was required. This Court cannot regard that conclusion as an error in principle. The question is whether a sentence of shorter duration could meet the situation.

23. The issue of short sentences was addressed by Lord Lane C.J. in the case of *R. v. Bibi* [1980] 1 W.L.R. 1193. There, the court was dealing with an appellant who was a Kenyan Indian widow aged 49 with an unblemished record and subservient to her brother in law at whose home she lived. She became involved on the fringe of an enterprise conducted by him involving the illegal importation of herbal cannabis. She was appealing the severity of a three year sentence of imprisonment. There, in the course of his judgment, Lord Lane commented at p. 1195:-

"So much so that sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal. Many offenders can be dealt with equally justly and effectively by a sentence of six or nine months' imprisonment as by one of 18 months or three years. We have in mind not only the obvious case of the first offender for whom any prison sentence however short may be an adequate punishment and deterrent, but other types of cases as well."

24. Prof. O'Malley in *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016) at p. 174 comments:-

"The experience of imprisonment, even for a short period, can be remarkably onerous and punitive for an offender who has never been in conflict with the law before and who may, in fact, have been of positive good character [referring in the footnote to *The People (Director of Public Prosecutions) v. Doherty* (Unreported, Court of Criminal Appeal, 29th April, 2003) and also to *The People (Director of Public Prosecutions) v. Mooney* [2015] IECA 301]. This consideration is all the more valid where the offender also happens to be middle-aged or elderly."

25. This was a case where there were factors present which meant that any sentence of imprisonment would be particularly burdensome. The person before the court was the mother of five young children. As a response to this offence, the family had left their home in Ireland and gone to Brussels. This meant that if the appellant was to be required to serve a prison sentence, she was going to have to serve it away from her husband and children. In fairness to the judge in the Circuit Court, this was not a point which was highlighted in the course of argument, but it was nonetheless a point of significance.

26. This Court has been provided with a report from a senior psychologist and invited to have regard to it if addressing the question of resentencing. That document merits quotation:-

"From my vantage point, I see many of the difficulties Jackie's family is facing in the wake of her sentence.

The first and most obvious one is the huge and expensive hurdle which must be crossed for her children to see her. Jackie and her husband Noel have five children, ranging in age from thirteen to seven and they live in Brussels. Noel brought the children to Mayo for Christmas, from where they visited Jackie in the Dóchas Centre. These visits were very welcome and also reassuring for the children. The fact that all of this was taking place over the Christmas period, especially for such young children nonetheless added to the logistical and emotional complexity of the situation. They are now back in Brussels and Noel and the children have a six minute phone call each evening with Jackie. The fact that Jackie's income from her part-time teaching work is now lost, there is limited money for flights back to Ireland on a regular basis.

Life in Brussels is hard without Jackie. She is the French speaker and without her Noel is struggling to run a busy household and care for five children. Language difficulties are compounded by a total lack of extended family or support structures – when, for example, Noel needs to go to the launderette, he must take all 5 children with him as he cannot leave them alone. The challenges of collecting, delivering, organising and scheduling his children's lives in the wake of Jackie's confinement has also necessitated him dropping a French class which he is supposed to attend for his work – he simply no longer has the time.

Jackie's mother Jill did travel to Brussels in the immediate aftermath of the sentence. Unfortunately, however she is not in a position to return there to run the house in Jackie's absence. She is quite elderly and also speaks no French and so found that she was completely unable to contribute to the practicalities of dealing with the children's daily lives through French."

27. In the Court's view even on the basis that there was going to be a custodial sentence, the case could have been dealt with by a sentence somewhat less than twelve months. To the extent that that did not happen, there was an error. This Court is very struck by the information put before it about the difficulties the appellant faces maintaining contact with her husband and in particular with her children. In fairness to the trial judge, this was not an issue that was explored in detail at the sentence hearing, perhaps because the emphasis was understandably on the attempt to avoid custody. However, in the view of the Court it was always an issue of some significance, and at this stage it is clear that it is an aspect of some considerable significance indeed.

28. In re-sentencing, the Court will not depart from the view of the Circuit Court that this was a case for a custodial sentence, but

the Court, conscious of how difficult a prison sentence must be for a mother of a large young family required to serve her sentence away from her husband and children, will reduce the sentence from one of twelve months to six months.