



THE COURT OF APPEAL

[237/19]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JAROSLOW KILIAN

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 21st day of February 2019 by Birmingham P.

1. This is an appeal against the severity of sentences that were imposed in the Circuit Criminal Court in Dublin on 25th October 2017. On that occasion, sentences were imposed in respect of a number of counts that had appeared on three different Bills of Indictment. On Bill 551 of 2017, a sentence of three years imprisonment was imposed in respect of an offence of possession of stolen property contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001. On Bill 547 of 2017, a sentence of five years and six months imprisonment was imposed in respect of three counts of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and in that instance, the final two years of the sentence were suspended. That sentence was made consecutive to the sentence on Bill 551 of 2017. Bill 671 of 2017, sentences of three years imprisonment in relation to a s. 15 Misuse of Drugs Act offence and two years imprisonment in respect of an offence of possession of stolen property were imposed. Those sentences were initially stated to be concurrent to each other and also to be concurrent with the sentences imposed on Bill 547 and they were, in fact, ultimately suspended. Thus, the effective aggregate sentence was one of eight and a half years imprisonment with the final two years suspended on condition that a bond was entered into to keep the peace and be of good behaviour for a period of three years following the release from prison.

2. The background to the somewhat complicated matters before the Circuit Court is to be found in the fact that Gardai had some information to the effect that a particular vehicle, a silver Renault Clio, bearing false registration plates was listed for sale on the Done Deal website.

3. On 13th February 2017, a vehicle bearing registration plates 090Y 7072 was located in a multi-storey carpark on Sean McDermott Street in Dublin. On closer inspection, the various documents displayed on the windscreen of the vehicle appeared to be false. The Insurance Disc appeared to come from another vehicle, Reg. No. 12D 17503, which had been reported stolen at an earlier stage. Examination of the Chassis Number indicated that it matched those of a vehicle said to have been stolen on 29th January 2017. The vehicle was monitored covertly. Meanwhile, the Insurance Disc had raised Garda interest in a particular vehicle which had been reported stolen on 23rd December 2016. The area was searched and the vehicle, an Audi, was located at nearby Marlborough Court, Dublin. There was a parking ticket in the vehicle and CCTV footage for the time at which the vehicle had entered a carpark was viewed, and the viewing of that footage in turn raised interest in a particular Ford Focus that had been reported stolen on 9th February 2017. The vehicle in question, a grey Ford Focus, was located on the second floor of the Q-Park carpark.

4. While these further enquiries were being carried out and producing the results indicated, the vehicle which had originally attracted interest, the silver Renault Clio, continued to be monitored. At approximately 2.40pm, while Gardai had the vehicle under surveillance, a male approached the vehicle and entered it. He was arrested and brought to Store Street Garda station in Dublin. When he was arrested, he had two further car keys in his possession, a key for an Audi and a key for a Skoda. The Audi key, it was established, related to the stolen vehicle that had been located some hours earlier at Marlborough Court.

An examination of Garda records indicated that the appellant had, on an occasion, been stopped driving a white Skoda Superb bearing Reg. No. 151D 17488. Further enquiries into that vehicle established that it had been clamped on 13th February 2017, the same day that the appellant was arrested.

5. When questioned following his arrest in the Renault Clio at Sean McDermott Street, the appellant admitted an involvement with the vehicles and indicated that he intended to sell them on behalf of an unnamed individual. Later, he was rearrested under warrant and questioned in relation to the Skoda Superb, and at that stage, admitted that the key which had been found on him belonged to that particular Skoda and he said that he had used that vehicle on and off while attempting to sell it. Again, the sale that was being attempted was on behalf of the unnamed individual. While there were some efforts during the course of the sentence hearing to assign a particular role to Mr. Kilian, these efforts ran into some difficulty, but not before a Garda indicated that he did not see him as being at the lower end of the hierarchy.

6. The sentencing Court also dealt with events that had occurred on 21st December 2016 at Shangan Road, Ballymun, Dublin, involving a black BMW 520. These were matters that featured in Bill 671. The Court heard that that offence was committed while the appellant was on bail in respect of other matters, those other matters involving alleged incidents of 24th August 2016 and 10th

December 2016.

7. So far as the BMW 520 incident is concerned, the situation is that on 20th December 2016, Gardaí became interested in an advert for a BMW that appeared on the website DoneDeal.ie. The vehicle had a particular Registration Number 09DL 12627. Contact was made with the registered owner, who was a garage owner from Sligo, and he confirmed that he had possession of his vehicle and that he was not selling it on Done Deal in Dublin. Contact was then made with the advertiser of the BMW and arrangements were put in place to view the vehicle at the Ikea carpark in Ballymun at 5.30pm on 21st December 2016. A number of texts were exchanged, and eventually, Gardaí who were waiting there were approached by a lone male. He informed them that he was the seller of the vehicle and that the vehicle was parked nearby, but that he had no lift, and so he requested that they give him a lift to where the car was parked. They agreed, and so they all went in a Garda vehicle, unmarked obviously, to an underground carpark in Shangan Green. The individual who had approached Gardaí was the appellant, Mr. Kilian, and he had a swipe card and access codes to get them into the underground carpark. He brought them to a BMW which was bearing Reg. No. 09DL 12627, and they were false registration plates, and the Chassis No. did not accord with the Chassis No. assigned to vehicle 09DL 12627. Enquiries established that the Chassis No. did match that of a different vehicle, 08KE 9907. That was a vehicle that had been reported stolen.

8. In relation to the counts on the third Bill of the indictment, the position is that on Wednesday 1st February 2017, the attention of Gardaí was drawn to a black BMW 520 bearing particular registration plates which was being driven slowly, and it seemed to Gardaí, suspiciously, on Grantham Street in Dublin. The Gardaí spoke to the driver and it appeared to them that the driver was very agitated. They got a smell of cannabis from the car. When the car was searched, it was found to contain a quantity of cannabis herb in the rear foot well. There was also a sum of €2,020 in cash. Enquiries established that the registration plates on the vehicle – 11D 9110 – were false and that the vehicle had been stolen after a burglary at a house in Cabra on 6th December 2016. The cannabis was valued at €1,316 and there was a quantity of Ecstasy tablets in the vehicle to a value of about €225. In terms of the value of the vehicles involved, the Renault Clio was valued at €6,700, the Audi A7 at €32,000, the Ford Focus at €14,000 and the Skoda Superb at €22,000.

9. In terms of the appellant's background and personal circumstances, he was born in May 1984. He had 13 convictions recorded in all, though the defence pointed out to the sentencing Court that these, when analysed, really broke down to four incidents. Nine of the convictions recorded related to the Road Traffic Act, including offences of no insurance and providing a false identity. There was a s. 2 assault and there was a s. 4 theft (shoplifting) offence. The Court heard that he had at one stage been in business, operating a Polish grocery store. He was a Polish national, he had come to Ireland in 2005 and he operated the shop between 2012 and 2015. The Court was told that the purchaser had not paid over the full price. At various stages in his career, he had worked as a Chef in Lynans Hotel and also in the Shelbourne Hotel. The Court heard that he had begun to abuse drugs.

10. The written submissions in support of the appeal raise two issues. First, that the appellant was sentenced as though he had a proximity to the relevant burglaries and theft and that was not apparent on the evidence. Second, that the headline sentence was measured at too high a level considering his actual placement in the hierarchy of the organisation responsible for the background criminal enterprise. In the course of the oral presentation this morning, the focus has been on the efforts by the prosecution to assign a place in the hierarchy to Mr. Kilian. In support of those submissions, there has been reference to a particular decision of the Court of Criminal Appeal and to a judgment of that Court delivered by Hardiman J, that being the case of DPP v. Philip Delaney delivered on 28th February 2000.

11. In the Court's view, the situation that was under consideration in that case and the present situation are entirely different. In the Delaney case, the sentencing Judge had asked a particular question of the investigating Garda. He had asked "if there were a hierarchy of drug dealing or possession for supply, where would Philip Delaney stand if there were a hierarchy? Grade him out of 10 really". As the Court of Criminal Appeal pointed out, that question was entirely inadmissible. For good measure, it appears that the sentencing Judge had some concerns once the Garda began to respond because he interrupted to indicate that he could not receive particular evidence, but then said that it was evidence that he would receive de bene esse but would otherwise ignore.

12. The present situation is quite different. One of the Gardaí who was dealing with the facts of the case was asked by prosecution counsel "are you in a position to say where in the hierarchy of the organisation in the scheme of selling certain cars Mr. Kilian could be fairly situated?". The Garda responded "it would be my opinion, Judge, that based on value of the vehicles in this instance, approaching approximately €70,000, that I could not see Mr. Kilian being at the lower end of the hierarchy in an organisation. I couldn't see him being at the lower end". Prosecution counsel, obviously anxious to be completely fair, put a further question "you don't see him either at the very apex, though, do you?" To which the Garda said "I couldn't speculate that way. From previous dealings, a person wouldn't be left in possession of such an amount of vehicles with such value if they were at the lower end of the scale". There was some reference to his role by the sentencing Judge. She referred to certain conflicts in the prosecution case that she perceived in relation to the role played by Mr. Kilian and went on to say "however, these were expensive vehicles and he appears to have been an integral part in relation to criminal activity. This activity was quite elaborate". Those remarks made by the sentencing Judge were obviously sensible and were obviously reflective of the evidence that she had heard.

13. In relation to the complaint that too much attention was placed to the position of the victims and that this had the effect of linking the appellant to the thefts and burglaries, the Court does not see any substance in this complaint. The sentencing Judge was at pains to point out that Mr. Kilian was not being sentenced as the stealer of the vehicles or the burglary. It is, however, the case that if there were not people like Mr. Kilian to dispose of stolen cars and to assist in the disposal of stolen cars, that there would not be the same number of cars stolen, that there would not be people subjected to financial loss and distress of having their vehicles stolen and in some instances having their constitutionally-protected dwelling entered in the course of the burglary. The Court sees no substance in that ground.

14. Viewing this case in the round, the Court is of the view that what was in issue before the Court was sustained criminality involving repeat offending and sustained criminality at a commercial level. The Court can say immediately that it is in no doubt that this is not a case where the sentence was too severe. What has caused the Court to pause and to consider carefully is whether we should in fact increase the sentence, it is our view that the sentence imposed was a lenient one, indeed, a very lenient one, and it might well be that a more severe sentence could have been imposed.

15. However, the Court has decided that it will simply confine itself to dismissing the appeal against severity and that is something we do without hesitation.