



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.
247/15**

**THE PEOPLE AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS**

V

VIOREL SALAGEANU.

Respondent

Appellant

Judgment (ex tempore) of the Court delivered on the 18th day of July 2016 by Mr. Justice Edwards.

1. In this case the appellant pleaded guilty on the 16th of October 2015 before Dundalk Circuit Criminal Court to a count of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
 2. The appellant was sentenced to four years imprisonment, less credit for four months spent in pre-trial custody in Ireland, and eight days spent in custody in Romania awaiting his rendition to Ireland on foot of a European Arrest Warrant, the said sentence to date from the 18th of September 2015.
 3. The appellant appeals against the severity of his said sentence.
- The facts as established in evidence.**
4. The sentencing court heard evidence from Garda Sean Flanagan concerning the circumstances of the crime.
 5. On the 19th October 2011 the appellant and another man entered premises known as Diamond Jewellers at Marshes Shopping Centre in Dundalk at approximately 2:00pm. A Ms. Yvonne McEntaggart was working in the jewellers at the time and recalled a man coming into the shop and enquiring about some watches. That man then left the shop and returned some twenty minutes later with an older man, who was the appellant.
 6. The appellant and the other man then asked to see certain items of jewellery which were contained in a locked glass cabinet on the shop floor. The other man asked Ms. McEntaggart to show him some earrings and pearl necklaces. Ms. McEntaggart opened the display case and took out the requested items in order to show them to him. While Ms. McEntaggart was showing these items to the other man, she left the display cabinet door open. The other man indicated to Ms. McEntaggart that he wished to purchase certain of the items that he had been shown and Ms. McEntaggart replaced all the other items of jewellery in the cabinet. The appellant and the other man then accompanied Ms. McEntaggart to the counter of the shop to organise the wrapping of the items and payment. The appellant took out some cash at this point. The other man indicated that he would need to go to an ATM machine in order to withdraw some further cash to pay for the items. This man asked Ms. McEntaggart to proceed with wrapping the items and told her he would return to pay for them in a few minutes. Both men then left and never returned to the shop to buy the items. Ms. McEntaggart did not immediately notice or realize that anything had been taken.
 7. It was the following day when it was discovered that a tray of rings was missing from the display cabinet. This led the shop's proprietor, Mr. Rory Burns, to view the CCTV footage of the shop from the previous day. The CCTV footage showed that Ms. McEntaggart had attended to the two men as described, and that during the transaction the appellant was to be seen taking a tray of rings from the display cabinet behind him and concealing it in his jacket while Ms. McEntaggart was distracted and engaged in showing the other man specific items that he had expressed interest in seeing. When both men left the shop, the tray of rings was still concealed in the appellant's jacket.
 8. There had been 10 rings in total on the tray, the entire value of the tray being €12,723.
 9. The relevant CCTV footage was viewed by members of An Garda Síochána and the appellant was recognised from the footage and arrested on the 8th November 2011. In the course of interviews with the appellant carried out during his detention, he made admissions and accepted that he was the person shown in the CCTV footage. The appellant told the investigating members that the items were now gone, that they had been lost on the road. He further stated that he did not know the other gentleman with whom he had in shop very well. He suggested that the other gentleman was the instigator.
 10. The rings were insured against theft and the policy holder, Mr. Burns, was indemnified by his insurer in respect of theft, save for a policy excess sum of €500. The stolen property was never recovered.
 11. The appellant was charged and appeared before Dundalk Circuit Court during the April sessions of 2012. The appellant failed to appear at Dundalk Circuit Court on the 17th April 2012 and a bench warrant was issued for his arrest. Later a European Arrest Warrant was issued and transmitted to Romania seeking the rendition of the appellant to Ireland so that he might be tried for the offence in respect of which he had been charged. On the 10th of September 2015 the appellant was arrested and detained in Romania on foot of the said European Arrest Warrant. The appellant elected not to contest the rendition request and consented to being returned to Ireland. He was duly surrendered to the Irish authorities on the 18th September 2015. Upon the appellant's arrival back in Ireland on that date he was formally arrested and was placed in custody. He subsequently appeared before Dundalk Circuit Court on the 6th October 2015 and thereafter was remanded in continuing custody to the 16th October 2015.
 12. The appellant pleaded guilty on the 16th of October 2015 and requested a early sentence date within the same sessions. His sentence hearing took place during the following week, on the 22nd October 2015.

13. Garda Finnegan accepted in cross-examination that was no violence or threat of violence used in the commission of the offence; that although there was a degree of pre-planning there was also an opportunistic dimension to the offence in as much as the display cabinet had been left open; that the appellant had been co-operative during the interviewing process, and that the shop owner, Mr Burns, would be willing to accept a sum of €500, if offered by the appellant, in re-imbursement of the sum he had lost due to the insurance policy excess clause.

The appellant's personal circumstances

14. The appellant was 45 years of age at the date of his sentencing.

15. The sentencing court heard that the appellant had nineteen previous convictions in total. All of these were dealt with in, or had originated in, the District Court. Thirteen of these were for theft offences and were recorded on various dates between 2007 and 2012, and for which diverse penalties had been imposed ranging from fines of €1000 (on two occasions) to terms of imprisonment ranging from six months to eight months (on three occasions) with some being taken into consideration with other matters. In addition he has other recorded convictions for the offences possession of a false instrument, the use of a false instrument, s. 2 assault, and failing to appear. Again, the evidence was that for some of these offences custodial penalties ranging from three months to six months imprisonment were imposed, while the remainder were taken into consideration with other matters.

16. The Court heard that the appellant is Romanian, and has been residing in Ireland for some time. The Garda indicated he had no family ties here, but that he understood he had a wife and family in Romania and that he had come to Ireland to find a job with a view to sending home money. He was unable to confirm in cross-examination either that the appellant had worked since arriving in Ireland, or that the appellant's wife was ill as a result of a stroke, and that because of this the family were under severe financial stress.

The sentencing judge's remarks.

17. In the course of sentencing the appellant, the sentencing judge recounted the circumstances of the offences, and commented that:

"In respect of count number 1, the maximum custodial prison sentence is 10 years and I must decide where does this count lie in respect of the maximum sentence. I am satisfied it would be in the higher range. Then I must have regard to his personal circumstances. He is now aged 45 years. He is a Romanian national. He's from Bucharest. He is a married man. He has a wife and two children. He's in Ireland since 2007 and he has some work history while in Ireland.

In mitigation, there was a plea of guilty, he cooperated with the investigation, he made admissions, he expressed remorse. He also, when the -- in respect of the extradition warrant, he didn't contest it. He agreed to the warrant being executed and being extradited back to Ireland. While he's in custody -- Cloverhill -- he's on the E1 wing, meaning that he's on standard privilege level and that he's well behaved while in custody. The aggravating factors in the case are that this is a serious offence, the manner of his involvement in the offence, he was involved with another person and he was involved in the stealing and theft of the rings. Ms McEntaggart, the shop employee was misled, set up in respect of the purported purchase of a necklace and earrings. The display cabinet had been left open and the accused stole the tray of rings from the display cabinet by putting it inside his jacket and concealing the tray of rings and then leaving the store, his accomplice having informed Ms McEntaggart that he had to go to an ATM machine to pay for the necklace and earrings, and of course they never returned. Theft is serious interference with a person's entitlement and right to the ownership, possession and use of their property, which includes goods, meaning jewellery. The stealing of the tray of rings by the accused was a serious interference to Mr Rory Burns, the owner of the shop, entitled by right to the ownership and possession and the use of the jewellery/rings. The effect of the loss of the rings as a result of the theft to Ruairi Burns, which indeed has been substantial, my understanding is that he may well have -- the insurance policy may have covered it but it would have been potentially loss in respect of the theft, but that does not correct by reason of the fact that the insurance company settles a claim, that does not correct any matter in respect of theft, only it does in many ways just restore Mr Burns to the financial position that he was before the theft. But of course he was caught for the excess which is not unusual in insurance policies. All insurance policies carry an excess. I'll continue with the aggravating factors. There was previous convictions, his failure to attend the Circuit Criminal Court at Dundalk to honour his bail, a bench warrant had to be issued, a European warrant had to be applied for and had to -- and sought to extradite the accused from Romania, which he duly was, but I've already given him credit that that was on a voluntary basis. There are substantial aggravating factors in the case and as regards to the seriousness of the offences -- seriousness of this offence I should say -- there's only one offence here, so of this offence and to the very substantial aggravating factors and balanced against the mitigating and the personal circumstances, I will have regard to the mitigating and the personal circumstances. And it's also very concerning that there is a history of thefts prior to this theft being committed, but also that's only part of the inclusion in the substantial aggravating factors in the case. I will also have regard to the difficulties that a non-national may experience while in custody in this jurisdiction in respect of the sentence I will impose. Then as regard to the seriousness of the offence and to the substantial aggravating factors and balance them against the mitigating and the personal circumstances -- I will have regard to the mitigating and the personal circumstances. In respect of count number 1 I'm imposing a four-year custodial prison sentence. Basically, the four years should run from the 18th of September 2015 and in addition he's entitled to the period, was it four months, that he's been in custody"

The grounds of appeal

18. It is contended on behalf of the appellant that the sentence imposed by the court below was unduly severe, and it was initially contended that the sentencing judge erred in principle in a number of respects. However, at the oral hearing before counsel for the appellant indicated that in fact he only wished to proceed with one ground, namely that the sentencing judge had erred in principle in assessing the gravity of the case as falling "in the higher range". It was submitted that the case did not fall within the higher range, and that the sentence of four years ultimately imposed, after due allowance for relevant mitigating factors, was excessive.

Discussion

19. This is yet another case where this Court finds itself dealing with a severity of sentence appeal in circumstances a sentencing judge has not indicated his starting point, or indeed what quantum of allowance he was prepared to make for relevant mitigation.

20. In this Court's recent judgment in *The People (Director of Public Prosecutions) v. Davin Flynn* [2015] IECA 290 (Court of Appeal, Edwards J, ex tempore, 4th December 2015) we stated (at para 14):

*"There is a strong line of authority starting with *The People (Director of Public Prosecutions) v M* [1994] 3 I.R. 306 ; and*

continuing through *The People (Director of Public Prosecutions) v Renald* (unreported, Court of Criminal Appeal, 23rd November 2001); *The People (Director of Public Prosecutions) v Kelly* [2005] 2 I.R. 321; and *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in *The People (Director of Public Prosecutions) v McCormack* [2000] 4 I.R. 356."

21. We then added (at paras 18 and 19):

"18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.

19. However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld. ..."

22. We do know that in the present case the trial judge characterised the gravity of the offending behaviour as being "*in the higher range*", after taking into account aggravating factors such as the premeditation involved, the commercial nature of the theft, the modus operandi employed of deliberately distracting of the shop assistant, the accused's recidivism in terms of having thirteen previous convictions for theft; as well as the harm done, and in particular the loss to the indemnifying insurer in circumstances where the stolen goods were never recovered. This view was offered in circumstances where the sentencing judge had expressly adverted to the maximum penalty as being one of ten years imprisonment.

23. The spectrum of available penalties in this case ranged from non-custodial options up to imprisonment for a maximum of ten years. Reference to "*the higher range*" suggests a likely three way division of the spectrum by the sentencing judge into a "low", "mid" or "medium" and "high" range. The ten year maximum sentence represents 120 months and so the range from 0 to 120 months is capable of subdivision by three into a low range running from 0 to 40 months, a mid range from 41 months to 80 months, and a high range from 81 months to 120 months.

24. Even though the circumstances of this case were quite serious, we do not consider that, on any view of it, it could be regarded as falling into the higher range such that it would attract a headline sentence of 81 months or more, before discounting for mitigation. On the contrary, we would assess the gravity of the case as falling squarely within the mid range, and we would be inclined to place it marginally above the mid point.

25. However the mere fact that the gravity of the sentence was mischaracterised by the sentencing judge as requiring its placement in the higher range is not dispositive of the matter. It is also necessary to consider the sentence ultimately imposed. While we do not know exactly what discount was given for mitigation, no complaint was pursued at the end of the day suggesting that there had been a failure to take due account of mitigating factors. In our judgment the mitigating factors in the case, as identified by the sentencing judge, would have properly merited a discount in the order of 25% from whatever headline sentence was identified as being appropriate. In circumstances where this Court would locate the headline sentence as belonging within the mid range, and perhaps marginally above the mid point, the starting point should therefore have been in the 60 month to 66 month region. Allowing a 25% discount on these figures would represent a deduction of between 15 months and 16½ months, resulting in a net sentence in the 45 month to 49½ month region.

26. The trial judge's ultimate sentence was one of 48 months and was therefore clearly within the range of acceptable discretion. In the circumstances we find no error of principle and dismiss the appeal.