



THE COURT OF APPEAL

Court of Appeal Record No: 298/2018

**President
Edwards J.
Donnelly J.**

BETWEEN/

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

RESPONDENT

- AND-

JOHN DONOGHUE

APPELLANT

**JUDGMENT of the Court (*ex tempore*) delivered on the 5th day of December, 2019 by
Ms. Justice Donnelly**

Introduction

1. The appellant pleaded guilty at the first opportunity at Cork Circuit Cork to two offences:
 - (a) On the 14th of October, 2017 at Cahill's Shop, Meelin, Newmarket, in the County of Cork he robbed the shopkeeper of Amber Leaf tobacco and Benson and Hedges cigarettes to the value of €66 and €40 in mixed coins.
 - (b) On the 18th of October, 2017 at O'Riordan's Filling Station, Bluepool, Kanturk in the County of Cork he stole property to wit petrol to the value of €20.
2. On the 22nd day of November, 2018, he was sentenced to three years' imprisonment in respect of count one, with the final twelve months suspended and a further sentence of two and a half years' imprisonment on count two, with the final eighteen months suspended. The second sentence was consecutive to the first sentence, thus giving a total sentence of four and a half years' imprisonment, the last 18 months of which were suspended on his entering into a bond to keep the peace and be of good behaviour for a period of three years and further that the appellant shall engage and remain under the supervision of the Probation Services and comply with all directions of any assigned Probation Officer, including attendance at any courses and/or counselling and further, that the appellant shall advise said Probation Services of any change in circumstances such as contact, telephone details or address. That the appellant shall remain free from all alcohol, controlled drugs and make himself available, whenever required to do so to provide appropriate toxicology tests and further, that he remain away from the village of Meelin in perpetuity.
3. We note that there was some confusion as to the effect of the suspended element of the first sentence when the second sentence was made consecutive. We would simply comment that the suspension of an initial sentence to which another is being made

consecutive may cause difficulties in the calculation of the commencement of the second sentence, and in any event may be unnecessary.

Grounds of appeal against severity of sentence

4. Two grounds of appeal were relied upon by the appellant and I set those out as follows:
 - (a) The learned Trial Judge erred in law and fact in setting a headline sentence of two and a half years for the offence of theft of €20 of petrol in the absence of any aggravating factors and further erred in only mitigating the headline sentence of two and a half years to one of two and a half years with the final eighteen months suspended consecutive to the sentence imposed on count number one.
 - (b) The learned Trial Judge erred in law in fact in making the sentence at count two consecutive to the sentence imposed in count one and erred in law and fact on the application of the principle of totality.
5. In essence therefore the appeal was in respect of the imposition of the two and a half year sentence for the theft of the petrol and the fact that it was made consecutive to the first sentence.

Evidence

6. The evidence was given with regard to each of the two counts on the Indictment to which the appellant had pleaded guilty. First related to the offence of robbery on the 14th day of October, 2017 at Cahill's shop in Newmarket. As there was no appeal in respect of this matter it is unnecessary to say anything further about this offence.
7. The second offence was committed four days after the earlier offence, when the appellant entered a filling station, filled a motor vehicle with €20 worth of petrol and left without making payment.
8. In respect of both offences, neither Injured Party wished to make formal victim impact statements.
9. Evidence was given with regard to the appellant's previous convictions. The appellant had nineteen previous convictions in total since 2016 including one for burglary, six for theft and one for possession of an article contrary to Section 15 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, all of which were dealt with summarily and none of which concerned crimes of violence. The appellant did not commit these offences during the operation of a suspended sentence and he was not on bail at the time of the commission of these offences. It is also the case that any sentence of imprisonment that he had served was not in respect of his dishonesty convictions.
10. The appellant had admitted full culpability and responsibility in respect of both offences. It was further accepted that when the appellant was charged in respect of the two offences, the subject matter of this appeal, he made known his intention to enter a plea of guilty immediately. The appellant was 22 years old at the time.

Sentencing Judge's Remarks

11. The sentencing judge took the view that the sentence to be imposed ought contain a deterrent to stop the appellant from re-offending. This was both specific and general *i.e.* not just to deter him but

"put out the message that other people should not carry or follow your example of such criminal activity".

12. In dealing with the theft of €20 of petrol the trial judge referred to the offence as *"one of those horrible thefts"*. He had previously described both offences as very serious offences.

13. The sentencing judge in specifically dealing with the imposition of sentence concerning count number two, the s.4 theft of €20 worth of petrol, in so assessing sentence as follows:

"The same circumstances apply – and factors apply, as set out when referring to count one. The court assesses a headline sentence of two and a half years in relation to this offence and will suspend the last eighteen months of that sentence, but I am making the last eighteen months – I will suspend on the accused entering into a bond in the same terms and conditions, thereby leaving a net sentence to be served of one year, and the sentence will be consecutive to the sentence imposed in respect of count one".

14. The sentencing judge considered the question of the totality of the sentence but stated there was no necessity for a further deduction bearing in mind all the circumstances which apply in the case.

The submissions

15. The appellant relied upon the well know principle in *DPP v. McCormack* [2000] 4 I.R. 356 that the appropriate sentence depends not only upon the facts of the particular case but also on the personal circumstances of the accused. He submitted that the "drive off" offence was clearly an offence of a minor nature and the headline sentence was set too high. The DPP accepted that the trial judge had made a jump from the manner in which his previous sentences for dishonesty had been dealt with non-custodially and this custodial sentence. In written submissions the DPP identified the effect on the victim as an appropriate matter that the trial judge was entitled to take into account.

16. As regards consecutive sentencing, the appellant relied upon the dicta in *DPP v. McC* [2003] 3 I.R. 609: -

"It has long been the sentencing practice in this jurisdiction that a discretion in favour of consecutive sentences is exercised sparingly"

and,

"There has always been a totality principle in relation to sentencing so as to ensure that the overall sentence after taking consecutive elements into account etc. is a just sentence for the criminal conduct concerned".

17. As regards the totality principle the appellant relied upon the dicta of Birmingham P. in *DPP v. Casey and Casey* [2018] IECA 121 as follows:

"The totality principle is potentially engaged whenever a court is seeking to reflect the overall gravity of two or more offences for which an accused faces sentencing, either by means of overlapping sentences, or wholly consecutive sentences. It permits a court to adjust the final sentence, and some or all of its individual components, as required to reach an overall figure as appropriate both to the gravity of the offending, but also to the circumstances of the individual offender".

18. The appellant submitted the sentencing judge erred in imposing a consecutive sentence on count two consecutive to count one. No mandatory circumstances prevailed whereby the sentence concerning count two was mandatorily consecutive. In imposing a consecutive sentence, it was submitted the sentencing judge erred in the overriding duty to impose a sentence that fairly reflects the overall gravity of the appellant's criminal conduct. The sentencing judge did not explain why he imposed one and it was submitted it was unwarranted and unnecessary.

19. The DPP relied upon O'Malley, *Sentencing Law and Practice* (Round Hall, 3rd edn.):

"In so far as there is any guiding common-law principle, it is that concurrent offences should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents."

20. There has always been a recognised discretion in the sentencing court where there are different victims and especially if the offences are unconnected. This is seen in *DPP v G. McC* [2003] 3 I.R. 609 in which it was stated:

"It is of course true and always has been true that where there have been a number of offences relating to different victims and especially if they are unconnected, there is discretion in the sentencing judge as to whether he or she makes the respective sentences concurrent or consecutive."

Conclusion

21. This is dealing with an appeal in respect of an offence of the theft of petrol worth €20 carried out by a young man. It was not identified to this court exactly how this offence came to be before the Circuit Court other than an indication that it was sent forward at the same time as the robbery offence.
22. We do not see how this offence could be viewed as anything other than a minor offence, although we accept that relevant previous convictions might affect that assessment. In this case, while there were relevant convictions for offences of dishonesty there was no

suggestion that he had convictions for this type of behaviour. We certainly cannot agree that it can be characterised as “one of those horrible thefts”.

23. Although there is a discretion in a trial judge to impose consecutive sentences, that must be done in a considered and reasoned manner. The trial judge did not give a considered and reasoned explanation as to why he was doing so in this case. In the particular circumstances, where there had been an early admission and plea of guilty, where he had expressed remorse, where he was a young father of two children and had bought food with the proceeds from the robbery, and where he had not served a sentence for offences of dishonesty, we are of the view that there was an error in principle to impose a consecutive sentence.
24. Furthermore, a two and half year sentence even with 18 months suspended consecutive to a sentence of 3 years with one suspended is clearly disproportionate to both the offence and the circumstances of this offender.
25. In light of all the circumstances and in resentencing the appellant we are of the view that the appropriate manner of dealing with this offence of theft is to impose a sentence of three months to run concurrently with the sentence for the robbery offence.