



**THE COURT OF APPEAL  
CRIMINAL**

**UNAPPROVED**

**Court of Appeal Record Number: 219/21  
Neutral Citation Number: [2022} IECA 143**

**Edwards J.**

**Kennedy J.**

**Ní Raifeartaigh J.**

**BETWEEN/**

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

**RESPONDENT**

**- AND -**

**JOHN KINSELLA**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 22<sup>nd</sup> day of June 2022 by Ms. Justice Ní Raifeartaigh**

1. This is an appeal against severity of sentence in circumstances where a sentence of 20 months' imprisonment was imposed in respect of a single count of handling stolen property, namely a crystal vase to the value of €500.

2. The appellant pleaded guilty in Wexford Circuit Criminal Court to one count of handling stolen property contrary to s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The particulars of the handling count were that the appellant had on the 2 March

2020 at an address in New Ross in the County of Wexford without lawful excuse possessed pieces of crystal valued at €500 knowing that the property was stolen or being reckless as to whether it was stolen. The plea was entered before His Honour Judge James McCourt. He was sentenced to a period of 20 months' imprisonment to date from the 29 October 2021, which was the date upon which he entered the plea of guilty. The indictment also contained a count of burglary of the vase but a *nolle prosequi* was entered in respect of that count.

3. Garda Laura Lyons gave evidence at the sentence hearing and indicated that the premises from which the item was stolen was a residential address. She indicated that the owner of the vase was a female person, a neighbour of the appellant who had known him for a long time, and that she had declined to make a victim impact statement. The Gardaí became aware of the matter because they received a phone call from a staff member from the Youth Café in New Ross on the 3<sup>rd</sup> March, who said that a male had arrived at the café the evening before and had a crystal vase in his possession which he was trying to sell. When Garda Lyons looked at the CCTV footage, she was able to identify the man with the crystal vase in his possession as the appellant. The vase had been left at the café by the appellant and it was retrieved by the Garda and ultimately restored to its owner.

4. The appellant was already in Garda custody at the time of his identification because he had been arrested previously for a separate burglary. A cautioned memo of interview was taken from him in relation to the crystal vase. He said he could not remember what had happened because he was intoxicated the evening before. The Garda accepted that this was the case as he was intoxicated when he was arrested. He was described as "very cooperative" in answering any questions to which he did know the answers. He did not take a trial date and indicated a guilty plea at an early stage.

5. The appellant had a large number of previous convictions. Of particular relevance to the instant charge was that he had 13 previous convictions for burglary, 6 prior convictions for theft, 2 prior convictions for possession of stolen property and 6 convictions for unauthorised taking of an MPV. There were also convictions under the Misuse of Drugs Act, the Road Traffic Acts and the Public Order Act, as well as 3 previous convictions of assault, one of which resulted in a two-year term of imprisonment being imposed, and a prior conviction for assault of a peace officer. He had received the benefit of a number of suspended sentences previously: including a 10-month suspended sentence for burglary on the 3 December 2019, and on the 8 March 2018 in respect of road traffic matters, and on the 13 March 2017 in respect of burglary.

6. In cross examination of the Garda, it was indicated that Mr. Kinsella was well known to the Gardaí and was known to be cooperative when confronted by them. He had a problem with his drug abuse and this was a very significant contributor to his offending. The Garda was aware that he had tried in the past to deal with the drug problem but that he had relapsed.

7. Mr. Kinsella gave evidence to the judge. He said that he was now 36 years of age and had spent nearly fourteen years of his life in prison. He said that he wanted to get into rehab, sort out his life and get his family back together. He had been homeless on the streets for four and a half months when this happened and was back in his mother's house at the moment. His mother was giving him another chance. He spoke about his involvement with the Cornmarket Project, a drug treatment facility in Wexford, at a certain point. He got married and had a child. He had a relapse after three years and the marriage fell apart, as he said. His wife got a barring order against him and ever since then he was not able to get his life back on track. He said that when he was released in connection with this offence, he rang

the methadone clinic that he sought to seek a drug counsellor about getting into rehab and ultimately the Cornmarket Project is willing to take him on. He said that his father was in court with him today. He had four children altogether (one with his wife), and the age ranges were from age two to sixteen. He said that one of the reasons why he wanted to go into rehab was because his eldest children were now old enough to understand who he was and what his lifestyle was like. He also apologised for what he had done, saying that he knew the woman from whom the vase was stolen all his life, and said that he had apologised to her also when he saw her.

**8.** In his plea in mitigation, counsel Mr. Stafford submitted that while the appellant had a long list of previous convictions, he also wished to draw attention to the fact that Mr. Kinsella had left school very early from a difficult background without any exam qualifications and never had a job of any significance. His offending was directly related to his addiction. He pointed out that he always cooperated with the Gardaí and made admissions and he believed that Mr. Kinsella had pleaded guilty to virtually all the offences he had ever been charged with, and that the property was nearly always recovered and given back to its owners.

**9.** The sentencing judge recited the maximum sentence (5 years) for the offence of handling, and said he had to consider the harm done to the injured party and the harm to society done by his offending and his moral culpability. On the mitigating side he said that he took into account the apology that had been given, and the early plea. However he said that it was asking him to go beyond the bounds of credulity to accept that Mr. Kinsella had turned a corner. He had tried to address his drug problem before and had not been successful in doing so. While the appellant showed a degree of insight into his wrongdoing, the judge

did not have the comfort of any report that he would be likely to cease this type of behaviour were his liberty to be restored. He said the sentence had to include an element of deterrence specific to Mr. Kinsella and to society at large. He had some regard to the appellant's difficult upbringing but said he had not committed this offence while young and that he was now 36 years of age. That the problem persisted as was clear from the list of previous convictions. He accepted the plea of counsel insofar as it said that the offences and this offence in particular was "*mindless, senseless stuff*" which he said was evidenced by the fact that the appellant had taken the item into a coffee shop to try and sell it.

**10.** The judge said the aggravating factor was clearly the lengthy list of previous convictions. He said he had no testimonials and no reports and could not see how Mr. Kinsella could avoid a custodial sentence. He nominated a headline sentence of 3 years as appropriate before being discounted for the mitigating factors outlined. He said that these mitigating factors should then reduce the sentence to two years. He refused to suspend the sentence upon being so asked by counsel. An exchange then took place as to whether the appellant should be given credit for time already spent in custody and the judge ultimately imposed a sentence of 20 months. This appears to have been a further reduction which was not due to time spent in custody in respect of this offence (despite counsel's initial impression that this was the case).

**11.** On appeal, counsel on behalf of the appellant submitted that if the possession charge had been the only charge, the matter would have been dealt with in the District Court where the maximum sentence was 1 year. He pointed out that the matter proceeded in the Circuit Court because of the burglary charge but that a *nolle prosequi* was entered in respect of that.

**12.** He referred to the previous convictions and said that O'Malley, *Sentencing Law in Ireland* pointed out that offenders must be sentenced primarily by reference to the offence of conviction and that to punish them for previous offences for which penalties have previously been imposed could amount to a double punishment; the better approach was to apply a progressive loss of mitigation for previous convictions. He accepted that with so many previous convictions, the point of no mitigation may have been reached in this case. Nonetheless, he submitted that that the appropriate maximum sentence was the District Court limit.

**13.** He also submitted that there was a suspicion that the judge was influenced by the burglary charge which was not pursued.

**14.** Counsel on behalf of the DPP submitted that while the prior offending had been described as mindless and senseless, it was a serious offence and the sentence imposed was far from excessive particularly when viewed in light of the appellant's past record of serious criminality. Counsel submitted that the decision in *DPP v. Ryan* [2014] IECCA 11 mandates that the Court of Appeal should only intervene if it views the divergence from what have been an appropriate assessment of the seriousness of offence and the culpability of the accused and the appropriate sentence to be imposed in that context to be sufficiently significant to warrant finding an error of principle. The fact that the court might have imposed a slightly lower or slightly higher sentence or assessed the case at a slightly lower or higher point on the spectrum of seriousness would not of itself be sufficient to justify intervening.

**15.** Counsel also cited *DPP v. J.C.* [2019] IECA 173 where the court said that while rehabilitation is an important objective in the sentencing process, there must be a sound

evidential basis if a court is being invited to go the extra mile in terms of building rehabilitation into the sentence. There was no such evidence before the court in the present case.

16. Counsel submitted that the judge had correctly identified the previous relevant convictions as aggravating factors. He pointed out that the appellant was also during the currency of a suspended sentence for one of those offences when he committed this offence. He also cited O'Malley but for the proposition that the appeal courts were now more inclined to treat previous convictions for similar serious offences as an aggravating factor unless there had been a significant interval since the last conviction. In this regard, he cited *DPP v. K.(G.)* [2008] IECCA 110 where the Court of Criminal Appeal held that previous convictions are relevant not just in terms of their absence in mitigation of sentence but in terms of assessing an appropriate sentence in terms of the seriousness of the offence itself. It was submitted that the headline sentence identified by the sentencing judge could not be described as excessive having regard to the nature of this offending when taking into account the extensive previous convictions which were highly relevant and which the court correctly identified as being an aggravating factor.

17. He also pointed out that the judge had discounted the sentence from the headline sentence of 3 years ultimately to a sentence of 20 months. It was submitted that both the headline sentence and the ultimate sentence were not outside the available range of sentences and did not amount to an error of principle.

### **Decision of the Court**

**18.** The Court agrees with the respondent that the two aggravating factors in this case were: (1) the substantial number of previous convictions relevant to the instant offence, being offences involving dishonesty; and (2) the fact that the offence was committed during the currency of a suspended portion of a sentence. Both of these factors warranted an increase in the headline sentence beyond that which would have been appropriate for an offender with no such convictions who had committed the same offence.

**19.** Nonetheless, we are of the view that notwithstanding these two aggravating factors, the nomination of a headline sentence of 3 years was too high having regard to the actual offence itself, namely handling of a stolen vase worth €500. While the Court is not confined to the “progressive loss of mitigation” approach with regard to previous convictions, and relevant previous convictions can aggravate the culpability for the offence, there is a limit to which they can increase the headline sentence beyond that which is appropriate having regard to the particular offence and the particular facts of the offence. The maximum sentence for the offence of handling stolen property is 5 years; thus, the sentencing judge in selecting a headline sentence of 3 years was placing this offence at approximately the 60% mark in the total range for handling offences. This was in our view an unduly severe headline sentence even having regard to the aggravated culpability of this appellant by reason of the two factors already mentioned.

**20.** It may be that the judge was indirectly influenced by the fact that burglary had originally been charged on the indictment. It is clear from the transcript that he made two references to the fact that the vase had been stolen from a residential property of a woman (who the judge surmised was probably older than the appellant), and at one point made a slip of the tongue referring to the appellant as having stolen the property before correcting himself. It is not entirely clear why he thought the origin of the stolen property was so



relevant. The *mens rea* for the offence is knowledge or recklessness, and it does not appear to us that there was unequivocal evidence that the appellant knew of the stolen property's origin (as there might be in some cases). The evidence was that the appellant had said he did not know what happened because he was intoxicated he evening ; thus, the evidence before the Court was that he had now knowledge of what had happened. Further, it would have been inappropriate to surmise that the appellant was somehow connected with the burglary itself in circumstances where the burglary charge was the subject of a *nolle prosequi* (and indeed the offence of handling refers to a person handling 'otherwise than in the course of stealing'). Contrary to a submission made on behalf of the respondent, we do not consider that the appellant's apology to the victim of the burglary indicated his acceptance of his guilt of that offence; it was made clear in court (as a matter of fact) where the vase had originated from, but his apology does not necessarily mean that he was thereby accepting that he himself had taken it from that location. It is not necessary in any event to decide that the judge *was* influenced by the presence of the burglary count on the indictment or that he considered the appellant to have committed this offence; it suffices to say that we consider that a headline sentence of 3 years for this offence, even with the offender's record and the fact that it was committed during the currency of a suspended sentence, was unduly severe having regard to the overall maximum sentence for this offence and the circumstances of this particular offence and offender.

**21.** For the avoidance of doubt, we should perhaps clarify that we do not accept the appellant's argument that simply because the matter *might* have been charged in the District Court had there been no burglary charge, it should be taken as a given that the appropriate maximum sentence was in effect the maximum sentence which could be imposed by the District Court. The DPP exercised her discretion in respect of this particular offence and offender, and the matter was in the Circuit Court with the corresponding sentencing powers

of that Court in play. The Court cannot speculate as to why the DPP made her particular decision. Our view that the headline sentence was too high does not stem from an acceptance of this particular submission of the appellant.

**22.** In our view, an appropriate headline sentence would have been more in the region of 2 years. Applying a generous reduction in mitigation, although not quite as generous as the sentencing judge's ultimate reduction from 3 years to 20 months, we are of the view that an appropriate post-mitigation sentence in this case should be one of 15 months.

**23.** Accordingly, we propose to quash the sentence of 20 months imposed by the sentencing judge, and impose today instead a sentence of 15 months backdated to the 29 October 2021 (being the date of the original sentence).