



THE COURT OF APPEAL

Record Number: 181/22

Birmingham P.

Kennedy J.

Burns J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

PALFINGER IRELAND LIMITED

RESPONDENT

JUDGMENT of the Court delivered on the 28th day of July, 2023 by Ms. Justice Tara Burns.

1. This is an application pursuant to s. 2 of the Criminal Justice Act 1993 ("the 1993 Act") seeking a review of the sentence imposed on the Respondent on grounds of undue leniency.
2. The Respondent entered a guilty plea before Limerick Circuit Court to a single offence of failure, as an importer and supplier of an article for use at work, to supply adequate information about the use for which the article is designed or has been tested, and about any conditions relating to it so as to ensure that, when in use, it will be safe and without risk to health, contrary to section 10(1)(b) and section 48(1)(a) of the Safety, Health and Welfare at Work Act 1989 ("the 1989 Act"). The particulars of the offence were as follows:-

"Palfinger Ireland Limited on the 12th March, 2003, being a person who imported and supplied an article for use at work, imported and supplied an article, namely, a Palfinger crane...fitted with a winch...to Nationwide Crane Hire Limited (formerly known as Cussen and Co (Crane Hire) Ltd at Dock Road, Limerick, for use at work and failed to take such steps as were necessary to secure that the person supplied...with the said crane and said winch, was provided with adequate information about the use for which it was designed or had been tested, and about the conditions relating to the said crane and said winch so as to ensure that, when in use, it would be safe and without risk to health, and, in particular, you failed to

provide to the said Nationwide Crane Hire Limited (formerly known as Cussen and Co (Crane Hire) Ltd), any or any adequate information about the carrying out of a functional test of the safety overload protection system on the said winch of the said crane."

3. A sentencing hearing was held on 27 July 2022. On 7 October 2022, the sentencing judge pronounced the sentence imposed on the Respondent as a fine in the amount of €25,000 with 12 months to pay.

The Offence

4. Section 10 of the 1989 Act provides, inter alia:-

"(1) It shall be the duty of any person who designs, manufacturers, imports or supplies any article for use at work –

...

(b) to take such steps as are necessary to secure that persons supplied by that person with the article are provided with adequate information about the use for which it is designed or has been tested, and about any conditions relating to the article so as to ensure that, when in use, dismantled or disposed of, it will be safe and without risk to health."

Section 49 of the 1989 Act provides for an unlimited fine to be imposed upon conviction.

Background

5. The background to the prosecution is extremely tragic. In August 2015, repair work was carried out on Thomond Bridge in Limerick City. A Palfinger crane, which included a winch, was utilised for the operation. This crane had been hired from the co-accused (Nationwide Crane Hire Limited). It had been imported and supplied by the Respondent to the co-accused in March 2003.
6. The repair work operation entailed stonemasons occupying a cage which was suspended from the crane over the River Shannon so that the work could be carried out. On 29 August 2015, three stonemasons were working on the bridge from the cage. Tragically, the overload protection safety device for the winch comprised in the crane failed which led to the winch cable snapping. The basket containing the three men plunged into the River Shannon leading to the deaths of two of the men. The third man managed to free himself from a harness which the workers were required to use.
7. An extensive investigation into the cause of the accident took place which both the Respondent and it's co-accused fully co-operated with. It was discovered that when the crane and winch were supplied to the co-accused in March 2003, the Respondent failed to supply that part of the operator's manual which related to the requirement to regularly

inspect the overload protection safety device. This missing portion of the manual was referred to in the index to the manual which had been supplied. The omission was not realised by any party until after the accident.

8. When the crane was delivered by the Respondent to the co-accused in March 2003, a demonstration of how to operate the crane in accordance with the rules and guidelines in force was carried out. Furthermore, all safety devices and functions were explained. However, specific instruction in accordance with what was set out in the manual in relation to the overload protection safety device was not provided. The Respondent had serviced the crane twice, mostly recently on 29 May 2015. A microchip from the crane revealed that the overload protection system had activated 156 times during 27 operational hours, thereby demonstrating that it was operational.
9. The co-accused plead guilty to an offence of failing to manage its undertaking on 29 August 2015 so as to ensure that persons in the course of their work were not exposed to risks to their safety, health or welfare contrary to s. 12 and s. 77(9)(a) of the Safety, Health and Welfare at Work Act 2005, as a consequence of which failure the two workers died. They were fined €200,000 with 12 months to pay.

The Respondent's Circumstances

10. The Respondent is based in Tullamore, County Offaly. It employs 24 staff. It has no previous convictions under health and safety legislation.

Sentencing Determination

11. The sentencing judge noted that the Respondent and the co-accused were prosecuted for separate and discrete offences. He also noted that the trial would have been complex and that the pleas of guilty which were entered were of immense benefit. He noted the extensive co-operation by the Respondent with the investigation which included the provision of a substantial amount of paperwork. The fact that the crane had been recently serviced was also referenced. However, he found that the failure to provide that portion of the manual which referred to the necessity to regularly inspect the overload protection system was a significant matter.
12. Having considered *The People (DPP) v. Kilsaran Concrete Limited* [2017] 2 IR 510 and the principles set out relating to sentencing a corporate offender, the sentencing judge dealt with the Respondent in the following manner:-

"Insofar as Palfinger Ireland Limited is concerned, the Court acknowledges that the crane was sold in 2003 by them to Cussen Crane Hire Limited. It acknowledges that the error was only discovered as a result of this tragic accident. However, the Court is of the view that the error is a significant error and again, having considered the evidence and having factored in the aggravating and mitigating circumstances, the

Court feels that the appropriate and proportionate sentence is a fine of €25,000 with 12 months to pay."

Submissions of the Parties

- 13.** The Applicant's position is that, in the circumstances of the case, the sentence imposed constitutes a substantial departure from the appropriate sentence, such that it is unduly lenient within the meaning of the 1993 Act and having regard to the principles set out in *The People (DPP) v. Byrne* [1995] 1 ILRM 279. Counsel for the Applicant submitted that the sentencing judge erred by failing to identify a headline sentence; by treating the fact that the non-discovery of this failure for a twelve year period was a mitigating factor; and by imposing a fine which was simply too low having regard to the asserted gravity of the offence.
- 14.** Counsel for the Respondent submitted that the sentencing judge correctly identified the Respondent's level of culpability and gravity of wrongdoing given the circumstances of the case; that proper regard was had to all aggravating and mitigating factors; and that the sanction which was imposed was not a substantial departure from the appropriate sanction in the circumstances of the case.

Discussion and Determination

- 15.** The principles for determining undue leniency are well established and are set out in *The People (DPP) v. Byrne* [1995] 1 ILRM 279 which this Court adopts. In essence, the Applicant must prove that the sentence imposed constitutes a substantial or gross departure from the appropriate sentence such that an error of principle is established before this Court will intervene.
- 16.** *The People (DPP) v. Kilsaran* [2017] 2 IR 510, enumerated the headings to be considered when assessing the appropriate sentence to be imposed on a corporate offender as an assessment of the gravity of the offence; the allowance for mitigating factors; proportionality; and general sentencing policy.
- 17.** *The People (Director of Public Prosecutions) v. Cavan County Council* [2015] IECA 130, is also instructive in terms of the setting out the principles applicable when sentencing a corporate offender. Edwards J., delivering the judgment of the court stated at para 61:-

"In the case of corporate offenders, while there is no constitutional requirement of proportionality in terms of interference with personal rights and personal liberties, sentencing must nevertheless be fair to the corporate offender and be in accordance with the constitutional guarantees of due process. Accordingly, the process of sentencing a corporate offender must still take account of the gravity of the offence, including the culpability of the offender, and relevant circumstances of the entity concerned should be taken into account in mitigation. A sentencing court must still

have regard to the sentencing objectives of retribution, deterrents both specific and general and rehabilitation but there will frequently be more emphasis on deterrents than other objectives."

- 18.** The Court will have regard to the principles set out in these cases for the purpose of determining whether there has been a substantial departure from an appropriate sentence in this matter.

Failure to identify a headline sentence

- 19.** Whilst best practise dictates that a sentencing judge identify a headline sentence before considering mitigating factors, it has been held on a number of occasions by this Court (e.g. *DPP v. Brady* [2022] IECA 313; *DPP v. Flynn* [2015] IECA 290) that failure to approach a sentence in this manner is not in itself an error in principle if the sentence actually imposed is appropriate.
- 20.** In the instant case, the approach adopted by the sentencing judge does not amount to an error in principle in circumstances where he clearly set out and assessed the factors relating to the Respondent's culpability, and also set out and considered the mitigating factors which he took account of, particularly having regard to the decision which this Court comes to in relation to the fine actually imposed.

The 12 year delay

- 21.** The Applicant complains that the sentencing judge incorrectly treated the 12 year period before the accident in Limerick occurred as a mitigating factor. It is submitted that the failure to provide the manual was a significant standalone breach and the fact that the failure did not come to light for 12 years is not a matter which provides mitigation to the Respondent.
- 22.** The Court does not agree that this is how the sentencing judge characterised the 12 year delay. It is clear from the sentencing judge's remarks that he viewed the failure to provide that part of the manual as a significant breach. However, it is also clear that he was mindful of the fact that the offence occurred in 2003 and that for a 12 year period the crane had operated properly, safely and without incident and had also been serviced by the Respondent. The Court is of the view that the criticism of the sentencing judge's approach in this regard is misplaced. The sentencing judge did not treat the 12 year period as a mitigating factor but rather correctly and appropriately had regard to it in assessing the Respondent's moral culpability.

The Sentence was too low

- 23.** The Applicant's principal complaint is that the fine imposed was simply too low in light of the gravity of the offence.

24. With respect to an application of this nature, the onus is on the Applicant to establish that the sentence is a substantial departure from what is the appropriate sentence in the circumstances.
25. The factual context of the breach must be considered to determine the Respondent's culpability. Whilst the manual provided by the Respondent to the co-accused, twelve years prior to the accident mistakenly omitted that portion of the manual which related to the requirement to carry out regular inspections of the overload protection safety device of the crane, provision of the manual was not the sole instruction provided to the co-accused with respect to the operation of the crane. As noted previously, when the crane was delivered, a demonstration took place in relation to the operation of the crane and its safety functions were explained. Furthermore, the crane had been serviced by the Respondent most recently three months prior to the accident. In addition, it is clear that the safety feature had been operational in light of computer download from the crane.
26. It is important to be precise about the offence which the Respondent was prosecuted for and pleaded guilty to, namely the failure to provide the relevant portion of the manual in 2003. The Respondent was not prosecuted for an offence which related to the accident which occurred at Thomond Bridge, nor was it alleged by the Applicant that the statutory failure on the part of the Respondent contributed to the deaths of the two stonemasons. Accordingly, the sentence imposed on the Respondent's co-accused is not an appropriate comparator.
27. Having regard to the offence which the Respondent was prosecuted for, this Court is of the opinion that the sentencing judge correctly assessed the Respondent's moral culpability and gravity of offending in relation to that offence and had regard to all relevant factors, including aggravating factors. It is also the case, that the sentencing judge correctly identified the mitigating factors present which were of significant value.

Conclusion

28. This Court is of the view that the sentence imposed by the sentencing judge was not a substantial departure from the appropriate sentence which should have been imposed in relation to this matter having regard to the offence which was being considered, the factual circumstances, the aggravating factors, the mitigating factors and having regard to the sentencing policy of deterrence. Accordingly, the Court is of the opinion that the sentence was not unduly lenient within the meaning of the 1993 Act.