



THE COURT OF APPEAL

[30CJA/22]

The President

Kennedy J.

Burns J.

BETWEEN

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

APPLICANT

AND

PEARSE O'CONNOR

RESPONDENT

JUDGMENT of the Court delivered on the 1st day of December 2023 by Birmingham P.

Introduction

1. The Court is dealing with an application brought by the Director pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review sentences on grounds of undue leniency. The sentences sought to be reviewed are sentences which were imposed on 13th January 2022 in the Circuit Court in Dundalk. On that occasion, sentences were imposed in respect of eight counts of use of a false instrument contrary to s. 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and one count of fraudulent trading, contrary to s. 297 of the Companies Act 1963, as substituted by s. 137 of the Companies Act 1990. The sentences are: a sentence of five years imprisonment, which was imposed in respect of the fraudulent trading count, and also in respect of one count of using a false instrument; and, a sentence of four years imprisonment, which was imposed in respect of four of the counts of use of a false instrument. The Court took the four remaining s. 26 counts into consideration. Both sentences, which were concurrent, were fully suspended for a period of five years. On the same occasion, the Court made a disqualification order prohibiting the then accused, now respondent to this application, from acting as a director or secretary of a company for life.

Background

2. By way of background, it should be explained that the respondent was a director and also operated as sales manager of a company, Pearse Roof & Cladding Ltd. The principal business of the company involved the manufacture and sale of roofing and cladding materials. That company went into liquidation in or around June 2015. A report from the liquidator, under s. 56 of the

Company Law Enforcement Act 2001, revealed certain irregularities in how the company had operated. That report triggered a Garda investigation. Central to that investigation was the interaction between Pearse Roofing & Cladding and another company, Keys Commercial Finance Ltd. Keys Finance was in the business of providing invoice discount facilities; essentially, Keys Finance assisted the cashflow of their partner's businesses. When presented with an invoice by a partner company, it was their practice to provide finance of up to 75% against that invoice. Count one on the indictment, an offence relating to the use of a false instrument, related to false accounts which were provided to Keys Finance in order to induce them to participate in a continuing business relationship. The accounts painted a false picture of the state of health of Pearse Roofing & Cladding Ltd. The accountant whose name appeared on the accounts as their author had no involvement whatever in the production of the accounts. Count two is a count of fraudulent trading and the balance of the counts that the Court was dealing with involved the use of false instruments – in these cases, false invoices – which suggested that Pearse Roofing & Cladding had provided services to particular clients and were owed money by those clients in respect of the goods and services provided. The invoices were submitted to Keys Finance, made out in varying sums to different companies with which Pearse Roofing & Cladding might have been expected to have been doing business. These companies named as customers knew nothing of the invoices, they had not received goods or services from Pearse Roofing & Cladding, and the companies did not owe monies to Pearse Roofing & Cladding. On analysis, it emerged that Keys Finance was defrauded in the amount of approximately €370,000.

Personal Circumstances of the Respondent

3. In terms of the respondent's background and personal circumstances, he was born in August 1982 and is a separated father of two children. He had five previous convictions recorded, two of which involved offences of harassment and stalking contrary to s. 10 of the Non-Fatal Offences Against the Person Act 1997 as amended. It appears this offending involved printing or distributing leaflets or posters on behalf of an individual engaged in debt collection. The three other matters were offences under the Road Traffic Act 1961 as amended, one of them an offence from April 2017 of driving under the influence of an intoxicant. The Court heard that the respondent experienced significant difficulties with alcohol, but he had taken this in hand.

4. In the course of the plea in mitigation, counsel for the respondent made the point that the background to his client's wrongdoing was that the respondent's company was in financial difficulty and in debt. He submitted that his client's wrongdoing had not been engaged in for his own personal benefit, but rather, was an attempt to keep a company afloat. His client's bad decision-making was at a time when he had problems within his family, and in particular, had significant problems with alcohol, but that these alcohol problems had been taken in hand. Counsel also pointed out that his client, at the time of the sentence hearing, was in fulltime employment; rather remarkably being employed by a company which itself had been owed a large sum of money by Pearse Roofing & Cladding. Counsel made reference to a number of testimonials, to a psychological report, and to the contents of a probation report. The probation report saw the respondent as being at low risk of reoffending. Counsel urged the judge to deal with the case by way of a non-

custodial disposal. He accepted that this would be an exceptional approach but said that this was a case for such an exceptional approach.

The Sentence

5. In the course of his sentencing remarks, the judge made reference to the degree of preplanning and to the elements of sophistication. He referred to the fact that the first count on the indictment, the production of a false financial statement, had to have had an element of preplanning, which he saw as an aggravating factor. Second, in relation to the production of the invoices, again, there was an element of sophistication involved. He referred to the respondent's personal circumstances, including the fact that he had secured employment with a Northern Ireland company. The judge had been told by the Managing Director of that company that without being in a position to employ the appellant, the company would have had to close their operations in the Republic of Ireland. The judge referred to the fact that the company that now employs the appellant was a company which was owed in excess of €400,000 at the time of the liquidation of the respondent's company. The judge referred to the fact that he had been urged by counsel to deal with the matter in an exceptional way and to hold the sword of Damocles over the respondent rather than sending him to prison, as no useful purpose would be served by jailing him.

6. The judge then imposed the sentences which he identified as appropriate and said the issue for him was whether he ought to follow what was urged upon him by counsel for the respondent, *i.e.* to suspend some or all of the sentence which he had just imposed. He said he was influenced by various matters which had been referred to by counsel in the course of the plea in mitigation, including the fact that the offences were committed by the respondent at a time when his use of alcohol must surely have clouded his judgment. While the respondent continued to be employed during the five-month period during which the offending was taking place and would have received some monies as a director during that period, the underlying motive for the criminality was to seek to ensure that the company stayed afloat at all costs. He referred to a section of the probation report which suggested that there was an expectation on the part of the then accused now respondent that he would have been in a position to pay back the monies he was taking once debts owed to the company had been recovered. He referred to the fact that the probation report indicated that he was at low risk of reoffending, and made reference too to the report from the clinical psychologist which referred to the fact that he was someone who was seriously depressed, and in the past, had experienced suicidal ideations, and at one stage, may have attempted to act on those ideations. Referring to the significance of the plea, he said he was inclined to the consider that counsel was correct when he said that perhaps this was a case for exceptional steps to be undertaken by the Court and for a fully suspended sentence to be imposed. So, he said that, with some degree of reluctance, he was proposing to suspend the sentences in their entirety for a period of five years.

Discussion and Decision

7. We begin our consideration of this issue by making the obvious point that this was very serious offending. The amount involved, €370,000, was very significant. The offending was not a once-off event but occurred over a period of several months. As the sentencing judge pointed out,

preplanning and deliberation were features of the case. This was evident both at the stage of producing the false company profile in order to induce Keys Finance to agree to an ongoing funding relationship, and it was also evident at the stage of the preparation and submission of the individual false invoices. It is not a case where there was any restitution.

8. It is quite evident that the sentencing judge approached his task of sentencing with great care and that he specifically addressed the question of whether, having identified an appropriate sentence, there was a basis for suspending the sentence. He did so in circumstances where there were significant factors present by way of mitigation, which included but were not limited to: the plea; the remorse; the absence of relevant previous convictions; the fact that the now respondent was seen as unlikely to reoffend; and the fact that the respondent was clearly taking steps to get his life back on track, addressing his problems with alcohol, securing employment and making a valuable contribution on behalf of his employer.

9. While we recognise the significant factors present by way of mitigation, nonetheless, we find ourselves in a situation where we cannot agree with the decision of the sentencing judge to suspend the sentence in its entirety. It seems to us that this was a case where the offending was of such seriousness that the custody threshold was clearly crossed and that a non-custodial disposal was simply not an option. In our view, a fully suspended sentence was not just very lenient, but actually unduly lenient.

10. Being of that view, in the ordinary way, it would fall on us to resentence at this stage. The well-established jurisprudence of this Court and its predecessor means that what is required of us is not that we identify the sentence we feel should have been imposed at first instance and proceed to now impose it, but rather, that we resentence as of today's date. If we had been in the business of identifying an appropriate sentence to be imposed at first instance, we would have taken the same starting point as did the sentencing judge – five years. We would have accepted that there was a basis for part-suspension, and while suspending a greater part of the sentence, we would have required the respondent to serve a sentence of 18 months or two years, with the balance of the sentence suspended.

11. We have carefully considered the question of whether the respondent must now be required to serve an actual sentence of imprisonment. One matter which causes particular concern is the period of time that has passed since the sentence hearing on 13th January 2022. Since undue leniency reviews first became part of the legal system, the practice of this Court and its predecessor, the Court of Criminal Appeal, has been to give priority to such reviews when allocating dates. In particular, it has been our invariable practice to give priority to cases where there has been a non-custodial disposal at first instance, but where the Director, as the moving party, is contending that there ought to be a custodial sentence. Alongside such cases, we give priority to cases where the sentence imposed at first instance was a short one, so as to avoid, if at all possible, a situation where a respondent to an application could find themselves serving the sentence imposed by the sentencing Court, released into the community, and then reincarcerated.

12. We accept that anyone can make mistakes and that there has been no error-free system, but we cannot ignore the significance of the passage of time. This was particularly so in circumstances where the sentence hearing was itself at a considerable remove from the time when the offending came to light. The liquidator's report was in late 2015, and the actual offending

occurred in the early part of that year. The matter first appeared in the Circuit Court list in October 2020, and following adjournment, during which discussions between the parties took place, pleas of guilty were entered on 15th April 2021. The passage of time since the offending, and more specifically, what had occurred during that period, were matters to which the sentencing judge had to and did give consideration.

13. The period that has passed since the sentence hearing in the Circuit Court has served to highlight the respondent's continuing efforts to reform and turn his life around. By way of example, a letter submitted to the Court from his employer refers to him as a hard and dedicated worker, often the first to arrive in the office and the last to leave. He heads up the Northern Ireland company's sales force in the Republic of Ireland and has now been working for them for the last eight years. He has addressed his alcohol dependency, and this does not appear to be a continuing problem. He is living in close proximity to his estranged wife, which means he is in a position to bring his children to school on a daily basis. While conscious of the seriousness of the offending, and conscious also that the need for general deterrence is a highly relevant consideration in the case of fraud and white collar crime, we have come to the conclusion, not without considerable hesitation, that at this remove, almost nine years after the offending occurred, and eight years after the liquidator prepared his report, that the interests of justice would not be served by incarcerating the respondent at this stage.

14. In the circumstances, we will refuse the Director's application to review the sentences.