



# THE COURT OF APPEAL

**UNAPPROVED**

**NO REDACTION NEEDED**

Appeal Record Number: CCA CJ 0162/2022

Neutral Citation Number: [2023] IECA 66

**The President  
McCarthy J.  
Ní Raifeartaigh J.**

**BETWEEN/**

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

**APPELLANT**

**- AND -**

**TIMMY O'  
REILLY**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 21st day of March 2023 by Ms. Justice Ní Raifeartaigh.**

1. This is an appeal brought by the Director of Public Prosecutions on the ground that the sentence imposed was unduly lenient. The sentencing judge imposed a sentence of eighteen months, fully suspended, at a sitting of the Circuit Criminal Court, Kilkenny on the 28<sup>th</sup> July 2022 in respect of eight sample counts of money laundering.
2. Section 7(1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 provides that a person commits the offence if -

(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:

- (i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
- (ii) converting, transferring, handling, acquiring, possessing or using the property;
- (iii) removing the property from, or bringing the property into, the State.

3. Subsection 7(1)(b) provides that the person must also know or believe or be reckless as to whether or not the property is the proceeds of criminal conduct. The maximum penalty for the offence on indictment is a fine or imprisonment for a term not exceeding fourteen years.

4. Section 6 of the Act, which is located in Part 2 entitled “Money Laundering Offences”, sets out a definition of the proceeds of criminal conduct. It says that the “proceeds of criminal conduct” means any property that is derived from or obtained through criminal conduct, whether directly or indirectly, or in whole or in part, and whether that criminal conduct occurred before, on or after the commencement of the Part.

#### *The Sentence Hearing*

5. At the time of sentence, there were three accused persons before the court of whom the respondent was one. The evidence adduced at the sentencing hearing was as follows. The officer in charge said that in 2018 an investigation was conducted in respect of certain unexplained assets and, as a result of that, the Gardai became aware of certain accounts in a credit union in Kilkenny relating to the three suspects and obtained an order under s.63 of the Criminal Justice Act 1994 in order to access relevant information. One account was in

the name of the respondent, the other in the name of Stephen O'Reilly (the respondent's son), and the third in the joint names of the respondent and Francis O'Reilly (another son). The account in the respondent's name had a balance of €5,315; the account in relation to Stephen O'Reilly had an amount of €61,330; and the joint account had an amount of €11,565. A Garda Superintendent made a direction that various applications would be made to freeze the accounts. Inquiries had been carried out with social welfare and the revenue authorities and the only legitimate income identified consisted of social welfare payments. All three men were claiming welfare on a "nil means" basis, meaning that their only income was from social welfare.

6. Six addresses were searched in June of 2018 on foot of search warrants, including the home of the respondent. This led to the uncovering of an Irish Life account that was previously unknown to the investigation. A similar order was applied for in relation to that account and in time it was revealed that this account, an investment account, had a balance of over €100,000, and that it had been opened on the 29<sup>th</sup> November 2007.

7. In August 2018 the three accused were interviewed by arrangement at Kilkenny Garda Station in connection with suspected money laundering. The respondent handed in a prepared statement and declined to answer any questions. His statement said that he could not, by reason of the lapse of time, provide an explanation of how the monies came to be in the Irish Life policy. In relation to the credit union account, he said he opened it and made various lodgements and transfers to it from an account he held at the Trustee Savings Bank totalling €22,500, but no explanation was given of where that money had come from. He said that on the 27<sup>th</sup> July a lodgement of €7,500 was made to his credit union account and this had been withdrawn from the joint account held by him and his son Stephen. In respect

of the joint account held with Francis O'Reilly, he said he had settled a personal injuries action in May 2013 in an amount of €15,000. This fact was verified by the Gardaí. He said that the amount was lodged to that account and then he gifted money to his sons Francis and Stephen. He also said that his wife had settled a personal injuries action in the amount of €11,000 and a portion of that was lodged into his account. The Gardaí had uplifted her account under court order and it was shown that the entirety of the €11,000 went into that account but no portion of it was lodged to Mr. O'Reilly's account.

**8.** The respondent said that he was involved in buying and selling horses as well as collecting scrap on a small scale, and that he would lodge money from these activities to his accounts. He said that he was an early school leaver, had difficulties with literacy and numeracy and found it difficult to identify individual lodgements and withdrawals. He also said that it was common within the Travelling community, of which he was a member, to lend money to family members who would then repay it in lump sums or instalments.

**9.** Counsel asked the investigating officer whether there was a net sum that was considered to constitute the proceeds of crime, taking away the personal injury claims that were accounted for. The answer was that the view is taken that once monies are diluted by the proceeds of crime, the entirety of the amount becomes the proceeds of crime.

**10.** It may be noted that the credit union accounts and the Irish Life account were preserved initially by the making of an order by a superintendent for a seven day period and thereafter by applications at 20 day intervals to the District Court pursuant to s.17 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Following the matter being sent forward for trial on indictment, the monies were preserved by virtue of an order of the High Court under s.24 of the Criminal Justice Act 1994, pending the outcome of criminal

proceedings. As the Criminal Assets Bureau were appointed as inspector of taxes, they achieved an attachment order over all the funds held in his name, in addition to the High Court order preserving the money. The intention was that, following the conclusion of the proceedings, the sum of €115,234 which had been frozen would be forfeited by CAB on foot of the attachment order in respect of the outstanding liabilities to revenue, leaving a balance of €93,286.37 for which the respondent was liable. There also remained the social welfare overpayment of €433,665.30 in respect of which he entered a formal agreement with the Department of Social Welfare to receive a deduction of social welfare payments going forward.

**11.** The book of evidence was served in April 2019 and the trial was estimated (in respect of all three accused) to last three months. In the event, no trial date was actually fixed because of the Covid pandemic, and each of the accused men ultimately entered pleas of guilty in May 2022. The officer gave evidence that they were “*very valuable pleas in light of the charges against the accused*”. He said that the State would not have been in a position to present evidence of specific acts of criminality underlying the money laundering and that they were relying on the presumptions under the Act to prove the case. They were unexplained monies in that there was no source of income for them other than social welfare.

**12.** In cross examination, the officer accepted that the case could be contrasted with other money laundering cases where it could be shown that the assets were directly the proceeds of a particular crime or criminal enterprise, and that this would have made it a more difficult case to prove to a jury. The officer said that he was in a position to exclude criminality of a

national nature involving drugs or firearms; this was in response to a specific question from counsel which was phrased in that precise manner.

**13.** He also accepted that the invoices that were gathered showed that the respondent had worked for an engineering firm who were building the Kilkenny ring road adjacent to his home and that money was paid during the completion of that work.

**14.** He accepted that the respondent was a family man, was one of a number of children, and had a number of children himself. He had presented no difficulty to the Gardai during the investigation and was cooperative, other than standing on his right to silence in interview. He was at the time of sentence a 47-year-old man. He accepted that the respondent had never made any application to have monies drawn down or to set aside the orders made. In addition to the guilty pleas, there was engagement by the entire family including the respondent with the Criminal Assets Bureau. An agreement had been reached, which dealt with both his tax and welfare liability. The social welfare overpayment was in an amount of 433,665.03. There was an agreement that there would be a sizeable reduction in the social welfare payments to be made to him on an ongoing basis to allow recompense to be made.

**15.** The respondent had 15 previous convictions. These included trespass in 2017, assault causing harm in 2014, public order offences, a District Court conviction for possession of knives or other articles in 2010, breach of the peace, production of an article, threatening and abusive behaviour and violent disorder. Reference was made to a more recent offence in 2020 but as it was under appeal, it was agreed that it would be disregarded by the court. Most if not all of the convictions were District Court convictions or the subject of Circuit Court appeals.

**16.** In the course of the sentence hearing, evidence was also given by a Detective Garda Tong who was attached to the Criminal Assets Bureau. She indicated that CAB had been appointed as the respondent's Revenue inspector. She laid a spreadsheet before the court which indicated that the respondent had a tax liability of €208,520; this broke down into a tax amount and interest, the interest consisting of €100,000. The total amount attributable to the respondent in respect of the accounts frozen was €115,234. The officer indicated that this would be used to reduce his tax liability at the conclusion of the proceedings. Reference was made to his agreement with the Criminal Assets Bureau in respect of social welfare payments, which involved a weekly deduction of €90.00 from his current social welfare payments. As a result of this weekly deduction the figure of social welfare payment had been reduced to date from €433,665 to a figure of €427,000.

**17.** A psychiatric report confirmed that the respondent had been a user of the Kilkenny Mental Health Services since 2010 with a diagnosis of PTSD as a result of a car accident in 2010, with depressive symptoms and that he attends there on a regular basis. He has been stable during the past years and reviewed on a regular basis in the outpatient department. A number of references handed into court on his behalf confirmed the respondent's work in the local Traveller community and his involvement in community matters.

*The Sentencing Judge's Decision*

**18.** The sentencing judge dealt with the matter as follows. He recited the evidence given, and then said that the aggravating factors were the length of time the monies were in the bank accounts and, in relation to the respondent and his son Stephen, the larger amounts of

money involved. He listed the mitigating circumstances as the early pleas of guilty which were of value having regard to the strength of the evidence and the length of time the trials would have taken. He referred to the fact that a trial of three months would have required a judge to be assigned to take up the trial which would take the judge away from hearing other cases on Circuit, and also that there was a backlog of cases as a result of the Covid era, and therefore the pleas were of “considerable value”. He said he was taking into account the fact that the State would have been relying on the presumptions in the Act as set out in s.11 thereof. He also took into account the engagement and cooperation with the Criminal Assets Bureau and the fact that the freezing orders were not challenged in the District Court which saved considerable time. He said he was familiar with such applications and that people frequently challenge them but in this case valuable time had been saved by the absence of such challenge. He took into account that monies were being paid back by way of social welfare deductions. He also took into account that the accused including the respondent met the Gardaí by appointment and that there was no particular underlying criminal activity identified by the prosecution such as drugs offences or firearms offences. Concerning the respondent, he took into the account his personal circumstances and remorse and referred to the booklet of documents handed in including a psychiatric report and various letters of recommendation from third parties.

**19.** The sentencing judge then referred to the judgment of the court of 4<sup>th</sup> February 2021 in *DPP v. Sinnott, Long and Joyce*. He noted that the court had indicated that the sentencing judge should have regard, when identifying a headline sentence, to (a) the amount of money involved (b) the role played by the accused in relation to the money and (c) whether the conduct of the accused was intended to assist a criminal organisation and, if so, the nature and scale of that organisation. He said that the purpose of money laundering was usually



obvious from the evidence but that was not the situation in the case here. He also referred to other authorities including *DPP v. Ajibola* 15<sup>th</sup> October 2019, *DPP v. Breen* 6<sup>th</sup> October 2019, and *DPP v. Kavanagh* 27<sup>th</sup> January 2020.

**20.** He indicated that he was fixing a headline sentence on the case of the respondent as one of three years imprisonment in respect of each of the eight counts to which he had pleaded guilty. He would impose an actual sentence of eighteen months on each to run concurrently but in view of the circumstances of the case, referencing the cooperation and the payments being made, rehabilitation was something which would continue and he would therefore suspend the entirety of the eighteen months.

### *The Appeal*

**21.** The Director's central submission in this appeal is that the sentence imposed was unduly lenient because the offending merited a custodial sentence in all the circumstances, and that the failure to impose any period in custody failed to reflect the need for deterrence in the sentencing regime, both in terms of specific deterrence for this offender and general deterrence in relation to offending of this nature.

**22.** The Director points out that the respondent pleaded guilty to eight counts which were sample counts on a "full facts" basis in respect of an indictment which contained a total of 32 counts contrary to s.7(1)(a)(ii) and 7(b) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The period of offending covered by the counts was from January 2010 to December 2018, an eight year period of offending.

**23.** The Director points out that the evidence indicated that the respondent had never been in employment, had always been in receipt of social welfare benefits, had never filed any

returns with Revenue, and had never declared legitimate source of income other than the receipt of social welfare payments

**24.** The Director of Public Prosecutions submits that the sentence imposed at first instance represented a substantial departure in what would be considered the norm in such cases. The DPP referred to the *Sinnott* case and pointed out that Ms. Sinnott was the only person to receive a suspended sentence out of the three accused who were before the court on that occasion, and that the Court had emphasized the exceptional aspects of her case. The Court had said that she had all the hallmarks of a normally law abiding citizen who made one extremely foolish and rash error of judgment but who followed up with responsible behaviour in her cooperation with the Gardaí and dealings with the court, and that it was one of the *“rare cases which falls into the exceptional category of cases in which a wholly suspended sentence was within the appropriate range of the trial judge’s discretion”*. By way of contrast, the Director submits, the respondent was engaged in large scale money laundering for a period of 8 years, has previous convictions albeit not for the same scale or type of offending, and the matter was only uncovered following a large-scale investigation by Gardaí in Kilkenny with the assistance of officers from the Criminal Assets Bureau.

**25.** The respondent submits that the DPP is incorrect in her view that the absence of a custodial aspect of the sentence failed to reflect the need for deterrence and submits that a non-custodial sentence, while lenient, did not constitute a substantial departure from the normal range of sentence in such cases. He submits that the sentencing judge took appropriate account of the mitigating and aggravating factors in the case, addressed the appropriate principles of sentencing, and arrived at a sentence which he was fully entitled to impose having regard to the specific factors in the case. The respondent also refers to the

social welfare repayment that he is currently making and will make into the future and the impact that this has both personally on him and on his family.

**26.** The respondent refers to a number of authorities concerning the offence of money laundering and submits that the sentence imposed on him is within the range of discretion available to a sentencing judge. He refers to *People (DPP) v. Kavanagh* [2020] IECA 13 where the Court dismissed an undue leniency appeal in circumstances where the respondent received three years with the final eighteen months suspended, in circumstances where he was found in possession of a bag containing over €800,000 cash. In *People (DPP) v. Ajibola* [2019] IECA 253, an appeal against severity was dismissed in circumstances where the appellant received four years imprisonment with two years suspended, and the amount in question was €32,000. In *People (DPP) v. Carew* [2019] IECA 77, the Court dismissed a severity appeal in circumstances where a sentence of eight years was imposed; in *People (DPP) v. Trimble* [2016] IECA 30, the Court determined that the sentence at first instance was excessive and imposed a sentence of five years imprisonment with two suspended in circumstances where the Gardaí seized almost €300,000 in cash and the appellant's position was that he had participated in the criminality for a reward of €4,000 or €5,000 and there were various mitigating factors. In *People(DPP) v. Cunningham* [2013] IECCA 62 a fully suspended five year term of imprisonment in relation to a sum of money of €275,000 was imposed. He had been found guilty of ten counts of money laundering relating to almost a quarter of a million euro after a lengthy trial and had served three years before his conviction was quashed on appeal.

*Decision*

27. One of the singular features of the present case is that neither the sentencing judge nor this Court knows what the underlying criminal activity was, from which the proceeds which were being laundered by the appellant were derived. The particulars on the indictment do not even specify the precise manner by which he committed the offence, alleging in each count that the act consisted of: “convert, transfer, handle, acquire, possess or use” the property the subject of each count.

28. In most if not all of the previous cases involving this type of offending which have come before the Court, the connection between the proceeds and a particular type of crime was clear, and this constituted a factor of some significance in a consideration of what sentence range was appropriate. For example, in *DPP v. Long*, the evidence was that the accused person had been caught up with a drugs gang operating in the Wexford area and was collecting money and bringing it to locations on behalf of other people; in *DPP v. Ajibola*, the accused had intercepted a legitimate transfer of €32,000 in the context of the purchase by a third party of equipment for his construction business; in *DPP v. Carew*, the judgment records that the garda operation in question was tackling a large organised crime group operating inside and outside the State; in *DPP v. Divicarro*, as has already been noted, the context was that of a trend of bank accounts opened in Italian names in Ireland to receive large amounts of money from suspect invoice frauds worldwide; and in *Breen*, it seems to have been accepted from the circumstances that there was a connection to organised crime as there are a number of references in this Court’s judgment to criminal gangs.

29. However, in the present case, all that the Court knows from the sentencing hearing is that the underlying criminality did not consist of drugs or firearms offending at a national level, which was the way in which the question was very precisely phrased when put to the investigating officer by counsel on behalf of the respondent at the sentence hearing.

30. Lest it be thought, on the other hand, that the connected criminality consisted merely of failure to pay tax, it is interesting to note that in *Criminal Assets Bureau v. McCormack* the High Court (Owens J., 20<sup>th</sup> July 2020) [2020] IEHC 32, rejected an argument made by CAB that because there was no evidence of tax returns or payments referable to non-criminal income during the relevant period, it must follow that a failure to pay tax in and of itself were in part of proceeds of crimes arising from the failure to make tax returns and failure to pay taxes. The High Court rejected this argument in the following terms:

32. ...In my view, conduct by a recipient of property such as earnings or payments which takes place after receipt of that property and which involves criminal offences such as failing to make tax returns or payments cannot, without more, convert that property or the general assets of that property into "*the proceeds of crime*".

33. Proof of "*result of or connection with criminal conduct*" will not cause difficulty in many cases involving tax evasion. Criminal conduct connected with tax evasion often involves a fraudulent intent to cheat the Revenue by concealing receipt of taxable income. Payments are often inextricably connected with specific offences set out in the tax code which are committed at time of receipt.

34. Any residual category of activities which involve cheating the Revenue out of tax or duty, or conspiracies to carry out these types of fraud is criminalised by s.1078(1A) of the Taxes Consolidation Act 1997 as inserted by s.142 of the Finance Act 2005. This section introduces an offence of tax evasion and makes clear that all arrangements for “*hot money*” payments, or to “*cook the books*”, or for “*under the counter*” receipts with intent to evade tax and cause loss to the Revenue, whether made alone or in concert with others, constitute criminal offences....”

**31.** The judgment of the Court of Appeal in the same case (Murray J., [2021] IECA 184) did not revisit the above passages in the High Court judgment, presumably because the above finding was not the subject of appeal. Assuming the view of Owens J to be correct, it would seem to follow that when the respondent in the instant case pleaded guilty to money laundering, the connected criminality did not consist merely of a failure to make tax returns or pay tax during the relevant period. Beyond that, however, the Court has no information as to what the underlying criminality was and is certainly not entitled to speculate.

**32.** Some factors are known, however. What is known is that the *period* of money laundering was an eight-year period between 2010 and 2018. What is also known is the *amount* of money which accepted that he had laundered which, as appears from the evidence described above, amounts to approximately €115,000. It also appears from the evidence that the other two people involved in the offence were his sons, and that he appears to have played a more dominant role than they did.

**33.** As to the amount of money involved, it was neither trivial nor small, but neither was it at the higher end of amounts in terms of the sums one sees in money laundering operations. The Court would consider it to fall within a moderate or medium range of the sums involved

in this type of offence. The period of time was obviously a very long period of time (eight years) and that is a serious matter. In terms of the respondent's culpability, he may be considered as having played the leading role in the offending; it is noted that he was the father of the other two men, and there is no suggestion that he was involved in this offending by reason of pressure, coercion, intimidation or exploitation, as features in some cases of this kind of offending. On the other hand, there is no suggestion of any involvement with third parties or criminal organisation, as already noted. For those reasons the Court would be inclined to agree with the sentencing judge when he nominated a headline sentence of three years. In truth, in any event, the concern of the Director is not with the nomination of the headline sentence but rather with its reduction to eighteen months and then the total suspension of that eighteen months.

**34.** Relevant to the question of whether a fully-suspended sentence was a substantial departure from the range of appropriate sentences is that the respondent had a reasonably significant criminal record involving fifteen offences albeit that none involved similar conduct and most of the offences were at District Court level. He therefore did not come before the Court as a person of no previous convictions and having led an entirely blameless life, as was for example the situation in the *Sinnott* case, where the offender in question was a midwife who engaged in a spur of the moment disposal or concealment of the proceeds of crime in circumstances where she suspected that her partner had received those proceeds.

**35.** The primary mitigating factor in respect of the respondent in the present case was his guilty plea, particularly in circumstances where (1) a lengthy trial was envisaged and (2) the prosecution was relying on the presumptions within the legislation as there was no evidence to be presented with regard to the underlying criminality giving rise to the proceeds in question.

**36.** Another factor of importance in the context of mitigation was the agreement reached with CAB/Revenue and the fact that he would be repaying a significant amount of money & by way of deduction from his social welfare payments) for the foreseeable future by way of recompense.

**37.** Also of some relevance was a degree of cooperation with the Gardaí (although he did exercise his right to silence during interview) and the fact that he did not challenge the orders made in respect of the monies at any stage, which the sentencing judge considered to be something which led to a saving of time. The question therefore presents itself as the net one of whether those mitigating factors warranted the entire suspension of the eighteen months post mitigation sentence at which the sentencing judge had arrived.

**38.** In our view, the fact that the sentence was entirely suspended did bring it outside the range of the sentencing judges' range of discretion and into the unduly lenient category. Notwithstanding the difficulty of characterising the precise gravity of the offence in this case, given the absence of evidence about the underlying criminality which had generated the proceeds that were the subject of money laundering, it is significant that there was a sum of over €100,000 involved and that the laundering took place over a period of eight years. As noted, the criminality, the nature of which is unknown, did not consist of merely failing to make tax returns and therefore must have involved criminality of a different kind. All that the Court knows is that it did not consist of drugs or firearms offending at a national level. This is not to say that the Court can speculate as to what the underlying offending was. That factor must of necessity be neutral in the present case. However, focusing on the amount of money, the duration of the offending behaviour, the inherent seriousness of the crime itself which carries a maximum of fourteen years imprisonment, and the respondent's



own role in relation to it as the parent of two other young men who pleaded guilty at the same time, the Court considers that a custodial element was indeed required and that the sentence should be quashed for being unduly lenient. The Court will therefore proceed to re-sentence the respondent.

**39.** The Court considers that the appropriate sentence in all of the circumstances is one of 18 months with six months thereof suspended. The Court emphasizes that, in circumstances where the underlying criminality was unknown, the case is *sui generis* and unlikely to be of assistance in determining the appropriate sentence in future cases of money laundering.