



THE COURT OF APPEAL

Court of Appeal Record No. 156CJA/2021

**President
McCarthy J
Kennedy 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)**

PROSECUTOR/APPLICANT

-AND-

GIUSEPPE DIVICARRO

ACCUSED/RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 28th day of January 2022 by Mr Justice McCarthy

1. This is an application pursuant to section 2 of the Criminal Justice Act 1993 for a review on grounds of undue leniency of the sentence imposed by Judge Greally at the Dublin Circuit Court on the 21st of July 2021. On 11th of May 2021, Giuseppe Divicarro, a 47-year old Italian national, the respondent herein, entered an early guilty plea to count no. 1 on the indictment to Bill No. DU317/2021, to wit: participation in the activity of a criminal organisation, contrary to section 72 of the Criminal Justice Act 2006 and on 21st July 2021 he entered further guilty pleas to count nos. 2, 4, 6, 8, 10, 11 and 13, offences of money laundering, contrary to section 7(1)(a)(i), s.7(1)(b) and s.7(3) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Whilst the money laundering offences have been treated by all as the principle offences in the present context, there was associated weight each of those offences an offence of using a false instrument contrary to section 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001; in each case those offences were marked taken into consideration.

2. The learned sentencing judge identified a sentence of seven years as the headline sentence for the principal offences. The money laundering offences carried a maximum penalty of 14 years imprisonment and the judge imposed a post-mitigation sentence of 5 years imprisonment on each count to which he pleaded guilty, with the final 18 months suspended on condition that he keep the peace and be of good behaviour for a period of 18 months. The judge also required that the respondent leave the jurisdiction within 14 days of his release from prison and that he undertakes not to return for 15 years. The remaining counts were taken into consideration.
3. The facts can be outlined as follows. Evidence was given by Detective Garda Angela Gavin of the Garda National Economic Crime Bureau (GNECB) to the Dublin Circuit Court on the 17th of July 2021. The GNECB had become aware in early 2020 of an emerging trend of bank accounts opened in Italian names in Ireland with these accounts receiving large amounts of money from suspect invoice re-direct frauds worldwide.
4. It was explained to the court that an invoice redirect fraud occurs where a company receives an email purported to be from a legitimate supplier where the supplier says that their bank account number has been changed and gives a new bank account number, the original company then pays into this new bank account when they next get an invoice from the supplier. The original email was a fraud and the new bank account is not associated with the supplier. Generally, once the money enters this new account it is quickly withdrawn or transferred. The email from the fraudster generally is very similar to the legitimate supplier's email address with a subtle change that is easily missed.
5. GNECB was examining this trend in early 2020 and also received a number of "Section 19" reports from banks. It was explained that these reports were reports generated by financial institutions who are obliged to inform an Garda Síochána when they have a suspicion about how an account is being operated. GNECB identified that a number of Italian nationals had opened accounts of concern. All of these persons were from Trieste in Italy and it appeared that genuine ID cards were being used to open accounts but often the same address was being used coupled with the use of the same false utility bill to verify the address.
6. By mid-April 2020, Detective Garda Gavin gave evidence that Detective Superintendent Michael Cryan had formed the view that this group of persons were part of an international criminal organisation as defined by the Criminal Justice Act 2006, that is that the organisation was not randomly formed for the immediate commission of a single offence but were acting together in respect of a number of offences and that they had been doing this since early 2018 and that their sole purpose being the commission of crime in Ireland and other countries and that crime was "invoice re-direct fraud". The evidence was that this criminal organisation was laundering the proceeds of these frauds through bank accounts set up in Ireland and that by April 2020, Detective Superintendent Cryan was of the view that well over €1 million had been stolen and laundered through these accounts and indeed substantially more subsequent to that date.
7. The evidence before the court was that in April 2020, a Dutch company, Unit 45BV became aware that a number of payments had been wrongly wired from their bank account to bank

accounts held in Thailand and Hong Kong. This fraud was initially reported in Holland and following enquiries, it transpired that these emails had been sent from IP addresses located in Ireland. Further investigation led to the identification of a suspect in the sending of these emails and on foot of this investigation, a search was carried out in May 2020 at the address of a male (not the respondent). This person was connected to a large network of individuals and bank accounts including the accounts held by the respondent and other Italian nationals. The link between all of these individuals (including the respondent) was that the same utility bill was used to open all accounts. This is how the respondent was identified as part of the investigation. An examination of the documentation about suspect accounts was obtained and showed these accounts were being used for receiving monies from invoice redirect fraud.

8. Detective Garda Gavin then gave evidence as follows in respect of the eight accounts held in the respondent's name, we refer only in this context to the money laundering offences, linked to the relevant counts on the indictment: -

Ulster Bank Account (Counts 2): This account was opened by the respondent using the respondent's genuine Italian driving licence but with a fraudulent Electric Ireland Utility bill on the 21st of June 2018. The address provided was 104 South Circular Road, Dublin 8. There were four international transfers credited to his account for the total sum of €104,342.96 and the remitting accounts were identified as being in Taiwan and Japan. There was a subsequent recall in respect to these funds citing fraud. A total of €64,823.50 was debited from his account by way of two ATM cash withdrawals for €950 and remaining sum of €63,873.50 was transferred to an account in Turkey. The remaining sum was suspended, and the account closed on the 18th of September 2018 which was within three months of it having been opened.

Bank of Ireland Account (Counts 4): This account was opened by the respondent using his genuine Italian driving licence but with a fraudulent Electric Ireland Utility bill on the 22nd of June 2018. The address provided was again 104 South Circular Road, Dublin 8. There were two international transfers credited to this account in the sum of €23,416.30 during August 2020. A total of €2,700 was then debited, an ATM cash withdrawal €2,000, an in-branch cash withdrawal €3,500 and a credit transfer to an account in Turkey €17,200. These all occurred within 24 hours of the initial lodgement. The account was closed on the 28th of November 2018 by the bank which was within five months of it having been opened.

PTSB Account (Counts 6): This account was opened by the respondent using his genuine Italian driving licence but with a fraudulent Electric Ireland Utility bill the 25th of June 2018. Over a three-month period just under €30,000 was lodged to this account. There were multiple transfers from another individual connected to the investigation who had used the same address and utility bill as the respondent. These included also included a sum of €12,450 which was later recalled. This account was closed on the 12th of September 2018.

EBS Account (Counts 8): This account was opened by the respondent using his genuine Italian driving licence but with a fraudulent Electric Ireland Utility bill on the 9th of August 2018. The address provided was again 104 South Circular Road, Dublin 8. On the 15th of July 2020, there is a credit transfer of a sum of 9,879.32 and the following day €8,300 was withdraw in cash at two separate branches and €600 the following day.

AIB Account (Count 10): This account was opened in February 2013 and appears to have operated as a normal bank account until the 18th of July 2018 when the sum of €32,517.88 was credited to the account, the remitting bank account in the US. The following day €10,000 was transferred to an account in Turkey. There were also cash withdrawals for €4,200. There was a recall and a balance of €18,307.45 was returned.

N26 Online Account (Count 11): This related to an account with a German bank N26. This account was opened on-line on the 3rd of December 2018 using his genuine Italian National Identity card. Proof of address was not sought although the address provided was Apartment 15, Joyce House West, Viking Harbour Apartments, Ushers Island, Dublin 8. There are multiple inward transfers of circa €13K and withdrawals including €11,000 ATM cash withdrawals.

An Post Account (Count 13 and 14(TIC)): This account was opened by the respondent using his genuine Italian driving licence but with a fraudulent Electric Ireland Utility bill on the 30th of January 2019. The only significant activity on this account is a transfer from the N26 account on the 5th of April 2019 of €1,874.99.

9. There were two exceptions to the fact that the respondent's wrongdoing fell into the category of money laundering; namely the charge in relation of the activity of a criminal organisation (Count 1) and that pertaining to the use of a false instrument to open a KBC account (Count 12). As indicated, a plea of guilty was entered to Count 1 and Count 12 was taken into consideration.
10. On the 17th of July 2020, the home of the respondent was searched and cash to the sum of €9750 was seized. The cash was wrapped in EBS withdrawal slips dated the 16th of July 2020 and she confirmed that Gardaí were of the view that this cash was attributable to the monies withdrawn from the EBS on the 16th July 2020. There was also evidence that a mobile phone was seized which had a number of pictures of Italian ID cards of other persons of interest who had opened accounts.
11. On the 20th of July 2020, the respondent was arrested on suspicion of having a committed an offence under section 72 of the Criminal Justice Act 2006. He was brought to Mountjoy Garda Station where he was detained pursuant to section 50 of the Criminal Justice Act 2007 and interviewed on seven occasions.
12. During the first interview the respondent confirmed that he lived at 70 Addison Drive, and had been 10 years in Ireland, originally from Trieste in Italy. He confirmed that he didn't

have any utility bills at that address. During the second interview he suggested that the monies lodged in the EBS account were for a Nigerian film made in Spain and that he was involved in filmmaking. The third, fourth and fifth interviews mainly involved the Gardaí going through various accounts with the respondent. By the sixth interview, most of the accounts had been dealt with, and he then stated that he was approached by a Romanian male to open accounts, that he would be paid €2000 per account, that he would hand over details of the accounts to this Romanian and that he was paid in cash.

13. In the final interview the respondent was asked about the EBS account. He stated that he had received a large lodgement to this account for work done on the Nigerian film (previously referenced in the second interview). However, he did not provide the name, production company, or hotels. Ultimately when the monies found in the wardrobe were put to him, he stated that in fact that he had provided his bank account to a Nigerian male, he had withdrawn €8300 in separate withdrawals and was to pass this on to the Nigerian, but he didn't give any details as to how this was to take place. When asked whether he had anything to add, he stated that he was guilty.
14. The respondent was subsequently charged and refused bail on the 22nd of July 2020. He has been in custody since the day of his arrest the 20th of July 2020.
15. Detective Garda Gavin having analysed all the accounts was in a position to tell the court that in total **€200,019.65** had been lodged into all the accounts associated with the respondent of which **€138,573.50** was withdrawn within days of the lodgements (approximately 70%). €61,446.15 was the subject of recalls to the remitting bank where fraud had been identified.
16. In sentencing the judge noted that while it didn't appear as if the respondent had any role in the invoice redirection and didn't appear to be one of the principal beneficiaries, she considered that his role played a *"vital facility which he was providing to organised criminals"* and further that *"he was certainly playing a vital role in relation to realising the proceeds of the criminal conduct of other persons further up the chain"*.
17. In considering the mitigating factors, the judge took account of the respondent's early pleas of guilty and these were viewed as *"all the more valuable due to the fact that this was an investigation with many international aspects which would have been a costly case to run for the state"*. The judge also took account that respondent had no previous convictions in this jurisdiction but had three convictions in Italy including a conviction for making a false statement to a public official on his own identity in 2012 for which a one-year sentence was imposed. She was of the opinion that they were not of the same category as the offences before the Court and his offending therein *"marks a very considerable escalation in terms of his criminal conduct"*. The trial judge also took account of the cooperation that the respondent provided through the admissions he ultimately made alongside the responsibility he ultimately took for his actions as further enhanced by a letter he supplied to the Court. The trial judge was also cognisant of what she described as the *"difficult experience for a foreign national to be serving a sentence away from friends and family"* [although that is a factor of very modest weight indeed] and the fact that the respondent

is separated from his daughter which was highlighted by a letter she provided to the Court. The judge also recognised the respondent's occupation as a photographer, which she viewed as a prosocial and productive occupation to which he can return following the completion of his prison sentence. She also accepted his enhanced prisoner status and his efforts to apply himself well within the Irish prison system.

18. The judge identified a headline sentence of seven years for each of the offences and on the basis of the mitigating factors imposed sentences to five years, to be served concurrently, and with the final 18 months suspended in each case on the condition that the respondent enter into a bond to keep the peace and be of good behaviour for a period of 18 months, and furthermore, that he undertook to leave the jurisdiction within a period of 14 days from the date of his release and not to return for a period of 15 years from that date.

Grounds of Appeal

19. The applicant summarised their grounds of appeal as follows: -

- I. *The imposition of a five-year sentence with final eighteen months suspended was unduly lenient..*
- II. *The learned sentencing judge erred in law and in principle in fixing a headline sentence of seven years for offences of money laundering and participation in a criminal organisation in light of the aggravating factors.*
- III. *The learned sentencing judge erred in law and in principle in placing undue weight on the mitigating factors and personal circumstances of the respondent.*
- IV. *The learned sentencing judge erred in law and in principle in placing undue weight on the most significant factor which was the plea of guilty.*
- V. *The learned sentencing judge erred in law and in principle, having found that the offences merited headline sentences of seven years, in reducing the effective sentence to be served of one of five years with eighteen months suspended, which resulted in a 50% discount in the effective sentence served.*
- VI. *The learned sentencing judge erred in law and in principle in suspending the final eighteen months of the sentence.*

Having regard to the considerable overlap amongst them we will deal with them together.

20. Counsel on both sides presented the appeal with admirable clarity. Prosecuting counsel contended that as the maximum penalty in respect of the money laundering offences is one of 14 years but an indicative or headline sentence of only 7 years was identified by the judge, she thereby fell into error. It was submitted that the gravity of the offence did not lie in the midrange in respect of such offending as the selection of that term indicated but rather the offending fell into a more serious category; while counsel did not identify or refer to a term of years, it seems proper to infer that, allowing for a margin of appreciation and the fact that differentiation between different categories of offence is far from an exact

science, a headline sentence in double figures might have been appropriate and certainly some years in excess of 7 years; it seems proper to infer that any such sentence should have been in the lower part of the highest range in her contention.

21. The applicant referred in this connection to the aggravating factors; counsel's submissions in that regard stressed the multiplicity of incidents, which it were in substance seven in number (giving rise to a multiplicity of count in each case), together with the offence of participation in the activity of a criminal organisation, the modus operandi adopted (described by her as organised and methodical), the fact that the criminal conduct continued over a period of over two years, the fact that the respondent was, as counsel put it, an essential "cog" in the wheel so far as the commission of the offences was concerned, that the respondent's conduct was to be considered against the background of an international background of offending by an international organisation, the criminal activities of which extended to large scale fraud of over €1 million by the time of the respondent's arrest and the amounts involved here in excess of €200,000; apparently no more than 30% of the sums dealt with by the respondent were recovered.
22. Counsel for the applicant did not, indeed could not, take serious issue with the mitigating factors identified by the judge. She stressed the fact that she was not dealing with a once off incident, even where cases have come to the courts where larger amounts were involved and fell within the middle range.
23. Counsel for the applicant submitted that mitigation of two years from the headline sentence (if that was correct) may have been legitimate; counsel maintained that there was no or no sufficient evidence to warrant, thereafter, a suspension of any part thereof and that there was no basis for any suspensory period on the post-mitigation sentence arrived at by the judge. Counsel for the applicant contends that this gives rise to an implicit "double counting", insofar as it gave rise to a 50% reduction on the headline sentence. In effect a sentence of three and a half years had been imposed, whatever the theoretical position, since the respondent was to leave the jurisdiction on release decided by the judge.
24. Counsel for the respondent contend that the trial judge carefully weighed and balanced all relevant matters and crafted a sentence that was reflective of both the crime and the circumstances of the respondent. They argue that the sentence falls within the proper ambit or scope of sentence and within the judge's discretionary margin and does not form an error of principle, nor constitute "double counting". Further, it is the respondent's position that the applicant fails to meet the high threshold to be met for a successful undue leniency application.
25. In fact, on our reading of the judgment we think that due weight may not have been given to the factors in mitigation in arriving at a post mitigation sentence – without more. However, in practice, whatever about the correct theoretical approach the necessity to give such weight was sought to be achieved by partial suspension. We would not have suspended so significant a part of the sentence whether to give due weight to mitigation or otherwise if we were dealing with the matter at first instance – the period to be served in custody might have been greater .We do not think however that the final result was arrived at by

the judge, especially in light of his margin of discretion, reached the threshold for establishing undue leniency.

26. Therefore, we reject the contention that the trial judge fell into an error of principle and accordingly, we dismiss this application for undue leniency.