THE COURT OF APPEAL

Record Number: 145CJA/2021

Edwards J.
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
APPLICANT

- AND –

TELSTAR INVESTMENTS LIMITED
RESPONDENT

JUDGMENT of the Court delivered on the 13th day of October 2022 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency. The respondent pleaded guilty to the offence of failing to discharge the duties of an employer as required by sections 8(1) and 8(2)(a) of the Safety, Health and Welfare at Work Act, 2005 (hereinafter "the 2005 Act") and contrary to section 77(2)(a) of the 2005 Act. The respondent was fined €7,500. An offence of failing to conduct an asbestos risk assessment was taken into consideration by the sentencing court.

Background

2. In 2016, developers McAleer & Rushe, the co-accused in the initial proceedings, were carrying out a large-scale development project on Findlater House, Dublin, where the respondent operates three linked licensed premises. The nature of the works required the removal of ceiling tiles in an area used by the respondent. The three licensed premises fed into this area which was used by the respondent's staff for access and storage and by

regular patrons as a shortcut between the three premises. The developers contracted a company to remove the ceiling tiles.

3. On the 23rd June 2016, as the sub-contractor's employees were removing the ceiling tiles, they came upon an asbestos sticker and informed the site foreman, Mr McAuliffe, another co-accused, of this finding. Mr Murray, a director of the respondent company was informed also. The foreman ceased work that day. Specialist asbestos contractors; MCE were contacted to render the area safe.

4. On the 24th June, Mr McAuliffe returned with specialist asbestos contractors to the site, they observed people removing ceiling tiles, operating from a platform on a forklift truck. They were unable to gain access to the site.

5. On the 28th June, MCE returned to erect safety shielding to close off the area and remove the asbestos. It transpired that the asbestos tiles had been removed by Mr Murray and his employees.

6. In a voluntary statement of the 22nd September 2016, Mr Murray said that he made the decision to remove the rest of the ceiling tiles. Mr Murray and two employees used a platform which was placed upon the teleporter arms of a forklift truck to gain access to the roof. They each wore disposable gloves, overalls and masks. Mr Murray operated the forklift and his two employees removed the remaining asbestos tiles. The tiles were placed into a wheelie bin which contained the pieces of ceiling that had already been removed by the contractors.

7. The Health and Safety Authority tested the area, and a prohibition notice was issued on the 28th of June. On foot of the prohibition notice, Mr Murray contracted his own qualified asbestos removal experts to clean and clear the area, the cost of which was €38,500.

8. Mr Murray, in his statement, said that after being notified by the developers of the potential of the presence of asbestos, he viewed the area himself and was dissatisfied with the condition in which the ceiling had been left. He stated that he feared that parts of the ceiling would fall on his staff or patrons and that he had previously been litigated against by a customer where a piece of plasterboard fell on her from a ceiling. Mr Murray also stated that the removal of the remaining pieces of asbestos tile took approximately 20 or 30 minutes and that they used protective masks and suits.

9. Mr Kinch, the company accountant gave evidence of the loss of trade for the 15 months prior to sentence due to the pandemic. He gave evidence of approximately €8.7 million in bank borrowings at the end of June 2020 and in cross-examination, confirmed that the value of the fixed assets of the respondent was €16,367,000.

10. McAleer & Rushe had carried out an asbestos survey for the majority of Findlater House, but this survey did not include the area in issue.

11. The respondent pleaded guilty and Mr Murray personally expressed his remorse. There are no previous convictions recorded.

The fine imposed

12. At the sentencing hearing on the 19th July 2021, the respondent was fined €7,500 for breaches of the Safety, Health and Welfare at Work Act, 2005 and a further offence of failing to conduct an asbestos risk assessment was taken into consideration.

Grounds of appeal

13. The Director seeks a review of sentence on the following seven grounds:

> *"1. That the fine imposed on the Respondent was unduly lenient having regard to the nature of the charges and the circumstances attending the commission of the offences.*
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> *2. That the fine imposed did not adequately reflect that a commercial decision was made to clean up an area known to contain a hazardous material in order that the licensed premises which used the area could trade for profit.*
>
> *3. The fine imposed did not adequately reflect that the Respondent was made aware of the presence of asbestos before engaging in the works performed.*
>
> *4. The fine imposed did not adequately reflect the nature of the serious health risks associated with asbestos.*
>
> *5. That the fine imposed did not adequately reflect the requirement for general deterrence.*
>
> *6. That where no headline fine was nominated and explicit reductions made, it is impossible, with any certainty, to identify what weight was given to what mitigating factors. However, it is submitted that undue weight was given to the mitigating factors. In particular:*
>
> *6.1. The clean-up costs that were incurred by the Respondent were potentially recoverable from the main contractor. It is inappropriate that full mitigation be given for the costs of the clean up. It is accepted that mitigation can be given for the fact of the clean up.*
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> *6.2. The main contractor had arranged for the area to be cleaned prior to the specialist contractors engaged by the Respondent but this was not done as the Respondent engaged in the works it did.*
>
> *6.3. While the Respondent operates in an industry which has had a particularly difficult time, the evidence did not disclose an inability to pay a higher fine.*
>
> *6.4. Excess weight was given to the guilty plea entered by the Respondent given the nature and quality of the evidence available.*
>
> *7. The sentence of €7,500 imposed on the Respondent, as opposed to the sentence of €100,000 imposed on the main contractor, even allowing for their different roles, breaches the principle of parity of treatment."*

Submissions of the applicant

14. No issue is taken with the identification of the first three mitigating factors identified by the judge, namely, the plea of guilty, the co-operation and the absence of previous offending behaviour, however, the applicant submits that the sentencing judge erred in categorising the respondent's level of culpability as being at the lower end. This submission is made in light of the profound dangers associated with asbestos and the certain knowledge the respondent had of the presence of asbestos. It is said that not only were Mr Murray his two employees endangered but so were the staff and patrons of the licensed premises who visited there over the course of the weekend.

15. The applicant points to a short section of the transcript wherein a witness from the HSA states that the licensed premises ought to have been closed down on the weekend in question, awaiting attention from specialists.

16. It is submitted that while an element of the decision made by Mr Murray to clean and clear the area could be due to the fact of him having previous experience being litigated against in a similar situation, his desire to utilise the area for commercial reasons during the course of the coming weekend was a factor that was overlooked by the judge in sentencing.

17. The applicant relies on a Court of Appeal decision, *The People (DPP) v Kilsaran Concrete Limited* [2017] IECA 112 which she says highlights this Court's clear desire to ensure that those who take risks for commercial reasons will be punished for doing so.

    In that case, a concrete block manufacturing plant took short cuts in an attempt to speed up the manufacturing process and this resulted in the death of an employee. The sentencing court imposed a fine of €125,000 and this was increased on appeal to €1,000,000.

18. *The People (DPP) v South East Recycling Ltd* [2010] IECA 126 is also cited. In that case, O'Donnell J stated that a deliberate breach of the law for profit could be treated as being a significant aggravating feature.

19. The applicant describes the danger to which the respondent exposed its staff and patrons as "grave." It is submitted that as the works were performed with certain knowledge of the presence of asbestos, this is a major aggravating factor justifying moving the culpability of the respondent from low to moderate.

20. The applicant submits that there is a need to deter the actions which the respondent herein took by virtue of the dangers posed by asbestos. It is further submitted that the evidence adduced by the respondent showed no inability to pay a higher fine which would have been a more adequate vehicle for general deterrence. It is noted that McAleer & Rushe had a €100,000 fine imposed on them and that Mr McAuliffe, the site manager, had a fine of €12,500 imposed on him personally. The HSA publishes a list of asbestos based prosecutions on their website and the applicant draws attention to a number of these.

21. The applicant submits that the judge taking into account the "expense this situation has caused to the company" amounts to an error in law. It is said that should the works commenced by McAleer & Rushe have led to a restriction on the ability of the respondent to operate their licensed premises there was no bar on the respondent seeking damages in the civil courts. It is further noted that McAleer & Rushe sought to bring experts to the site whilst the respondent company was engaging in its illegal works and, as a result, the respondent company bore the costs of mitigation works after its illegal acts. It is said that this is, at best, evidence of a belated realisation of wrongdoing which could be reckoned in a reduction of fine for remorse and does not justify setting the level of fine at less than 10% of that imposed upon the contractor.

22. Finally, the applicant submits that there is, as per *The People (DPP) v Stronge* [2011] IECCA 79 a "substantial or gross departure" between the fine imposed and that which is appropriate in the circumstances.

Submissions of the respondent

23. The respondent submits that the fine imposed was not unduly lenient on the following grounds:

> "A. A more severe sentence could have been imposed; however, the sentence did not fall outside the ambit or scope of sentence within the judge's discretion having regard to the margin that must be afforded to him
>
> B. The Appellant's submission ignores the fact that due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence in light of the evidence and submissions received, evaluated, and considered at first hand by him.
>
> C. The Appellant has not proven that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in all of the circumstances and therefore the sentence imposed does not amount to an error of principle."

24. The applicant's claim that the respondent acted for commercial reasons is refuted. Mr Murray testified that he took the course of action he took because he was concerned that there might be repercussions for staff and customers and it is pointed out that no evidence was advanced contradicting or rebutting his testimony. The respondent notes that the only evidence approaching such was that the pub operated as normal over the course of the weekend, however, there was no evidence that the pub would have been unable to operate commercially had the affected area been sealed off.

25. It is the respondent's position that there is no evidence to support the contention that the sentence "constituted a substantial or gross departure from what would be an appropriate sentence in all the circumstances" as is required by *The People (DPP) v Parkes* [2019] IECA 199 nor is there any evidence to support that the sentence was an error in principle as required by *The People (DPP) v McCormack* [2000] 4 IR 356.

26. It is further pointed out by the respondent that the applicant does not cite any authority to support their contention that the trial judge, by taking into account the expense this situation has caused to the respondent, erred in law. Where the only sanction available to the court is a financial sanction, it is submitted that it is not an error of law for a judge to take into account expenses already incurred mitigating the situation. Further, it is noted that by the taking of this appeal, the respondent's legal costs continue to rise.

The Sentencing Remarks

27. In proceeding to sentence the respondent the trial judge stated:

> "JUDGE: Thank you. It seems on the particular weekend a large development was taking place on this particular premises. Obviously, Telstar and Mr Murray had licensed premises on the ground floor, and it seems at a certain point the main contractor encountered asbestos. They had done quite a bit of work on the roofing before they realised the presence of asbestos, but it seems they stopped. But it seems this particular area was of vital importance to Mr Murray and Telstar. It seems people moved in and out through this area. And it seems Mr Murray needed this area to be free and safe. It seems Mr Murray is a man of direct action. He himself and two of his employees decided to remove the remaining part of the roof or the ceiling and to make the area safe. It seems Mr Murray was aware of, I think generally, that there may have been asbestos there, but he wasn't aware of the particular danger of this form of, I think, brown asbestos. It seems he took certain precautions, he had suits and masks and other protective gear, but this is not the specialist gear that would be necessary to render this operation absolutely safe. But it seems they did it, they disposed of the offending asbestos in a certain way, and it seems what they did became apparent very soon the next week. It seems the Health Authority, Health & Safety Authority were contacted. It seems Mr Murray was very clear and very candid with the Health & Safety Authority, and they took a statement from him.
>
> I do agree that in relation to the levels of culpability in relation to this situation, he's at the lower end. He was presented with a problem, and he directly responded to the problem. Obviously, the prudent course would have been to wait, close the area down and move on, but he didn't. Now, obviously, he's pleaded guilty to a particular offence, as outlined in Count No. 1 of the indictment. The mitigating factors are clear; one, his plea of guilty, the plea of guilty by the company. Two, the co-operation of the servants or agents of the company, being Mr Murray. Three, the lack of previous offending behaviour. Four, it seems to me I must take into account the level of culpability compared to others. Five, I do take into account the expense this situation has caused to the company. I do take into account this is a pub company, if you want to call it that, and it seems they're -- it's obvious they're encountering very difficult times. But it seems Mr Murray, on behalf of the company, took a risk that he shouldn't have. Obviously, a monetary fine is the only, I suppose, punishment this Court can impose, and taking everything into account I think the fine I'm going to impose on Telstar is a sum of €7,500. I'm also

going to levy obviously the costs, as mentioned by Mr Berry in the matter on Count No. 1."

Discussion

28. Inhalation of asbestos can have very serious consequences and, therefore, regulations place strict standards on employers where there is a risk of exposure. By removing the balance of the tiles on the 24th June 2016, the applicant says that the respondent exposed employees to the risks inherent in asbestos exposure. Moreover, the area in question was not sealed and rendered safe until the 28th June 2016 during which time, the three licensed premises operated as normal.

29. Section 8(1) and 8(2)(a) of the 2005 Act provides:-

"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.

(2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:

(a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;"

29. Section 77(2)(a) provides:-

"A person commits an offence where he or she-

(a) fails to discharge a duty to which he or she is subject by virtue of sections 8 , 9 , 10 , 11(1) to (4), 12 , 13 and 15 to 23."

30. The penalty provisions are set out at s. 78 of the 2005 Act with the relevant provision stating at ss. 2:-

(2) A person guilty of an offence-

(a) under section 77(2) to (8) and (9)(a),

(b) [not relevant]

(c) [not relevant]

Is liable-

(i) [not relevant]

(ii) on conviction on indictment to a fine not exceeding €3,000,000 or imprisonment for a term not exceeding 2 years or both."

30. As is well settled, the sentencing judge must, at first instance, assess the gravity of the offence, with reference to the available range of penalties, and identify on that range the appropriate penalty, having regard to the culpability of the offender and the harm done. In reality, the only realistic penalty in most circumstances is a fine. In the present case, the range of available fines runs from zero to €3,000,000.

31. The gravity of this type of offending is assessed by taking account of the degree of fault on the part of the corporate entity, the degree of culpability will, of course, depend on the particular circumstances and so it is necessary to take account of the overall circumstances giving rise to the breach; being those factors which aggravate and extenuate the culpability.

32. Sentences for breaches of Health and Safety legislation must be such so as to impose a penalty which takes into consideration the appropriate punitive and deterrent elements.

General Deterrence

33. The applicant contends firstly that the penalty of €7,500 was inadequate in terms of general deterrence. It is accepted that the circumstances in the present case are very different to those in *Kilsaran*, where a fine of fine of €1,000,000 was imposed, in that in the instant case, the respondent is involved in the operation of licensed premises rather than construction. However, it remains the position that the respondent breached the regulations by placing employees and members of the public to the risks posed by asbestos, which is known by all and sundry to be a dangerous substance.

34. In *Kilsaran* reference is made to *R v Palmer & Harvey McLane Ltd* [2013] 1 Cr App Rep (S) 34 where Stanley Burnton LJ stated:

> "However, the purposes of a fine go beyond that purpose. In our judgment, they include the marking by the court of society's condemnation of the company's breaches. The size of the fine marks the importance of the breach, both in terms of the gravity of the offending and the importance of the safety of employees and members of the public who may be affected by the operations of any business. There is punishment as a proper purpose and deterrence, not only of the appellant itself, the company whose breach of the statutory duty is in question, but of others who have in their hands care for their employees or members of the public or both."

35. General deterrence is reflected in the headline sentence and in the instant case, while no specific headline sentence was nominated, the judge expressed the view that Mr Murray was "at the lower end" in terms of culpability.

36. Counsel for the Director also contends that Mr Murray was aware of the existence of asbestos having been so informed by Mr McAuliffe, however, counsel for the respondent, Mr O'Higgins SC takes issue with this categorisation and says that Mr Murray had a suspicion of the presence of asbestos. However, it is clear that he had a level of appreciation of its presence, given that he ensured that he and the two employees had

some form of protective clothing, albeit inadequate for protection from asbestos. Mr Murray also exposed himself to the substance, and while each person is presumed to know the legal position, the company's moral culpability is somewhat reduced in light of that fact, as said by counsel for the respondent, he was, "no armchair general."

37. It cannot but be gainsaid that Mr Murray committed a significant error by his actions and no doubt such a decision was motivated in part by the desire to keep the businesses open. While it is argued that he was concerned that a part of the ceiling would fall and injure persons, this of course, would not have been a possibility if the premises had been closed immediately. This, therefore, is an aggravating factor.

38. Insofar as it is said that the judge gave too much weight to the fact that the respondent company discharged the sum of €38,500 in addressing the situation, it is accepted by the Director that the costs of the clean-up are a factor to be taken into consideration in mitigation, but that the amount should not be deducted in full from the headline fine for three reasons; firstly, the respondent company could have sued to recover the money from the contractors who commenced the work, secondly, the specialist company were unable to gain access the following day as works were in being by the respondent company and, thirdly, if the respondent company had not engaged in works, the area could have been secured.

39. We agree with these submissions. The fact that the company engaged contractors to clean up the area is a factor to be taken into account as a mitigating factor in that it bears on remorse but this does not necessarily mean that the amount ought to be deducted in full. The appropriate weight must be given to that factor in assessing the appropriate reduction from the headline fine for mitigation. The fact that the respondent engaged a specialist company to render the area safe can also be considered as evidence of genuine remorse.

40. We are satisfied in the circumstances that the decision to remove the tiles was one which was motivated in part to ensure the business remained open but we are not persuaded that it is at the level so as to amount to a deliberate breach in order to maximise profits in the sense of something being done which is manifestly dangerous in order to increase profits. The decision to remove the tiles was made in order to allow the business to continue operating, which is somewhat different. The business should, of course, have been closed immediately until the remedial works were completed and the premises rendered safe.

41. Mr O'Higgins argues that in terms of hierarchy, the respondent is at the lowest level, taking the investor in the development, the construction company, and the foreman at higher levels. While we accept this point, it remains the position that a decision was taken with a level of appreciation for the possible presence of asbestos, to remove the asbestos, thus risking the health of not only Mr Murray himself but the employees and the wider public.

42. In essence, it is said on the part of the respondent that in examining the overall situation and the roles of the various parties, the fine imposed was within range. Insofar as deterrence is concerned, Mr O'Higgins argues that the respondent company footed a bill of effectively €50,000 for an action of approximately 10 minutes in circumstances where the site ought to have been closed and a party, more central to taking that decision, had not done so.

Decision

43. In our view, we are persuaded that the ultimate fine imposed failed to adequately reflect the gravity of the offending conduct or to properly take account of the principle of general deterrence, moreover, we do not believe that the entire amount of the outlay in terms of the clean up ought to have been deducted in mitigation. We are, in the circumstances, satisfied that the ultimate fine is simply too low and that, in itself, is an error in principle.

44. Breach of the safety regulations designed to protect employees and the public at large must be penalised and such future conduct of that sort ought to be deterred by an appropriate penalty, the ultimate fine of €7,500.00 was inadequate in the circumstances to properly reflect that principle.

45. The judge properly took account of the hierarchy of the various parties in assessing the respondent's culpability. We make the observation that it would have been helpful if there was evidence adduced in the court below as to the turnover for the weekend that the licensed premises remained open to assist the judge in determining the appropriate penalty.

46. In the context of mitigation, it was, of course, appropriate to take account of the plea of guilty, co-operation, remorse, remedial steps taken in the form of the clean-up operation and the absence of prior offending conduct.

47. Any penalty to be imposed must be proportionate and the respondent's financial resources and ability to pay is relevant in this context. In the instant case, the evidence disclosed that the respondent company's turnover fell significantly during the pandemic, which was in the 15 months prior to sentencing, reducing from approximately €2.3 million in the year-end June 2019 to approximately €676,000 at the end of April 2021. Evidence was heard that the company has borrowings and that at the end of June 2020, an amount of €8,712,186 was outstanding, with a commitment of monthly repayments of €78,411. In cross-examination, the fixed asset value was said to be €16,367,000.

48. With reference again to *Kilsaran* at para. 92, Edwards J. referred to *People (DPP) v Cavan County Council and Oxigen Environmental Limited* where it was stated:-

> "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,

deterrence (both specific and general), and rehabilitation but there will frequently be more emphasis on deterrence than on the other objectives."

49. As is apparent from the foregoing, we are satisfied that the sentence in this case was unduly lenient as being a clear departure from the norm and so we will quash the sentence imposed in the court below and proceed to resentence the respondent.

Re-Sentence

50. We assess the gravity of the within offence with reference to the range of punishment available, we consider the respondent's culpability to fall at the lower level, but not at as low a level as must have been found by the sentencing judge.

51. We must impose a penalty which is proportionate to the impugned conduct, which is both punitive and has regard to the necessity for general deterrence.

52. We have considered all relevant factors including the financial situation of the respondent company with fixed assets valued in excess of €16 million, demonstrating that the respondent company is a profitable business.

53. In the circumstances, we believe a headline sentence of a fine of €60,000.00 is appropriate on count 1, we take account of the mitigating factors, including the plea of guilty, the co-operation, the remorse which we accept as genuine and reflected by the remedial works, we also take account of the absence of any prior convictions and so we will reduce the headline sentence accordingly to a fine of €40,000.00 to be paid within 4 months of the date of this judgment. Count 2 to be taken into consideration.

54. Costs were levied against the respondent in the court below and in light of s. 78(4) of the 2005 Act, we do not see and nor have we heard of any special and substantial reason for not so ordering.

55. Liberty to apply should any issue arise concerning costs.