



THE COURT OF APPEAL

Record Number: 5CJA/24

**McCarthy J.
Kennedy J.
Burns J.**

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

CLIVE GARGAN

RESPONDENT

JUDGMENT of the Court delivered on the 11th day of June 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act, 1993 for the review of a sentence on grounds of undue leniency. The principles applicable to reviews such as this cannot be said to be in dispute between the parties, and in truth, there has been no real dispute about the principles to be applied since the first such case of its kind, that of *People (DPP) v Byrne* [1995] 1 ILRM 279.
2. The sentence sought to be reviewed is one of three years, wholly suspended, imposed on 8 counts with the balance of the counts taken into consideration. A headline sentence of five years' imprisonment was nominated and reduced to three years, which was suspended in full.
3. The respondent was charged with 84 counts in total: 42 counts of failure to deliver a VAT return contrary to s. 1078(2)(g)(ii) of the Taxes Consolidation Act, 1997, as amended by s. 133(a) of the Finance Act, 2002 and 42 counts of failing to pay the VAT due within the statutory period contrary to s. 1078(2)(i) of the same Act, as amended.

Background

4. The indictment spans a period from 2009 to 2016. The respondent is a self-employed person who was engaged by companies as an IT consultant. He had previously been registered for VAT during the period of the 25th October 2004 to the 1st November 2006, after which time he de-registered for VAT.
5. While the respondent was not registered for VAT during the relevant period, he was an accountable person for VAT pursuant to s. 69(2) of the Value-Added Tax Consolidation Act, 2010, by virtue of the fact that he had issued invoices to customers with a number purporting to be his VAT registration number and was charging VAT.

6. The offending came to light when a customer of the respondent, Fenergo Ltd, sought a VAT return and was asked to provide certain information to the Revenue Commissioners so that this return could be processed. Included in that information, were two invoices from the respondent which included a VAT registration number that had ceased to be valid on the 1st November 2006.

7. Further investigative steps were taken, and it transpired that the respondent had received payments from Fenergo Ltd from 2011 and from a second company, Ergo Services, in 2008, 2010 and 2011 and that no VAT returns of payments were received in respect of any of these payments. The total VAT involved in the case was €180,623.51.

8. The respondent paid the VAT due plus interest on the 30th June 2016. At the sentence hearing on the 1st December 2023, there was approximately €16,000 outstanding. The sentencing judge put the matter back for two weeks in order for the respondent to pay the €16,000 sum, before handing down her sentence.

Personal Circumstances of the Respondent

9. The respondent has no previous convictions, he has a good employment record and on the date of sentence, he was fully tax compliant.

Sentencing Remarks

10. The sentencing judge outlined the aggravating factors in the case, noting that the offending occurred over a long period of time, there was a large amount of money involved and that the offending was pre-planned and pre-meditated. The judge then turned to consider the personal circumstances of the respondent, noting that he has no previous convictions, a good employment record and had not come to adverse garda attention either before or after the offending behaviour.

Grounds of Application

11. The Director relies on the following grounds of application in her review of the sentence imposed on the respondent:-

- "1. The sentencing judge erred in principle in giving too much weight to the mitigating factors;*
- 2. The sentencing judge erred in principle in failing to have sufficient regard to the sentencing principle of punishment; and*
- 3. The sentencing judge erred in principle in failing to have sufficient regard to the sentencing principle of deterrence."*

Submissions of the Parties

The Applicant

12. The Director relies on a number of comparator cases from this Court and the Court of Criminal Appeal. In *People (DPP) v Murray* [2012] 2 IR 477, a sentence of 12½ years was imposed following a guilty plea and immediate admissions in respect of social welfare fraud amounting to a loss of approx. €250,000. This was reduced to a sentence of nine years with one suspended on appeal. In *People (DPP) v Begley* [2013] 2 IR 188, a six-year sentence was reduced to two years on appeal where the loss involved was in the region of €1 million and restitution was in the process of being

made. In *People (DPP) v Hughes* [2013] 4 IR 69, a sentence of four years' imprisonment was substituted for a sentence of two years in a case where very substantial restitution had been made.

13. *People (DPP) v Campbell* [2014] IECA 15 concerned a loss of approx. €370,000 with interest and penalties amounting to a total of €1.2 million. On appeal of the three-year sentence imposed at first instance, the appropriate sentence was identified as one of 18 months' imprisonment.

14. *People (DPP) v Floyd* [2014] IECA 39 concerned a loss to Revenue of €684,000. A sentence of 6 years' imprisonment with one suspended was imposed at first instance which was reduced to five years with one suspended on appeal. It is noted that the respondent in this case was described as the "fall guy."

15. *People (DPP) v Slattery* [2017] IECA 90 concerned a three-year sentence, fully suspended for similar offending. The loss to Revenue was approx. €234,000, of which €35,000 was repaid. This Court commented that the appropriate sentence was one of three years with the last eighteen months suspended.

16. In *People (DPP) v Mahony* [2018] IECA 58, the total unpaid tax amounted to €1.224 million. A sentence of three years, which was fully suspended and a fine of €10,000 was imposed at first instance. This Court commented that the appropriate sentence was one of three years with up to half suspended.

17. The Director takes no issue with the headline sentence identified but contends that the mitigation was insufficient to merit a discount of some 40%, given the late guilty plea in this case and the manner in which the respondent approached the prosecution.

18. It is further complained that the sentence was suspended in full without any explanation from the sentencing judge or any basis identified in the cross-examination or mitigation offered.

19. The Director further relies on the principles of punishment and deterrence. Reference in this regard is made to the following portion of *People (DPP) v O'Brien* [2018] IECA 2:-

"In the past it has been suggested by the former Court of Criminal Appeal in People (DPP) v. GK [2008] IECCA 110 that a court in sentencing, or an appellate court in reviewing a sentence 'must examine the matter from three aspects in the following order of priority, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence'(this Court's emphasis), thereby suggesting that the penal objective of rehabilitation is always to be afforded the highest priority. While we do not now think that this is necessarily a correct statement of principle and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence or retribution and incapacitation."

20. It is asserted that contrary to the common belief that revenue offences are of lesser seriousness in that there is no injured party, these offences have serious ramifications for the community at large as they reduce the funds available to the government to run the State and provide services to citizens. It is also noted that part of the VAT take is used to fund the EU and that the failure to submit tax in accordance with law puts an increased burden on compliant taxpayers.

- 21.** It is submitted that the respondent essentially received no punishment for his offending. It is emphasised that this respondent did not cease his offending behaviour until he was caught.
- 22.** It is asserted that the sentencing judge's remarks are silent on the issue of deterrence and punishment and that there was a complete absence of consideration of these sentencing principles.
- 23.** It is the Director's position that the imposition of a fully suspended sentence does not adequately reflect the seriousness of the respondent's offending behaviour and does not go far enough to deter others from such offending.

The Respondent

- 24.** The respondent relies on *People (DPP) v Redmond* [2001] 3 IR 390 to the effect that account must be taken in sentencing of any sums forfeited in a civil process in determining the overall proportionality of sentence and that it would be "unreal and unjust" to do otherwise.
- 25.** The respondent in that case had paid a sum of £782,000 to Revenue in discharge of his revenue liabilities and was fined a total of £7,500. It is emphasised that the Director was unsuccessful in a review of this sentence but that it was not argued that a term of imprisonment ought to have been imposed but that the respondent should have received a higher fine.
- 26.** Reliance is also placed on *People (DPP) v Hughes*, in which the Court of Criminal Appeal commented that:-

"An appellant does not establish an error of principle by comparison of the facts of one earlier case (which are not, in any event, available to this court) and claiming that a similar sentence should have been imposed."

- 27.** Further reliance is placed on the following portion of *People (DPP) v Begley*:-

"this court would have significant concerns in advocating any blanket approach in tax fraud cases. Such type of offences are totally dissimilar to many others, including the more serious crimes against the person. Secondly, the variation within such cases is great and, whilst we note the self-stated limitations of The People (Director of Public Prosecutions) v. Murray [2012] IECCA 60, nonetheless factors with little, if any, probative value to crimes against the person, such as restitution, may have a level of high legal significance in fraud cases. Thirdly, at least in a broad sense, it is common public knowledge that in a great number of evasion cases many defaulters are never prosecuted and frequently for good cause; instead their behaviour is dealt with on the civil side of the law or by some Revenue scheme, involving as it might the payment of penalties and interest, as well as public disgrace via media identification. Fourthly, factors such as admissions and pleas are a crucial part of the process, without which the prosecution of white collar crime would be even more retarded than what it is presently. Fifthly, incentivising cooperation must never be lost sight of. Therefore, it seems to this court that, in the absence of a wide ranging review on sentences, the current approach, which should continue, is that individual cases must be dealt with individually."

- 28.** The respondent distinguishes the present case from that cited by the Director, *People (DPP) v Campbell*, on the grounds that the respondent in that case did not cooperate with revenue authorities and actively attempted to obstruct investigators, further, that no restitution at all had been made.

29. The respondent further distinguishes the cases of *Floyd*, *Slattery* and *Mahony* from the present case on similar grounds.

30. The respondent's position is that the cases referred to by the applicant are readily distinguishable. In this regard, it is emphasised that the respondent in the present case made full restitution of the amount owed to Revenue and there was no suggestion that he impeded the investigation or engaged in any wider form of deception to conceal his activities. The respondent disputes that there was a "complete absence of consideration" of the sentencing principles of deterrence and punishment on the part of the experienced sentencing judge.

Discussion

31. The issues lie with the reduction for mitigation and in the decision to wholly suspend the 3-year sentence, resulting in what is said to be an unduly lenient sentence. As we have said the principles for determining undue leniency are well established commencing with *Byrne* and further refined in *People (DPP) v Stronge* [2011] IECCA 79. The onus is on the Director to establish that this sentence was unduly lenient to the extent that the divergence between the sentence imposed and that which ought to have been imposed amounted to an error in principle before this Court may intervene. The divergence must constitute a substantial departure from the norm.

32. We commence our discussion by observing that offences involving VAT must be seen as serious in that not only is there a failure to discharge the VAT due, but there is also a strong element of dishonesty in the manner in which the VAT is obtained from third parties, such as the companies in the present case.

33. Secondly, while many cases have been furnished to us by way of comparator cases, it is axiomatic that each case differs in facts and circumstances, and so are of limited assistance. For example, some cases concern few counts but substantial sums of money. Moreover, where the arguments concern the discount for mitigation, obviously, this differs in every case.

34. This offending proceeded over a prolonged period from May/June 2009 until March/April 2016. The amount which the respondent failed to pay was that of €180,623.51 and whilst not as large as the amounts in some of the comparator cases, it is a significant amount, nonetheless. The respondent was accountable for VAT pursuant to s. 69(2) of the VAT Consolidation Act, 2010 as he had issued invoices with a purported VAT number and was charging VAT. As such he is deemed to be a person registered for VAT. There were 85 invoices issued by him during the period on the indictment. The VAT number which he used was one which Revenue records showed had ceased on the 1st November 2006 in terms of VAT.

35. Upon discovery of these discrepancies, a revenue investigation commenced of which the respondent was advised. A tax agent was appointed, and it seems some communications took place thereafter. The respondent sought to make a qualifying disclosure for the years 2007-2009, but this could not take place as the investigation had commenced.

36. On the 30th June 2016, the respondent paid the outstanding VAT due in full without any admission of liability. During the sentence hearing on the 1st December 2023, €16,000 in interest was still outstanding. Time was sought to pay that amount and it was paid in full by the 15th December 2023, when sentence was imposed. It seems that civil discretionary penalties were pending. No more detail was offered in this respect save to say that just prior to the imposition of

sentence, the Director indicated if the sum was in excess of €75,000, the matter would proceed before the High Court.

37. The respondent took three trial dates which he sought to have vacated; February 2022, when, as we see from the transcript, he discharged his legal team, 7th November 2022, when a medical certificate stating that he was suffering from severe anxiety and low mood with suicidal ideation and was unfit to attend court was produced, and January 2023, for which the reason is not specified but may have been on the basis of anxiety. There is a further medical report dated the 2nd November 2023 which refers to his anxiety in the context of court hearings. He therefore entered his pleas on the fourth trial date.

38. At the sentence hearing, the respondent was tax compliant. He had no previous convictions and testimonials were furnished to the court. The respondent had received a "Teaching Hero Award" in 2021.

39. The judge had adverted to the aggravating and mitigating factors during the first hearing and again referred to those factors at the point of imposing sentence. In light of the mitigating factors, she reduced the headline sentence to 3 years' imprisonment and suspended the sentence in full.

40. We look first to the mitigating factors; it is true that the respondent pleaded guilty, but it is also true that he did so at a late stage in the proceedings. There were 3 trial dates fixed for this matter and while account must be taken of the medical reports furnished, nonetheless, the plea cannot be given the same weight as an early plea.

41. Secondly, restitution is a factor to which weight must be given. Some considerable debate took place at the hearing of this appeal as to the level of weight to be given. The Director ultimately contended for limited weight saying that the monies were due, and the respondent should not gain credit from that which he was obliged to do in any event. Whereas the respondent contended that significant weight should be attributed to this factor relying on *Redmond* and *Begley*.

42. In *Redmond*, Hardiman J. referred to the sum of £782,000 paid to the Revenue Commissioners, through the Criminal Assets Bureau, where he says at p. 401:-

"the fact that a portion of the £782,000 may be attributed to penalties or penal interest is a legitimate factor to be considered when sentencing. The legal nature of a revenue penalty is that it is a penalty, which is civilly recoverable i.e., it is a punitive consequence to the offender."

43. It is our view that it is important to distinguish between the figure paid for penal interest and that of the amount which was due on foot of VAT accrued. Greater weight should be attributed, in terms of mitigation, to sums paid by way of interest than to sums which were due in any event. Hardiman J. specifically refers to penalties when he says at p. 403:-

"In the present case, the prosecution has fairly and properly conceded that the court may have regard in considering sentence, to sums paid in the nature of civil penalties. We would only add that this is consistent with the attitude of the court in other cases. It would be unreal and unjust to exclude from consideration in a larceny case the fact that restitution had been made or damages paid, for example."

44. McKechnie J. refers to restitution as having a level of "high legal significance in fraud cases" in *Begley* and goes on to say, when considering restitution specifically that "restitution, and ancillary

punishments such as the payment of interests and penalties on arrears of tax (The People (DPP) v Redmond [2001] 3 IR 390) when effected, is a material factor for mitigation."

45. It was unclear in *Begley* as to what amount of the sum paid involved penalties or interest. It is, however, very clear in the present case that the sum of €16,000 represents interest.

46. That there is a distinction to be drawn in terms of monies which were due, and interest/penalties stems from *Redmond* and is stated in *Hughes* at para. 60:-

"Just as in any case of crime involving property or financial crime, it is material to consider the extent to which the injured party has been compensated. There is clearly a distinction between a payment of the previously unpaid tax and payment of interest and penalties. The last two are civil penalties for failure in observance of the tax code. In respect of the first, the taxpayer is entitled to less credit for belatedly meeting his obligations. A sentencing judge will, however, have regard to the matter."

47. While a distinction should be drawn between payment of monies due and interest, in terms of weight, it is clear that a court should take all financial reparations into account and assign the appropriate weight.

48. The first question is whether the judge allowed an excessive discount for mitigation. It is clear that there was mitigation present including the pleas and other factors. However, it must be recalled that these were late pleas, and even taking account of the respondent's mental health issues, the respondent simply cannot expect the same level of mitigation as if he entered an early plea. Moreover, while the respondent made financial reparation, the majority of the payments made were payments which he was obligated to make.

49. The sentencing judge suspended the entirety of the sentence, and it seems from the transcript that she did so on the basis of mitigation. Whilst we do not accept the Director's submission that the respondent essentially received no punishment, as a suspended sentence is a sentence, we are of the view that the discount from 5 years to a wholly suspended sentence is a substantial departure from the norm and constitutes an error in principle.

50. We will quash the sentence and proceed to sentence the respondent *de novo*.

Re-Sentence

51. Acknowledging the aggravating factors, we agree with the nomination of a global headline sentence of 5 years' imprisonment, however, we then depart from the views of the sentencing judge.

52. Proportionality is central to a just sentence; the correct sentence is that which reflects the offence committed by the particular offender. In that context, the plea, albeit late, the payment of the sum due plus interest, the testimonials, the absence of previous convictions and the level of co-operation as can be gleaned from the transcript are all relevant factors. He has not come to adverse attention since these matters came to light. He is now tax compliant as is his obligation.

53. We consider that the appropriate reduction is that of 18 months for mitigation, leaving a sentence of 3½ years. We consider it appropriate to suspend a portion of the sentence to further incentivise his rehabilitation and so we suspend the final 2 ½ years on the statutory condition, leaving a period of 1 year in custody.