



**THE COURT OF APPEAL**

**Birmingham J.  
Edwards J.  
Ní Raifeartaigh J.**

**Record No: 101/2019**

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

**RESPONDENT**

**V**

**MIHAI TACHE**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on 22nd of April, 2020 by Mr. Justice Edwards**

**Introduction**

1. On the 13th of May 2019, the appellant was before Cork Circuit Criminal Court for sentencing on Bill No CYDP0038/2019, to which he had pleaded guilty on arraignment, and which contained a single count of handling stolen property, to wit forty nine mobile phones of different makes and models, to the value of €13,143.90, knowing that the property was stolen or being reckless as to whether it was stolen, contrary to s.17 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
2. We should say at the outset that while the figure in the indictment was €13,143.90, and the transcript is silent as to whether there was any amendment of that figure, the evidence in the case referred to a figure of €17,378.90. While we simply note this discrepancy, we do not consider it to be of any materiality in terms of the issues before us today.
3. The appellant received a sentence of four years' imprisonment to date from 13/05/2019. The matter comes before this court by way of an appeal against the severity of that sentence.

**The Circumstances of the Crime**

4. The court below heard evidence that there is a mobile phone sales and repair shop in Market Street in Bandon, County Cork known as "RepairIT.ie". This shop was burgled at approximately 03.00 on the 28th of September 2018 and a large number of mobile phones were stolen from the premises. Upon the burglary being discovered the matter was reported to An Garda Síochána who initiated an investigation.

5. In the course of that investigation it was established from inquiries made, and from CCTV footage recovered, that five persons had entered the shop to effect the burglary and that they had used two vehicles to enter and leave the town of Bandon. The vehicles were identified as a Mitsubishi Carisma and a black Peugeot 206. Further inquiries revealed that the black Peugeot 206 had been purchased by a man named Mihai from West Cork Car Sales in Bishopstown. Gardai later received confidential information that a man named Mihai was offering mobile phones for sale online. This prompted the Gardaí to seek a search warrant to search the home of the appellant who was identified as living at 9 Elmvale, Wilton in Cork.
6. The search warrant was executed on the 4th of October 2018. In the course of the search gardaí found a total of 67 mobile phones concealed in two areas of the property, namely under a bed and in a wardrobe, to a total value of €17,378.90. All mobile phones have a unique identifier number known as an IMEI number. When the IMEI numbers of the mobile phones recovered in the course of the search were checked, gardaí were able to establish that amongst them were the mobile phones stolen from RepairIT.ie in the course of the aforementioned burglary on the 28th of September 2018.
7. On the following day the appellant, having contacted the Gardaí himself, attended at Bandon Garda station by appointment whereupon he was arrested. While the sentencing transcript is silent as to whether he was arrested on suspicion of burglary or of handling stolen property (it was clearly one or the other), the evidence was that he was detained and was interviewed on three occasions while in detention. During the course of these interviews the appellant maintained that he had purchased the phones with a view to reselling them at a profit. He claimed not to have previously known the persons from whom he had purchased the mobile phones and he would not identify the location at which he had made the alleged purchase. The property stolen from RepairIT.ie was identified by that firm's owner, the injured party, and has since been returned to him.

#### **The Impact on the Victim**

8. A victim impact statement was received by the court below from the injured party. It is not confined to the impact of the appellant's crime but related to the overall effect of the burglary and appropriation of stock from his business. He is no longer at any loss in terms of stock misappropriated. He suffered other financial losses but these were associated with damage caused in the course of the burglary (for which the appellant is not being sentenced) and the cost of additional security. The statement goes on to deal with the trauma and stress suffered by himself and his immediate family by virtue of his business having been burgled, and with difficulties in dealing with his customers and his employees in the aftermath of the incident. Once again, it requires to be stressed and emphasised that the appellant was not being sentenced for burglary, but rather for handling stolen property.
9. The sentencing judge was, it seems to us, careful to acknowledge that differentiation. One of the main purposes of a victim's impact statement at sentencing is to assist the sentencing judge in appreciating the harm done which is one factor to be taken into account in assessing the gravity of the offending conduct. The sentencing judge did

record his appreciation that not all of the harm described by the victim in his victim impact statement in this case could be laid at the appellant's door and that, indeed, insofar as there had been an initial apprehension of likely financial loss in circumstances where stock in trade had been stolen, the stolen stock in trade found in the possession of the appellant had been returned to the injured party. That having been said, the sentencing judge's observation that "*we would have very few thieves if we didn't have receivers or handlers and only for receivers and handlers we may have much less theft around the country*", was, we think, a point well made. The appellant's crime was certainly not one which could fairly be considered as a victimless crime, or one that had no impact on the victim even in circumstances where all of the stolen property was returned.

### **The Appellant's Personal Circumstances**

10. The appellant's date of birth is the 28th of February 1989, and accordingly he was twenty-nine years of age on the date of the offence. He is a married man and is the father of six children and he works as a delivery driver for a Chinese take away restaurant. The appellant has 24 previous convictions. He is Romanian National resident in this jurisdiction for many years, and apparently speaks good English.
11. A good number of the appellant's previous convictions were for road traffic matters. However, he does have a number of convictions for crimes of dishonesty. The most recent such conviction was recorded on 14/7/2010 at Bandon District Court and it was also for a s.17 offence of handling stolen property. The appellant received a six months' suspended sentence. Prior to that a conviction was recorded at Cork City Court No 1 on 28/07/2008 for burglary in respect of which he received a fine of €50. On 07/07/2008, and at the same court, he received a sentence of six months imprisonment for s.12 burglary and a further sentence of four months for s.4 theft. On 05/12/2007 a further four convictions for s.17 offences of handling stolen property and a further two convictions for s.4 theft were recorded. The transcript is silent as to the penalty that was imposed for these. Finally, on 21/06/2007 he was fined €300 by Middleton District Court for an offence of s.4 theft. It is clear therefore that the appellant has a significant record in terms of crimes of dishonesty and in particular is a recidivist handler of stolen property. Moreover, he has been afforded the benefit of a suspended sentence in the past but despite this has reoffended.
12. Counsel for the appellant made the valid point on his behalf that he had succeeded in staying out of trouble from 2010 until 2018. The point was also made on his behalf that his wife does not drive, and she and the children would be significantly disadvantaged if the appellant were to receive a custodial sentence. A sum of €1000, with the promise of perhaps another €2000 if further time were granted by the court, was offered in compensation.

### **The sentencing judge's remarks**

13. The sentencing judge established in exchanges with counsel that the maximum potential penalty was a custodial sentence of ten years imprisonment and/or a fine. He began his sentencing remarks by outlining the legal approach he was required to take with respect

to the assessment of gravity, acknowledging in particular the proportionality requirement to have regard not just to the circumstances of the crime but also to the fact that the crime was committed by this particular offender in his particular circumstances. The judge commented:

*"Your level of culpability is obviously clearly high, it was intentional, clearly intentional and that if you took in all of these phones with a value of €17,378, numbering in total 66 mobile phones, and you've taken in those phones knowing the value of mobile phones on the market and the use that mobile phones are put to by other persons in criminal activity. It is constantly before these Courts that we hear of persons in other criminal activity who are relying on, inverted commas, "purchased mobile phones from other sources." Which they use to promote their criminal activities for brief periods of time using these mobile phones which they obtain in the black market. You are clearly in the business of selling mobile phones in the black market. You've pleaded guilty to the following offence, handling stolen property, knowing that the said property was stolen, or being reckless as to whether the said property was stolen or not. You certainly were not going into the nearest Vodafone shop and offering to sell the phones to them. That was certainly not your intention and the Court is entitled to infer the strong possibility that you were going to feed and assist further criminal activity by other parties, by selling on these phones to such persons for your own personal gain. That is, in this Court's view, an exceptional aggravating factor in addition to the number of phones involved, the value of the property involved. The Court has heard very little remorse on your part. The Court notes that in three interviews with An Garda Síochána on being pressed in the appropriate manner, certain information which An Garda Síochána could have well done with and which was most likely within your knowledge, was not passed on by you. That's your decision not to assist further in An Garda Síochána's investigations. That's your free decision not to do so, but by taking that free decision in your course of your garda interviews, this Court is entitled to take that into account when imposing penalty."*

14. The sentencing judge went on to consider the harm done to the injured party and to society by the appellant's crime. Further, he noted and acknowledged the appellant's plea of guilty. However, the sentencing judge considered that the appellant had effectively been caught red handed and said that the reduction for the guilty plea would be tempered to a certain degree on that account. He said that he could see no further major mitigation in circumstances where the appellant had at least ten previous convictions for handling, burglary and theft. The court did acknowledge that there had been a period of eight years during which the appellant had received no convictions and the sentencing judge said that he would take that into account. The court acknowledged that a custodial sentence would be difficult for the appellant's wife and family but said that the court could not relieve him of the consequences of his bad decision on that account. The sentencing judge indicated that it was his view that the case required a custodial sentence and that any other available penalties would not be appropriate. In that regard he noted that the appellant

had had the benefit in the past of suspended sentences or fines in relation to previous convictions.

15. The sentencing judge concluded:

*"And bearing all that in mind, and noting a maximum sentence of 10 years, the Court will impose a headline sentence of six years. Having imposed a headline sentence of six years, it will take into account your early guilty plea, though again noting that it must be tempered by virtue of the fact that you were caught basically red handed by An Garda Síochána. And it will reduce the.. six year headline sentence, to four years, and that with post-mitigation, a sentence of four years, taking into account all mitigating factors. And the Court sees no grounds on which to suspend any part thereof."*

### **Grounds of Appeal**

16. The Notice of Appeal filed by the appellant lists a total of nine complaints, namely:

1. the sentence of four years was excessive;
2. the sentencing judge erred in failing to suspend portion of total sentence;
3. the sentencing judge did not give any regard to rehabilitation as a guiding principle when formulating the sentence, particularly in failing to suspend portion of the total sentence;
4. the sentencing judge erred in principle in failing to give due regard to the principle of totality;
5. in formulating the sentence the sentencing judge failed to give due regard to the level of cooperation offered by the appellant during the investigation;
6. in forming the sentence the sentencing judge did not give sufficient regard to the fact that the accused guilty;
7. the sentencing judge erred in failing to give due consideration to the fact that the appellant is a foreign national and the effect that serving custodial sentence in a foreign prison would have on the appellant;
8. in sentencing the appellant, the sentencing judge erred in principle in failing to have sufficient regard to the principles of proportionality and the personal circumstances of the appellant; and
9. in all the circumstances of the case, including the personal circumstances of the appellant, the sentence imposed was excessive and unjust.

17. Following today's hearing, the court considers that appellant's complaints may be distilled to just two substantive grounds. The appellant takes serious issue with the identification of six years, which he says over-assesses the gravity of the case. While the Notice of

Appeal also makes complaints about the weight (if any) attached by the sentencing judge to various mitigating factors put forward by the defence in deciding on the extent of the discount for mitigation, including the fact that the appellant is a foreign national, and the appellant's partial cooperation, family circumstances and guilty plea, these complaints were given what might be colloquially described as "a light rub". Our impression was that in truth no real issue was being taken with the sentencing judge's decision to reduce whatever was the appropriate headline or starting sentence by one-third, but rather the appellant's real complaint is the sentencing judge's failure to consider suspending any element of it.

### **Discussion and Decision**

18. The Court has received detailed and helpful written submissions from both sides for which it is grateful, and these have been amplified at the remote oral hearing of this appeal conducted today.
19. The appellant has attempted to persuade us by reference to comparators, including *The People (DPP) v Lyons* [2019] IECA 131; *The People (DPP) v Gannon* [2008] IECCA 131; *The People (DPP) v Floyd* [2014] IECA 39; and *The People (DPP) v O'Sullivan* [2016] IECA 13, that the nominated headline sentence was excessive.
20. We have not found these cases to be particularly useful as comparators as they differ widely in their circumstances and are simply too small a sample to be indicative of a reliable trend.
21. Be that as it may, we have nevertheless concluded that the headline sentence of six years was too high, notwithstanding that the appellant had previous relevant convictions, the fact that the crime was motivated by profit, and the substantial value of the stolen goods involved. By the same token, the stolen property was fully recovered in a saleable condition, and a period of eight years had elapsed since the appellant's last conviction. In all those circumstances we consider that a headline sentence of four and a half years would have been more appropriate and that to have nominated a headline sentence of six years was an error of principle.
22. With regard to mitigation, while we note that the fact that the appellant is a foreign national was not specifically referenced by the trial judge we consider that this fact on its own would only attract very modest mitigation. It would be different if there had been evidence of a lack of family network or if there had been evidence of perhaps significant language difficulties or cultural issues. However, there was no such evidence.
23. We find no error in the trial judge's assessment of the level of co-operation as being really quite limited. Moreover, the appellant did receive credit for his guilty plea and we consider that the trial judge's view that some tempering was appropriate having regard to the circumstances in which his crime was detected was justified in the circumstances of the case. Further, we cannot fault the trial judge's approach to the family circumstances put forward, and his view that notwithstanding these a custodial sentence was required.

24. Overall, we are satisfied that a discount of one third was entirely adequate to reflect the available mitigation, and in re-sentencing the appellant we will apply the same discount.
25. As to the complaint that a portion of the sentence should have been suspended, we do not agree. We have said many times that before a part suspension of a sentence can be justified on the grounds of rehabilitation there requires to be an evidential basis for it. There was no evidence that the crime committed by this appellant was precipitated or contributed to by some underlying problem (such as addiction) that requires to be addressed through a positivistic intervention in the context of a suspended sentence. In so far as it might be suggested that a part suspension of the sentence could be justified as incentivising an earnest to reform (as opposed to rehabilitation in the strict sense), the fact of the matter is that this appellant received previous chances but has returned to crime, albeit after some years. We find no error of principle in the sentencing judge's decision not to suspend part of the sentence. His decision was one entirely within his lawful discretion.
26. Accordingly, in circumstances of having identified an error of principle in terms of the headline sentence we will quash the sentence imposed by the court below and proceed to a re-sentencing of the appellant.

**Re-sentencing**

27. We have noted the up to date information provided by counsel for the appellant. In our judgement the appropriate headline sentence is one of four and a half years' imprisonment. We will discount from that by eighteen months (or one third) to reflect mitigation, leave a net ultimate sentence of three years' imprisonment. For the avoidance of doubt we do not consider it an appropriate case in which to suspend any portion of the sentence.