



THE COURT OF APPEAL

Record No.: 251/2019

**Birmingham P.
McCarthy J.
Donnelly J.**

BETWEEN/

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

RESPONDENT

-AND-

BRANDON ABRAHAMS

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 30th day of June 2020 by Ms. Justice Donnelly

1. On the 8th day of June, 2018, the appellant was sentenced to 5 years imprisonment in respect of a total of 22 offences. The final four years of the sentence was suspended on condition that the appellant leave the jurisdiction within three months of his release from prison and not return for a period of four years. This sentence was backdated to March 2018.
2. The appellant had affirmed a signed plea of guilty at Cork Circuit Criminal Court (His Honour Judge O'Brien) on the opening day of the criminal sessions of April 2018 in respect of 10 Counts of using a false instrument, 2 counts of possessing a false instrument contrary to Sections 26 and 29 of the Criminal Justice (Theft and Fraud) Offences Act, 2001 and 10 counts of deception, contrary to section 6 of the Criminal Justice (Theft and Fraud) Offences Act, 2001.
3. The appellant never left the jurisdiction and the matter was re-entered before His Honour Judge Ó Donnabháin in July 2019 under the provisions of s. 99 of the Criminal Justice Act, 2006. The appellant was remanded in custody from time to time until the matter was finally disposed of on the 7th November 2019.

Factual Background to the Offence

4. The evidence at the sentence hearing on behalf of the Prosecution was given by Detective Garda Anne Flynn on the 25th April, 2018. The offences in question were detected when a staff member from Three Mobile Network contacted the Gardaí to inform them that they believed the accused was committing a fraud with mobile phone contracts. A search warrant was obtained and documentation was found at the appellant's home. The appellant was arrested and interviewed.
5. The essence of the offences was that the appellant had obtained a false driving licence and utility bills from the internet. The appellant thereafter went into a phone shop, used

this false licence and utility bill to enter into phone contracts, most of them being for Samsung Galaxies with a value of €550 each, and he obtained an insurance policy on the phone. Within a few days after leaving the store, he would contact the insurance company and report the phone lost. He would then get a replacement phone. When the first direct debit was due to be taken from his account there was no money in the account, so the phone company were then out of money for that and he would have obtained phones and sold them on over the internet. The total value of the 12 phones was €6,607.88. On two occasions the appellant reported these phones lost in garda stations, one being Anglesea Street Garda Station, on the 31st July, and the second one was the Bridewell Garda Station on the 16th September, 2017 and he used his false driving licence to report the phone lost to the Gardaí. The details were entered onto the PULSE system and in that regard the deception charges arose.

6. The appellant made full admissions in interview and signed a plea of guilty in the District Court at the first available opportunity. It was also acknowledged that the trial would have been quite a complicated trial in the event this had come to the Circuit Court on indictment and had to be run before a jury.

Personal Circumstances

7. The appellant was 25 years of age when he committed these offences. The appellant had 24 previous convictions, 10 of which were in relation to s. 4 thefts. He had no previous convictions for deception and this was his first occasion before the Circuit Court.
8. The appellant is a South African national who was 25 years of age at the time of sentencing and been in Ireland for a period of 6 years at that time. The appellant initially was in Ireland on foot of a valid visa which expired in 2014. The appellant was in a relationship and had a 21-month-old baby at the time of sentencing. The appellant gave evidence of his background in South Africa. His parents were separated and his mother had bipolar disorder. He couldn't pay fees, he said he committed the offences because he wasn't entitled to social welfare or other benefit. He said he did not have drug or alcohol addictions (although he appeared to have some convictions related to drug use). He also submitted that he was reapplying for his visa by virtue of the status of his daughter. The appellant set out that his time in prison had been an eye opener.

The Sentence

9. At the time he was sentenced, the appellant was also serving a separate prison sentence. The present sentence therefore overlapped with the earlier sentence. He freely entered the bond to leave the jurisdiction. His consent to do so was queried by Judge Ó Donnabháin but the appellant's counsel confirmed that there was no difficulty with that part of the order and stated he was going to leave the jurisdiction. The issue of whether the sentencing judge had been correct in making it a condition of the sentence that he leave the jurisdiction was therefore not in question in the court below and was not challenged in any way during this appeal.

Section 99 Application to Re Enter the Sentence

10. In the course of the brief hearing in respect of the reactivation of the sentence, it was confirmed that he did not leave the jurisdiction, that his partner was in Ireland and was

pregnant now. It was also said by counsel for the prosecution that he indicated that he would reside in Northern Ireland and that the Garda was not happy with the address provided. The judge was asked not to impose the entire four years as he had come forward on a signed plea. The judge replied he got a sentence, it was measured "all I can do is either apply or lift the suspension."

11. The trial judge said he had plenty of time to consider his options and he has quite deliberately – for personal reasons – decided he cannot leave the jurisdiction. The judge said he could not force him to leave so he would lift the suspension.

Submissions

12. In written submissions, counsel for the appellant referred back to the issues in mitigation that were presented at the sentence. In her very focused submissions to this Court, counsel for the appellant confirmed that the point of appeal concerned the activation of the suspended sentence. She submitted that it was disproportionate in all the circumstances.
13. Counsel submitted that the appellant's only breach was a failure to leave the jurisdiction within 3 months. He had no other breach of the bond and he had not come to the adverse attention of the Gardaí. Counsel focused on what she submitted was an error in principle of the trial judge with respect to only have a binary choice to either apply or lift the suspension. She submitted that the trial judge had a discretion to partially reactivate the sentence.
14. Counsel for the respondent submitted that the original sentence was measured, proportionate and in accordance with jurisprudence. The respondent accepts that a discretion resided in the trial judge as to activation but the circumstances here were that the original sentence was inclined towards leniency and that was relevant. In her submission, the appellant had voluntarily entered into a bond requiring him to leave the jurisdiction, had the opportunity to do so but had not taken it and the activating judge acted appropriately in reactivating the sentence.

Decision

15. There is no doubt that under the provisions of s. 99 of the Criminal Justice Act, 2006 the judge has jurisdiction to consider the partial reactivation of a sentence. We are not however satisfied that the activating judge in this case meant to convey that as a matter of law his only power was either to activate the sentence or refuse to activate the sentence. Indeed, as a very experienced judge of the Cork Circuit Criminal Court there can be little doubt but that he was aware of his powers. We are satisfied that when he said "all I can do is either apply or lift the suspension", he was referring to the particular facts of the case.
16. Thus, the real question for this Court is whether in the circumstances where an individual freely enters into a bond to leave the jurisdiction on suspension of his sentence but fails to do so within the permitted time and without an excuse being presented, he is entitled to have his sentence only partially reactivated.

17. We have not been presented with the precise details as to how long the appellant was at liberty prior to the re-entry of the proceedings against him. There is no doubt but that it was in excess of 3 months and quite likely, on looking at the dates of the sentence, he was at liberty for up to 6 months. No reason appears to have been presented to the Court as to why he did not leave within the 3 months period. It appears from the submissions to the activating judge that there was discussion at that stage about an address in Northern Ireland and whether it was satisfactory to the Gardaí or not. We are satisfied that where a condition is to leave the jurisdiction as part of the bond to be entered into as a condition of the suspended sentence, the jurisdiction to which the person will go or the address at which he will reside are no longer questions for the Gardaí, the prosecution or the Court. The condition is to leave the jurisdiction and whether that is to travel across the border on this island, to travel further afield or to live at a particular address abroad is a matter entirely at the defendant's discretion.
18. In the present case, the appellant was given three months to leave this jurisdiction. He did not do so. At most, the information that was presented at the hearing was that his partner in this jurisdiction was now pregnant. This was not being presented as a ground as to why he did not leave within 3 months (in reality, a difficult argument to have made) because the next submission concerned the address in Northern Ireland being verified.
19. It is undoubtedly the case that there was some concentration at the hearing about whether the Gardaí or even the judge would be satisfied with the address in Northern Ireland. As we have said, that was not a matter which ought to have concerned the authorities. The real issue was whether the sentence was one which required to be reactivated on the basis of the failure to leave the jurisdiction.
20. The sentence in this case was never challenged by the appellant. Indeed, it is difficult to see how it could have been. He received a sentence of 5 years in respect of a series of deliberate deceptions carried out in a premeditated fashion which involved making false reports of loss of the phones on two occasions to the Gardaí. He had relevant previous convictions for theft. He tried to excuse his actions on the basis that he was in need of money because of his inability to access social assistance payments because of his lack of status in this jurisdiction. He willingly entered into a bond to leave the jurisdiction and received an extremely lenient four year suspended period out of the entire five year sentence. We are satisfied that it was self-evidently the case that the leniency of that suspended portion was driven by the willingness on the part of the appellant to leave the jurisdiction.
21. A condition such as leaving the jurisdiction is in essence a binary one for a defendant. He either leaves the jurisdiction or he does not. If he does not, he will have received a suspended sentence on a particular basis that he will have entirely repudiated unilaterally. To seek to only have that partially reactivated because he did not leave the jurisdiction is, in effect, to seek to have a rerun of the sentence hearing again. This is entirely unlike the situation where a person has breached other conditions of the bond where there may be breaches which are incidental to the overall purpose of the bond. That might occur where

the purpose of the bond was to incentivise rehabilitation by requiring attendance at addiction services or other community activities. It might even apply where the defendant committed a minor and unrelated breach of the criminal law where the question of proportionality to the reactivation of the entire sentence might arise.

22. In the present case no such proportionality arises where there was a straightforward failure to leave the jurisdiction despite having been given ample time to do so. If there was a problem in that time, it was incumbent upon the appellant to apply to the court to vary the bond for the purpose of allowing more time. It is also important to note that if an appellant is unhappy with the original sentence imposed, that is the matter which must be appealed and must be appealed in a timely fashion. We note that this appellant did not present to the Circuit Court (or indeed this Court) any argument that he should no longer be required to leave the jurisdiction. His argument was that the failure to leave was not a breach that merited the full imposition of the sentence.
23. This sentence was suspended on one condition only: the appellant was to leave the country within 3 months from his release from custody and not return for a period of four years. No reason was presented to this Court or indeed the Court below as to why he was unable to do so at that time. We are satisfied that this was the type of breach of bond, which in the absence of exceptional circumstances or at least of a reasonable explanation as to why it occurred, gave the activating court little choice but to ensure that the earlier sentence imposed upon the appellant but suspended, was to be respected by the reactivation of the sentence in its entirety.
24. We therefore dismiss this appeal.