



**THE COURT OF APPEAL**

**Record Number: 41/20**

**Birmingham P.  
Edwards J.  
Kennedy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**DENIS O'BRIEN**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 15th day of September 2020 by  
Ms. Justice Isobel Kennedy**

1. This is an appeal against sentence. On the 28th February 2020 the appellant received a sentence of two years' imprisonment in respect of a single count of theft contrary to section 4 of the Criminal Justice (Theft & Fraud) Offences Act, 2001 consecutive to a sentence imposed on the 17th of February 2020, being a sentence of five years' imprisonment with the final two years suspended.

**Background**

2. The offence in question occurred on the 12th of April 2019. The injured party Sean McCarthy, who was 74 years of age, reported that a male called to his home and stated that his cattle trailer had broken down and requested to borrow money from Mr McCarthy to repair the cattle trailer. This male assured Mr McCarthy that he would return at 3 pm on that day and return the money to him. Mr McCarthy, feeling intimidated, loaned this male €200 from his wallet and then returned to his bedroom and placed his wallet in his jacket pocket. The male then went into his bedroom and took €100 from his wallet without his permission and left the house. The male did not return any of the money to Mr McCarthy later that day as arranged. Gardaí viewed the CCTV footage from Dunmanway Garda Station and observed a black Hyundai and identified the driver as Denis O'Brien.
3. The appellant was arrested and questioned and made admissions regarding his involvement in the matter.

**Personal circumstances of the appellant**

4. At the time of sentencing the appellant had 61 previous convictions. The most recent being on the 17th February 2020 before Cork Circuit Criminal Court in respect of theft



offences carried out after the commission of the offence in the instant case, where he received a sentence of five years' imprisonment with the final two years suspended.

5. The Court heard that the appellant was 29 years of age at the time the offence was committed. He is a married man with five children ranging from the age of 6 to 6 months and he had mental health issues and addiction issues in relation to cocaine. The appellant had been in custody since October 2019 and was engaging with services in the prison. The appellant wrote a letter of apology that was submitted to the Court expressing remorse for his actions.

#### **The sentence imposed**

6. In imposing sentence, the sentencing judge emphasised the effects of the offending behaviour on the injured party and he remarked that the appellant would likely continue to engage in this type of behaviour until the penalties become too heavy or his time in prison burns him out. The sentencing judge imposed a sentence of two year' imprisonment which he made consecutive to the sentence imposed on the 17th February 2020. The sentencing judge accepted that there was no need, according to law, to make the sentence consecutive; but in view of the circumstances, in view of the pattern and in view of the hurt, it was necessary.

#### **Grounds of appeal**

7. The appellant puts forward the following grounds of appeal:-
  - (1) That the sentence was excessive in all the circumstances.
  - (2) That the learned sentencing judge erred in principle in imposing a consecutive sentence to the sentence imposed on the 17th of February 2020, the accused not being on bail for the offence the subject matter of the within appeal.
  - (3) The learned sentencing judge erred in principle in failing to consider the principles of proportionality and totality in imposing the consecutive sentence.
  - (4) That the learned sentencing judge erred in principle in failing to afford sufficient weight to the mitigating factors in the case.
  - (5) The learned sentencing judge failed to give any or any adequate consideration to the prospect of suspending a portion of the consecutive sentence to allow for the appellant's rehabilitation.
  - (6) That the learned sentencing judge erred in principle in imposing the within sentence in that sufficient weight was not afforded to the public interest in the appellant's rehabilitation.

#### **Submissions of the appellant**

8. The appellant submits that the discretion of the Court to impose consecutive sentences is one to be exercised sparingly. Prior to the commission of these offences, the appellant's most recent conviction for theft was in 2014. There was clearly no pattern of offending present. Furthermore, in circumstances, where there were full admissions, an indication



of a plea at an early stage in the District Court and the fact that the DPP had consented to summary disposal, it is submitted that the imposition of a consecutive sentence where there was no requirement in law to do so was disproportionate and excessive.

9. The appellant refers to the following passage in *The People (DPP) v. Casey and Casey* [2018] IECA 12 where the Court considered how the principle of totality should be engaged by the sentencing judge-

“The totality principle is potentially engaged whenever a court is seeking to reflect the overall gravity of two or more offences for which an accused faces sentencing, either by means of overlapping sentences, or wholly consecutive sentences. It permits a court to adjust the final sentence, and some or all of its individual components, as required to reach an overall figure that is proportionate both to the gravity of the offending, but also to the circumstances of the individual offender.”

10. The appellant submits that insufficient weight was given to the mitigation present and where the appellant had mental health difficulties and substance addiction and had fully co-operated with the investigation, made admissions and followed that with an early plea, together with a letter of apology, and where the DPP consented to summary disposal in this matter, the imposition of a wholly consecutive sentence with no part of it suspended was disproportionate and excessive
11. The appellant further argues that the sentencing judge did not give sufficient consideration to the prospect of rehabilitation of the appellant in his structuring of the sentence, given the age of the appellant and public interest in his rehabilitation.

#### **Submissions of the respondent**

12. The respondent accepts that no rule of law operated so as to mandate consecutive sentences and indeed, the judicial discretion as regards the imposition of consecutive sentences should be used sparingly but such sentences need not be restricted to exceptional circumstances. The respondent refers to *The People (DPP) v. G.McC* [2003] 3 IR 609 as follows:-

“...it is, of course, true and always has been true that where there have been a number of offences relating to different victims and especially if they are unconnected there is discretion in the sentencing judge as to whether he or she makes the respective sentences concurrent or consecutive.”

13. Furthermore, the respondent notes that if the sentence had been made concurrent to the sentence already imposed of five years' imprisonment with the final two suspended, this would have resulted in the appellant serving little or no additional period of imprisonment and, in effect, going unsanctioned in respect of a serious offence committed against an elderly and vulnerable victim.
14. The respondent submits that having heard the plea in mitigation the sentencing judge was apprised of all relevant mitigating factors and as regards the suspension of a portion of the sentence imposed it would be artificial to consider the sentence imposed in



isolation from that sentence imposed less than two weeks prior to the imposition of the sentence the subject matter of the within appeal wherein the sentencing judge imposed a sentence of five years' imprisonment in respect of four counts of theft; suspending the final two years of that sentence. It is submitted that, viewed globally, the sentencing judge had adequate regard to the imperative of rehabilitation in suspending two years of the global sentence imposed

15. While there was allusion on the part of the appellant to a drug habit, there was no evidence offered to support the suggestion that the appellant's offending was motivated by his addiction. While rehabilitation must be an object of all sentencing, it does not loom as large in cases such as this which do not involve sexual offending or offending for the purposes of funding a drug habit.

### **Discussion**

16. The aggravating factors in this case are manifest, the appellant is a man with 61 previous convictions and those which relate to theft and deception aggravate the offence. There was certainly an element of planning, preying on an elderly victim, who resided in a rural and isolated location. The impact on this gentleman is understandably severe, removing his peace of mind at this stage of his life.

17. Certainly, there are mitigating factors, the greatest of which is the plea of guilty.

Issue is taken with the judge exercising his discretion in imposing the sentence on a consecutive basis, that is consecutive to the sentence imposed on other theft offences which were committed after this offence. It is correct to say that there was no mandatory requirement that the sentence be imposed consecutively, however, such an option was open to the judge and in our view, an entirely appropriate approach was taken in the circumstances. Moreover, in our view, the judge made it quite clear why he deemed a consecutive sentence appropriate in light of the circumstances of the case and, significantly, the pattern of offending. We find no error in this respect.

18. It is said that the sentence is disproportionate in light of the totality principle. The sentence imposed in any given case must fairly reflect the offending conduct and the personal circumstances of the offender.
19. Proportionality ensures a just sentence reflecting both the offence and the offender. In the present case, where the appellant has a vast number of previous convictions and where some of those concern offences of dishonesty, it is our view that the sentence ultimately imposed by the judge was one which had careful regard to the principle of totality, resulting in a proportionate sentence.
20. Finally, it is contended that the judge failed to have adequate regard to the mitigating factors and should have incorporated an element of suspension in the sentence and had greater regard to rehabilitation. The judge was fully apprised of the appellant's personal circumstances and indeed had dealt with the appellant some eleven days previously when he imposed sentence on four theft offences. In addition, the appellant wrote a letter of



apology with which the judge professed himself deeply impressed. In the letter, the appellant sets out his personal circumstances including a cocaine addiction and his efforts to address it. While the judge did not expressly refer to the appellant's personal circumstances, the sentence imposed reflects consideration of those matters.

**Conclusion**

21. We are not persuaded that the sentence imposed was excessive. This is a man with a significant offending history, who ultimately received a sentence of seven years with the final two years suspended for five counts of theft. Were the judge not to impose a consecutive sentence, this would mean that the sentence would not accurately reflect the breadth of the offending conduct. Undoubtedly, due consideration was given to the appellant's mitigating factors including the strongest mitigating factor of all, that being the plea of guilty, resulting in a just and proportionate sentence with which this Court will not interfere.
22. The appeal is dismissed.