THE COURT OF APPEAL

[262/19]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

APPLICANT

AND

AKBAR JAFARI

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 26th day of January 2021, by Mr Justice McCarthy

1. This is an application by the Director of Public Prosecutions pursuant to s.2 of the Criminal Justice Act, 1993 to review of the sentence imposed on the respondent by the Circuit Court on the 18th November, 2019 in respect of a charge of conspiracy contrary to section 71(1)(b) and (4) of the Criminal Justice Act, 2006. The conspiracy was with one Noureddine Rehem and others, was committed between the 7th January, 2017 and the 17th January, 2017 and it was (according to the particulars of offence): -

> "… to do an act outside the State to wit, make false instruments, namely identity cards with the intention that they be used to induce another person to accept them as genuine and by reason of so accepting them to some act or make some omission to the prejudice of that person or any other person which would constitute a serious offence under the law that place and which would, if done in the State, constitute a serious offence contrary to s. 25 of the Criminal Justice (Theft and Fraud Offences) Act, 2001."

2. The appellant pleaded guilty at an early stage after he was sent forward for trial on the 9th November, 2018 and evidence was subsequently heard on a number of subsequent dates. The sentencing hearing was thereafter adjourned to the 16th January, 2019, to the 11th February, 2019, to the 1st April, 2019, to the 24th July, 2019, the 29th July, 2019, the 31st July, 2019 and the 11th November, 2019. All of these adjournments with one exception were granted to facilitate the respondent. A sentence of two years was imposed on the 18th November, 2019 but this was fully suspended, the respondent having entered into a bond in certain terms. The judge fixed the headline sentence at one of three years but the post-mitigation sentence imposed was one of two years. There does not appear to be any reason to suppose that the respondent is likely to find himself again in serious breach of the criminal law – he is not, for example, a person with a

history of recidivism or, say, an addiction to controlled drugs such that there is any meaningful risk that the suspended sentence will fall to be served.

3. The documents in question were fourteen in number and they have been described as Italian and Belgian identity documents. These were produced in the trial court but have not been furnished to us. It is not in debate, however, but that valid documents of such a kind could be relied upon by persons seeking to travel about the European Union.

4. The offending came to light when the Metropolitan Police intercepted a package at Heathrow addressed to the respondent in Greece. In the course of the investigation in this jurisdiction which followed the respondent's residence at the Abbey Court Hostel and what is described as a storage facility were searched. Documents were seized in the course of the searches and a sum in cash was also found in the respondent's room in the hostel. After arrest he was interviewed on three occasions in the course of which he admitted that he knew the co-accused, claimed that he had been in Greece on holiday, having travelled there alone, that he had there met members of his family and requested the co-accused to make identification documents as they wanted to travel to Europe (although they were of course in Europe in any event); he accepted that he had given photographs to Mr. Rahim (the co-accused) and that the latter had chosen the names and dates of birth which would be used in the documents. He further asserted that that was the extent of his contact with the co-accused; eight of the false documents were in his own name and the others were false. He said that he had made the arrangement with Mr. Rahim whilst in Dublin. He agreed that he had booked flights for some family members (that is how he characterised the individuals for whom he was seeking the false documents) but not all of them, claiming that he was paying for this from his work and social welfare payments. The respondent was, however, at some point (certainly November 2018) working in a restaurant in Temple Bar, on a full time basis. So one infers that no social welfare payments were being made at that time. There is little information as to his previous work record. He is described as being divorced and it seems that at the time of sentence in the Circuit Court he was in full time education which, whilst a good thing in itself, may not have been a sensible commitment since he was undoubtedly at real risk of a custodial sentence. The respondent was born in 1985. He is Afghani and sought asylum in this country on the 24th March, 2009, having arrived here in 2007. Subsequently he was naturalised in this jurisdiction being notified of that on the 28th July, 2015.

5. The identity of the individuals for whom it was sought to obtain identification documents, whether or not they were related to him (or in what degree, if so) and his motivation (said by him to be to assist members of his extended family they also having fled from Afghanistan) are matters peculiarly within his own knowledge but he did not give evidence. Of course he had no obligation to do so but nonetheless it means that there was a paucity of evidence which could readily have been remedied had he seen fit or, perhaps, were he capable of doing so. The absence of evidence is relevant to the grounds upon which the present application is made.

6. While the respondent's contention was that his motives in seeking to facilitate the entry of members of his family into the European Union were benign and that he was not engaged in the transactions for monetary gain it is clear that the co-accused was so engaged for the latter purpose. Apparently he received €50 in respect of each of the identity documents. They were obtained from a third party not before the court. It is unclear how much was paid for them.

7. The evidence on what transpired to be the crucial issue of the motivation of the respondent was his exculpatory answers to the Gardaí when being interviewed and sundry documents which were produced by him over time, and facilitated by repeated adjournments. The documents which were produced are, firstly, a translation of a purported marriage certificate issued by the Supreme Court of the Islamic Republic of Afghanistan purporting to show the marriage between one Kadija Hassani and one Mohamed Ali Jafari (the respondent's father and mother respectively); particulars are also given of the purported witnesses to the marriage. She who is described as the respondent's mother is said to have been born on the 11th July, 1969 and his father on the 25th June, 1962 but the witnesses, of whom particulars are also given, are described as being born in 1977 and 1990 respectively. The original is in a different form to the copy. The origin of the documents is unclear. There are two further documents taken apparently from the "State Civil Status Registry" and in particular its office in Helmand Province, which for a number of years could be described as an area where extensive conflict is taking place.

8. A document is also furnished which is described as a "relative's certificate" referring to fourteen persons. Certainly in our terms it is singular that a court (and the document purports to be from a court) would provide proof of the identity of individuals some years after they had left the country. That alone (the document is dated the 16th September, 2019) obviously must raise issues of its reliability.

9. The respondent also furnished emails from ten persons who purported to be the respondent's relations on whom he apparently intended to confer benefit. Each of these is very similar. They go beyond mere character references but of course issues of credibility arise also where they are concerned. Their contents is classic hearsay insofar certainly as it purports to state facts as to the relationship of the respective individuals and the respondent, their status and the respondent's efforts or activities on their behalf or otherwise. The fact that each of them consists of hearsay goes to their weight. We see that all of the individuals in question are now resident in a number of countries in the European Union. No doubt the purpose of obtaining the documents was to assist them in leaving that part of the European Union and travelling elsewhere within it. It does not appear to be in dispute but that these individuals sought or are seeking asylum as refugees in some one or more countries of the European Union based upon conditions in Afghanistan. Reference to these, of course, in itself, raises issues about the reliability of the documents purportedly emanating from that country upon which the respondent seeks to rely for the purpose of making out the proposition that his motives were benign and not self-interested (e.g. financial).

Grounds of Appeal

10. The Director of Public Prosecutions bases this application for review on the following grounds:-

    (1) The headline sentence identified was too low;

    (2) The learned sentencing judge erred by making a finding of fact that: -

        (a) none of the people named on the false identification cards were people that the court should have real concerns regarding security issues;
        (b) that all of the same people were related to the respondent's father or mother.

    (3) The learned sentencing judge erred in law and in fact in attributing too little weight to the aggravating factors, including *inter alia*: -

        (a) the impact of the offences on the security of the State and the EU;
        (b) the threat to the integrity of the State's immigration laws.

    (4) The learned sentencing judge erred in law and in fact in attributing too much weight to the mitigating factors;

    (5) The learned sentencing judge erred in law and in fact by reason of the extent of the difference sentence imposed on this defendant when compared to the co-accused.

11. The judge's sentencing remarks were relatively brief, as follows: -

> *"The position is, in the first instance, I am going to hand back the material which was submitted to me last week, and insofar as I can be satisfied that the persons who sought and were to obtain the national identity cards, I am now as satisfied as I can be that they were either related to Mr Jafari's mother or father. And, as I say, it is not a matter of which I can be 100% certain and particularly in the context of the particular charges, but I am satisfied as I can be in the circumstances. And, in my view, that puts Mr Jafari in quite a different category to that of his co-accused, Mr Rahem, who was the middle-man in organising the national identity cards and was doing so for financial gain.*
>
> *Mr Jafari, in his dealings with the Gardaí maintained at all times that his motivation was not financial but that it was a desire on his part to enable his relatives to have a better life in this part of the world. And that is a trend which has been followed over the years by immigrants who have fared well and who seek to share their circumstances with members of their family in their native country. So, in terms of culpability, Mr Jafari's level of culpability is quite different to that of his co-accused. However, he engaged in a very serious sequence of events and it is a matter which must be regarded very seriously by the Court. It is certainly of some comfort that all of the people for whom Mr Jafari was seeking to obtain cards were people known to him and not people in respect of whom the Court would have any real concerns in relation to security issues either.*

So, in terms of the headline sentence, taking into account the essentially serious nature of the activity involved, I am going to seek a headline sentence of three years.

I am going to give Mr Jafari credit for the fact that he pleaded guilty, at an early stage, and I also take into account that was a very helpful and useful plea in terms of the saving of resources. I also take into account the very full admissions that he made following his arrest and the explanations that he provided for his involvement in the offence. I also take into account the fact that he is somebody with no previous criminal convictions and he has not come to any adverse attention since the commission of the offence. I take into account the fact that he a position of employment and that he has an excellent reference from his employer to say that he is very effective in his role as the manager of a particular restaurant and that he is very well liked by staff and customers, and very efficient in the way that he performs his duties. I also take into account the circumstances of his background, the fact that he has come from a particularly volatile part of the world and that he had a very difficult experience in his early years in this country prior to the point when he obtained permission to remain resident in the state on a permanent basis.

So, taking all of those factors into consideration, the Court ultimately had a difficult decision to make in terms of whether Mr Jafari should face a custodial sentence in relation to this particular offence. And I have considered the matter at some length and I persuaded, due to the many mitigating factors in this case and particularly due to the fact that this was done not for any personal gain but in a very misguided effort to help family members from Afghanistan to gain access to Europe. In all of the circumstances I propose to impose a sentence of two years' imprisonment. But I am going to suspend it for a period of two years and I am suspending it on a condition that Mr Jafari keep the peace and be of good behaviour for a period of two years, and the amount of the bond is to be €100."

12. We think it appropriate to first address the alleged erroneous finding of fact. In that regard counsel emphasises the fact the hearsay nature of the evidence adduced and that certain discrepancies are apparent between them and the respondent's instructions to counsel as opened in court. In particular it is said that two of those referred to (from Zahra and Aslan) are characterised as nephews rather than cousins, that one Nahid was related by marriage and that her daughter Setare was not, as contended for, a first cousin. It is further submitted that the names in the purported Afghani court documents do not agree with the spelling used in a number of the emails and that a number of the names on the false documents had been selected by Mr. Rahen. It is submitted that the judge had no evidential basis for reaching the conclusion that the individuals for whom it was contended the identity documentation was obtained were not a threat to the security of the State and that the court took what was called "a leap" in concluding that the respondent's explanation for his engagement in his criminality was for the benefit of members of his family and not, in distinction to his co-accused, for financial gain.

13. The respondent has submitted that in effect, what the director is seeking to do now under this heading is to criticise the judge in relation to a matter which she failed to raise, as she ought to have done, at the hearing and in particular ought to have put the respondent on full proof of the principal factors urged in mitigation and assist the court by appropriate submission based on any evidence admitted or sought to be admitted. These propositions are not well-founded. The question therefore is whether or not the judge was entitled to reach the view she did as to the identity of the individuals sought to be benefitted by the respondent and accept accordingly the proposition that he was actuated by benign motives.

14. We have considered the evidence upon which the Circuit Court judge reached the conclusion that the appellant was not engaged in the criminality in question for the purpose of monetary gain but rather out of a desire to assist members of his family. Whilst, frankly, we might not have reached the same conclusion we must be slow to intervene to set aside a finding of fact by the trial judge who, as has been long established, is generally in a better position than we are to adjudicate on disputed issues of fact having regard to the evidence given and what we might describe as the run of the case. We do not think that this is such a case - cases where we reject the findings of fact of the trial judge and substitute our own are exceptional. There was an evidential basis for her conclusion and it is plain that she considered it carefully and indeed exhaustively. We proceed therefore on the basis of the facts as found by the trial judge and we accordingly reject the second ground (namely, that the judge erred by making the findings of fact in question).

16. The remaining factors can be dealt with together, namely, the question of the headline sentence, the weight attached to aggravating and mitigating factors and the differentiation as to sentence between the appellant and the co-accused.

17. We think that the headline sentence as fixed by the trial judge was within her margin of discretion. We have repeatedly said that sentencing is not an exact science and the choice of a headline or indeed any sentence is a matter of judgment from case to case. Comparators are available in respect of many offences or classes of offence and in a number of instances the court has elaborated with some degree of detail as to where on a scale of seriousness or otherwise a given offence might fall and given guidance as to terms of imprisonment accordingly. This offence is a rarity and accordingly, hitherto, neither comparators nor analysis has taken place. It may be that the Court will do so at some point.

18. Counsel for the appellant has placed reliance upon the fact that in the case of the co-accused a headline sentence of four years was determined to be correct, that a post-mitigation sentence of three years was arrived at and thereafter that the Circuit Judge saw fit to suspend one year of that sentence. It is submitted that the same headline sentence ought to have been selected here and that the court should thereafter have proceeded in the normal way to have regard to mitigating factors. This is of course correct as far as it goes: however, the fact remains that each accused must be dealt with

separately and we must look at the headline sentence imposed in the present case even if a different view was, rightly or wrongly, taken in another. In our view the Circuit Court Judge did not fall into any error of principle by selecting it as such, *viz* – three years.

19. On the basis of the headline sentence fixed by her, she then had regard to mitigating factors. Ultimately, she took the view that these were such as to mean that the post-mitigation sentence should be one of two years. These mitigating factors were the early plea of guilty, admissions which were inculpatory to a very significant degree, the fact that the appellant had no previous convictions, that he had a good employment record, that he came from a difficult background in a volatile part of the world and (it is said) had had difficulties in this jurisdiction (although we have some doubts about the latter). The aggravating factors are of course the multiple documents, the fact that the respondent travelled to Greece to assist the individuals, that he purchased airline tickets for a number of them, that the State's borders and immigration laws as well as those of the European Union in their integrity were undermined and that issues of the security of the State and of the European Union arose. These factors were properly taken into account when deciding on the headline sentence.

20. Ultimately, the real issue, accordingly, is not in our view that of the headline sentence or the post-mitigation sentence but rather whether or not the Circuit Court Judge fell into error in suspending the entirety of it. We think that she fell into an error of principle in this respect. We think that her error was in so suspending it without sound evidential basis (we take the view that there was no such basis). No suggestion has been made to us that such an error of principle arose by the virtue of the fact that a premium must be placed upon general deterrence in respect of offences of this kind but it must be obvious that this is a major factor pointing towards a custodial sentence.

21. We accordingly quash the sentence imposed by the Circuit Court and we proceed to re-sentence. It is now well established that when re-sentencing after a successful application by the Director to review sentence the court generally, though not necessarily or invariably, has regard to the understandable disappointment of a respondent now facing imprisonment and accordingly we will limit our intervention to requiring him to serve a custodial period of one year. Accordingly, we substitute for the judgment of the Circuit Court a sentence of two years imprisonment, the last year whereof we will suspend for a period of one year on condition that the respondent enter into a bond to keep the peace and be of good behaviour for that period.