

UNAPPROVED

NO REDACTION NEEDED



THE COURT OF APPEAL

[97/21]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DANIEL MUNTEANU

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 8th day of March 2022 by Birmingham P.

1. Before the Court is an appeal against severity of sentence. The sentence under appeal is a sentence of seven years' imprisonment, with the final six months suspended, that was imposed on 25th March 2021. The sentence was imposed in circumstances where the accused had entered pleas of guilty to 28 counts in all, being one count of participating in a criminal organisation contrary to s. 72(1)(a)(ii) and s. 72(2) of the Criminal Justice Act 2006, as substituted by s. 6 of the Criminal Justice (Amendment) Act 2009, sixteen counts of possession of a false instrument (or a material designed or adapted to create one) contrary to s. 29 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and eleven counts of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

Background

2. The background to the case is to be found in the fact that, in late 2018, Gardaí received complaints from officers of the Bank of Ireland, indicating that a large number of offences had been committed, relating to what might be described as ATM fraud. The offences involved the attachment of hidden devices to cash dispensing machines for the purpose of reading information from cards used by the bank's customers, as well as recording PIN numbers used in connection with the individual cards. Then, the information obtained is used to create cards of other kinds *e.g.* loyalty cards issued by large retailers, which, so adapted, can then be used instead of a legitimate card to withdraw money. The initial complaint related to 212 ATM withdrawals, involving 28 accounts, and then, at a later stage, there was a further complaint relating to 300 withdrawals concerning 52 accounts. In total, a sum of approximately €120,000 was unlawfully taken from ATM machines. In terms of the geographic locations in relation to where ATM machines were compromised, and where individuals had their accounts accessed, they included Monaghan, Louth, Meath, Westmeath, Galway, Offaly, Kildare, Dublin and Wicklow.

3. Gardaí mounted a major investigation, involving viewing CCTV footage linked to the ATM machines. As the inquiry progressed, attention focused on a particular vehicle, the movement of which, over a period, was plotted as matching the locations where the incidents at the ATM machines had occurred. At one point, the vehicle which became of interest was stopped with two occupants inside, one of whom being the appellant. Arising from the identification of this vehicle, an address in Navan was nominated as a place of interest. Surveillance was placed, but for a period, the investigation went cold, in part because it appears the appellant may have returned to his home country of Romania for some time in or around Christmas 2018. On 28th February 2019, a search warrant was executed at the

residence in Navan. There were two individuals there, the appellant and co-accused. Counsel indicated that three strands of evidence emerged from the search. The first strand was drawn from the seizure of mobile phones which contained photographs of four males together in the house, going back to October 2017; the fact that there were four people there was of some relevance in the context of the first offence of participation in a criminal organisation. The second stream was that a large number of what were described as loyalty cards were found. Finally, also found was a substantial amount of electronic equipment used for harvesting data, pin numbers, and electronic data from an individual's bankcard.

4. It is to be noted that, despite the number of accounts accessed and the number of customers affected, the loss was that of the Bank of Ireland rather than the individual customers, though it is the case that individual customers were considerably inconvenienced, and in some cases, much distressed by what had occurred.

Personal circumstances of the appellant

5. In terms of the appellant's background and personal circumstances, he had six previous convictions recorded, though none from this jurisdiction. Significantly, though, the appellant has two relevant previous convictions from the UK. In 2015, the appellant was convicted of possession of an article for use in fraud, and received an eight-month sentence. In 2012, he was convicted again of possession of an article for use in a fraud and received a twelve-month probation order. It is accepted that both of these offences related to the possession of so-called skimming devices.

6. The appellant was born on 3rd March 1989, and the Court was told that he had a wife and family in Romania. The Court heard that he had been in custody since 4th March 2019, and that he had been behaving positively while in custody. The Court was told that it was his intention to leave Ireland once he had completed his sentence, in order to return to Romania.

The sentence

7. The judge's approach to sentencing was to identify a headline sentence for the offence of being involved a criminal organisation as eleven years, headline sentences of ten years for the false instrument counts, and headline sentences of nine and a half years for the theft counts. Two grounds of appeal are advanced. Firstly, it is said that the judge erred in identifying inappropriately high headline sentences. It is pointed out that the headline figures were at, or close to, the maximum sentences available. While that is true in relation to the false instrument and theft offences, it is not entirely accurate in relation to the criminal organisation offence, where the maximum sentence available is one of fifteen years. Secondly, it is said that there was then inadequate allowance for the mitigating factors that were present, which included early admissions and an early plea of guilty; a plea which it is contended was particularly valuable as a contested trial would have been complex, and whatever about being complex, would certainly have been lengthy.
8. It is contended that the sentence imposed was out of line with those that have been imposed in other cases. There is reference to decisions of this Court which were seen to be relevant, decisions of trial courts, and in particular, decisions of the Special Criminal Court. There is also some surveying of media reports of cases seen as having a similar character. It is said that by reference to the review of other relevant decisions that has been undertaken, what emerges is that the sentence given in the present case is an outlier.
9. Counsel referred to the decision of this Court in *DPP v. Aylmer* [2020] IECA 106, and extracted from it what he identified as a number of factors relevant to sentences in respect of offences of participation in a criminal organisation:

- (i) It is not necessary for the prosecution to establish a link to any particular serious offence which has been or is to be committed by the criminal organisation.
- (ii) The seriousness of the offence charged will in part be determined by what type of gang he or she is assisting. This is the matter on which counsel placed particular weight.
- (iii) The activity or acts of assistance engaged in by the person could take many forms.
- (iv) There are two alternative forms of *mens rea* to be considered for the offence. This is not a matter of particular relevance in the present case.
- (v) The sentencing Court should take into account the gravity of a particular offence actually committed by the criminal organisation.

10. It is said that, while the activities in which this particular criminal gang engaged was serious and reprehensible, they were not of the same league as a gang involved in major drug trafficking, prepared to commit murder. It is said that there was nothing to indicate that this was a large-scale sophisticated operation; this was not a Mafia-type organisation. It was accepted that cards were occasionally sent from locations in Belgium or Italy, but that the main centre of activity was in Ireland, and in Romania, where money was sent by courier. Counsel submitted that the accused's role in the organisation was that of a foot soldier rather than a CEO. In the Court's view, however, what was involved here was sustained, intensive criminality. The accused was an active participant, a committed participant, in what was a criminal industry.

11. Much of the criticism of the trial judge has focused on her identification of headline sentences. In our view, the headline sentences identified were sentences that were open to her. So far as the theft and false instrument offences are concerned, it is true that the figures

identified were placed at or close to the statutory maximums, but it must be appreciated that the statutory maximums are maximums for the commission of one offence. In this case, the Court was dealing with a great number of offences. So far as the headline identified for the participation in a criminal organisation case is concerned, it is true that the sentence imposed placed the offence within the upper band, though close to the border between upper band and mid-range. However, having identified that headline or pre-mitigation figure, the judge applied very significant mitigation. The mitigation allowed has to be seen as significant, even generous, if regard is had to the fact that this was an accused who had directly relevant previous convictions. While it is possible to imagine criminal organisations engaged in more significant criminality, what was in issue here was very significant criminality in which the appellant was a committed participant.

12. In these circumstances, we have no doubt that the sentence ultimately imposed, one of seven years, with the final six months of the sentence suspended, was one that clearly fell within the available range.

13. We identify no error of principle and we must therefore dismiss the appeal.