APPROVED JUDGMENT

NO REDACTION NEEDED

THE COURT OF APPEAL

Record No: 181/2024

Neutral Citation: [2025] IECA 20

Edwards J.

McCarthy J.

MacGrath J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

RYAN FITZPATRICK

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 4th day of January, 2025.

Introduction

1. This is an appeal brought by Mr. Ryan Fitzpatrick (i.e., "the appellant") against the severity of the sentence imposed on him by the Circuit Criminal Court in respect of pleas of guilty to one count of perverting the course of justice contrary to the common law and one

count of corruption contrary to s. 5(1) of the Criminal Justice (Corruption Offences) Act 2018 ("the Act of 2018").

2. The appellant had entered a guilty plea on both counts on the 21st of March 2024. While a trial date of the 5th of November 2025 had been scheduled, it was accepted that the pleas were early ones, allowing that listing to be vacated and ensuring witnesses were not inconvenienced.

3. On the 29th of April 2024 the Court below sentenced the appellant to three years and nine months imprisonment on the corruption count, to date from 29/04/2024 and the count of perverting the course of justice was taken into consideration.

4. The appellant appeals this sentence on the grounds that the sentencing judge failed to take full and proper account of the courts' general approach that the person providing unauthorised information ought receive a more serious sentence than the person receiving information, that the sentencing judge did not attach appropriate weight to the appellant's personal circumstances when arriving at the effective sentence, and that the sentencing judge imposed a sentence which was unduly severe given the circumstances of the offence.

Factual Background

5. At the sentencing hearing on the 29th of April 2024, the Court heard evidence from a Detective Garda Garth Durnin in respect of both offences.

6. In May 2020, the gardaí became concerned that a person within the gardaí was sending images taken from the PULSE system to unauthorised persons outside the gardaí. Ms. Lauren McCann, a civilian call taker working for the gardaí, was identified as a possible suspect. On the 17th of May 2020, gardaí conducted a search of the garda station where Ms. McCann worked and searched both her and her work area. Ms. McCann immediately admitted guilt and provided the gardaí with her mobile phone.

7. An analysis of the mobile phone revealed a number of WhatsApp messages and a number of images that had been exchanged with a contact saved as 'R' who has since been identified as the appellant. The text exchanges commenced on the 10th of May 2024. The text exchanges indicate that on several occasions Ms. McCann accessed the PULSE system and provided the appellant with information about the appellant and his brother in exchange for money. This information included screenshots of pages that identify the appellant by name.

8. The gardaí identified the phone number associated with 'R' as belonging to the appellant and subsequently applied for a search warrant to search his premises. On the 27th of May 2024, this search warrant was executed. The gardaí elected to breach the door of the premises rather than knock and disclose the search warrant in order to preserve any vital evidence at the scene. Immediately upon entering the building the gardaí encountered the appellant upstairs running towards the toilet. The appellant had a mobile phone which he threw into the toilet. The gardaí recovered the phone but were unable to retrieve information from the phone due to water damage. The gardaí did recover a SIM card from the phone that was registered to the same mobile number that Ms. McCann had identified as 'R'.

9. The appellant was arrested at a later date for the purpose of interview. Nothing of evidential value arose from this interview. When inference provisions were invoked relating to possession of the phone, the content of the messages exchanged with Ms. McCann, and his attempt to destroy the mobile phone, the appellant replied, *"No comment"*. A file was subsequently sent to the Director of Public Prosecutions and while directions were pending, the appellant left the jurisdiction. A European Arrest Warrant was issued for the appellant and was executed in Spain. The appellant spent a period of time in custody in Spain while the European Arrest Warrant was being executed. The appellant was granted High Court bail upon return to Ireland.

Personal Circumstances of the Appellant

10. The appellant was 26 years of age at the time of sentencing. The appellant is the youngest of five siblings and lived with his mother and father prior to sentencing.

11. The appellant has 30 previous convictions including two convictions for possession of drugs for sale or supply. The appellant has 24 road traffic convictions including 10 for dangerous driving, two for hit and run, and one for endangerment.

12. The appellant is a single father with two children from a previous relationship, aged two and four, and *"gets on extremely well"* with his former partner. The appellant takes the children every weekend and provides for them financially.

13. The appellant has a history of employment. He completed a year of higher education in business management before working in a car valet business, then installing pipes, and then working as a window cleaner in his father's business.

14. The appellant's father recently suffered a serious fall leading to a head injury and months of hospitalisation. The appellant subsequently took over his father's business. Counsel for the appellant submitted that the appellant is now *"integral"* in providing for the entire family.

15. The appellant had a drug problem in his youth that has since been resolved.

Sentencing Judge's Remarks

16. On the 29th of April 2024, the judge in the court below passed sentence on the appellant. The judge noted the factual background of the case as described by Detective Garda Durnin.

17. The sentencing judge identified the relevant aggravating factors in this case as follows:

"He has a record of convictions, some of them reasonably serious. And the Court does take those convictions into account. The Court in the past imposed a two-and-a-half-year sentence on Ms. McCann for her part in this particular criminal scheme. Mr. Le Vert submits to me that normally, it's the State employee or the State agent who suffers the most. I'm not sure in this case about that. It seems [the appellant] *was there and there were certain inducements given to this young lady. And this young lady, by reason of her immaturity and stupidity, couldn't withstand these inducements."*

18. In relation to mitigation, the sentencing judge made the following remarks:

"Now, the mitigation, as identified by Mr. Le Vert, is clear. There is a plea of guilty. There is general cooperation. There is probably no great admissions in the case. There is a work history. There is – I think he's a – he's certainly got the ability to change his life. He seems to be an intelligent man. It seems many people have good things to say about him, and the Court has regard to that."

19. The sentencing judge identified a headline sentence of six years and a post-mitigation sentence of 4 years. The sentencing judge reduced the sentence by a further three months to reflect time already served, including time spent in custody awaiting rendition in Spain, resulting in an effective sentence of three years and nine months.

Submissions on Appeal

Appellant's Submissions

20. The appellant seeks to appeal the sentence imposed in this case on the following grounds:

1. Failure to take into account the general approach of the courts that the person providing unauthorised information in such cases should receive a more serious sentence than the person receiving information.

2. Failure to attach adequate weight to the personal circumstances of the appellant when arriving at the effective sentence.

3. Imposition of a sentence that was unduly severe given the circumstances of the offence.

21. The appellant submits that there are sufficient grounds to believe that there is a general principle that providers should be treated more severely than receivers in cases such as this, and that the disparity between Ms. McCann's sentence and the appellant's sentence (which was one year and six months longer than Ms McCann's) constitutes an error of law.

Respondent's Submissions

22. The respondent submits that the sentence imposed in the court below is not unduly severe on the following grounds:

a. No principle exists to indicate that the provider of information should be treated more severely than the receiver in cases such as this. The respondent submits (quoting a paper delivered by a former Director of Public Prosecutions to the Burren Law School) that *"one of the problems of offences of corruption is that in many cases it is impossible to say which of the two parties to the corrupt act are more culpable"*. The media reports of comparators are also not sufficient to extrapolate a general principle

of sentencing law, nor are these judgments of a Superior Court which indicate a binding principle of sentencing. Sentences imposed by courts of first instance are also often *ex tempore* judgments and *ex tempore* judgments can be *"of limited value as precedents for other cases"* – per Murray C.J. in *People (DPP) v. Redmond, (*Court of Criminal Appeal, unreported ex tempore, 27th of May 2009).

b. The sentencing judge did attach sufficient weight to the personal circumstances of the appellant. The sentencing judge reduced the sentence from six years to four to reflect the mitigating factors at play. This was an appropriate reduction. The appellant's guilty plea, while received in advance of a trial date, was not entered at the earliest possible opportunity. By comparison entering a signed plea at the earliest possible opportunity has been held by this court to entitle the accused to a reduction of one third, which is what the appellant in this case received. Additionally, the claim that the appellant received insufficient credit for not running a potential defence alleging that another may have used the SIM card fails to engage with a number of factors. These factors include the appellant's exercise of his right to remain silent during garda interviews, thereby not advancing any account of SIM card switching; the appellant's response to all questions relating to possession of the SIM card being *"No comment"*; the appellant's efforts to destroy the phone in order to deprive gardaí of access to the information on it; the fact that the material sent in message exchanges with Ms. McCann predominately related to the appellant.

c. The sentence was not unduly severe given the circumstances of the offence. The sentencing judge nominated a headline sentence of six years for what he considered to be two *"very serious offences"*. The notion that corruption is a serious offence is supported by the Supreme Court in *People (DPP) v. Forsey* [2019] 2 IR 417 where Ms. Justice O'Malley noted *"that corruption is a serious and pernicious offence"*.

Additionally, the respondent submits that the deliberate corruption of a civilian operative within the gardaí is always a significant matter and that the headline sentence reflects this appropriately. The sentencing judge later reduced the sentence to one of four years imprisonment to reflect the mitigation, further indicating that the sentence imposed was not unduly severe.

Court's Analysis & Decision

23. In sentencing scholarship the cardinal seriousness of an offence refers to its relative gravity, based on the maximum potential penalty, *qua* other different types of offences in the criminal calendar. However, the ordinal seriousness of an offence refers to its relative gravity, based on culpability and harm done or that might potentially have been done, in the particular circumstances of the case, *qua* other offences of the same type.

24. While the two offences for which the appellant was to be sentenced had different levels of cardinal seriousness (i.e., the maximum potential penalty on indictment for the corruption offence was imprisonment not exceeding ten years and an unlimited fine; whereas the maximum penalty on indictment for the common law offence of perverting the course of justice was notionally imprisonment for life), it is clear that in the circumstances of the case, and notwithstanding their differing cardinal seriousness, the corruption offence was in fact to be treated as *de facto* the more serious of the two offences in the circumstances of the case.

25. This can be stated with some confidence because, in the circumstances of this case, the perversion of the course of justice offence equates substantially with the statutory offence of destruction of documentary evidence, contrary to s. 17 of the Criminal Justice Act 2011 ("the Act of 2011"), which carries a maximum penalty of imprisonment for five years and an unlimited fine. The definition of a document under s. 2 of the Act of 2011 includes *"information recorded in any form and any thing on or in which information is recorded and*

from which information can be extracted", which would clearly include a mobile phone. Section 17 of the Act of 2011 applies to destruction of evidence relevant to the investigation of any "*relevant offence*". Relevant offences for the purposes of the Act of 2011 are listed in Schedule 1 to that Act. They now, by virtue of an amendment to the said Schedule 1 effected by s. 28 of the Act of 2018, include an offence of corruption under s. 5 of the Act of 2018. At the time of the raid on the appellant's house under warrant the gardaí were investigating suspected corruption under s. 5 of the Act of 2018 and, as the appellant destroyed evidence potentially relevant to that investigation, it seems to us that he might equally have been charged with destruction of evidence contrary to s. 17 of the Act of 2011, as with perversion of the course of justice. In circumstances where the same factual matrix would allow for prosecution of either offence, they are ordinally equivalent. It is appropriate therefore to have regard to the fact that, in respect of the exact same conduct, a 5 year maximum penalty would have applied had the appellant been charged under s. 17 of the Act of 2011, rather than being charged with the common law offence of perverting the course of justice.

26. As regards the corruption offence, however, bearing in mind the maximum penalties, and having regard both to the culpability of the appellant and the harm actually done, and further the harm that might have been done, we are satisfied that the gravity of the offending conduct, in ordinal terms, was significant.

27. An offence under s. 5(1) of the Act of 2018 is committed in the following circumstances:

> "*A person who, either directly or indirectly, by himself or herself or with another person—*
>
> *(a) corruptly offers, or*
>
> *(b) corruptly gives or agrees to give,*

a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to his or her office, employment, position or business shall be guilty of an offence."

28. The mischief that is corruption was well characterised by Thomas L.J. in *R v. Innospec Ltd [2010] Crim L.R. 665,* where he stated*:*

"corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality-of-life and allows organised crime, terrorism and other threats to human security to flourish."

29. The particular form of corruption that we are concerned with in the appellant's case is the paying of money, in effect a bribe, to a Ms. McCann, a civilian employee of An Garda Síochána to furnish intelligence information to him harvested from the Garda confidential computer system known as Pulse, which information substantially, although not exclusively, comprised data concerning the appellant personally and his suspected criminal activities . The information in question was screen shotted by the civilian employee and transmitted by mobile phone using "WhatsApp" messenger to a number attributed in the said employee's mobile phone to a person called "R". In circumstances where during the garda raid a mobile phone was thrown by the appellant into, and later recovered from, the toilet bowl in the appellant's home, and that mobile phone contained a SIM card registered to the same mobile number that the civilian employee was sending WhatsApp messages to, and in circumstances where the appellant has since pleaded guilty to s. 5(1) corruption, it is a reasonable inference that the appellant was "R". The Court has been shown printouts of the screen shots transmitted to R by the civilian employee, and the information contained therein constitutes intelligence gathered during garda operations and may on that account alone be inferred to have been confidential and sensitive.

30. The disclosure of such information by the supplier, i.e., Ms McCann, was corrupt and constituted a serious breach of trust or abuse of position of office. However, as regards the receiver of the information, in this instance the appellant, his conduct was also corrupt and in the circumstances of this case was itself highly aggravated. We should say that contrary to the submission made by counsel for the appellant, there is no principle of sentencing law which says that the supplier of information is necessarily to be treated as more culpable than, or equally culpable with, the receiver. It will depend on the circumstances of the individual offender's case, and the level of their involvement.

31. A single instance of corrupt conduct will be less culpable than corrupt conduct over a sustained period of time. Opportunistic and unplanned corrupt conduct will be less culpable than sophisticated and/or planned corrupt conduct. Where the corrupt conduct is part of group activity or committed in support of organised crime, that is an aggravating circumstance. The role of the offender is highly relevant to culpability. A peripheral role may be less culpable than a significant but non-leading role, which in turn will be less culpable than a leading role. Involving others through pressure or influence is aggravating. The intentional corruption of an official performing a public function will always be a significant aggravating factor. If that person has a vulnerability that is exploited it will aggravate culpability all the more. The motive behind corrupt activity will also be highly relevant to culpability, whether that be financial, commercial or political gain; or in the case of corruption in a law enforcement context, the facilitation of the commission of crime, or the evasion of detection of involvement in crime, or a deliberate and calculated effort to undermine the proper functioning of the police and security services, the criminal justice system, or the courts, either as a benefit to the accused personally or to someone else. Conversely, involvement in corruption through coercion, intimidation or exploitation may reduce culpability. Further, having limited awareness or understanding of the extent of corrupt activity may also reduce

culpability. The amount or size of any gift, inducement or payment (i.e., bribe) to the supplier of information by the receiver may be a relevant factor in assessing culpability. The offender's culpability may also be aggravated by extrinsic circumstances, e.g., by having previous convictions for the same or a similar type of offending, or by having committed the offence while on bail or during the currency of a suspended sentence. It is important to say that this does not purport to be an exhaustive list of factors potentially bearing on culpability, but it is intended to highlight some of more common ones.

32. As regards the harm done, or that might be done, corrupt conduct is, as Thomas L.J said, corrosive of social norms. The police and the criminal justice system cannot function properly unless intelligence gathered during police criminal law enforcement, investigation and surveillance operations can be held securely, confidentially and, where necessary, secretly, such that access to it and its dissemination is restricted only to those with the necessary authorisation. It requires no stretch of imagination to conceive that unauthorised access to and dissemination of police intelligence data will at the very least be undermining of effective crime detection and law enforcement, and in certain circumstances could even endanger a life or lives. In this particular case the appellant was alerted to the fact that he was a person of interest to gardaí in the context of being suspected of involvement in criminal activity, and of some of the basis for that suspicion. He was also alerted to police intelligence data concerning others and associates

33. In assessing the appellant's culpability, and the harm done, and further potential harm that might have been done but for the detection of the crime, we consider that the existence of multiple aggravating circumstances justified, in his case, the nomination by the sentencing judge of a headline sentence of 6 years imprisonment. The offence here was aggravated by:

- Being comprised of conduct sustained over a lengthy period of time, as is apparent from the WhatsApp screenshots provided to the Court;

- Being pre-planned, and sophisticated in execution in that the WhatsApp screenshots reveal that in addition to general police intelligence data concerning the appellant provided to him by the civilian employee as supplier, the appellant requested and was supplied "to order" with certain specific information relating to himself, his brother, and other named individuals.

- The fact that money was to be paid to the supplier of the information, of at least €500 per the WhatsApp messages, albeit that there was no evidence at the sentencing hearing of any amount or amounts actually paid over, or dates on which such payments may have been made.

- The motive for the corrupt activity on the appellant's part was prospective personal benefit; through either the facilitation of the commission of crime, alternatively the evasion of detection of involvement in past crime, alternatively a deliberate and calculated effort to undermine the proper functioning of the police and security services, and/or the criminal justice system, and/or the courts.

- There was significant undermining of the proper functioning of An Garda Síochána in its crime detection and law enforcement role, for a significant period of time and only limited by the eventual detection and termination of the corrupt activity of the appellant and his associate, the aforementioned civilian employee. That this occurred at all was potentially undermining of public confidence in An Garda Síochána. It was also potentially undermining of any confidence on the part of intelligence sources that information supplied by them to An Garda Síochána would be held securely and kept confidential.

- This appellant's offending was committed whilst he was on bail, a factor which by virtue of s. 11 of the Criminal Justice Act 1984 is to be treated as aggravating. Further, this offending was committed during the currency of a 3 year suspended sentence for an endangerment offence.

- The charge of perverting the course of justice to which the appellant pleaded guilty, the circumstances of which involved the destruction of evidence, was to be taken into consideration in sentencing globally on the s. 5(1) corruption count.

34. Counsel for the appellant, having been asked at the oral hearing to identify what errors of principle the sentencing judge had committed in sentencing the appellant, pointed firstly to a claim that his client should not have been treated more severely than the civilian employee, Ms. McCann; and secondly to a remark by the sentencing judge to the effect that *"Destroying the evidence is a serious matter because this evidence could have helped reveal other avenues of enquiry for the guards"*, which counsel contended was unsupported by the evidence.

35. As regards the first alleged error, we do not agree. Whether or not the sentence imposed on the civilian employee was correct, there was nothing in the evidence at the appellant's sentencing hearing to suggest that he could either avail of the parity principle, or to credibly suggest that his involvement was less aggravated than hers. Moreover, in terms of mitigation and relevant personal circumstances, there were numerous differences in the circumstances of their cases, as pointed to by counsel for the respondent in his written submissions, including (in her case): a signed plea of guilty, extensive admissions, the provision of her phone and passcode to the investigation team, the fact that she was in her first position in her work life, her youth and immaturity, and her absence of previous convictions.

36. In contrast the appellant here had taken a trial date, had been totally none-cooperative, had engaged in destruction of evidence with a view, it may be inferred, to obstruction of justice, had absconded from justice resulting in a request for his rendition from Spain on foot of a European Arrest Warrant, had offended while on bail, had offended during the currency of a suspended sentence, and had significant previous convictions leading progressively to total loss of mitigation for being of previous good character.

37. We find no error on the trial judge's part in neither treating Ms. McCann and the appellant as being of equal culpability, nor treating the appellant as being of lesser culpability than Ms. McCann. He would have been quite wrong had he done either of these things.

34. As regards the second alleged error, while it is true that there was no factual basis for asserting that there was evidence on the appellant's phone which could lead to the revelation of further avenues of enquiry, and it was an error to suggest that that was so, we do not consider this error led to the imposition of an incorrect sentence. A reviewing appellate court will only be justified in interfering with a sentence which has been imposed, if the sentence is wrong in the circumstances of the case. We do not consider that to be true in the circumstances of this case.

35. We think it proper to comment that in this case there was unquestionably destruction and spoilation of evidence, even though it is not known for certain whether that evidence would have been incriminating or not. However, when a party destroys evidence, it may be reasonable to infer that that party had "*consciousness of guilt*" or other motivation to avoid the evidence. Therefore, the factfinder may conclude that the evidence would have been unfavourable to the spoliator. We consider that such an inference was unquestionably open to the trial judge in this case, and that it is reasonable to conclude that he must have drawn that inference, although he did not state in terms that he did so.

36. While it was only pressed lightly by counsel, a further ground of appeal suggests that the trial judge gave an insufficient discount for mitigation. We reject this contention *in limine*. He received a discount of one third from the headline sentence, plus an additional three months to take account of time served. Such a level of discount, having regard to the evidence, was well within the sentencing judge's margin of appreciation.

37. In conclusion, we find no error of significance in the sentencing judge's overall approach or in the global sentence ultimately imposed by him. The appeal is therefore dismissed.