



**THE COURT OF APPEAL**

**276CJA/2018]**

**The President  
Edwards J.  
Kennedy J.**

**BETWEEN/**

**SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**- AND -**

**MICHAEL FARRELL**

**APPLICANT**

**RESPONDENT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 30th day of April 2019 by Ms. Justice Kennedy**

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 19th October 2018. Following a trial in the Circuit Criminal Court which concluded on the 18th July 2018, the respondent was found guilty of four counts of arson contrary to s.2 of the Criminal Damage Act, 1991 and two counts of unauthorised interference of a vehicle contrary to s.113 of the Road Traffic Offence Act, 1961. The respondent was sentenced to four and a half years' imprisonment with the final eighteen months suspended on terms.

**Background**

2. The offences in question relate to two separate incidents. On the 11th January 2017, three cars were set alight at Tomar Court in Palatine Square, Dublin 7, causing extensive damage to the vehicles. This was a residential estate and residents in the vicinity had to be evacuated. Following this, Garda surveillance was placed in the area and on the 18th January 2017, a member of an Garda Síochána, observed the respondent on the North Circular Road where he set alight a bag of rubbish. Other Gardaí in the area were alerted, who then followed the respondent to Cavalry Row, Dublin 7 where they observed him in the back of a vehicle which was shortly afterwards set alight.

3. The respondent was arrested and interviewed in respect of both incidents and made no admissions in relation to either. CCTV footage in respect of the incident at Tomar Court was gathered and showed a man entering the housing estate in the early hours of the morning. The respondent accepted that he was on the CCTV but maintained that he had nothing to do with the fire. He pleaded not guilty and following a trial of three days' duration, unanimous verdicts of guilty were returned in respect of all counts on indictment.

**The Sentence**

4. At the sentence hearing, a number of victim impact reports were handed into the court which detailed the financial loss suffered by the victims and the significant emotional impact of the offences on them. The sentencing judge identified the serious nature of the offending in relation to the arson as the primary aggravating factor in circumstances where the arson took place in a built-up residential area and led to residents having to leave their premises. The judge also referred to the emotional and economic impact on the victims and the pre-meditated nature of the offending as aggravating factors and noted that the respondent had 159 previous convictions but accepted that many of these were for road traffic or minor matters.

5. In relation to mitigating circumstances, the judge observed that the most important mitigating factor, that being a plea of guilty, was not present in this case. She referred to the report of Dr Fitzpatrick, Clinical Psychologist, which details the respondent's various difficulties including poor cognitive abilities, the fact that he suffered a head injury as a child and his subsequent history of substance abuse. The respondent has engaged in personal and vocational training, which we note was something which Dr Fitzpatrick was of the opinion, should be prioritised in his case. The Court also referred to a letter from the respondent's mother but noted that the respondent's numerous previous convictions diluted the character testimony available to him.

6. The judge went on to identify a headline sentence of six years' imprisonment and, taking into account the mitigating circumstances, she then imposed a sentence of four and a half years' imprisonment and suspended the final eighteen months on terms. The terms of that suspension, as we have already indicated, reflected the recommendation of the psychologist.

**Personal Circumstances**

7. At the time of sentencing, the respondent was 26 years of age. He had 159 previous convictions, 23 of which are Circuit Court convictions. At the sentence hearing, the report of Dr Fitzpatrick, was furnished and that stated that the respondent sustained an acquired brain injury as a young child, as a result of a road traffic accident which led to behavioural and cognitive difficulties which resulted in him being referred to the child and adult mental health service in the Mater Hospital when he was six years of age, during which time he was reportedly diagnosed with a certain disability. The report also detailed his history of poly-substance dependency

which has had a significant impact on him.

### **Grounds of Appeal**

8. The DPP puts forward 8 grounds of appeal, as outlined in written submissions: -

- (i) The learned sentencing judge erred in principle in failing to properly formulate and structure the sentence in accordance with approved sentencing practice as enunciated by the Court of Criminal Appeal.
- (ii) The learned sentencing judge erred in principle in failing to adequately reflect the seriousness of the offences by marking a "headline sentence" as being one of 6 years' imprisonment.
- (iii) The learned sentencing judge erred in principle in failing to adequately reflect the seriousness of the offence by imposing a sentence of 4 and a half years' imprisonment and suspending the final 18 months of that sentence.
- (iv) The learned sentencing judge erred in principle in failing to attach sufficient weight to the aggravating factors in the case, in particular the potential risk to the lives of a number of people in a residential estate.
- (v) The learned sentencing judge erred in principle in failing to attach sufficient weight to the evidence of the respondent's previous convictions, including previous convictions for a number of indictable offences.
- (vi) The learned sentencing judge erred in principle in giving undue weight to mitigating factors in the case.
- (vii) The learned sentencing judge erred in principle by failing to provide the respondent with a sufficient deterrent not to reoffend.
- (viii) In all the circumstances the sentence imposed by the learned sentencing judge was unduly lenient.

9. The DPP submits that the headline sentence of six years' imprisonment does not reflect the gravity of the offences, and coupled with the respondent's persistent offending, make the headline sentence unduly lenient. The appellant emphasises that the maximum sentence for arson is one of life imprisonment and in circumstances where the respondent was found guilty of four separate counts of arson, gravity is on the upper end of the scale in terms of potential harm. Moreover, when one considers the impact on the victims, the premeditated nature of the offending behaviour, the respondent's previous convictions and the fact that the offences were carried out seven days apart; the pre mitigation sentence, it is argued by the appellant, was inadequate.

10. Furthermore, the DPP argues that the sentencing judge gave excessive credit for the mitigating factors. It is argued that the mitigating features that reduced the sentence from six years to four and a half years, and then down to a net three years' imprisonment, were essentially the same factors, namely, his psychological issues and his drug addiction and it is submitted that an effective 50% reduction was excessive in circumstances where the respondent had pleaded not guilty. Finally, the argument is advanced that the sentencing judge erred in not referring to the principle of deterrence in the course of sentencing.

11. In reply on behalf of the respondent, Mr McCarthy BL submits by written submissions that the headline sentence of six years not only reflects the gravity of the offence but also reflects the particular circumstances of the respondent and in effect, his moral culpability. Moreover, it is submitted that the sentencing judge was conscious of the need to consider both the offence and the offender and stated very clearly how seriously she viewed the offences. Moreover, he says that the mitigating factors in this case are unique to the respondent as he suffers from extremely low cognitive ability as a result of an acquired brain injury, and has a longstanding drug habit. In the circumstances, it is submitted that the appropriate balance was struck.

12. In relation to deterrence, the respondent submits that the concept of deterrence might be beyond the respondent's capacity to understand and fully appreciate given his intellectual difficulties and it is submitted that a term of incarceration of four and a half years with the final eighteen months suspended by its nature and duration must and can only be seen as a deterrent.

### **Discussion and Conclusion**

13. Grounds 2 – 5 inclusive concern the pre mitigation sentence of six years' imprisonment, which, it is argued does not adequately reflect the gravity of the offences. These were undoubtedly serious offences which is reflected by the maximum sentence of life imprisonment. The offences were committed in a residential area. Mr Farrell is a man with 157 previous convictions. The impact on the victims was significant.

14. The appellant argues that double credit was given for the mitigating factors, these included Mr Farrell's psychological condition and his drug addiction difficulties. Testimonials were furnished to the court but the judge was of the view that his previous convictions diluted the value of such testimonials. In the latter respect, it is correct that his previous convictions give rise to a progressive loss of mitigation. He was given every possible credit for the mitigating factors, reducing the sentence by a quarter in the first analysis and the judge then proceeded to suspend the final eighteen months on terms as recommended by the clinical psychologist.

15. In the Court's view, the sentence imposed was lenient. However, the judge applied the correct legal principles and imposed a sentence for the offences as committed by this offender with his particular set of circumstances. The issue is whether the sentence is so unduly lenient, so as to warrant intervention by this Court, we are fully satisfied in the particular circumstances of the respondent that intervention is not warranted.

16. We are satisfied that the sentence imposed fell entirely within the discretionary range available to the sentencing judge and in the circumstances we have no hesitation in dismissing the appeal.