



**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 121

**Birmingham J.  
Sheehan J.  
Mahon J.**

**154CJA/14**

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

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**V**

**ALAN HARTE**

**APPELLANT**

**RESPONDENT**

**Judgment of the Court (ex tempore) delivered on the 24th day of April 2015 by**

**Mr. Justice Sheehan**

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, for a review of the sentence imposed on the respondent on the grounds of undue leniency.

2. The respondent was convicted of an offence contrary to s. 7(2) of the Criminal Law Act 1997, namely doing an act with intent to impede apprehension or prosecution. The respondent was sentenced to six years imprisonment for the said offence with the final three years of the sentence suspended on the following terms:

- (i) That he keep all supervision appointments with his Probation Officer.
- (ii) That he advise his Probation Officer of his address for the receipt of letters regarding supervision appointments and also immediately advise the Probation Officer of any change of address.
- (iii) That he reside at an address to be agreed with his Probation Officer.
- (iv) That he complies with all directions of the Probation Officer in relation to substance abuse.
- (v) That he attends for assessment and treatment as directed by the Probation Service.
- (vi) That he maintain a drug free status.
- (vii) That he engage with such counselling and support services as directed by the Probation Service.
- (viii) That he submit to the direction of the Probation Service in relation to drug tests.
- (ix) That he attends such training or employment services as directed by the Probation Service.
- (x) That he attends or participates in such therapeutic services and assistance with life skills as directed.

3. These were also the conditions under which a three year post release supervision order was made by the sentencing judge.

**Background**

4. The background to this offence is as follows. The respondent pleaded not guilty to the murder of Peter Gunne, the deceased, on the 4th January, 2009. On the 31st March, 2014, the respondent was acquitted of that offence by a jury, but found guilty of an offence contrary to s. 7(2) of the Criminal Law Act 1997. A summary of the evidence was given at the sentence hearing on the 19th May, 2014. The respondent had met the deceased and others at around 11.30 am on the 3rd January, 2009, and they had gone drinking together in a public house in the city centre.

5. Around midnight they were joined by a third person, Kastriot Boza, and at around 2.30 am on the 4th January, the deceased, the respondent and Mr. Boza all left the public house with another male and returned by taxi to a flat in Phibsboro, Dublin, that was then being occupied by Mr. Boza.

6. The deceased was stabbed and killed in the flat. As a result of a phone call sometime after the killing, an associate of Mr. Boza, Mr. Rama, drove his car to the flat in Phibsboro and unknowingly assisted Mr. Boza and the respondent in bringing the body of the deceased to a remote lane at the back of Dublin Airport. This area was known to the respondent and was in reasonable proximity to a house that was being built by a relative.

7. When Mr. Rama had arrived in Phibsboro, the body of the deceased man was placed in the back of the car by the respondent and Mr. Boza on the pretext that the deceased man was asleep.

8. The respondent then sat in the front seat and, having chosen the location, gave directions to the driver. At that location, Mr. Boza and the respondent removed the deceased's body from the car and put it into a water filled trench.

9. As a result of confidential information the gardaí recovered the body of the deceased ten days later. The prosecution case was that the killing was committed by the respondent, however, this was rejected by the jury.

10. The respondent gave evidence that the killing was committed by Mr. Boza.

11. Two victim impact statements were read to the court in the course of the sentence hearing; one on behalf of the deceased's partner and the other was read by the deceased's mother. Both victim impact statements recounted the devastating effect that the deceased's death had on their respective families.

12. The sentencing court was informed that the Director of Public Prosecutions viewed this case as being at the upper end of the scale noting that the maximum sentence for this particular offence was one of ten years imprisonment.

13. Section 2 of the Criminal Justice Act 1993 provides as follows: -

*"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.*

*....*

*(3) On such an application, the Court may either -*

*(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*

*(b) refuse the application."*

The principles governing the law in relation to undue leniency appeals pursuant to s.2 of the Criminal Justice Act 1993 were summarised in a judgment of the Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v Derrick Stronge* [2011] 5 JIC 2301 where it was stated that: -

*"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are: -*

*(i) the onus of proving undue leniency is on the D.P.P.:*

*(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former:*

*(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate:*

*(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal:*

*(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise:*

*(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally*

*(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.*

*The relevant cases are The People (D.P.P.) v. Byrne [1995] 1 ILMR 279, The People (D.P.P.) v. McCormack [2000] 4 I.R. 356 and The People (D.P.P.) v. Redmond [2001] 3 I.R. 390."*

14. In applying these principles to this case, this Court notes that the sentencing judge took into account the seriousness of the offence, the victim impact statements and the personal circumstances of the offender.

15. In the course of his plea in mitigation, counsel for the respondent submitted that the respondent *"came from as bad a background as one could imagine."* His childhood was marked by extreme deprivation and neglect which continued to affect him throughout his life and this was confirmed by a report prepared by a Forensic Clinical Psychologist for the sentencing court and similarly echoed in a report prepared by the Probation Service.

16. In approaching the question of sentence in this case, it is clear from an examination of the transcript that the sentencing judge applied the principle of proportionality and also sought to reconcile that principle with the penal aim of rehabilitation.

17. It is the Court's view that this is not a case where it could be said that the sentencing judge erred in principle either in his approach to sentence or in the sentence actually imposed. This Court notes that the terms on which the remainder of the sentence was suspended are onerous terms and represent an additional significant sanction in addition to the period of imprisonment that was imposed.

18. This Court also notes that it is clear from the hearing that, notwithstanding the strong submissions made by counsel for the Director of Public Prosecutions in respect of undue leniency, the gap between the parties is in fact a relatively narrow one. The complaint is that a portion of the suspended part of the sentence should be removed and the respondent returned to prison to serve a further sentence of perhaps a year or eighteen months and this to take place in circumstances where he is now a person who has been released from prison and is presently under the active supervision of the Probation Service and working in the community.

19. This Court is of the view that a response such as this, at this point, could be considered to be disproportionate and possibly

counterproductive. Bearing in mind all these factors, this Court considers that the sentence imposed by the sentencing judge in this case does not constitute a substantial or gross departure from what would be the appropriate sentence in the particular circumstances of the case.

20. Accordingly, the Court holds that the sentence was not unduly lenient and refuses the application.