



THE COURT OF APPEAL

**Birmingham P.
Whelan J.
McCarthy J.**

Court of Appeal Number 267/2017

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

MARK O'SHEA

APPELLANT

JUDGMENT of the Court delivered on the 19th day of October 2018 by Ms. Justice Máire Whelan

1. Before the Court is an application brought by the appellant, Mark O'Shea, appealing a sentence on grounds of severity, being a sentence of imprisonment for a period of five years. The offence to which he entered a plea was possession of an explosive in suspicious circumstances, contrary to s. 4 of the Explosive Substances Act 1883, as amended by s. 15(4) of the Offences Against the State (Amendment) Act of 1998.

2. The sentence sought to be reduced on grounds of severity was imposed on 23rd November 2017 at Dublin Circuit Criminal Court. The sentence was backdated to 14th June 2017, which was the day on which the appellant first went into custody.

The relevant facts

3. The appellant was born on 22nd August 1985. On 11th June 2017, when he was then aged 31 years, a device commonly known as a "pipe bomb" was discovered in the driveway of the dwelling house of a prison officer in Dublin 3.

4. The injured party's young son discovered the device whilst playing with his dog in the front garden. He had kicked it under a bench. The child brought the device into the home where it was handled by the child's grandmother and grandfather who mistakenly believed that it was connected to the family's motor vehicle. In turn it was handed to the prison officer who was at home at the time.

5. The injured party took the pipe to a sink where he saw ball bearings coming out of it and got a fright, realising that it was not a part of the motor vehicle.

6. The immediate result was that the injured party and his family had to leave the house and a bomb-disposal team arrived on site.

7. CCTV footage obtained that same day by the gardaí showed a man, later identified as the appellant, placing the device under the car. It transpires that the appellant had been stopped by the gardaí approximately 15 minutes before he placed the device under the vehicle and at that time officers had noted the clothing he was wearing. They were in a position to confirm that same matched the clothing he was seen wearing in the CCTV footage. Garda investigations identified other CCTV material in the general area which captured the appellant at one stage earlier on in the day in question with two men and later in the company of one man. One such CCTV footage showed the appellant throwing a bag away when he noted members of the gardaí approaching. After he had spoken with the gardaí he then retrieved the bag which CCTV showed was in his possession when he went on to the injured party's property shortly afterwards.

8. The appellant was apprehended on 14th June 2017 after comprehensive detective work and analysis of CCTV at various locations. He was arrested for the offence of possession of explosives. During subsequent detention he was interviewed on a number of occasions.

9. During an interview he stated that he had been asked by two individuals to place an item under a car at the address in question. He had agreed to do so because he had been told he would be given some money in return. In the course of one interview he informed the gardaí that he knew the item was a pipe bomb.

10. A ballistics examination subsequently carried out on the device confirmed that it consisted of a rolled steel pipe 36 mm in length and 1-inch in diameter with improvised end caps. On receipt of the device by the ballistics section of An Garda Síochána there was no fuse present. The contents of the device was found to consist of six 12-gauge shotgun cartridges. The cartridges had been cut open and their contents removed. The device also contained a quantity of shotgun cartridge lead pellet, estimated at 109.3 g in total, together with 0.75 g of shotgun cartridge propellant. The ballistic expert concluded that the materials formed the greater part of an improvised explosive device and could be described an explosive substance within the meaning of the legislation notwithstanding that the fuse was missing. Despite a search of the prison officer's garden and house, the fuse was not recovered. At sentencing the judge heard evidence that the bomb could not have exploded without the fuse. However, there were explosives packed in the pipe bomb.

Victim impact statement

11. The injured party, a prison officer, compiled a victim impact statement. He was treated by his doctor on three or four occasions following the incident. Primarily, he was suffering from stress and anxiety. He was initially prescribed medication for those symptoms which he no longer required as of the date of sentencing. He experienced worry for a number of weeks following the incident given the number of people living in the house and he had feared that a further attack would materialise. He also had loss of earnings

amounting to €1,300.

Mr. Mark O'Shea's personal history

12. The appellant is a man with 25 previous convictions, all of them in the District Court. Seven involve public order offences, six for s. 13 warrants, one for theft and eleven for various road traffic matters of a relatively minor nature such as bald tyres and the like. Sixteen of the said convictions occurred between 2008 and 2011. Same were in respect of public order offences and were dealt with at Bandon District Court. Thereafter, between 2011 and 2015, there were seven offences dealt with in Dublin, in each case at District Court level, of which five were in respect of warrants and one in respect of theft.

13. It is clear from the statements made by the appellant to the investigating gardaí that he knew it was a pipe bomb although he had no knowledge that the property on which he was placing the device was owned by a prison officer. His reward for his part in this incident was €20 or two trays of tablets.

14. It was acknowledged that the appellant was cross-addicted to diamorphine pills, heroin and alcohol. At the time of the offence he was living a nomadic existence.

His entry of a guilty plea at an early stage

15. There can be no doubt but that his entry of a plea of guilty at a very early stage on 27th October 2017, being the first listing of this matter in the Dublin Circuit Criminal Court, provided significant relief to the injured party and his family.

The judge's sentencing remarks

16. The sentencing judge's comments are commendably clear. He accepted that the appellant, Mr. O'Shea, did not know that the residents in the house where he was placing the pipe bomb included a prison officer. The judge noted that placing a pipe bomb underneath a car is a serious act and if the appellant had thought about it he would have come to the conclusion that this device could have caused death or serious harm. He noted that had the appellant thought about it he could have come to the conclusion that the bomb could have been handled by children or other innocent parties and in fact the device was handled by a child. The judge noted that, from the appellant's perspective, he was putting a pipe bomb beneath the vehicle and he was unaware of the fact that it was not live. He concluded that the appellant's moral culpability was high in this case. "To do such an act is a very serious act."

17. By way of mitigation the sentencing judge took into account the plea of guilty, the appellant's cooperation with the gardaí and he further noted and took into account that the accused was remorseful for what he had done. The court noted that the appellant had a record of previous convictions which were relatively minor compared to this crime. The sentencing judge further noted that Mr. O'Shea was reforming himself and was well capable of reforming himself. At the date of the sentencing hearing he was drug free and the sentencing judge stated that it would be good for himself and society at large if that continued.

18. The court noted that the maximum sentence for this type of crime was 14 years. However, the judge noted that Mr. O'Shea had been preyed upon by others who knew his vulnerability and took advantage of it. For a very small reward he committed a serious crime and the sentencing judge concluded that he ought to serve a substantial sentence. He imposed five years backdated to the date on which he first went into custody on 14th June 2017.

The appeal

19. The appellant appealed the sentence on grounds of severity as being unduly severe, excessive and not in accordance with law and in particular asserted that the sentencing judge failed to have any or any adequate regard to these mitigating factors:

- (i) The appellant's admission to the investigating gardaí of his wrongdoing.
- (ii) The early plea of guilty on 27th October 2017.
- (iii) The provisions of s. 29 of the Criminal Justice Act 1999.
- (iv) The efforts made by the appellant to rehabilitate himself within the prison system, based in particular on the report of Mr. Noel Dowling of Merchants Quay Ireland Counselling Services.
- (v) That, albeit the dangerous condition of the device, no fuse had been incorporated into it.
- (vi) The appellant had demonstrated his desire to prove himself drug free over a period of time before sentencing came to be imposed.
- (vii) The appellant had committed to and attended one-to-one drug counselling within the prison system before sentence came to be imposed.
- (viii) The status of the appellant's cross-addiction to alcohol, heroin and illicit pills at the time of commission of the crime.
- (ix) The absence of any motive other than financial gain.

Summary of legal submissions

20. Mr. Luigi Rea, BL, in very comprehensive submissions outlined the relevant case law and the principles and jurisprudence that support the grounds of appeal. He strongly argues that whilst an early plea of guilty was noted by the sentencing judge it was given inadequate weight, as was Mr. O'Shea's cooperation with the gardaí at interview by the trial judge in determining the sentence to be imposed.

21. Reliance was placed on *The People (AG) v. O'Driscoll & O'Driscoll* Frewin 1 351 (Court of Criminal Appeal, 3 March 1972) at p. 359 where the Supreme Court emphasised that the objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life. He also relied on *The People (DPP) v. John Jennings* (Court of Criminal Appeal, 15 December 1999, unreported) which is authority for the proposition that a sentencing judge should have regard and attach weight to efforts on the part of an offender to rehabilitate. Additionally, it was contended that he was entitled to a credit for his early pleas pursuant to s. 29 of the Criminal Justice Act 1999.

Submissions on behalf of the respondent

22. It was contended on behalf of the DPP that the sentence was not excessive but rather proportionate and that it disclosed no error in principle having regard to the facts. It was argued that it is apparent from the transcript of the sentencing judge's remarks that all mitigating factors were taken into account and considered by him at the time he imposed sentence including the early plea, the appellant's condition and his addictions on the date of the offence and his cooperation with the gardaí during the interview. In addition, reliance was placed on the decision of *The People (DPP) v. Stephen Somers* [2015] IECA 175 where the appellant had been sentenced to five years imprisonment in respect of a single count of possession of a pipe bomb contrary to s. 4 of the Explosive Substances Act 1883, as amended. It was asserted that the *Somers* decision represents a sound comparator given that the decision concerned the exact same legislative provision that Mr. O'Shea was convicted under.

23. In *Somers* the appellant, whilst a passenger in a car, dropped a device underneath the vehicle when it was pulled over by patrolling gardaí. The device was subsequently established to be a viable pipe bomb fitted with improvised explosives. The appellant, on the evidence in *Somers*, had merely been collecting the explosive item for a third party having come under pressure to assist in transporting the pipe bomb due to drug debts and a threat to his girlfriend unless he cooperated. He pleaded guilty and was sentenced to 5 years imprisonment. The Court of Appeal rejected his appeal against severity and was satisfied the sentence imposed of five years imprisonment was reasonable and appropriate and that it adequately took account of both the offence and the offender.

The Court's view

24. The Court is mindful that prison officers play a crucial role in society and for the public benefit. By any measure this was a shocking and disturbing crime. It is accepted that Mr O'Shea was exploited by third parties and had no knowledge that a prison officer resided at the house. The appellant fairly admitted that he knew the device he was taking to the residence in question was a pipe bomb. Nevertheless, he proceeded and placed it under a vehicle in the driveway of the home. The appellant acted with indifference as to the potential consequences of his conduct. It was obvious to him that he was placing the device at a private residence and there was serious risk of harm to others.

25. This Court notes that s. 29 of the Criminal Justice Act 1999 provides that:

"(1) In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court, if it considers it appropriate to do so, shall take into account—

(a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) To avoid doubt, it is hereby declared that subsection (1) shall not preclude a court from passing the maximum sentence prescribed by law for an offence if, notwithstanding the plea of guilty, the court is satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence.

(3) In this section, "fixed by law", in relation to a sentence for an offence, means a sentence which a court is required by law to impose on a person of full capacity who is guilty of the offence."

26. This Court notes that the sentencing judge expressly adverted to and accorded some mitigating value to the appellant's admission to investigating gardaí of his wrongdoing and to his early plea of guilty for which he was due and did receive appropriate credit. The sentencing judge expressly noted the efforts made by Mr. O'Shea to rehabilitate himself and the good work he engaged in as evidenced by the Prison Governor's Report and also by the report of Mr. Noel Dowling of Merchants Quay ICS. The court noted the appellant's efforts at reforming himself and was satisfied that he was a person well capable of reforming himself and noted approvingly that he was drug free at the sentencing date. The court also considered it a mitigating factor that the appellant had been preyed upon by others who took advantage of his vulnerability.

27. However, this court is satisfied that the argument made by Mr Rea BL on behalf of the appellant is correct insofar as he contends in substance that insufficient weight was given by the sentencing judge to the cumulative impact of the various mitigating factors identified by him. In the court's view the key considerations in this regard were the total ignorance of the appellant of the fact that the device was being placed at the home of a prison officer coupled with the fact that the device itself was not viable. The latter fact offers a materially distinguishing factor from those which obtained in the case of *The People (DPP) v Stephen Somers* [2015] IECA 175 which the respondent seeks to rely upon and which is of some limited assistance to this court.

28. The appellant has established a sufficient evidential foundation for his contention that beyond adverting to the many mitigating factors the sentencing judge in taking them into account ought to have imposed a more lenient sentence. This court agrees and recognises that the efforts of Mr O'Shea to rehabilitate himself whilst in custody pending the sentencing demonstrates some capacity by him to actively engage in his own rehabilitation. This warrants that this court suspend a portion of the sentence on the basis that to do so will offer a powerful deterrent to Mr O'Shea not to reoffend coupled with strong incentive to continue with his rehabilitation.

29. In the circumstances this court would impose a sentence of 5 years imprisonment with the final 12 months of the said sentence suspended for a period of two years post Mr O'Shea's release from prison on his entering into a bond to keep the peace and be of good behaviour for a period of 24 months from and after the date of his release from prison in substitution for the sentence which is appealed against herein.