



THE COURT OF APPEAL

Record No. 139/2017

**Peart J.
Mahon J.
Hedigan J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SMAEL HEIROUCHE

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 9th day of April 2018 by Mr. Justice Mahon

1. This is the appellant's appeal against his sentence of five years imprisonment imposed by Cork Circuit Criminal Court on the 31st May 2017.
2. The appellant pleaded guilty and was convicted on the 29th May 2017 of one count of threatening to kill contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997.
3. The appellant was sharing an apartment with a number of French nationals at 6, James Street, Cork on the 15th November 2015. On that date the appellant, while dressed in Muslim style clothing and carrying a copy of the Quran, aggressively confronted Yann Figare and threatened to kill him while physically drawing his hand across the complainant's throat in a cutting motion. The complainant believed he was going to be killed and was in fear of his life. Another resident recorded the incident on his mobile phone including threats by the appellant to kill people who were not Muslims. The apparent cause of the appellant's aggression was the complainant's disclosure that he was not interested in religion and did not wish to read the Quran.
4. At the time of the offence the appellant was forty years old. He originally came from Amsterdam and is of Moroccan descent. He had been working in Ireland for a short period. He was diagnosed schizophrenic in Holland and had spent time in a psychiatric institution. He had previous convictions in Holland including one relating to a threat to place an explosive device on a bus in the Netherlands. He was assessed as fit to plead by Dr. Ronan Mullaney in a medical report dated the 29th May 2017.
5. The ground of appeal relied on by the appellant is that the learned sentencing judge erred in law and in fact in imposing a sentence of five years imprisonment in respect of the offence and in doing so failed to have any or any adequate regard for mitigating factors. The mitigating factors identified include the plea of guilty made at an early opportunity, the contention that the threats issued to the complainant were made in circumstances where the appellant was not in a position to act on the threats immediately and was not armed. Reliance is also placed on inculpatory admissions made in custody and his expression of regret for the statements he made. Reference is also made to the fact that the appellant was medically unwell and suffering from a psychotic episode at the time of the commission of the offence.
6. When sentencing the appellant, the learned sentencing judge stated:-

"..There is no doubt. This man has been in custody since November and we are very - the progress is extremely limited, so the dangers that were there on the night of the first presentation are still there and I have to have concern in the circumstances to best - as best I can, I have to consider this man and his welfare and his future and I also have to consider, in all the circumstances, given the aggression and the length of time it went on for, the nature of the threats, I have to consider the safety of the public, including the victim, Mr Figare, who genuinely believed he was at risk on the night in question and he had been living in the same room, or in the same apartment as him and he saw the deterioration. Now, I'm significantly concerned that - at the lack of improvement or settlement between then and now, but in my view, this is a threat very much at the higher level of what might be experienced under the section, given the threats that were made and the background that was presented. So I think the appropriate sentence backdated to the 05/11/16 is five years' imprisonment, and I will recommend that he receive all possible psychiatric care and that any and all the provisions of the Mental Health Acts be applied to him for his benefit."
7. While the learned sentencing judge did not expressly refer to the plea of guilty entered by the appellant at a relatively early stage in the proceedings it is inconceivable that he was not fully conscious of it when sentencing the appellant in circumstances where the case had been adjourned for the purpose of a plea being facilitated. The issue therefore for the court is whether sufficient credit was afforded for the guilty plea.
8. This was a difficult sentencing case for any court. At the time of sentencing the appellant was not co-operating with efforts to treat him for his long standing mental health illness. One issue that may have concerned the learned sentencing judge was whether the appellant was willing to enter into a bond, or indeed his ability to understand what that would require of him. However, it was a fact that the appellant had been declared fit to plead and that itself would suggest that his ability to understand his responsibilities on entering into a bond ought not to have been in doubt, particularly in circumstances where he was fully legally represented.
9. The maximum sentence for this offence is one of ten years imprisonment. The learned sentencing judge's decision to impose a five year sentence was within his discretion and reasonably reflected the seriousness of the offence. While it was of course a fact, as has been submitted to this court, that the appellant was not in a position at the time of the commission of the offence to immediately carry out his threat, it nevertheless constituted a very real and terrifying threat. This court is therefore satisfied that his decision to impose a five year sentence was not in error.
10. The court is however satisfied that the failure on the part of the learned sentencing judge to suspend any element of the five

year sentence constitutes an error of principle. Some recognition of the guilty plea was required particularly in circumstances where there was, with good reason, concern about the failure on the appellant's part to co-operate with medical treatment. Suspending a portion of the five year term on strict conditions that the appellant would co-operate with advised medical treatment was appropriate, and was also in the public interest. Such would have provided a strong incentive to co-operate with such medical treatment as was deemed necessary.

11. Having so found that there was an error of principle in the imposition of a five year term without any element of it being suspended on certain conditions, the court will quash the sentence imposed and will proceed to sentence the appellant as of today. The court has been informed that the appellant is currently involuntarily detained under the Mental Health Acts, and of the very positive news that he is co-operating with, and benefiting from, current medical treatment. In those circumstances, and having regard to the fact that the appellant has a long history of mental illness and was previously detained in a mental health facility in his native Holland, the court is satisfied that there ought to be built into the sentence a significant suspended element to incentivise rehabilitation and, most importantly, co-operation with medical treatment.

12. The sentence therefore will be one of five years imprisonment with the final two years suspended for a period of three years on condition that the appellant enter into a bond in the sum of €100 to, firstly, keep the peace and be of good behaviour, secondly, that he co-operate with advised medical treatment and with all requirements of his medical advisors including the taking of prescribed medication and, thirdly, that he has no contact of any nature with the victim, Mr. Figare.