



THE COURT OF APPEAL

Ryan P.
Mahon J.
Edwards J.-

48CJA/12

In the matter Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

Appellant

- v -

Simon Gentles

Respondent

Judgment of the Court (ex tempore) delivered on the 15th day of December 2014 by Mr. Justice Mahon

1. On the 18th October, 2011, the respondent pleaded guilty at Ennis Circuit Criminal Court to an offence under s. 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was sentenced to four years in prison which was directed to be served consecutively to a prison term then being served by him.
2. This is an application by the appellant pursuant to s.2 of the Criminal Justice Act 1993, for a review of that sentence on the ground of undue leniency.
3. Briefly stated, the facts were that the respondent, as a member of a criminal gang, on the 7th January, 2010, at Sixmilebridge, Co. Clare, very forcibly burst into the home of a Mrs. Fitzpatrick while his colleagues remained outside. The Fitzpatrick home had been targeted because of a belief that there was a considerable amount of cash in the house at the time. The respondent kicked in the door of the house and confronted Mrs. Fitzpatrick and her fourteen year old son. The subsequent fifteen minutes or so undoubtedly proved traumatic and extremely frightening for the woman and her son. The respondent wore a balaclava and carried a loaded sawn off shotgun which he made certain that his victims knew was loaded. He threatened them, including a threat to blow Mrs. Fitzpatrick's head off unless she revealed the location of the safe and he prodded her with the shotgun and pointed it towards the young boy's head. He told them that he knew where the fourteen year old attended school and he pulled the phone cable from the wall.
4. The forcible entry into homes, particularly in rural or isolated areas of the country, is unfortunately a common occurrence in these times, but even as they go, this incident has to stand out as being a particularly terrifying ordeal for the occupants of the house. Subsequently and as a result of excellent garda investigative work, the respondent and his co-accused were arrested. Following his arrest the respondent refused to cooperate with the gardaí over a period of eighteen interviews, but eventually he pleaded guilty on the 18th October, 2011.
5. The respondent has eighty two previous convictions, including assaults, stealing cars, road traffic offences and public order offences. In 2005 he received a three year sentence for assaulting a garda. He is now 29 years old, and was 25 at the time of the offence.
6. The appellant's criticisms of the sentence are essentially twofold, firstly that the learned trial judge erred in principle in failing to sufficiently recognise the severe nature of the offence including, in particular, the use of a loaded shotgun to threaten his victims. Secondly, that the learned trial judge erred in principle in placing the offence too low on the scale of gravity, at the lower to mid range.
7. It is clear from the transcript of the sentence hearing that the learned trial judge identified the various aggravating factors and in particular the use of a gun, the fact that the house targeted was in a remote area and the respondent's many previous convictions. The learned trial judge took the view that mitigating factors excluded, the appropriate sentence was seven years. He then went on to reduce this tariff to four years in view of the mitigating factors, including the plea of guilty.

Decision

8. This court is cognisant of the decision in *The Director of Public Prosecutions v. Byrnes* [1995] 1 ILMR 279, which is the recognised authority in relation to appeals pursuant to s. 2(1) of the Criminal Justice Act 1993. At p. 287 of that judgment, the following is stated:-

"Finally, it is clear from the wording of the section, that since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this court."

9. In its subsequent judgment in *The Director of Public Prosecutions v. Derrick Stronge* [2011] 5JIC2301, the Court of Criminal Appeal further identified the applicable principles in undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993. The court stated the following:-

"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 DPP;*

(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 ambient 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 appellant 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 only 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 (DPP) v. Byrnes [1995] 1 ILRM 279, The People (DPP) v. McCormack [2000] 4 I.R.356 and The People (DPP) v. Redmond [2001] 3 I.R.390."

10. Having regard to the particularly violent and threatening nature of this offence which involved the use of a loaded firearm, this Court is satisfied that the learned trial judge erred in principle in identifying a sentence of seven years as being appropriate for this offence excluding mitigating factors. It is this Court's view that an appropriate tariff was in the region of ten to twelve years and not seven years as indicated by the learned trial judge and that an appropriate reduction for the plea of guilty and other factors should be in the region of two to three years, which would result in an appropriate custodial sentence of seven years. There was therefore in this case a substantial departure from the appropriate sentence.

11. Having regard to the courses taken while in prison and the testimonial of the respondent's partner indicating the respondent's efforts to rehabilitate, the court will reduce the seven years term by a further year which will result in a six year sentence and that is the sentence of this Court.