



**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 237

**Appeal No. 2016/337**

**Birmingham J.  
Mahon J.  
Hedigan J.**

**BETWEEN**

**WAYNE ELLIS**

**AND**

**APPELLANT**

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Birmingham delivered on the 31st day of July 2017**

1. This is an appeal from a decision of the High Court (Twomey J.) refusing a declaration that s. 27A (8) of the Firearms Act 1964 as substituted by s. 59 of the Criminal Justice Act 2006 is unconstitutional. I should say at the outset that I am in complete agreement with the conclusions arrived at by Twomey J. and indeed with his reasoning. I would therefore be in favour of dismissing the appeal. I propose to state briefly the reasons why I have come to the decision that I have.

2. The background to this case is that the appellant was charged with two offences arising out of events at Knocklyon Shopping Centre on 5th July, 2012. He was charged with the offence of possession of a sawn off shotgun contrary to s. 27A(1) of the 1964 Act and also charged with an offence contrary to s. 15(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 in relation to the possession of a sledgehammer, a plastic bottle containing petrol and socks with the intention that they be used in connection with an offence. A sentence hearing was held in the Dublin Circuit Court on 7th May, 2013. On that occasion the Court was told that the appellant had 26 previous convictions. Of particular relevance is that the previous convictions included two previous convictions of carrying a firearm with criminal intent contrary to s. 27B of the Act of 1964. One of these convictions gave rise to a seven year term of imprisonment with two years suspended on 7th July, 2009 and the other had given rise to a six year term of imprisonment with 5 months suspended on 7th May, 2003.

3. Having heard the evidence and plea in mitigation, Judge Ring adjourned matters to 29th July, 2013 so that she could consider the contents of a number of reports that had been submitted on behalf of the appellant. These reports indicated that Mr. Ellis was addressing a drug problem at Coolmine Drug Treatment Centre and also indicated that he had not come to garda attention since his release from custody almost a year earlier. In fact matters were not finalised on the adjourned date of the 29th July, 2013, but instead Judge Ring further adjourned the matter on a further three occasions in order to assess the progress of the appellant. Eventually, on 26th May, 2014, matters were finalised so far as the Circuit Court is concerned when a sentence of five years imprisonment in respect of the offence contrary to s. 27A(1) of the 1964 Act was imposed but suspended in its entirety for a period of five years upon his entering into his own bond in the sum of €200 to keep the peace and be of good behaviour. A concurrent three year sentence was imposed in respect of the s. 15(1) Criminal Justice (Theft and Fraud Offences) Act 2001 matter which was likewise suspended on the same terms. The Director of Public Prosecutions sought a review of the sentence on grounds of undue leniency. Before the review application came on for hearing this Court delivered a decision in the case of *DPP v. Prenderville* [2015] IECA 33 in which it was held that the wording of s. 27A(8) of the Act of 1964, i.e. "a term of imprisonment of not less than five years as the minimum term of imprisonment to be served", required that a minimum of five years imprisonment must actually be imposed as distinct from imposed and suspended.

4. On 25th July, 2016, the Court of Appeal delivered judgment in respect of the undue leniency review and concluded that the trial judge had not been entitled to suspend any part of the five year sentence imposed on the firearms offence and thus proceeded to impose a term of five years imprisonment. Before the High Court and again before this Court it has been submitted on behalf of the appellant that the effect of the sentencing provisions of the Firearms Act 1964 (as inserted by s. 59 of the Criminal Justice Act 2006) was, in the case of persons appearing before the court with relevant prior convictions, to impermissibly fetter the discretion of a sentencing court and to do so in a manner that offended the Constitution.

**The statute in issue**

5. Section 27A of the Firearms Act 1964 (as inserted by s. 59 of the Criminal Justice Act 2006) so far as relevant provides as follows:

"(2) A person guilty of an offence under this section is liable on conviction on indictment—

(a) to imprisonment for a term not exceeding 14 years or such shorter term as the court may determine, subject to s. 27A(4) to (6) of this section or, where subsection (8) of this section applies, to that subsection, and

...

(3) The court, in imposing sentence on a person for an offence under this section, may, in particular, have regard to whether the person has a previous conviction for an offence under the Firearms Acts 1925 to 2006, the Offences against the State Acts 1939 to 1998 or the Criminal Justice (Terrorist Offences) Act 2005.

(4) Where a person ... is convicted of an offence under this section, the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person.

(4A) The purpose of subsections (5) and (6) is to provide that, in view of the harm caused to society by the unlawful use of firearms, a court, in imposing a sentence on a person ... for an offence under this section, shall

specify as the minimum term of imprisonment to be served by the person a term of not less than 5 years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of it, it would be unjust in all the circumstances to do so.

(5) Subsection (4) of this section does not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of it, which would make the minimum term unjust in all the circumstances, and for this purpose the court may, subject to subsection (6), have regard to any matters it considers appropriate, including —

- ( a ) whether the person pleaded guilty to the offence and, if so —
  - (i) the stage at which the intention to plead guilty was indicated, and
  - (ii) the circumstances in which the indication was given,
- and
- ( b ) whether the person materially assisted in the investigation of the offence.

(6) The court, in considering for the purposes of s. 27A (5) whether a sentence of not less than 5 years imprisonment is unjust in all the circumstances, may have regard, in particular, to —

- ( a ) whether the person convicted of the offence has a previous conviction for an offence under the Firearms Acts 1925 to 2006 , the Offences Against the State Acts 1939 to 1998 or the Criminal Justice (Terrorist Offences) Act 2005, and
- ( b ) whether the public interest in preventing the unlawful possession or use of firearms would be served by the imposition of a lesser sentence.

(7) Subsections (4) to (6) of this section apply and have effect only in relation to a person convicted of a first offence under this section ... and accordingly references in those first-mentioned subsections to an offence under this section are to be construed as references to a first such offence.

(8) Where a person ... —

- ( a ) is convicted of a second or subsequent offence under this section, and
- ( b ) is convicted of a first offence under this section and has been convicted of an offence under section 15 of the Principal Act, section 26, 27 or 27B of this Act or section 12A of the Firearms and Offensive Weapons Act 1990,

the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person.”

6. In essence the situation was, given that Mr. Ellis had relevant previous convictions for possession of firearms, that the Court had no discretion to impose a sentence of less than five years imprisonment to be served. It was on this basis that the matter was approached by the Court of Appeal when dealing with the application to review the Circuit Court sentence as unduly lenient.

7. On behalf of the appellant it is submitted that the elimination or restriction of sentencing discretion offends the notion of the separation of powers and also conflicts with the requirement that sentences imposed should be proportionate. In the light of a number of decided cases, the appellant recognises that the Oireachtas has a role when it comes to sentencing policy. In the case of *Deaton v. Attorney General* [1963] 1 IR 170 Ó Dálaigh C.J. had commented

“It is common ground that it is for the Legislature, when it creates an offence, to prescribe what punishment shall attach to the commission of such offence. It is also common ground that the Legislature may for a particular offence prescribe a single or fixed penalty, or a maximum penalty, or a minimum penalty, or alternative penalties, or a range of penalties.

...

The Legislature does not prescribe the penalty to be imposed in an individual citizen’s case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain.”

8. In *Osmanovic v. Director of Public Prosecutions* [2006] 3 IR 504 the applicant relied on the importance attached to the principle of the separation of powers in *Deaton* when arguing that what he saw as a fixed financial penalty for evasion of excise duty was unconstitutional. The Supreme Court took the view that the Act in fact provided for a range of penalties which could be imposed. In the course of his judgment Murray C.J. noted that the decision in *Deaton* contemplated fixed penalties. He commented:

It is quite clear from the judgment of Ó Dálaigh C.J. in *Deaton v. The Attorney General and the Revenue Commissioners* [1963] I.R. 170 that the Oireachtas does have powers to lay down general parameters within which a sentence is to be imposed. There is no necessity in this judgment and indeed it would be wholly undesirable to consider what the limits might be (if any) on the power of the Oireachtas to provide for either fixed sentences or mandatory sentences. One could postulate extreme situations where the sentencing powers of judges were removed altogether and every offence had a mandatory sentence. The constitutionality of such a law would obviously be questionable. But it has always been accepted and indeed was accepted, in *Deaton v. The Attorney General and the Revenue Commissioners* that, within reason at least, the Oireachtas has power to lay down those parameters.”

9. Other cases where the courts in recent time have considered the question of mandatory sentences include *Lynch and Whelan v. Minister for Justice* [2012] 1 IR 1 where what was at issue was the mandatory life sentence for murder and *Gilligan v. Ireland* [2013] 2 IR 745 where what was in issue was the provision for mandatory consecutive sentences in the case of offences committed in custody.

10. In challenging the statutory provision it is contended that there is no rational relationship between the requirement for a mandatory sentence and the offence at issue and the conclusion of the High Court judge to the contrary is challenged. It is said that the constitutional dimension is brought into focus by the fact that Judge Ring had felt that the just and proportionate sentence was a suspended one and the fact that the courts were in effect compelled by the Oireachtas to impose an actual sentence of a specified minimum duration to be served.

11. On behalf of the appellant it is said that there is no logical or rational basis for isolating possession of firearms cases from other areas of criminality. What is the rational basis, it is asked, for providing a mandatory presumptive minimum in the case of firearms offences and an absolute minimum in the case of second or subsequent offences for firearms and not doing it for serious crimes of violence, serious sexual offences or other areas of very grave criminality? A further point made is that the regime does not apply to all citizens which was something that Ó Dálaigh C.J. had insisted upon. It is said that it applies only to persons with relevant previous convictions and not others and that it also does not apply in the cases of persons under 18 years. I should say immediately that I regard this last argument as completely without merit. There is nothing unusual about the fact that a different sentencing regime is to apply in the case of second or subsequent offences. I regard the argument that the exclusion of those under 18 offends against the principles set out in *Deaton* as lacking in reality. There are sound constitutional and statutory bases for exempting children from the full rigours of a sentencing regime.

12. In the course of his judgment Twomey J. referred to the fact that Ireland has decided that its police force should be unarmed as providing a clear rationale for viewing firearms offences in a particularly serious light. I agree that in a country where even the police do not routinely carry arms that the possession of firearms unlawfully is a particularly serious matter and that the legislature is quite entitled to so treat it. I would, though, point out that Ireland is not alone in being concerned about the threat posed by the misuse of firearms. Prof. O'Malley at para. 18.18 in his text *Sentencing Law and Practice* (3rd Ed.) comments:

"One constant theme running through the jurisprudence on sentencing for firearm offences across all common law jurisdictions is that courts must be aware of the intense and, apparently growing danger posed by the misuse of firearms. The same concern is reflected in the legislative introduction of minimum sentences which have become increasingly common."

13. It seems to me that the Oireachtas has a legitimate role in setting sentencing parameters. The Oireachtas is entitled to fix maximum penalties. There have been occasions when judges have expressed frustration about the low maximum that has been prescribed in certain cases.

14. By the same token the Oireachtas can prescribe minimum sentences. To use the language of Murray C.J. the Oireachtas has within reason at least the power to lay down parameters.

15. The approach of the Oireachtas has been a very measured one. It has provided for a mandatory presumptive minimum in the case of certain firearms offences. However, in general courts are permitted to depart from that minimum and impose lesser sentences where it identifies the fact that there are exceptional and specific circumstances relating to the offence or the offender present. As the Court pointed out in the course of its Prenderville judgment, departures from the mandatory presumptive minimum are far from uncommon. In the case of second or subsequent offences there is an actual mandatory minimum. However, even here the courts are left with a considerable discretion in that judges are free to impose a sentence between the minimum stipulated of five years and the maximum provided for of 14 years.

16. In my view the Oireachtas is entitled to a considerable margin of appreciation when addressing sentencing policy. The threat to society posed by the unlawful use and possession of firearms is so serious that the approach they have opted for cannot be seen as irrational or disproportionate.

17. As I indicated earlier, I am in no doubt that the High Court judge was correct in rejecting the constitutional challenge and I would dismiss the appeal.