THE COURT OF APPEAL

[280/2017]

The President

Whelan J.

Baker J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DYLAN CAHILL

APPELLANT

JUDGEMENT (Ex tempore) of the Court delivered on the 26th day of October 2018 by Birmingham P.

1. This is an appeal against severity of sentence.

2. The sentence under appeal is one that was imposed on 26th June 2017 in the Special Criminal Court where a sentence of six years' imprisonment with one year suspended was imposed in respect of the offence of possession of a firearm and possession of ammunition, the offences usually referred to as suspicious possession, and also an offence of possession of an explosive substance.

3. The background to the offences is to be found in the fact that on 13th May 2015, members of An Garda Síochána stopped a vehicle at, Glenfarne, County Leitrim. It is to be noted that the vehicle was stopped in the course of a routine checkpoint by uniformed Gardaí against a background of reports of a "drive away" from a filling station. This was not, as sometimes happens, a case of a vehicle being stopped by armed Gardaí acting on foot of intelligence.

4. The vehicle that was stopped was owned and driven by the appellant and also travelling in the vehicle as a front seat passenger was a Mr. Burke. For convenience, even if not strictly accurate, Mr. Bourke will be referred to as a co-accused. In the passenger foot well of the car was a plastic bag and in that plastic bag was a .38 calibre Colt semiautomatic pistol, ammunition to accompany that pistol and two improvised explosive devices.

The Approach of the Sentencing Court

5. In the course of the sentence hearing, evidence was led, apparently by prior agreement between the parties, that the items were being transported in furtherance of the activities of an illegal organisation that is the IRA. The Special Criminal Court took a sentence of 7 and a half years' imprisonment as its starting point or pre-mitigation sentence and then came down from that figure to one of six years and then proceeded to suspend the final year of that sentence.

6. Much of the focus of tis appeal has been on the way in which the co-accused was dealt with. Unlike the appellant, who was brought before the Special Criminal Court, the co-accused was dealt with in the Circuit Criminal Court and there, a sentence of three and a half years' imprisonment with the final six months suspended was imposed in respect of the offence of possession of improvised explosive devices. The sentence hearing in the Circuit Criminal Court proceeded on a so-called full facts basis.

7. In terms of the background and personal circumstances of the appellant, he was born on 4th November 1992. The Court heard that he was the father of a one-year old child and that his girlfriend was pregnant with another child at the time of the sentence hearing. He had been working in a barber shop for a number of months. The appellant had no previous convictions. In that regard, it is of some note that the Court heard that the co-accused had 12 previous convictions including two for robbery.

8. On behalf of the appellant, it is said that the disparity between the sentences imposed on the appellant by the Special Criminal Court and that on the co-accused by the Circuit Criminal Court cannot be justified. It is recognised that the co-accused was dealt with only for possession of the improvised explosive devices, pipe bombs, but it is said that really this is a distinction without a difference since the improvised explosive devices, the semiautomatic pistol and the ammunition for it were all in the same plastic bag.

9. Counsel on behalf of the appellant says that the possession of an explosive substance is a particularly serious offence and that it has been recognised as such since the enactment of the relevant legislation in the late 19th Century and that the seriousness of the offence in question is a further reason why the extent of disparity between the sentences that has emerged was inappropriate.

10. In the course of the appeal hearing, members of the Court invited submissions on the extent to which like was being compared with like or whether it was a question of apples and oranges. The Court is not persuaded that the comparison between the situation

of the appellant and the co-accused is a valid one. The co-accused pleaded to an explosive substance count, the appellant to a count contrary to s. 27A of the Firearms Act in the Special Criminal Court. The practical effect of this was that quite different sentencing regimes applied. There was no statutory presumptive minimum operable in the case of the co-accused; there was here. The sentencing guidance that was provided in the case of firearms by the Court of Criminal Appeal in DPP v. Ryan [2014] IECCA 11 was not in operation in the case of the co-accused. Given that two quite different sentencing regimes were in place, that the ultimate sentences imposed would diverge, is hardly surprising. In the case of the appellant, there was specific evidence before the Court that the transaction was in furtherance of the activities of the IRA. There was no such evidence that that was the motivation for the co-accused in this case. Again, in the case of the co-accused, there was clear evidence before the Court that it was dealing with someone with particular characteristics and a particular background, an individual who was described from moving from hostel to hostel in Limerick, leading a somewhat isolated existence. The Gardaí, when giving evidence, said that they would not be surprised to hear that there were mental health issues. When asked would he be surprised, the investigating Garda responded "certainly not". For the sake of completeness and fairness, it is necessary and appropriate to refer to the fact that there were divergences which were to the appellant's credit, the absence of prior convictions in his case, while the co-accused had a significant previous record.

11. It seems to the Court, given the distinctions between the appellant and the co-accused, that the focus of attention should appropriately be placed on the approach of the Special Criminal Court to sentence. In this case, the Special Criminal Court approached the sentencing with considerable care following the two-step approach that has been advocated by this Court on a number of occasions. The headline sentence nominated was in accordance with the Ryan jurisprudence and there was then a reduction from that starting point to take account of the mitigating factors that were present; the plea, which was one that was entered on the date of trial, though notice of intention of intention to enter a plea had been given some weeks in advance; the sentencing Court referred specifically to the appellant's good character, to the fact that he was a young man without previous convictions who cooperated with Gardaí to a certain extent; they made reference to the testimonials that had been provided and commented that it was clear that the prospect of rehabilitation was a live one. They then proceeded to impose the sentence that is now under appeal.

12. The Court is in no doubt that if the focus is on the sentence imposed by the Special Criminal Court that it is clear that the sentence was one that fell within the available range, indeed, that it was a manifestly appropriate one. The net sentence of six years with one year suspended, a net sentence of five years to be served, is the mandatory presumptive minimum. This was a very serious offence, the carrying of a semiautomatic pistol, ammunition to go with it and pipe bombs and this in furtherance of the activities of an illegal organisation.

13. In the Court's view, there is no basis for suggesting that imposing the mandatory presumptive minimum in a case as serious as this could amount to an error in principle. The Court has no hesitation in dismissing the appeal. The Court has, however, been told that the Special Criminal Court did not give credit for certain periods spent by the accused in custody before taking up bail. Clearly, it is only appropriate and fair that the appellant should have credit for that and the Court will vary the order of the sentencing Court to reflect that.

14. The order of this Court will direct that the appellant is to have credit for the 55 days spent in custody before taking up bail.