THE COURT OF APPEAL

Kelly J.
Birmingham J.
Sheehan J.

173CJA/13

In the matter Section 2 of the Criminal Justice Act 1993
The People at the Suit of the Director of Public Prosecutions

Applicant

v

Daniel Prenderville

Respondent

Judgment of the Court of Appeal delivered on the 23rd day of January 2015 by Birmingham J.

1. In this case the Director, pursuant to s. 2 of the Criminal Justice Act 1993, applies to the court seeking a review of sentences imposed on the respondent in the Circuit Court. The sentences, the subject of the review, were imposed on the respondent, Mr. Prenderville on the 21st June, 2013. They are as follows:

> "On Count 1 in respect of the offence of possession of a firearm in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964 as amended, six years imprisonment. In respect of Count 3 of the indictment, the offence of unlawful use of a mechanically propelled vehicle contrary to s. 112 of the Road Traffic Act 1961 as amended, three years imprisonment. In respect of Count 5 on the indictment, the offence of dangerous driving a sentence of six months imprisonment.
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> Count 2 on the indictment, possession of ammunition in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964, as amended was taken into consideration. All sentences were to run concurrent to date from the 1st February, 2013. The last eighteen months of the sentence on Count 1 was suspended on conditions that he keep the peace and be of good behaviour for a period of two years from the date of his release from prison and further that he be under the supervision of the Probation and Welfare Service for a period of 12 months from the date of his release. The respondent was also disqualified from driving for a period of five years from the 1st February, 2013."

2. The legal principles applicable to undue leniency reviews, as first set out in the case of *DPP v Byrne* [1995] 1 I.L.R.M. 279, are at this stage well established and were not in dispute between the parties.

Facts

3. The facts giving rise to the respondent facing the charges that he did may be briefly stated. On the 6th September, 2012, a number of gardaí were on patrol in the area of Daletree Place, Ballyconnell. An Audi A3 was seen by them entering an estate and it was noted that there were no front registration plates. It was also noted that the three occupants of the vehicles were wearing balaclavas. Garda Finan, the driver of the patrol car which was in the area activated the blue flashing lights and the response to that was that the engine of the Audi was revved and the vehicle was driven head on into the patrol car, in effect the patrol car was rammed.

4. After the collision, all three occupants of the Audi sought to make their escape. The respondent, Mr. Prenderville, got out the driver's seat of the vehicle and was pursued by Garda Finan and, as he sought to discard a balaclava and a pair of gloves, he was apprehended seeking to escape over a wall. It was noted that one of the other occupants of the vehicle who had left it via the front passenger seat was seen to throw what appeared to be a firearm over a wall. The area where the object was thrown was searched and a firearm was located. It was a 0.32 auto (7.65) calibre Baikal semi automatic pistol. On examination the serial number had been deliberately removed. The firearm was fitted with a silencer and the magazine of the pistol contained three rounds of .32 calibre ammunition and there was a further round in the chamber of the firearm.

5. It later emerged that the Audi involved in this incident had been stolen earlier that day.

6. In terms of Mr. Prenderville's personal circumstances and his previous record, the situation is that he was born on the 3rd February, 1987, so he was 26 years old at the time of the sentence hearing. There were 23 previous convictions recorded, including one for s. 15A of the Misuse of Drugs Act 1977, for which he had received a five year sentence. He was released from that sentence about eighteen months before this offence was committed. He is the father of a young son and was predeceased by his mother who died in February 2007 aged 54 years from a brain haemorrhage. His mother's death had a very significant impact on him.

7. The sentence hearing commenced on the 30th May, 2013, but in a situation where the results of a urine analysis which had been sought were not available, matters were not finalised on that day. The plea in mitigation focused to a significant extent on the fact that the respondent was engaging with the clinical psychologist in Mountjoy, Dr. Anna O'Rourke. A report of Mr. Desmond O'Mahon, a Consultant Forensic Clinical Psychologist dated the 23rd May, 2013, which was before the court, referred to the fact that he had attended Mountjoy Prison on the 10th May, of that year, but that the prison officer who went to Mr. Prenderville's cell to collect him reported that he had been unable to rouse him due to intoxication. Mr. Prenderville had stated that he had started abusing cocaine at aged sixteen years. Mr. O'Mahony observed that Mr. Prenderville was not currently in a position to address his drug addiction and that it was this addiction which was the driver of criminal behaviour. The report did refer to the fact that Mr. Prenderville was attending Dr. O'Rourke for some time and was finding the sessions with her useful. On the adjourned date once again the results of the urine analysis were not before the court, but on this occasion there was a report before the court from consultant psychiatrist Dr. Brenda Wright who met with Mr. Prenderville at Mountjoy Prison on the 17th June for the purpose of preparing the report. This report also referred to Mr. Prenderville's interaction with Dr. O'Rourke and quoted Mr. Prenderville as saying that he had a long history of P19's (or disciplinary reports) while in prison, but that since he had started working with the psychologist, he had not had any further disciplinary problems. Significantly the report refers to drug screening in March 2012, September 2012, December 2012 and January 2013, all of which were negative. The report quoted Dr. O'Rourke, with whom Dr. Wright had been in contact by telephone, as saying that Mr. Prenderville was working hard and appeared motivated and that he appeared to be benefiting from the work that he was doing.

8. At this sentence hearing the suggestion that there was an extant drug debt arising from the drug loss which led to the s. 15A conviction was canvassed. While the debt issue was the subject of submissions and assertions, there was no actual evidence on this topic and when the issue was raised with the garda giving evidence, his response was that he was not in a position to accept or

dispute it. When she came to sentence, the learned trial judge adverted to this issue, commenting that the loss of drugs often exacerbates the position that people are in vis-à-vis the others from whom they received drugs and that clearly the loss of drugs resulting in a conviction under s. 15A meant that he was indebted to others. She referred to the fact that it was submitted that threats arising from that debt led to his involvement in the offences before the court today.

Sentencing remarks of the trial judge
9. The trial judge concluded her sentencing remarks as follows:

> "It is clear that on the night in question, Mr. Prenderville and others were found in highly suspicious circumstances, in possession of a firearm which had ammunition available for immediate use, and further they were dressed in clothing that would make their identification impossible by the use of balaclavas or any connection with the firearm by the use of gloves impossible. It is perhaps even more disturbing to hear that there was a silencer involved with the firearm, which is of itself an aggravating element to this event. The court has to have regard to the individual before the court and balances all of the matters in reaching a sentence. Clearly, deterrents and rehabilitation often present a challenge for the courts in sentencing on serious matters such as this. There has to be clarity in the community, that people in possession of firearms, particularly loaded and accompanied by a silencer, are to be dealt with severely in the courts to deter others from engaging in this type of activity. On the other hand, the court cannot throw away the key on any offender because of their involvement with a given offence or a series of offences. The 2006 Criminal Justice Act allows the court to depart from the presumptive minimum sentence if it is satisfied that there are exceptional and specific circumstances relating to the offence or to the person convicted of the offence which would make the presumptive term unjust in all the circumstances. In this case, the possession of the silencer is a matter that makes the court, even having regard to the circumstances of Daniel Prenderville, unable to depart from the presumptive minimum. I do have regard to the fact that he has no prior convictions in relation to firearms and I do accept that there may have been resulting difficulties imposed on Mr. Prenderville as a result of the incarceration for the drugs offence in 2007. I also am aware that at the time of the commission of this offence there were personal matters that were playing in Mr. Prenderville's life. However, he had only been released from a lengthy sentence in 2010, and a number of his convictions, albeit of a relatively minor nature, postdate that period. So, again, having been incarcerated for a period of five years, he came back out into the community and unfortunately did not turn away from criminal activity. He has been giving clear urines analysis, and again that would show that he is making efforts to rid himself of drug use. From that, he will hopefully rid himself of involvement with persons involved in the dealing of drugs, and from that hopefully he will rid himself of the contact with people who need to use him for such activities as the one he engaged in on the 6th September, 2012."

10. The trial judge then proceeded to impose the sentences which are now the subject of this review and, in relation to the sentence of six years, suspended the last eighteen months of that sentence on conditions, saying that she was doing so to encourage him in relation to work that he had undertaken with Dr. O'Rourke and with the prison authorities in keeping drug free.

Arguments on the application for the review
11. Essentially, two arguments are advanced by the Director in seeking a review of the sentences. First of all, it is said by counsel on her behalf that the trial judge imposed a sentence that was not permitted by statute. The trial judge had suspended a portion of the sentence on the firearms count so as to bring the sentence to be served below the statutory minimum sentence and had done so where she had not found that there were exceptional and specific circumstances which would justify the imposition of a sentence less than the statutory minimum. Further, the Director submits that this offence is to be placed at the high end of the scale and that for a high end firearms offence a sentence of six years with eighteen months suspended is seriously inadequate and represents a significant departure from the norm. Reliance is placed on the case of *DPP v Kieran Ryan* [2014] IECCA 11, where, of course, judgment was given subsequent to the imposition of sentence in the present case.

12. On behalf of the respondent, it is said that the sentence imposed was not an impermissible one, that there is a precedent for structuring a sentence to include a suspended sentence which brings the period to be served in custody below the statutory minimum even in situations where specific and exceptional circumstances were not found to exist. Reference in that regard is made to the case of DPP v. Creighton [2010] IECCA 56.

13. Counsel for the respondent disputes the contention that the case should be placed at the high end of the scale and says that this is a mid range offence and that the sentence actually imposed cannot be seen as unduly lenient for a mid range offence where there were significant mitigating circumstances present.

Statutory provision
14. Section 27A(4) of the Firearms Act 1964, as amended, provides as follows as far as material:-

> (1) . . .
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> (2) A person guilty of an offence under this section is liable on conviction on indictment
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> > (a) to imprisonment for a term not exceeding fourteen years or such shorter term as the court may determine, subject to s. 27A(4) – (6) and
> >
> > (b) . . .
>
> (3) . . .
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> (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 five years as **the minimum term of imprisonment to be served by the person** [emphasis added]
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> > (a) the purpose of [s. 27A(4) – (5)] is to provide that in view of the harm caused to society by the unlawful and 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** of not less than five years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of it, would be unjust in all the circumstances to do so. [Emphasis added]

(5) [s. 27A(4)] 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 [s. 27A(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

(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 five 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) Section 27A(4) - (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 27A(4) – (6) 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,

(b) . . . the court shall, in imposing sentence, specify a term of imprisonment of **not less than five years as the minimum term of imprisonment to be served by the person**. [emphasis added]

15. In the Court's view, the plain and ordinary language of the section makes it very clear that, unless there are exceptional and specific circumstances present which would make a sentence of five years or more unjust, the court is required to impose a sentence of five years as a minimum to be actually served in custody. Only if there are exceptional and specific circumstances identified is it possible to suspend all or part of the sentence so as to reduce the sentence to be served in custody below five years.

16. If the section had been couched in terms of "the court shall impose a five years sentence or shall impose a sentence of five years imprisonment" there might be an argument to be made, but the reference to specifying a term of imprisonment of not less than five years as the minimum term of imprisonment *to be served* puts the matter beyond doubt. An interpretation that would permit a suspension of circumstances of a sentence in the absence of exceptional and specific circumstances would be to set the clearly expressed intentions of the Oireachtas at nought.

17. Further support for this view is to be found in s. 27C which was inserted by s. 61 of the Criminal Justice Act 2006. That section provides as follows:

"(1) In this section, 'minimum term of imprisonment' means a term specified by a court under

(a) section 15 of the Principal Act,

(b) section 26, 27, 27A or 27B of this Act, and

(c) section 12A of the Firearms and Offensive Weapons Act 1990, less any reduction in the period of imprisonment under subsection (3) of this section.

(2) The power to commute or remit punishment conferred by section 23 of the Criminal Justice Act 1951 does not apply in relation to a minimum term of imprisonment.

(3) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct apply in relation to a person serving such a minimum term.

(4) Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960, as applied by section 4 of the Prisons Act 1970, to release temporarily a person serving a sentence of imprisonment shall not be exercised during a minimum term of imprisonment, unless for grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by that reason."

18. The restriction on the power to commute or remit and the restrictions on temporary release point very clearly to the determination of the Oireachtas that persons sentenced for offences for which minimum terms of imprisonment have been specified should actually serve these terms, less remission for good behaviour.

19. It must be appreciated that the Oireachtas has not sought to fetter totally the courts either in this area of firearms offences or in the analogous area of s. 15A Misuse of Drugs Act cases. Presumptive minimum sentences are specified, but the court is in a position to depart from the minimum where exceptional and specific circumstances are identified. In a significant proportion of cases, such circumstances have been found to be present and sentences less than the presumptive minimum have been imposed. Indeed, even in the case of s. 15A where the presumptive minimum is longer (ten years), there have been occasions when wholly suspended

sentences have been imposed and indeed have been upheld on appeal by appeal courts when a review of the sentence was sought. So, courts retain discretion, but what courts cannot do is to impose a sentence less than the minimum specified to be served if there are no exceptional and specific circumstances present which would render this specified minimum sentence unjust.

20. In the present case, the learned trial judge, having found there were no exceptional and specific circumstances present making it unjust to impose a sentence of not less than five years, erred in suspending a portion of the sentence so as to reduce the effective sentence, the sentence to be served below this statutory minimum. That error requires the intervention of this Court.

21. In the case of *DPP v. Ryan*, where judgment of the Court of Criminal Appeal was delivered by Clarke J., certain observations were made about sentencing in this area generally. So, at para. 7.16, it was said:

> "Before considering any appropriate adjustment to reflect mitigating factors, it seems to this Court that, in general terms, an offence at the lower end of the range ought attract a sentence of 5 to 7 years, an offence in the middle of the range ought attract a sentence of 7 to 10 years and an offence at the top of the range a sentence of 10 to 14 years."

22. Earlier, the court referred to the principle factors which will normally be required to be taken into account in assessing the seriousness of an offence. The factors are the nature and quantity of the firearm or firearms concerned, the extent to which any firearm was either actually used or brandished in a way which would have caused people to be concerned that it might be used, the extent that the offence arose or might be inferred to have arisen out of criminality generally (and if the so the seriousness of same), the specific and personal circumstances, and any circumstances concerning the culpability of the accused, such as the extent of the involvement of the accused or the extent to which it might be said that the accused was operating under a threat. The court added that doubtless other factors could loom large on the facts of any individual case.

23. In the present case, there were factors present which required that the case had to be seen as a very serious one. The fact that the weapon which was loaded was a semi automatic pistol, that a silencer was attached, adding an additional dimension of concern, as the learned trial judge pointed out, that the three occupants of the car including the respondent were wearing balaclavas and gloves and that the car had been stolen a short time before were all significant factors. The magazine of the firearm contained three rounds of ammunition and there was a further round in the chamber. Furthermore, the serial number had been removed. These factors mean that the offence has to be seen as being at the top, though not the very top of the range. Certainly, it is true that there were factors present by way of mitigation. There was the plea, there were the personal circumstances of the respondent and the evidence that he was making some efforts towards rehabilitation through his interactions with Dr. O'Rourke. However, even taking full account of all of these factors a sentence as low as an effective sentence of four and a half years cannot be justified and has to be seen as an error in principle. Accordingly, the Court will accede to the application by the Director. It will now proceed to consider what is the appropriate sentence to impose. In accordance with the procedures identified in *DPP v. Cunningham* [2002] IESC 64, the court will now hear such submissions as the parties wish to make and will consider any further material put before it, before proceeding to sentence.