THE COURT OF APPEAL

Record Number 146/2019

Neutral Citation Number: [2020] IECA 143

The President
McCarthy J.
Kennedy J.

IN THE MATTER OF S.2 OF THE CRIMINAL JUSTICE ACT,1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

HAYDEN CROSBIE

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 14th day of May 2020 by Ms. Justice Kennedy

1. This is an application made pursuant to s.2 of the Criminal Justice Act 1993, seeking a review of sentences imposed on the respondent on the 6th June 2019 in respect of two counts of robbery contrary to s.14 of the Criminal Justice Theft and Fraud Offences Act 2001. The respondent received a sentence of three years' imprisonment on each count with the final eighteen months suspended in each instance, on terms.

Background

2. The two counts in respect of the respondent relate to robberies which occurred on 4th November 2016. The first robbery occurred at Tully's Bookmakers in Wheaton Hall, Drogheda. Evidence was given that at around 8:45 pm three masked men entered the premises. There was one employee, Karl Connolly, in the shop at the time. One of the men was described as holding a hand gun and he was extremely aggressive. This man was followed by a second man and the third man, the respondent, remained outside the premises in order to keep watch. The gun was pointed in Mr. Connolly's face and the offender shouted "where is the money?", a shot was fired into the air and Mr. Connolly was struck at this stage with a fist to the right side of his face. The two men in the shop grabbed the money taken out by Mr. Connolly, around €1,600 in total. Following this, the man with the gun put the gun to Mr. Connolly's knee. The raiders took the hard drive from the CCTV. The male with the gun asked for the key of the poker machine. Mr Connolly told him he had had enough and at this stage he was struck a second time to the right side of his face, causing him pain. At this stage the men left the premises and left the scene in a car.

3. The second robbery took place some ten minutes later at Tully's Bookmakers in Ballsgrove, Drogheda. There was also only one employee, Gary Faulkner, on the premises at the time. In a similar manner, the three men entered the premises and one of the three brandished a silver hand gun and grabbed Mr. Faulkner aggressively,

demanding money. There were no shots fired this time and the sum of €1,735.00 was taken from the shop. Before leaving the raiders demanded to know where the CCTV footage recorder was located, they went to a rear office and pulled the wires out of the electronic device but did not succeed in erasing the footage. The men left the scene in a car. The Gardaí were able to recover the vehicle quickly and a number of items including balaclavas and gun casings were found in the vehicle.

4. The respondent was arrested on 27th September 2017. During Garda interviews, he initially denied any involvement in the robberies but he subsequently made admissions as to his participation including that he was the driver of the vehicle and he had received instructions on what he was to do. The respondent subsequently pleaded guilty and surrendered his bail in May 2019 prior to being sentenced on 6th June 2019.

Personal circumstances of the respondent

5. The Court heard that the respondent has a date of birth of 9th November 1999 and he was five days shy of his seventeenth birthday on the date of offending. He has forty-two previous convictions including two convictions for burglary, eleven for theft, four for criminal damage, five for unauthorised taking or carriage on a mechanically propelled vehicle, unauthorised carriage on a mechanically propelled vehicle, one for assault, three for trespass, sixteen road traffic matters and one for failure to appear. In respect of the most significant of these offences the respondent received a detention order of ten months.

The sentence

6. In terms of aggravating factors, the sentencing judge noted the use of masks and a gun, albeit that blanks were used, the use of threats and violence against Mr Connolly by one of the accused, damage to property and the effect on the injured parties involved, one of whom ceased employment in the bookmakers as a result.

7. In terms of mitigating factors, the sentencing judge took into account the respondent's age, his plea of guilty, his cooperation with the investigation and that he surrendered bail

8. In respect of count six, the trial judge noted that there was more money stolen and more aggression used. The sentencing judge identified a headline sentence of five years' imprisonment. Taking into account the mitigating factors, this was reduced to a sentence of three years' imprisonment with the final eighteen months suspended on terms.

9. In respect of count five, the sentencing judge identified a headline sentence of four years' imprisonment. Taking into account the mitigating factors, this was reduced to a sentence of three years' imprisonment with the final eighteen months suspended on terms, with both sentences to run concurrently.

Grounds of appeal

10. The appellant puts forward the following grounds of appeal:-

    (1) In respect of each of the said Counts, the learned Sentencing Judge erred in law, fact and principle in being unduly lenient regarding the matter of an appropriate

sentence when arriving at the totality of the period of incarceration to which the accused was to be subjected, the sentencing court having failed to give any or any sufficient reasons for the suspension of the portion of the sentence in question.

(2) In respect of each of the said Counts, the learned Sentencing Judge erred in law and in fact in failing to have any or any proper adequate or timely regard to the range of sentences appropriate to the said Counts, and in so doing had excessive regard to the totality principle.

(3) In respect of each of the said Counts, the learned Sentencing Judge erred in law and in fact in failing to assess each offence as being at the higher level of offending in all the circumstances.

(4) In respect of Count 5, the learned Sentencing Judge erred in fact and in law in determining that a headline sentence of 4 years, reduced to 3 years, the last 18 months of which were suspended on the same conditions as specified in respect of Count 6 was the appropriate sentence having regard to its place on the spectrum of seriousness of offences of this kind.

(5) In respect of Count 6, the learned Sentencing Judge erred in fact and in law in determining that a headline sentence of 5 years, reduced to 3 years, with the final 18 months suspended on his entering into a bond to keep the peace in the sum of €200 a condition of which was that on his release he would engage with the Probation and Welfare service for a period of 2 years, take their advice or instruction as relates to substance-abuse, remain substance free, and if approved perform 240 hours of community service within 12 months of the date of sentencing if deemed suitable was the appropriate sentence having regard to its place on the spectrum of seriousness of offences of this kind.

(6) In respect of each of Count 5 and Count 6 (hereinafter referred to as "the said Counts"), the learned Sentencing Judge erred in failing to attach appropriate weight to the aggravating factors in the case. In particular, though without prejudice to the generality of the foregoing, the learned Sentencing Judge failed to have appropriate regard to the following factors: -

(i) the number of occasions of offending for which she was sentencing;
(ii) the advance planning per se which went into the offending to include the fact that each offence was planned with the other in mind;
(iii) the employment in the course of the offending of an item designed to create in a person threatened by it to believe that it was a handgun;
(iv) the additional overall threatening conduct;
(v) the level of loss sustained by the victims, no portion of which was recovered by any of them; and
(vi) the significant number of previous convictions, to include the broad range of occasions where the respondent showed no respect for the law, and where there are a significant number of immediately relevant previous conviction

(7) By way of reference to an aggravating factor specific to Count 6, the learned Sentencing Judge erred in law and in fact in failing to have any or any proper adequate timely regard to the fact that, albeit that the item concerned was only capable of discharging blanks, the same was fired at the ceiling of the premises in circumstances which were intended to convey the threat that it was a real firearm and might be employed as such.

(8) By way of reference to an aggravating factor specific to Count 5, the learned Sentencing Judge erred in law and in fact in failing to have any or any proper adequate or timely regard to the fact that, albeit that the item concerned was only capable of discharging blanks, the same was nonetheless pointed at the knee of the immediate victim of the offending and circumstances which gave rise to a real fear or apprehension that the same might be employed at a minimum to cause physical injury to that part of the person of such victim

(9) In respect of each of the said Counts, the Learned Sentencing Judge erred in law fact and principle in that there were neither significant mitigating circumstances identified or indeed existent such would justify so lenient a sentence.

(10) The learned Sentencing Judge failed to have regard to past opportunities for rehabilitation which were not availed of, and of the very limited evidence of rehabilitation in the period since this offending

(11) In respect of each of the said Counts, the learned Sentencing Judge erred in failing to sufficiently incorporate elements of general deterrence in these sentences, having regard to the maximum sentence prescribed by the Oireachtas for the offence, and to the fact that penalties imposed in relation to previous convictions appeared not to have had the desired effect upon this Respondent. Deterrence is an important consideration and is essential in maintaining public confidence in the administration of justice.

Submissions
Headline

11. The appellant submits that the offending in each count ought to fall into the middle range of offending as per *The People (DPP) v. Byrne* [2018] IECA 120 .It is submitted that in each instance there was a clear error of principle in identifying the appropriate level of offending from which headline sentence might be distilled in respect of each count.

12. The respondent refers to *The People (DPP) v. Byrne* [2018] IECA 120 where the Court identified the range available for such offences and the requirements of a headline sentence:-

> "On the basis that a life sentence is likely to be reserved for only the very worst and most egregious offences of this type, the practical reality is that the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. An effective fifteen year range allows for a low range of

zero to five years, a mid-range of six to ten years and a higher range of eleven to fifteen years.

61. A headline sentence is required to reflect the gravity of the offence having regard to the offender's culpability and the harm done."

13. The respondent notes that in *Byrne*, a headline sentence of 5 years would have applied had that respondent been an adult but because he was 6 months shy of his 18th birthday, the Court adjusted downwards to reflect his minority status and a headline sentence of four and a half years was deemed appropriate and not three years. Thus it is submitted that even if the applicant is correct in submitting that these offences lie in the middle range, she fails to consider that the respondent's youth and his more limited role in the offending gave the sentencing judge scope to deviate from the mid-range so as to place the respondent at the very top of the low range for the Wheaton Hall robbery and one year from the top for the Ballsgrove robbery.

Aggravating factors

14. The applicant submits that while the sentencing judge made reference to the fact that she was sentencing the respondent for separate offences, and factored in use of a weapon and to some degree at least the overall threatening conduct, it is respectfully submitted that insufficient regard was had to these factors in setting the headline sentences and indeed in thereafter suspending a portion of the respective sentences.

15. It is submitted that the sentencing judge properly proceeded to take into consideration the fact that there was significance in and about the "spree" correctly identified by her - but she ought properly to have gone further by reflecting that the spree was occasioned by advance planning and during the sentencing process the sentencing judge makes no reference whatsoever to planning as an ingredient for her consideration; it ought properly to have formed a significant consideration; and it ought properly to have formed such a significant consideration in assessing each offence and thereafter, and only thereafter, considering where the headline sentences ought to be having regard to the totality principle.

16. It is submitted that she similarly made no reference of a specific nature to the extensive previous convictions of the accused, which not only evidence significant recidivism but familiarity with incarceration, something which she did reference in acknowledging that the accused was now going for the first time to an adult facility. Acknowledging that the previous convictions were product of events in his childhood, and confined to a limited period of time, nonetheless their apparent failure to effect rehabilitation ought properly to be noted ab initio as aggravating factors. It is respectfully submitted that the headline sentences imposed reflect the fact that she did not have any or any adequate regard for the previous convictions themselves as well as their failure to effect rehabilitation or deterrence.

17. In terms of the respondent's culpability, the respondent submits that it is of note that his participation in the offences was less than that of his co-accused and he can be distanced

from the more violent aspects of the robberies. In terms of planning and monetary loss suffered, the respondent submits that these factors were taken into account by the sentencing judge.

18. In terms of previous convictions, it is submitted that the sentencing judge was not required to recite every single factor taken into account and the evidence was very clearly set out in relation to previous convictions in this case. It could not have been anywhere but in the upper mind of the sentencing judge, even if not explicitly stated by her when pronouncing sentence.

19. The respondent submits that the sentencing judge had adequate regard to the fact that a firearm was discharged. She acknowledged that while he may have been on lookout, he had gone with people, presumably knowing that such implements would be used, and they would be violent.

Mitigation

20. The appellant submits that there was little offered in the way of mitigation in this case, aside from the plea of guilty, the respondent's youth, and his improved engagement with the probation service. The appellant notes that the probation report stated that the respondent indicated that he regretted his actions but this remorse, it is submitted, was in effect hearsay and no apology was offered to the victims.

21. The appellant submits that the previous periods of detention of the respondent show little or no rehabilitation and the appellant submits that a comparatively lengthy period of incarceration might offer realistic hope of such rehabilitation.

22. The appellant submits that the sentencing judge made no reference whatsoever to any basis for suspending a portion of the sentence in respect of either offence. It follows that there was no consideration, as regards the function of any such suspension as part of the sentencing process or any purpose that might be accomplished by such suspension and it is submitted that there was precious little urged by way of mitigation for which one might infer any specific purpose by way of rehabilitation.

23. The respondent submits that the remorse of the respondent, as evidenced in the probation report is valuable and reliable evidence, particularly when taken into consideration with the plea of guilty and the surrendering of bail.

24. The respondent submits that the sentencing judge gave due weight to the fact of his cooperation with the investigation, including the plea of guilty. This can be contrasted with the absence of cooperation from his co-accused, one of whom received a sentence of five years' imprisonment with the final year suspended and the other of whom was acquitted after a trial.

25. In terms of rehabilitation it is submitted that the appellant's submissions place a strained interpretation upon rehabilitation in the context of this case. Indeed, in terms of crime reduction (particularly with a young offender), a rehabilitative strategy will often be far more productive than a lengthy sentence.

Deterrence

26. The appellant submits that the element of deterrence employed in sentencing the respondent in the past had been somewhat ineffectual and that the instant case merited the incorporation of a significant element of deterrence. It is respectfully submitted that the judge, while appearing to have express regard for this as an element of sentencing, erred in principle in failing to have proper adequate regard to how this might be appropriately reflected in the sentence she imposed. Again, while deterrence in society was referenced, it is respectfully submitted that this sentence does not accomplish this goal.

27. The respondent submits that deterrence, whether specific or general, presents the potential in certain cases to run contrary to rehabilitation, where the accused has shown promise for rehabilitation or is at an age where rehabilitation may be still fruitful. It is respectfully submitted that such was the case herein but notwithstanding, the sentence imposed, balanced deterrence and rehabilitation.

Discussion

28. The jurisprudence relating to undue leniency appeals is well settled at this point. This Court will not intervene in the sentence imposed unless it is demonstrated that the sentence was a substantial departure from the appropriate sentence.

29. There were many aggravating features in the present case. Both offences involved three offenders, the use of masks, the production of a firearm and the use of a firearm in the instance of the first offence, and the production of the firearm in the second offence. Whilst we have been informed that the weapon was in fact a starter pistol, the offences involved the effective production of a firearm. Further aggravating features include the impact on the victims, the fact that the first victim was struck twice, the destruction of the CCTV hard drive in the first offence and the effort to damage the footage in the second offence.

30. In terms of the moral culpability of the respondent, it is clear that these were planned operations involving the assignment of roles, the use of a weapon, a getaway vehicle and the desire to erase CCTV footage. The offending conduct was undoubtedly intentional. In the assessment of gravity, there may be extenuating factors, in that context we note that the respondent was a few days shy of his seventeenth birthday. Moreover, the role played by the respondent was that of "lookout" which it is said has the effect of reducing his culpability.

31. The Director takes issue with the nominated headline sentence in each instance and the reduction afforded for mitigation giving rise to, it is argued, a sentence which is too low and out of kilter with existing jurisprudence. On count six, the headline sentence nominated was that of five years' imprisonment, on count 5 a headline sentence of four years was nominated.

Decision – Headline Sentence

32. In the first instance, we observe that while the second offence in time did not involve the discharge of a firearm, as the offence was second in time, this in itself is an aggravating

factor, and so, we do not see a reason to differentiate between the headline sentence for each offence.

33. Having said that, nothing other than a substantial departure from the appropriate sentence will warrant intervention by this Court. When we look to the aggravating factors present in each case, we are satisfied that the headline sentence was in both instances extremely lenient. The question is whether the sentences were so lenient so as to justify intervention by this Court.

34. It appears to us that the appropriate headline sentence in each instance was far too low and thereby constitutes a considerable departure from the norm. This was an error in principle and accordingly the sentences imposed were unduly lenient. These were serious, pre-planned offences. A headline figure must reflect the gravity of the offence with regard to the offender's moral culpability and the harm done. We consider that the appropriate penalty for the offences falls within the mid-range; that being a range of six to ten years.

Reduction for Mitigating Factors

35. We then consider the reduction afforded for mitigating factors present, the strongest of which were the pleas of guilty. He co-operated with the Gardaí and made admissions, he has expressed remorse and he engaged with the Probation Services albeit, belatedly. We have already referred to the fact that he was a minor, which is relevant in terms of mitigating his moral culpability.

36. The respondent makes the argument that he surrendered his bail and was therefore lodged in custody on 1st May 2019. Whilst this is so, he received the benefit of that course of action, in that his sentence was backdated. However, it does underpin his remorse and the pleas of guilty.

37. The sentencing judge reduced the nominated five and four year sentences to three years and then suspended the final eighteen months of each sentence. Each sentence was ordered to run concurrently. It was open to the judge to exercise her discretion and make the sentences consecutive, but she chose not to do so.

38. In our view, the level of reduction permitted for mitigating factors was too great, even allowing for the fact that the respondent was a minor at the time of the offence, the fact that his previous convictions were forty-two in number did not appear to lead to a progressive loss in mitigation, as should have been the effect.

39. In conclusion we are satisfied that the sentences imposed were unduly lenient. In those circumstances we will proceed to quash the sentences imposed and re-sentence the respondent as of today's date.

Re-Sentence

40. Whilst we have not received additional material, we understand from Mr. Seamus Clarke SC, for the respondent that the respondent is doing well whilst incarcerated. The respondent's expected release date was the 14th June 2020 and we are very cognisant of

the fact that an increase in his sentence proximate to his expected release date will be difficult to bear and all the more so, given that he is still a very young man.

41. We are satisfied that the appropriate headline sentence in each instance should have been of the order of some six and a half to seven years. We would have been minded to reduce that headline sentence to something in the order of five years and to have suspended a portion of that sentence. However, for reasons we will state in a moment we will reduce each sentence to a sentence of four years to take account of the mitigating factors.

42. In the present circumstances given that the respondent was anticipating his release mid-June, we recognise that to increase significantly his sentence at this remove would be most difficult for him. With that in mind, and in order to incentivise rehabilitation we will suspend the final fifteen months of that sentence in each instance on the usual conditions and also on the condition that he remain under the supervision of the probation services for a period of two years, a bond in the sum of €200 which may be entered into before the Governor of the prison. Liberty to apply to both parties should any difficulties arise regarding the bond.