



THE COURT OF APPEAL

[230CJA/18]

The President

Edwards J.

Baker J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

DAVID HEALY

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered on the 29th day of April 2019 by Birmingham P.

1. This is an application brought by the Director of Public Prosecutions seeking to review on grounds of undue leniency sentences that were imposed in the Circuit Court in Cork on 16th July 2018.
2. The sentences sought to be reviewed are sentences of seven years imprisonment imposed in respect of an arson offence which was suspended on conditions, including a condition that the accused pay to the State by way of a fine the sum of €25,000 within a month of the sentence hearing, and also a consecutive sentence of three years imprisonment imposed in respect of an offence of attempted deception. That was suspended, too, on conditions, including a condition that the accused pay to the State a fine in the sum of €8,000 within a month of the sentence hearing.
3. The sentences now sought to be reviewed were imposed in a situation where the respondent was convicted of the offence of arson by a jury following a contested trial. He was then remanded in custody, and spent some ten weeks in prison. The jury had returned its verdict of guilty on the arson offence on 15th May 2018 and he was then remanded in custody for sentence until 12th June 2018. At that stage, he entered a plea of guilty to the attempted deception charge, the indictment had previously been severed, and then the sentence aspect was finalised on 16th July 2018.
4. The background to the case related to a fire at a commercial premises known as Munster Air Compressors on Dublin Hill, Cork, on 16th December 2014. That premises was owned by a company controlled by the respondent and his father. The fire that started was an extensive one and was brought under control by three units of the Fire Service. The officer in charge of the Fire Service came to the conclusion that the fire had been set deliberately as there were six different seats of fire on different levels in the building; barrels of oil, shredded paper, and accelerants were used to start the fire. The officer was of the view that it would have taken a considerable period of time to prepare the fire. The attempted deception charge related to the fact that the value of certain machines had been overstated, a value of €30,000 was put on machines where they were in fact worth about €2,000. In the course of his sentencing remarks, the Judge noted that the level of insurance cover in respect of content had been increased in June 2014 from a level of €50,000 to one of €350,000.
5. In terms of the respondent's background and personal circumstances, the sentencing Court was told that he was a forty-year old businessman and lived in what was described as a large house in the Passage West/Monkstown area. The Court heard that he was in a long-term relationship and was the father of two children and that he had no relevant previous convictions, his only conviction being one for the use of a mobile phone while driving. In fact, in passing, it may be said that the sentencing Judge, when delivering his sentencing remarks, referred in error to the fact that there were five convictions recorded, none relevant, but this error was not a material one.
6. The approach of the sentencing Judge was to identify and fix a headline sentence for the arson offence at seven years. He saw the offence as being at the midrange of offending and he referred to the wanton recklessness exhibited in selecting six locations to ignite the fire. In relation to the deception offence which carried a maximum sentence of five years, the arson offence having carried a maximum sentence of life, the Judge saw the offence of attempted deception as being at the upper end of the scale. He referred to the increase in insurance cover by a multiple of seven, but he felt that some credit had to be given for the plea that had been entered on this count, even if that plea came late in the day. The Judge explained, at a later stage in the sentencing remarks, that he was imposing consecutive sentences in order to send out the clearest possible signal.
7. In moving the application on behalf of the Director, Mr. Ray Boland, Barrister-at-Law, acknowledges that he has a high bar to cross, that it is not enough for him to establish that the sentence was lenient, or even very lenient. Instead he was required to go further and to establish that it was unduly lenient such as to require intervention by this Court. In resisting the application, Mr. Sean Gillane, Senior Counsel, who did not appear in the Court below, contends that the high threshold has not been crossed. He says that in this case, if one analyses the complex sentence that was imposed in detail, one comes to the conclusion that the approach taken by the sentencing Judge was a permissible one. He points to the fact that when the jury returned its verdict, his client was immediately remanded in custody. He points out that the impact of incarceration in prison for the first time on someone of previous good character is very considerable. He describes the penalties that were imposed as hybrid, involving custody, suspended sentence, and also a significant financial aspect. The fines, it is to be noted, were paid promptly. He says that in a situation where the arson

and the attempted deception were clearly closely linked, the fact that consecutive sentences were imposed was unusual and the effect of that is that his client was subject to a very lengthy period during which there would be a suspended sentence in operation. He points out that the financial loss arising from this incident has fallen, not on the State or on any injured parties, but rather on his own client and on the company with which he was involved and others involved in that company.

8. This Court is in no doubt about the seriousness of the offence. The Director has correctly categorised the offence as carefully planned and premeditated. We regard the offence of arson as a very serious one. In this case, the arson that was planned was clearly linked with an elaborate act of dishonesty, but there is also the fact that it involved putting at risk those whose responsibility it is to respond to fires. In this case, the fire was fought by three units of the Fire Brigade. Not only do those first responders in the service of the community put themselves at risk, but the fact that they were required to respond to this incident means that their capacity to respond to other incidents is necessarily reduced and that is a matter of real seriousness.

9. We are of the view that notwithstanding that Mr. Healy appeared before the Circuit Court as a person of previous good character and without prior convictions, that this was a case where a custodial sentence was unavoidable. While it is the case that a plea was belatedly entered on the attempted deception charge, the arson count, the more serious of the two charges, was fully contested.

10. The approach of the Circuit Court Judge to structuring the sentence was an unusual one and it is not one which would have been adopted if this Court had been sentencing at first instance. Rather, our inclination would have been to identify a headline sentence in respect of the arson offence, to then reduce from that headline and to consider partially suspending the sentence in order to take account of the factors that were present in favour of the then accused. These factors were, principally, the absence of previous convictions, the respondent's prior good character, his family and domestic circumstances and the fact that there was an unlikelihood of further offending. This approach might have seen a headline sentence of seven years nominated and that then reduced to four years to take account of the mitigating factors mentioned and there might have been provision for a limited period of suspension of perhaps nine or twelve months. In those circumstances, this Court would have been minded to make the deception sentence concurrent.

11. The Court is satisfied that the sentence that was actually imposed did involve an error in principle. The Court must therefore quash that sentence and proceed to resentencing. The Court is required, in accordance with long and well-established jurisprudence, to resentence as of today's date. Given how the original sentence was structured, with multiple layers, that presents certain difficulties. In particular, we have to recognise that Mr. Healy has spent time in custody, has paid a significant financial penalty, has been the subject of a lengthy suspended sentence and that he is now being resentedenced at a considerable remove from the time when the offence was committed.

12. In the particular circumstances of the case, the Court proposes to deal with the situation as follows: by not interfering with the fines that were imposed and by leaving in place the sentence of seven years in respect of arson and the consecutive sentence of three years in respect of the attempted deception. But whereas the entirety of those sentences were suspended in the Circuit Court, this Court will suspend the attempted deception sentence in full, but in the case of the arson offence, will suspend all but two years of that sentence. The Court will also direct that Mr. Healy should have full credit for the period spent in custody between the conviction and the sentence hearing in the Circuit Court.

13. In summary, then, the change that the Court proposes is that the arson sentence will now be one of seven years imprisonment with all but two years of that sentence suspended, so the net sentence is one of two years with credit to be given for the period already spent in custody.