



THE COURT OF APPEAL

Record Nos. 208 & 209CJA/2016

**Birmingham J.
Mahon J.
Edwards**

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

MARK LOUGHLIN AND PHILIP PERRY

RESPONDENTS

JUDGMENT (ex tempore) of the Court delivered on the 3rd day of July 2017 by Mr. Justice Mahon

1. Both respondents were charged with a number of offences arising from an incident which occurred in the early hours of the morning of the 19th June 2015 at Clonmoyle, near Monasterevin in Co. Kildare. The previous day, shortly before midnight, a garda surveillance team observed Mr. Loughlin (the first respondent) getting into and driving a blue Volkswagon Passat at Broadford in Co. Kildare. The vehicle travelled towards Edenderry. En route, Mr. Loughlin and Mr. Perry (the second respondent) then got into a BMW 5 Series car and drove from Edenderry towards Rathdangan, and then on towards Monasterevin. At Clonmoyle the gardaí decided to intercept the vehicle. Having activated their blue lights and sirens two of the garda cars overtook the BMW in an effort to force it to stop. The vehicle failed to stop and attempted to ram the garda vehicles. In the course of this altercation Mr. Loughlin produced a firearm and discharged it from the passenger window of the BMW car. The vehicle was finally stopped. Its driver, Mr. Perry, ran away but was pursued on foot and arrested by gardaí. The front seat passenger, Mr. Loughlin, remained seated in the car. The gardaí found a loaded sawn off shotgun loaded with one cartridge, and another cartridge lying on the floor of the car. Admissions were made by both men to the gardaí. Their account as to the purpose of their journey and their intention to use the firearm to put pressure on another individual to pay a drugs debt was not entirely accepted as being true by the gardaí. Mr. Perry maintained that he was unaware that Mr. Loughlin had the firearm on board the vehicle and this was confirmed by Mr. Loughlin.

2. Both respondents were charged with a number of offences to which they pleaded guilty at Naas Circuit Criminal Court on the 16th and 18th December 2015. In Mr. Loughlin's case there were four offences, namely reckless discharge of a firearm contrary to s. 8 of the Firearms and Offensive Weapons Act 1990, possession of ammunition in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964 as amended, and two of damaging property contrary to s. 2 of the Criminal Damage Act 1991. In Mr. Perry's case, there were two offences, one of possession of a firearm in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964 as amended, and one of damaging property contrary to s. 2 of the Criminal Damage Act 1991. The reckless discharge offence carries a maximum sentence of seven years while the possession offences carry maximum sentences of fourteen years, and have a presumptive minimum sentence of five years.

3. Both respondents were sentenced on the 6th July 2016. Mr. Loughlin received concurrent sentences for the four offences ranging between two years imprisonment and three and a half years imprisonment. The firearm and possession of ammunition offences received sentences of three and a half years imprisonment and three years imprisonment respectively.

4. In Mr. Perry's case, he was sentenced to two years and six months in respect of the possession of a firearm, and a similar sentence for damaging property.

5. The appellant seeks a review of the sentences imposed on both respondents on the ground that the said sentences were unduly lenient, pursuant to s. 2 of the Criminal Justice Act 1993. It provides as follows:

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the sentencing court) on conviction of a person on indictment was unduly lenient, he may apply to the (Court of Appeal) to review the sentence.

(2) An application under this section shall be made on notice given to the convicted person within 28 days from the day on which the sentence was imposed.

(3) On such an application, the Court may either:-

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

6. Five broadly similar grounds of appeal were originally filed by the appellant. Two of these have now been dropped so that the appeal proceeds on the basis of the following grounds in relation to both respondents:

- (i) The sentences imposed amount to an error on principle for offences categorised as being in the mid range;
- (ii) the learned trial judge erred in principle in finding that there were exceptional circumstances on account of the fact that the accused had pleaded and had cooperated;
- (iii) the facts of the case do not disclose exceptional circumstances in favour of the accused such as to amount to worthwhile mitigation, and
- (iv) the learned sentencing judge erred in principle in his assessment of all the relevant factors in imposing the sentences in respect of the firearms offences.

7. Section 27(A) of the Firearms Act 1964 as substituted by s. 59 of the Criminal Justice Act 2006 provides for a presumptive minimum sentence in respect of a conviction for the offence of possessing a firearm or ammunition in suspicious circumstances. The relevant provisions of same are as follows:-

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

(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 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 subsection (5) of this section whether a sentence of 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 Act 1925 to 2006, the Offences Against the State Act 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."*

8. In the course of his sentencing judgment the learned sentencing judge found there to be in existence *exceptional and specific circumstances* which rendered the presumptive minimum sentence of five years or a greater sentence to be unjust in the circumstances. He identified these as the pleas of guilty and the provision of material assistance to the gardaí, without specifying what that material assistance was.

9. In the course of his judgment the learned sentencing judge referred to a number of mitigating factors present in each case, including the pleas of guilty and the respondents' cooperation. In the case of Mr. Perry, he stated that he had *made some admissions* while in the case of Mr. Loughlin he referred to him having made *full admissions*.

10. Mr. Loughlin has twenty four previous convictions, dating between January 2011 and June 2015. Fourteen of these are in respect of public order incidents, two are for criminal damage, three are for burglary, three are for assault and two relate to road traffic matters. Mr. Perry has nineteen previous convictions, of which sixteen are for road traffic matters, one is for burglary, one is for criminal damage, and one relates to s. 3 of Misuse of Drugs Act 1971.

11. In the course of being cross examined on behalf of Mr. Loughlin during the sentencing hearing, Sgt. Moore cast an element of doubt as to the reasons provided to the gardaí in relation to the background to the commission of these offences. His counsel asked the garda sergeant the following question:

"And I think he also gives - - instructs me that he was in a position that he was under an obligation to an individual to whom he owed money for drugs to basically take this firearm and put the frighteners on another individual, do you know anything about that?"

12. The garda sergeant answered thus:-

"I won't comment on that, Judge. But I can't comment on that, Judge, because I am unaware of that. But we can say that that's not the intelligence that we had to hand, that's not An Garda Síochána's view on this whole incident."

13. It must be emphasised at the outset that the offences committed by both respondents were remarkably serious. Being in possession, illegally, of a shotgun and ammunition in a motor vehicle are grave offences, as is attempting to ram a garda car. However, what makes this incident particularly serious was the deliberate discharging of the shotgun in the proximity of gardaí, and in circumstances where it was abundantly clear that the gardaí, and not anyone else, were in pursuit. They are fortunate that no gardaí were injured or killed. While Mr. Perry claimed he was unaware that Mr. Loughlin had a firearm in the car it is nevertheless the case that he pleaded guilty to the offence of possessing a firearm in suspicious circumstances. It was suggested on his behalf that his knowledge of the presence of the firearm was only from the moment it was produced by Mr. Loughlin, and shortly before he ran from the motor vehicle.

14. The learned sentencing judge did not identify headline sentences before proceeding to discount them as he believed appropriate to account for the mitigating factors, although he did identify those and clearly considered them prior to sentence. It might reasonably be speculated that those headline sentences were in the region of five years for Mr. Loughlin and four years for Mr. Perry.

15. A distinction in the sentences was undoubtedly appropriate having regard to the fact that Mr. Loughlin actually discharged the shotgun in the direction of the gardaí and by all accounts cannot claim any limitation as to the period of time in which he was in possession of the weapon.

16. The learned sentencing judge took the view that the firearm offences in Mr. Loughlin's case fell within the higher range, and, in Mr. Perry's case, within the *middle range*.

17. In *DPP v. Ryan* [2014] IECCA 11, a very useful and helpful decision in the context of these particular cases and which unfortunately was not open to the sentencing court, the Court of Criminal Appeal in its judgment delivered by Clarke J. undertook an extensive review of possession of firearms and ammunition sentences over the preceding six years, that is commencing in 2008, and indicated its view as to the appropriate ranges of the sentencing for such offences, emphasising at the same time that particular factors must be considered in individual cases. Clarke J., at paras 7.15 and 7.16, stated:-

"7.15 From that exhaustive review, it seems clear that the principal factors which will normally require to be taken into account in assessing the seriousness of an offence of possession of a firearm in suspicious circumstances 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 so the seriousness of same) or out of 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. Doubtless other factors could loom large on the facts of any individual case.

7.16 In the absence of exceptional and specific circumstances, there is, of course, a minimum presumptive, although non-mandatory, sentence of 5 years. 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. ..."

18. In the instant cases, and adopting both the sentencing ranges suggested in *Ryan* and a similar assessment as to the gravity of the firearms offences in each case to that identified by the learned sentencing judge, it is immediately clear that the sentences imposed were significantly unduly lenient and require adjustment.

19. In the court's view, the appropriate headline sentences are, in respect of the possession the firearms offences for both respondents a term of seven years imprisonment and in respect of the discharging offence also seven years imprisonment.

20. There are however strong mitigating factors present in both cases and these were referred to by the learned sentencing judge in the court below. The court attaches significant weight to the respondents' personal circumstances and their good behaviour in prison. It also makes allowance for the fact that both appellants now face increased sentences at a time when after they were originally sentenced and in Mr. Perry's case after he has completed serving his original sentence. In Mr. Loughlin's case, the court has also been provided with a number of certificates of achievement in prison which are quite impressive.

21. The sentencing which this court will now impose are as follows:-

1. In Mr Loughlin's case, the headline sentence in respect of the firearms discharge offence will be seven years. The court will however reduce this term to five years imprisonment because of the factors outlined above. The headline sentence for the possession offence will also be seven years, likewise reduced to five years. The criminal damage sentence will remain unchanged.

2. In Mr. Perry's case, the headline sentence in respect of the firearms possession offence will be seven years. The court will however reduce this to four years for the reasons outlined above. It will further suspend the portion of this four year sentence which is at yet unserved for a period of two years from today's date (and thereby give him full credit for the sentence already served) on his entering into a bond in the sum of €100 to keep the peace and be of good behaviour. It does so in recognition of the fact that Mr. Perry has recently completed his original prison sentence, is actively seeking employment, and is engaged with the care of his young son.

The sentence for the criminal damage charge will remain unchanged.

22. All sentences are to run concurrently, and from the dates directed in the court below.