THE COURT OF APPEAL

[68/2017]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

CONOR HUGHES

APPELLANT

AND

[69/2017]

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DARREN FOX

APPELLANT

JUDGMENT of the Court delivered on the 4th day of December 2018 by Birmingham P.

1. These are appeals by Conor Hughes and Darren Fox against severity of sentence. The sentences under appeal are sentences of seven years imprisonment imposed in the Special Criminal Court on 8th February 2017 in respect of offences contrary to s. 27A of the Firearms Act 1964 (as amended), the offence of possession of a firearm in suspicious circumstances.

2. The background to the sentence hearing and now this appeal is to be found in events that occurred on 30th October 2015. On that occasion, Detective Superintendent Thomas Maguire of the Special Detective Unit was in possession of confidential information relating to the movement of suspected members of the IRA and their intention to "effect an event". In those circumstances, the movements and activities of the appellants were monitored and they were placed under surveillance by members of the National Surveillance Unit. They were observed meeting a third individual in Adare, County Limerick, and observed engaging in what was described as a reconnaissance mission.

3. The appellants were intercepted by members of the Emergency Response Unit at 01.30am on 31st October 2015 in a stolen motor vehicle which was travelling from Adare in the direction of Rathkeale. When detained, the appellants were observed to be wearing gloves and each had a hood pulled tightly over his head. A loaded sawn-off side-by-side double-barrelled shotgun (loaded with two cartridges) and described as "ready to go" was located in the front of the vehicle. Also within the vehicle was a jerry can containing petrol and a quantity of matches. Both appellants were arrested and detained and interviewed and apart from denying membership of the IRA, exercised their right to silence. The sawn-off shotgun which was located in the vehicle had been stolen previously and the Serial Number on the shotgun had been removed.

4. In terms of the background and personal circumstances of the appellants, the Court heard that Conor Hughes had six previous convictions while Darren Fox had seven previous convictions, but it was said that none of these convictions were "of a substantive nature". The Court heard that Darren Fox was twenty-seven years of age and came from what was described as a decent, hardworking family background. He was also said to have had a good employment record. So far as Mr. Hughes was concerned, he was aged forty years at the time of the sentence hearing and the Court heard that he, too, had a good employment history.

The Approach of the Trial Court to Sentencing

5. The Special Criminal Court indicated that it was identifying a notional or headline sentence of ten years' imprisonment, but taking into account the mitigating factors identified that were present in respect of each accused and in order to permit the prospect of rehabilitation and to incentivise that in each case, they were reducing the sentence to one of seven years imprisonment.

6. In *DPP v. Ryan* [2014] IECCA 11, the Court of Criminal Appeal suggested by way of guidance that offences at the lower end of the range ought to attract a sentence of five to seven years, offences in the mid-range seven to ten years, and an offence at the top of the range a sentence of ten to fourteen years, these indicative sentences being pre-mitigation sentences.

7. The appellants have referred to a number of comparator cases and say that by reference to these cases, it emerges that the sentences imposed by the Special Criminal Court were somewhat out of line with sentences in other cases. Counsel for the appellants drew attention to the case of *DPP v. Nolan* [2017] IECA 127. This was a case where an unloaded shotgun was pointed into the face of a member of An Garda Síochána. In the trial court, a sentence of five years imprisonment was imposed in respect of the firearms offence and a concurrent eighteen-month sentence in respect of the drugs offence. In imposing sentence, the Judge in the Circuit Court had identified a headline sentence of seven and a half years, talking the view that the case fell within the mid-range identified in *DPP v. Ryan* [2014] IECCA 11. Seeking to review the sentence, the DPP contended that the Judge was in error in placing the offence as mid-range and contended that it should have been in the high range. The Court of Appeal was prepared to accept that the case belonged in the mid-range while adding that if it had been sentencing, it might have nominated a headline sentence towards the upper end of mid-range. The Court of Appeal was of the view that a higher headline sentence than that fixed by the Circuit Court would have been justified and that even before account was taken of the suspended portion of eighteen months, that a lower discount for mitigation than that provided for by the Circuit Court would have been justified. This Court then proceeded to impose a sentence of five years simpliciter.

8. The Court would simply observe that it has on a number of occasions recently expressed some doubts about the usefulness of reliance on undue leniency reviews in the case of appeals against severity of sentence. In the first undue leniency review, the case of *DPP v. Byrne* [1995] 1 ILRM 279, the point was made that it would rarely be helpful to ask the question whether a higher sentence than that the subject of review would have been upheld. By way of analogy, it may be said that it is often the case that had a sentence more severe than that imposed at first instance or following a review been selected, that it might very well have been upheld.

9. Clearly, pointing a firearm, albeit unloaded, at a member of An Garda Síochána is a very serious matter. However, if one focuses purely on the question of possession of the firearm, it seems to us that as a possession case, the present case is more serious. Here, the weapon was a loaded sawn-off shotgun, one that was "ready to go". The fact that the firearm had been stolen earlier, that the Serial Number had been erased, that it was being carried in a vehicle that had also been stolen earlier, the presence of petrol in a jerry can, and the mode of attire of the appellants gave rise to an irresistible inference that the firearm was being carried or possessed in the course of very serious criminal activity.

10. There is the further point which may serve to distinguish *DPP v. Nolan* [2017] IECA 127 from the current appeal. In that case, the Court was dealing with a young man, aged twenty at the time of sentencing, from a difficult family background who was described as "hopelessly addicted to drugs", but who, it was suggested, was making progress in custody towards addressing his addiction problems.

11. The appellants referred also to the case *DPP v. Loughlin & Perry* [2017] IECA 204. Again, this was also an undue leniency case. In that matter, a firearm was discharged giving rise to a charge of "reckless discharge", carrying a maximum of seven years as well as the suspicious possession charge. The Court of Appeal indicated that appropriate headline sentences for both the possession and reckless discharge offences would have been seven years imprisonment. When resentencing, the Court of Appeal had regard to the fact that both appellants were facing increased sentences at a time after the original sentence hearing and, in the case of Mr. Perry, after he had completed serving his original sentence. Again, the difficulties of relying on undue leniency reviews in the context of appeal against severity will be noted.

12. The case of *DPP v. Jason Freyne* [2017] IECA 41 is another undue leniency review. In that case, the charges before the Court were possession with intent to endanger life. In the Circuit Court, he received a prison sentence of eight years with the final two and a half years suspended. The case itself involved the actual discharge of a firearm at an individual in a residential area of Limerick with the consequence that the individual in question sustained gunshot wounds. In acceding to the application by the DPP, the Court of Appeal commented that it was satisfied that the sentence was unduly lenient and ought to have been one of at least ten years before any reduction was applied for mitigation. The Court, therefore, replaced the sentence of eight years with one of ten years. The Court went on to say that in its view, the suspension of two and a half years of a ten-year sentence would not be warranted to fairly provide for the mitigating factors, but that, nonetheless, the Court would reluctantly apply the same suspended sentence element as was applied in the Court below. It said that it was doing so in part in recognition of the fact that having received his sentence in the Court below, the respondent now faced the fact that the sentence was being significantly extended.

13. The case of *DPP v. Kavanagh* [2017] IECA 133 arose out of a robbery at a Mace store/post office at Clogherhead, County Louth. The charges in issue were charges of possession of a double-barrelled sawn-off shotgun with intent to commit an indictable offence and robbery. In the Circuit Court, a sentence of four years imprisonment with the final two years suspended was imposed. The Court of Appeal took the view that the sentence was unduly lenient and outside the wide discretion enjoyed by the sentencing Judge. The Court said that while the offence did not fall into the most serious category in terms of gravity, it nevertheless ranked well above the halfway mark and, having regard to the respondent's previous convictions, required a sentence of between seven and nine years. Having quashed the sentences in the Circuit Court, the Court then proceeded to resentence. It referred to a number of certificates of achievement awarded to the respondent since entering custody which are described as being "particularly impressive when considered in their entirety". The Court then proceeded to impose sentences of seven years imprisonment with the final two years suspended.

14. While the offence is, on one view, of a different character to the offence at issue in the present case, it can fairly be said that the sentence imposed, even following the undue leniency review, might seem lenient in comparison to the sentences imposed in this case by the Special Criminal Court.

15. This Court would take the opportunity to refer briefly to the case of *DPP v. Ryan* [2014] IECCA 11 and the subsequent case of *DPP v. O'Keeffe* [2014] IECCA 24. The former case is usually referred to because of the guidance offered for firearms sentencing, but the actual sentence imposed is of some interest. It will be recalled that in that case, the appellant was one of four occupants of a car who went to a hedge or area of undergrowth in a rural area outside Limerick and picked up a cloth bag there, which they brought to the car. The vehicle in which Mr. Ryan was travelling was under surveillance at the time and was stopped by members of the SDU and Regional Support Unit. The cloth bag retrieved from the undergrowth was found to contain a Browning semiautomatic pistol and ammunition suitable for use in such a pistol. Over the course of two judgments, Clarke J (as he then was) commented that he felt

that the starting sentence had to be between nine and ten years. When resentencing, the Court indicated that a sentence of nine years was the minimum which would reflect the seriousness of the offence itself, and indeed, that a sentence of up to ten years would be justifiable. A reduction of two years from the nine years was seen as the maximum that could be contemplated. The net sentence of seven years imprisonment is, therefore, the same sentence as was imposed on Mr. Hughes and Mr. Fox by the Special Criminal Court.

16. Slightly unusually, though very welcome as a development, the Special Criminal Court was referred to two of its own decisions. The case of DPP v. Brian Walsh & Anthony Carroll where a sentence had been imposed on 9th May 2015. In that case, a sentence of seven years imprisonment with one year suspended was imposed in circumstances where the two accused, forensically attired, were found in a stolen van in possession of two fully loaded weapons. An accelerant, lighters, and bleach were also found in the van. This was a case that was dealt with, not on the basis of a plea of guilty, but rather on the basis of "no contest". In the case of DPP v. Byrne & Finlay, dealt with the by the Special Criminal Court on 1st July 2016, the appellants were seen in a van, wearing disguises, when found in possession of a loaded pistol. In that case, sentences of five years imprisonment were imposed by the Special Criminal Court and were then subject to undue leniency reviews by this Court which were rejected.

17. Apart from the criticism of the assessment of gravity, the Special Criminal Court is also criticised for how it dealt with the fact that pleas of guilty were entered. It is said that pleas of guilty have traditionally been regarded as particularly valuable in the Special Criminal Court and that the Court was in error in departing from that situation here. The sentencing Court dealt with the issue of pleas as follows:

> "[w]e have taken into account matters urged in mitigation on behalf of both individuals. In taking into account the pleas of guilty, we must consider the time pleas were entered. The pleas cannot be considered as the earliest pleas, for which greater discount must be allowed. The pleas were entered in November 2016, and the trial was listed for January 2017. It is the position that both were caught red-handed. However, it has been accepted by the prosecution that the pleas were of value to the prosecution, and this, therefore, is to the credit of these accused. Each could have required the prosecution to prove the case against them, but did not do so."

This Court accepts that pleas of guilty in the Special Criminal Court are valuable. In other cases, the Court has refused application to review sentences on grounds of undue leniency on the basis that the Special Criminal Court is best positioned to assess the value of a plea. In this case, the discount from ten to seven years to take account of the plea and other matters present was 30% and could not be seen as inappropriate.

18. There remains for consideration the identification of a starting sentence of ten years, giving rise to a net sentence imposed of seven years. The Court would accept that the sentence on a plea was at the higher rather than the lower end of the available spectrum. The question, however, is whether it was so severe as to amount to an error in principle requiring intervention by this Court. Having considered the matter carefully, the Court has concluded that is not in fact the case. There were, as will have already appeared from this judgment, many factors present which meant that this was by any standards a particularly serious case. These included, to refer but to some, the nature of the weapon, a sawn-off shotgun, which can have no legitimate purpose, the fact that the weapon was loaded, was "ready to go", that it was being carried in a vehicle stolen earlier, that the activity interrupted by Gardaí was in furtherance of the aims of the illegal organisation that was the IRA and the intention of that organisation to "effect an event" that evening.

19. In those circumstances, the Court cannot conclude that the sentence imposed fell outside the available range. Rather, the sentence decided upon by the Special Criminal Court was a proportionate one.

20. The Court must dismiss the appeal.