



**THE COURT OF APPEAL**

**RECORD NOS. 200 & 201CJA/16**

**Birmingham J.**

**Mahon J.  
Hedigan J.**

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

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPELLANT**

**- AND -**

**MICHAEL FINLAY AND DEAN BYRNE**

**RESPONDENTS**

**JUDGMENT (ex tempore) of the Court delivered on the 24th day of February 2017 by Mr. Justice Mahon**

1. This is an application by the appellant for a review of sentences imposed on the respondents on the grounds that they were unduly lenient, pursuant to s. 2 of the Criminal Justice Act 1993.
2. The respondents were convicted following a trial in the Special Criminal Court on 16th June 2016 of two counts:-
  - (i) Possession of a firearm contrary to s. 27A of the Firearms Act 1964, as substituted by s. 59 of the Criminal Justice Act 2006 and as amended by s. 38 of the Criminal Justice Act 2007 and s. 26 of the Criminal Justice Act 2006, and
  - (ii) possession of ammunition contrary to s. 27(A) of the Firearms Act 1964, as substituted by s. 59 of the Criminal Justice Act 2006 and as amended by s. 38 of the Criminal Justice Act 2007 and s. 26 of the Criminal Justice Act 2006.
3. Both respondents were sentenced on the 1st July 2016 to concurrent terms of imprisonment of five years on each of the counts, said sentences to date from (in the case of Mr. Finlay) the 5th June 2014, and (in the case of Mr. Byrne) the 8th May 2016.
4. Following the receipt of confidential information, the gardaí undertook a surveillance operation on the 5th June 2014 at a location in Tallaght, Co. Dublin. They followed a Renault Kangoo van, which had been previously stolen, to another location. One of the gardaí approached the van with his firearm drawn and saw two men in the van. He saw Mr. Finlay with a pistol in his hand. He complied with the garda request to drop the weapon. Both respondents were found to be wearing disguises including false beards and sunglasses. Mr. Finlay was wearing an official An Post jacket. The seized weapon was found to have a fully loaded magazine with a bullet in the chamber. The stolen van had false registration plates. Accelerants were also found in the rear of the van.
5. Neither respondent resisted arrest. When interviewed, both respondents relied on their right to silence. Mr. Byrne had no previous convictions, while Mr. Finlay had three very old minor convictions, and which were excluded from consideration by the sentencing court. Both respondents responded "*not guilty no contest*" when asked to plead, prompting the court to enter pleas of "*not guilty*" on the respondents' behalf.
6. Section 2 of the Criminal Justice Act 1993 provides as follows:
  - (1) *If it appears to the Director of Public Prosecutions that a sentence imposed by a court...on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal 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.*
7. The appellant's grounds of appeal are similar as against both respondents. They are:-
  - (i) In all the circumstances of the case the sentencing court erred in principle in imposing an unduly lenient sentence in respect of both offences.
  - (ii) The sentencing court erred in failing to attach appropriate weight to the aggravating factors in the case. In particular the sentencing court failed to have appropriate regard to the following factors:-

(a) the fact that the respondent was found in possession of a fully loaded pistol at a time when he was wearing a disguise and was intercepted by An Garda Síochána in a stolen vehicle bearing false registration plates;

(b) the fact that the evidence was presented to the court that the investigation conducted by An Garda Síochána involved suspected members of the Irish Republican Army.

(iii) The sentencing court erred in law and in principle by giving undue weight to the personal circumstances of the accused and the other mitigating factors advanced on his behalf.

(iv) The sentencing court erred in law and in principle deeming the offending as being at the lower end of the scale for offending of this nature.

(v) The sentencing court erred in law and in principle in imposing a sentence at the very minimum that could be imposed for an offence of this nature and circumstances where the respondent entered a not guilty plea and did not cooperate with the investigation.

(vi) The sentencing court erred in principle and in law by giving undue weight to the respondent for not contesting the evidence that was tendered at the trial.

(vii) The sentencing court erred in principle in the imposition of a sentence of such leniency as such was not, in all the circumstances of the case, in the public interest and the sentence imposed was such as would not act as a deterrent to other persons and the prevention of further crimes.

8. In relation to the respondent's response of "*not guilty no contest*" to the invitation to plead guilty or not guilty, Butler J. in delivering the judgment of the court stated:-

*"This is not a plea and is not to be equated with a plea, but some allowance must be given for such behaviour, not least because it shortened the time the case took and it removed - it went a long way to removing uncertainties, if there would be any from it."*

9. The trial court graded the case in terms of its gravity as follows:-

*"So, as I say, in this case we consider it to be at the lower end and there is a presumptive minimum of five years imprisonment and in this case we are satisfied that that minimum sentence does apply. It so happens that that minimum coincides with our view of the case."*

10. The focus of the appeal very much rests on the contention that the sentencing court set the tariff too low. In her view the appellant maintains that the cases should have been graded in terms of gravity at the mid to upper category. It is also contended that the correct headline sentences were terms of eight years, but without a discount of three years off that figure.

11. The practical effect of the "*not guilty no contest*" plea was explained to this court as requiring the prosecution to prove every aspect of its case as would have been necessary had there been "*not guilty*" pleas, but without challenge by way of cross examination and absent also, submissions relating to the prosecution evidence. While undoubtedly this resulted in a somewhat easier run for the prosecution than might otherwise have been the case it nevertheless, as was emphasised by Mr. Heneghan, required the prosecution to still prove their case and left open the possibility of the appellants taking issue or challenging some element of the prosecution case in the hope of fatally undermining it, had such an opportunity arisen.

12. In the court's view, the sentencing court nevertheless quite correctly allowed the respondents "*some allowance*" for this approach, acknowledging the fact that it shortened the case and removed some of the uncertainties from it.

13. It is also argued by the appellant that the decision by the sentencing court that the mandatory minimum sentence was unduly lenient and an error. However the mandatory minimum sentence is nevertheless a significant sentence. It was not the lowest sentence available to the court as a lower sentence could have been imposed if the court had decided that it was appropriate to deviate from the presumptive mandatory minimum provisions. It was, of course, appropriate that the sentencing court decided there was no justification for so doing. While the sentencing court decided that there were no exceptional or specific circumstances which permitted it impose sentences of less than five years, it nevertheless was obliged to decide on what it considered was, to use the terminology of Barron J. in *DPP v. McCormack* [2000] I.R. 356, to be the appropriate sentence, when he said:-

*"The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused."*

14. A notable feature of these cases is the fact that both respondents were of previous good character. Mr. Finlay had minor previous convictions which the sentencing court quite properly considered irrelevant. This fact was apparently and quite rightly reflected in the sentences imposed by the sentencing court.

15. While the court accepts the submission made by Mr. Heneghan that the sentencing court placed the offences at too low a level in terms of their gravity, it is the actual sentences imposed which must determine the outcome of this appeal. It also accepts the submission that the appropriate headline sentences were in the region of eight years.

16. The issue is: were net custodial terms of five years lenient, and if so, were they unduly lenient.

17. There were clear reasons for discounting the eight year sentences including, in particular:-

(i) The so called pleas at the commencement of the trial;

(ii) the previous good character of both respondents;

(iii) the fact that there was immediate cooperation at the time of arrest, and in particular no attempt was made to use the firearm to escape arrest.

18. It is the court's view that the net terms of both sentences, being five years, were lenient, even very lenient, but not unduly lenient. They were within the outer range of discretion available to the sentencing court and therefore no error of principle has been identified by this court in their imposition.

19. The application is therefore refused.