THE COURT OF APPEAL

RECORD NO. 51 CJA/2015

PEART J.
MAHON J.
HEDIGAN J.

IN THE MATTER OF SECION 2 OF THE CRIMINAL JUSTICE ACT 1993 AND IN THE MATTER OF DUBLIN CIRCUIT CRIMINAL COURT BILL NUMBERS DU 563/14 AND 904/14

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND–

MARK TAYLOR

RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF MAY 2017

1. Before the Court for determination is an application by way of appeal by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act, 1993 against the sentences of imprisonment imposed on the respondent on the 16th February 2015 at the Dublin Circuit Criminal Court (His Honour Judge James O'Donoghue) on the grounds that when considered in their totality the sentence is unduly lenient.

2. The respondent had previously pleaded guilty to a number of charges on Bill Nos. 563/14 and 904/14, and was put back for sentencing.

3. The details of the offences and the sentences imposed can be conveniently described as they are set forth in the DPP's written submissions (corrected as to the Bill Nos.) as follows:

> *"3. In respect of Bill No. 904/14 the respondent pleaded guilty to an offence of unlawful use of a mechanically propelled vehicle pursuant to section 112 of the Road Traffic Act, 1961, as amended and an offence of criminal damage pursuant to section 2 (1) of the Criminal Damage Act,1991.*
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> *4. In respect of Bill No. 563/14 the respondent pleaded guilty to an offence of unlawful use of a mechanically propelled vehicle pursuant to section 112 of the Road Traffic Act, 1961 and two counts of endangerment contrary to section 13 of the Non-Fatal Offences against the Person Act, 1997.*
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> *5. The maximum sentence for an offence contrary to section 112 of the Road Traffic Act 1961 is €20,000 and/or up to 5 years imprisonment. The maximum sentence for an offence of endangerment contrary to section 13 of the 1997 Act is imprisonment for a period not exceeding 7 years. The maximum sentence for an offence of criminal damage s a fine or imprisonment for a term not exceeding 10 years or both.*
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> *6. Having heard the evidence and submissions, the Court imposed a sentence of three years imprisonment in respect of each of the counts on Bill No. 904/14 to run concurrently. In respect of Bill No. 563/14 the Judge imposed a one-year sentence in respect of both counts on the indictment, to run concurrently. The Judge exercised his discretion to make the sentences imposed on Bill No. 563/14 consecutive to the sentences imposed on Bill No. 904/14. The sentences on Bill No. 904/14 are also consecutive to the sentence of three years imprisonment imposed at Naas Circuit Court on 28th November 2013 which the respondent is currently serving. The respondent was on bail for that offence when the offences before the court were committed."*

4. The net effect of the sentences imposed is that upon the expiration of the sentence of three years imposed at Naas Circuit Court on 27th November 2013 (*i.e.* 6th June 2015) the respondent would begin to serve the total of four years imprisonment described above. The DPP submits that given the facts which gave rise to these offences, and in particular the significant aggravating factors, the effective four year sentence of imprisonment to be served represents a substantial departure from what would be regarded as the appropriate sentence, and in that sense is unduly lenient such that it should be set aside, whereupon this Court can impose the appropriate sentence.

5. Somewhat confusingly the offences contained in Bill 904/14 predate those contained in Bill 563/14.

6. It is convenient to summarise the facts of the offences in Bill No. 904/14 from the description contained in the respondent's written submissions as follows:

> *"On Bill 904/14, which is the first offence in time and which took place on 19th June 2013, the respondent was driving a Lexus which had been stolen in the course of a burglary. The car was spotted at a service station by an off-duty member of the Gardai, and this was reported by that member to his colleagues. Upon arrival at the service station, they were spotted by the respondent, who drove at the Garda car and crashed into the rear driver's side of that car. It was the belief of the Gardai that the respondent's intent was to ' … exit the area having no regard for the safety either of myself or my observer … and no regard to the damage he done to the vehicle (sic) (Transcript, Pages 3–4, Lines 32–34, Line 1). The respondent made good his escape from the service station and drove off. The incident was captured on CCTV, and the respondent identified. The Lexus was later recovered, and items found forensically linked the respondent to the vehicle. He was arrested on the 26 November 2013, his fingerprints were taken, and the link to the respondent was subsequently confirmed. Nothing further of evidential value arose during the interviews. The damage to the Garda*

vehicle, characterised in the submissions of the appellant as 'extensive' … was valued at €1588.83. Both Gardai in the car sustained injuries; both were taken to hospital. Garda Niland subsequently required an operation to remove a disc from his neck in order to prevent further debilitation arising from the injury he sustained. This left him with the scar in his neck and left him out of work for over a year. His colleague suffered pain and discomfort, and was off work for approximately 4 months. Garda Niland was still not back on full duty at the time of the sentencing hearing".

7. Since the respondent, in his written submissions, has agreed that the facts in relation to Bill No. 563/14 are largely as set out in the DPP's written submissions, they can be conveniently set out from those submissions as follows:

> *"The incidents giving rise to the offences the subject of Bill No. [563]/14 occurred on 29th June 2013, within 10 days of the conduct giving rise to the offences the subject matter of Bill No. [904]/14. The respondent was observed by members of An Garda Siochana driving a Subaru Legacy at speed on to a residential road. The vehicle was then observed driving towards the exit of a residential estate, were a number of pedestrians were present. The vehicle drove at speed over a speed ramp on the wrong side of the road. The vehicle then proceeded to crash into another car travelling on that residential road. The occupants of this vehicle sustained injuries but did not require hospitalisation. The gardai attempted to gain entry to the Subaru Legacy, however the respondent proceeded to drive in the opposite direction. The car was subsequently abandoned and the respondent was observed running from the vehicle."*

8. The aggravating factors to which the DPP refers, and which in fairness to the trial judge he acknowledged to exist during his sentencing remarks, are stated by the DPP to be the following:

> (i) The respondent has 100 previous convictions of which some 87 are in respect of offences under the Road Traffic Acts.
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> (ii) The respondent was already the subject of a 25 year driving disqualification at the time of these offences.
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> (iii) These offences were committed within 10 days of each other.
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> (iv) The respondent was on bail for other matters when these offences were committed.
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> (v) During the course of the offences on the 19th June 2013 two Gardai received injuries – those to Garda Niland being very significant, resulting in him having to undergo surgery for the removal of a disc in his neck, and a long period out of work. The other Garda was less seriously injured but nevertheless was unable to work for a significant period.
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> (vi) During the course of the offences on the 29th June 2013 the respondent deliberately drove at the Garda vehicle.

9. The mitigating factors identified and taken into account by the trial judge, were the timely pleas of guilty, the young age of the respondent at the time of the offences, the difficult family circumstances where his parents had separated when he was aged nine, his addiction to drugs and his subsequent rehabilitation in that regard while in prison on remand, such that he was drug and alcohol free, the fact that he has a supportive partner with whom he has a young daughter, his ongoing efforts to educate himself while in prison, and the contents of a well-written letter addressed to the trial judge which indicates significant insight into the consequence for others of his offending, as well as a firm resolve on his part to mend his ways for the future and lead a more responsible and productive life. All these matters were referred to by the trial judge in his sentencing remarks.

10. Counsel for the DPP, Ronan Kennedy BL, acknowledges that the trial judge referred to the aggravating factors in his sentencing remarks, and acknowledges also that the trial judge described the offences as "grave". It is nevertheless submitted that he failed to attach sufficient weight to these aggravating factors by reflecting that gravity in the sentences which he imposed. It is submitted also that when considering what sentence to impose, the trial judge failed to first of all identify where these offences fell on the scale of offending in order to identify a headline sentence, before making any deduction from that headline sentence to take account of the mitigating factors. It is also submitted in any event that he gave undue weight to such mitigating factors as existed, and accordingly that there is a substantial departure from what should be considered to be the appropriate sentence both in respect of the offences themselves and this offender, such that this Court may intervene.

11. It was also submitted that the trial judge failed to structure the sentence in a way that achieved the objective of deterrence having regard to the maximum sentence possible for such offences, namely 7 years. In support of this submission, the DPP has referred to the judgment of this Court (Edwards J.) in *DPP v. Corbett* [2015] IECA 174 where at para. 174 it is stated:

> *"With regard to the complaint made with respect to general deterrence, this court finds itself in disagreement with the submission made by counsel on behalf of the appellant. Deterrence, both general and specific, is a legitimate sentencing objective. It is a matter of significant importance for the courts to support the important role being played by front line professionals in the caring professions, to quote the trial judge "whether in healthcare, education, the fire service or in criminal justice". The victim in this case was a staff nurse on duty in an emergency department who was merely attempting to do her job and to assist the appellant who had presented in an intoxicated state for treatment. She was seriously assaulted in an unprovoked and vicious way and such an offence has to be marked with a sentence that will act as a deterrent, not just to the appellant herself but to others. It was entirely legitimate in this court's view for the sentencing judge to allude to the need to send a message in regard to the acceptability of such assaults and the court is therefore not disposed to uphold the complaint that this was a case in which the trial judge attached to much weight to the objective of general deterrence."*

12. Counsel for the DPP submits that taking everything into account the test for undue leniency for the purpose of intervention by this Court, as described in *DPP v. Byrne* [2012] IECCA 72, is satisfied in the present case. In *Byrne* the Court stated:

> *" … since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."*

13. The particular focus of the DPP's submissions is on the sentences of one year imposed in respect of the two endangerment offences with which the respondent was charged and convicted on Bill No. 563/14. She submits that the circumstances of those offences justified a significantly higher sentence to reflect their gravity, being offences involving driving at high speed through a residential area, including on the wrong side of the road and where pedestrians were present, and then proceeding to crash into another vehicle, in which passengers were seated, causing them injury, albeit not serious injury.

14. Counsel for the DPP has referred this Court to a number of cases where significantly higher sentences have been imposed in

respect of offences on comparable facts; for example *DPP v. Cash* [2015] IECA 198; *DPP v. Dumbrell* [2016] IECA 241; *DPP v. McCarthy* [2015] IECA 223; and *DPP v. Kenny* [2011] IECCA 16. Of these cases, that of *Cash* is perhaps of most relevance for the purposes of comparison since the offences for which that offender was sentenced included two offences of endangerment involving seriously reckless driving at speed, having previously been approached by Gardai. That defendant also had a previous criminal record stretching to some 85 previous convictions, including 16 for dangerous driving and one of endangerment. He received a sentence of 6 years with the final 18 months suspended.

15. Counsel for the respondent, Pieter LeVert BL, submitted that it is clear from what the trial judge stated when sentencing the respondent that he took full account of the aggravating factors which he identified, and overlooked nothing in this regard. He submits also that he took appropriate account of the significant mitigating factors in the case in order to arrive at a sentence which in its totality was appropriate.

16. Counsel accepts that the trial judge was entitled to exercise his discretion to make the sentences imposed on Bill No. 563/14 consecutive to the sentences imposed on Bill No. 904/14, and to direct that those sentences commence after the expiration of the 3 year sentence imposed at Naas Circuit Court on the 28th November 2013. However, it is submitted also that the totality principle must also take account of the fact that when the trial judge was imposing sentence the respondent was still serving the remainder of a three year sentence that had been imposed at Naas Circuit Court, and which still had some 4 months to run, and that this should not be overlooked by this Court when considering the DPP's submission that the sentences in their totality are unduly lenient. In such circumstances, it is submitted that this Court should have regard to not only the effective four year sentence to be served on these offences but also the previous three year sentence, making a total of seven years which this Court should consider when considering the totality principle. In this way, counsel seeks to distinguish the six year sentence for endangerment in *Cash* where no such prior sentence was still being served, but which is relied upon by the DPP as a comparator,.

17. Both counsel accept that leading up to the trial judge's final conclusion as to what sentence he was imposing in respect of these charges there had been some confusion and lack of clarity in the sentence remarks. However, Mr LeVert submits that ultimately it became clear that while the trial judge had initially expressed the view that on Bill No. 904/14 the appropriate sentence, having made a deduction for the mitigating factors, was three and a half years, and that on the endangerment charges in Bill No. 564/14 a sentence of two years was appropriate, making a total of five and a half years, he then, when reminded that these sentences had to be consecutive to the three year sentence then being served by the respondent, stated *"Well, very well, in those circumstances four years: three years on Bill number one [i.e. on Bill No. 904/14], and one year [i.e. on Bill No. 563/14], that's taking all matters into account"*.

18. In this Court's view the totality of the sentence imposed by the trial judge has failed to reflect in a proper way the gravity of the offending by the respondent as contained in the two Bills under consideration, even when the significant mitigating factors and the fact that the sentences were to commence only following the completion of the prior three year sentence then being served by the respondent in June 2015.

19. There was certainly a lack of clarity within the trial judge's sentencing remarks as to precisely how he was calibrating the sentences to take account of the various aggravating factors and the mitigating factors. One can perhaps discern a view on the part of the trial judge that the headline sentence on the offences in Bill 904/14 was five years, which should become three and a half years to take account of mitigating factors. Having regard to those particular offences, being of unlawful use of a vehicle where the maximum sentence is five years, and of criminal damage where, although the maximum possible sentence is ten years, the actual damage caused was in the sum of €1588, it is understandable that despite the vast number of previous convictions, the trial judge should consider a sentence of three and a half years to be appropriate, notwithstanding the fact that both Gardai were injured, one more seriously than the other.

20. But in this Court's view, a sentence of one year on each of the endangerment charges represents a substantial departure from an appropriate sentence having regard to the nature of the driving involved being in a built up area at high speed, and where there was undoubtedly a reckless disregard for the safety of members of the public actually present, as well as for the public generally. Those features make these offences egregious in nature, and therefore falling towards the upper end of seriousness for such offending. The sentence imposed fails to recognise the egregious nature of those offences, and the need to reasonably and proportionately deter others from similar conduct. The fact that the occupants of the vehicle into which the respondent drove at speed were not seriously injured is entirely fortuitous and coincidental, and certainly not something for which the respondent can be given any credit by way of mitigation. Undoubtedly the mitigating factors to which the trial judge's attention was properly drawn had to be taken into account, including the pleas of guilty and the other matters to which reference has already been made. However, although the trial judge stated that the offences were "grave" this expression did not find its way into the sentences imposed. The sentences of one year each on the endangerment charges has led to the total sentence being unduly lenient, even when the totality principle and proportionality are taken into account, and even when account is taken of the fact that the respondent was already serving a three year sentence.

21. The principle of deterrence both at the level of the individual offender and at a level of generality is one which can inform the sentencing judge's view of the appropriate sentence. In other words, it should be a sentence that, *inter alia*, serves to deter, as far as this is possible at all, the particular offender from re-offending in that way again in the future, and is also one that may deter persons generally from committing offences of this nature. That said, even such sentences must be constrained by adherence to the principle of proportionality. A careful balance must be struck between these competing objectives. This can be a difficult task, particularly in a case such as the present one where the offender has amassed some 100 hundred previous convictions thereby amply demonstrating a refusal to be deterred from his recidivism by the nature of any punishment meted out to him to date. Even in such circumstances the principles of proportionality and totality must be considered and fully respected.

22. Taking all these matters into account, this Court would not alter the two concurrent sentences of three years imposed for the offences on Bill No. 904/14 *i.e.* under s. 112 of the Road Traffic Acts (unlawful use), and s. 2 of the Criminal Damage Act, 1991 (criminal damage). Those sentences, taken in isolation, are not unduly lenient.

23. However, on Bill No.563/14, while the Court does not consider that the sentence of three years for the offence under s. 112 of the Road Traffic Acts is unduly lenient, the sentence of one year on each of the endangerment offences contrary to s. 13 of the Non-Fatal Offences Against the Person Act, 1997, is, having regard to the aggravating factors identified, a significant departure from what the Court considers to be the appropriate sentence. In this Court's view these offences each merited a headline sentence of five years to run concurrently with each other.

24. The sentences on Bill No. 563/14 will run consecutively to those imposed on Bill No. 904/14, leading to a total of eight years before making any deductions for the undoubted mitigating factors which have been identified in relation to the respondent. These

sentences will have commenced to be served on the 6th June 2015 being the date on which he ceased serving the three year sentence imposed at Naas Circuit Court.

25. This Court is satisfied in this regard that in addition to the fact that the respondent pleaded guilty in a timely fashion, he has through significant hard work and diligence on his part, succeeded in turning his life around. He has very commendably sought to pursue his education while in prison. He has addressed his addiction to alcohol and drugs to the point where he is drug-free. He has behaved in an exemplary fashion while in prison. His achievements in all these respects have been recognised by his being now what is referred to as "an enhanced prisoner". As the trial judge also accepted, his letter to the trial judge, which this Court has also seen, indicates a clear resolve on his part to continue on the path to full rehabilitation so that upon his release he can contribute in a positive way both to society generally in a way that he singularly has failed to do previously, and within his own family. The Court notes that his partner is supportive and that the respondent is committed to leading a life upon his release which will enable him to be of support to his partner and young daughter.

26. Taking into account these mitigating factors, yet keeping in mind the need to ensure that the seriousness of the offending is not unduly minimised, and at the same time ensuring that the overall sentence is proportionate and respectful of the principle of totality, including that these sentences follow upon the three year sentence imposed at Naas Circuit Court, this Court considers that the final three years should be suspended for a period of three years from the date of his release during which he be under the supervision of the probation service, and that he comply with any directions that may be given by that service during that period.

27. The application by the DPP will therefore be allowed. The sentences imposed by the trial judge will be vacated and the respondent is sentenced by this Court to the periods of imprisonment which I have set forth, with the final three years suspended as just stated, such sentences to be backdated to 6th June 2015.