



**Sheehan J.  
Mahon J.  
Edwards J.**

**131CJA/11**

**In the matter of Section 2 of the Criminal Justice Act 1993**

**The People at the Suit of the Director of Public Prosecutions**

**Applicant**

**v**

**Robert Moran**

**Respondent**

**Judgment of the Court delivered on the 22nd of June 2015 by Mr. Justice Sheehan**

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, for a review of the sentence imposed on the respondent on the ground of undue leniency.
2. On the 19th May 2011, the respondent was sentenced to three years imprisonment in respect of an offence of aggravated burglary and five years imprisonment with the final two years suspended in respect of two other burglary offences. All sentences were to run concurrently. These sentences were also to run concurrently with a sentence of three years imprisonment imposed in respect of an offence of robbery committed in June 2010. No order was made in respect of another count on the indictment which consisted of an offence of assault causing harm committed at the time of the robbery.
3. On that same date the respondent also appeared for sentence in respect of an offence of robbery committed on the 18th February, 2009. The sentencing judge ordered that this offence was to "be taken into consideration" with the other sentences. However, when the respondent committed the said aggravated burglaries and the robbery in June 2010 he was on bail in respect of the robbery committed on the 18th February, 2009. It should be noted from the outset that the respondent entered a plea of guilty in respect of all the above-mentioned offences.
4. The sentencing judge imposed a total sentence of five years imprisonment with the final two years thereof suspended for five years. The Director of Public Prosecutions submitted that this sentence was unduly lenient on the grounds that the sentencing judge:-
  - (i) Failed to identify an appropriate starting point to reflect the nature of the said offences and the aggravating factors of each of the offences.
  - (ii) failed to have regard to the impact of the said offences on the injured party.
  - (iii) Gave excessive weight to the mitigating factors.
  - (iv) Failed to have regard to the respondent's history of offending.
  - (v) Failed to treat the fact that the respondent committed some of the offences whilst on bail as an aggravating factor.
  - (vi) Wrongly treated the offence committed on the 18th February, 2009 as an offence which could properly be dealt with by being taken into consideration.
5. In order to consider these submissions it is necessary to set out the background to the offences.

**Background**

6. The background to the three incidents of offending is as follows. On the 18th February 2009, the respondent was involved in a robbery of an off-licence in Limerick. The respondent's role was that of a look-out and an accomplice armed with a large kitchen knife entered the off-licence and threatened to stab members of the staff. The accomplice took the contents of two tills which amounted to €480. The respondent was aware that a knife was going to be used prior to the robbery. The CCTV footage of the commission of this crime was not sufficient to ground a case against the respondent. Therefore, the respondent's admissions when interviewed by the gardaí were of critical importance to the prosecution. The respondent was charged with this offence on the 25th March, 2010, and released on bail.
7. On the 19th January, 2010, an intruder, armed with a hunting knife, carried out a robbery of a petrol station in Limerick. The intruder approached a male member of staff from behind, placed a hunting knife at his throat and demanded the contents of the till. A female member of staff ran behind the counter and pressed the panic alarm. A struggle ensued between the intruder and the male member of staff during which the staff member was injured when he received a significant cut to his neck. The intruder ran towards the till and lunged at a female staff member who was trying to remove the key from the till. He pointed the hunting knife at the female staff member and another shop assistant and leaned over the counter and opened the till. A further altercation ensued with the male member of staff resulting in the intruder dropping his knife. However he succeeded in escaping with €1,060.00.
8. Two days prior to the robbery the respondent was seen in the petrol station wearing similar clothing to that of the intruder. When interviewed by gardaí on the 20th January, 2010, he made full admissions and expressed remorse. He informed the gardaí that his

motive was to steal money to purchase heroin.

9. The male staff member received a six-inch cut to the right-hand side of his neck which has since healed. He did not wish to make a Victim Impact Statement.

10. The respondent was charged and released on bail but these charges were subsequently struck out. As a result he was not on bail for these offences at the time of the commission of the aggravated burglaries. These offences were subsequently re-entered after the aggravated burglaries had been committed.

11. The respondent committed the three offences of aggravated burglary in May and June 2010. The injured party, who suffered from a mental disability, was born in 1964 and lived in a house owned by the St Vincent de Paul. At about 3.30 pm on the 7th May 2010, the respondent broke a bedroom window and proceeded to enter the house. The respondent produced a knife and threatened the injured party. The injured party was not hurt but he was frightened and feared for his safety. The respondent stole €1,500 from the injured party on this occasion.

12. At about 7.30pm on the 22nd May 2010, three intruders broke a back bedroom window and entered the house armed with sticks. The injured party had his front door unlocked and managed to escape and raise the alarm.

13. On the 13th June 2010, at approximately 5.20 pm, three or four intruders entered the house through a window which they had broken with a rock. The injured party attempted to escape through the front door but one of the intruders was waiting there to prevent his escape. The injured party was attacked and received three or four punches from the intruders. The intruders stole €150 and the keys of his house.

14. The CCTV footage merely placed the respondent in the area and thus the case against him for these offences depended on his admissions. When interviewed by the gardaí the respondent admitted that on the first occasion he had entered the injured party's house through a window which he had broken. The respondent further admitted that he was armed with a knife and claimed that he stole between €800 and €900. He acknowledged that after this entry he became aware that the injured party was mentally impaired.

15. The respondent admitted that on the second occasion he broke a window at the rear of the house and he and another man entered the house but nothing was stolen.

16. On the 4th June 2010 the respondent was charged with two offences of burglary but released on bail for these offences. He was on bail for these offences and the robbery of the off-licence when he committed the final aggravated burglary.

17. When interviewed by the gardaí, the respondent admitted that he had carried out the final aggravated burglary with two others and he had stolen €150 from the injured party. He admitted that he had planned the final offence in the knowledge that the injured party was vulnerable.

18. The injured party was obliged to leave his home as he did not feel safe and was re-housed in another location by the Society of St. Vincent de Paul.

#### **Personal circumstances of the respondent**

19. The respondent is 26 years old and has a number of previous convictions. There are three relevant previous convictions the first of which dates back to 2005 and resulted in a seventeen-month period of detention in St Patrick's Institution in respect of two offences of robbery. The other two relevant previous convictions involve a twelve-month sentence for burglary in 2010 and an eight-month sentence for possession of a knife in 2011.

20. The respondent had a difficult upbringing and had obtained only a limited education. It was accepted at the sentence hearing that the respondent had a very serious drug problem for some time and these crimes were committed to feed his drug habit.

#### **Submissions on behalf of the Director of Public Prosecutions**

21. Counsel for the DPP in relying on s.11 of the Criminal Justice Act 1984 (as amended by s.10 of the Bail Act 1997 and as substituted in part by the Criminal Justice Act 2007), submitted that in most cases where an offence is committed while the offender is on bail two consequences automatically follow. First, it is mandatory to make any sentence imposed for such an offence consecutive to any sentence imposed for any offence in respect of which the offender has been released on bail. Second, offending while on bail must be treated as a separate aggravating factor unless there are exceptional circumstances justifying a sentencing court in not so doing and cited the following authorities in support of this position:- *The People at the Suit of the Director of Public Prosecutions v Doyle* (Unreported, Court of Criminal Appeal, 19th February, 2004); *The People at the Suit of the Director of Public Prosecutions v Abdulakim Yusuf* [2008] I.R. 204; *The People at the Suit of the Director of Public Prosecutions v Doran* (Unreported, *ex tempore*, Court of Criminal Appeal, 26th May 2008).

22. Counsel for the Director of Public Prosecutions submitted that the sentencing judge erred in principle in failing to impose a penalty in respect of the robbery at the off-licence and it was not appropriate to treat this offence as being "taken into consideration". It was submitted that while there were mitigating factors in relation to the respondent's role in this offence the nature of the respondent's past record was such that he ought to have received a separate sentence. Counsel for the DPP contended that the approach of the sentencing judge effectively relieved the respondent of the prospect of the sentences for the other bills being made consecutive to any sentence imposed for this offence. Counsel submitted that the principle of totality is a separate principle to be considered in cases where an offender is to be sentenced for a number of matters yet acknowledged that the sentencing judge was entitled to have regard to the principle and view the respondent's offending behaviour globally.

23. Counsel for the DPP submitted that the sentencing judge failed to identify the proper starting point to reflect the seriousness of the offences taken individually and in totality in respect of all of the offences. Counsel submitted that the sentencing judge had correctly identified the mitigating factors but he had given excessive weight to those factors.

24. It was submitted that the sentencing judge had failed to have regard to the level of violence exhibited by the respondent in the petrol station robbery and the use of a potentially deadly weapon.

25. It was submitted the sentences for the aggravated burglaries, for which there is a maximum sentence of life imprisonment, do not reflect the fact that a vulnerable man was subjected to a series of aggravated burglaries in his own home and was ultimately obliged to move house. The sentence similarly did not reflect the fact that the respondent carried out the second and third aggravated burglaries being aware of his victim's vulnerability and with a view to extorting money from him.

26. Finally, it was argued that the sentencing judge failed to reflect as an aggravating factor the fact that the respondent had offended while on bail and there was nothing in the evidence presented which would have warranted the sentencing judge disregarding this factor.

### **Submissions on behalf of the respondent**

27. Counsel for the respondent submitted that the sentencing judge carefully considered the sentence imposed and did not underestimate the seriousness of the offences. Counsel noted that the high level of co-operation given by the respondent to all the investigations was of critical importance as it contained admissions by the respondent in cases where there was arguably no other inculpatory evidence. The Court was correct to take into account the severity of the respondent's drug addiction and that the crimes were motivated to feed that addiction which the judge regarded as being different to an ordinary persistent serial offender who was without such addiction or driving impulse.

28. Counsel for the respondent referred the Court to the following judgments in relation to undue leniency: - *The People at the Suit of the Director of Public Prosecutions v McCormack* [2000] 4 I.R. 356; *The People at the Suit of the Director of Public Prosecutions v Byrne* [1995] 1 ILRM 279; *The People at the Suit of the Director of Public Prosecutions v Redmond* [2000] 3 I.R. 390.

29. Counsel for the respondent submitted that the trial judge correctly balanced the particular circumstances of the commission of the offences with the personal circumstances of the respondent.

30. Counsel noted that the respondent was sentenced in May 2011, he was subsequently charged with a further matter but arising prior to him being sentenced in May 2011. The new matter came before the Circuit Court and related to two further counts of robbery/attempted robbery which were committed in January 2011. The respondent pleaded guilty and a sentencing hearing was held on the 14th July 2014. The sentencing court on that occasion heard that the gardaí were of the view that the respondent had made a complete turn around since his release from prison in 2013 and had not come to the attention of the gardaí which was remarkable given his previous history of repeated offending. A probation report was also before the sentencing court on that date which documented a full engagement with the Probation Service and his drug rehabilitation. The sentencing judge imposed a sentence of three years imprisonment on both counts concurrent with each other and suspended the sentence for three years on conditions including that he continue to work with the Probation Service and abstain from illegal drugs. The respondent's suspended sentence in this matter will not expire until the 13th July 2017.

31. The court is clear that this matter is not the subject of review but accepts the contention advanced by counsel for the respondent that its relevance lies in demonstrating that the approach adopted by the judge in respect of the sentences currently under review was a correct one in that the chance given through encouragement of rehabilitation has been fully embraced by the respondent. It was submitted that the imposition of a further custodial sentence in respect of the respondent may be counterproductive and actually undo the respondent's rehabilitation to date. Counsel submitted that the delay by the prosecution in proceeding with the s. 2 review had provided the respondent with the benefit of being able to demonstrate the successful outcome of the stance adopted by the sentencing judge.

### **Decision**

32. This matter comes before the Court in a less than desirable fashion. The Director of Public Prosecutions lodged this appeal for review of sentence on the 13th June, 2011, lodged this appeal for review of sentence. The respondent completed the imposed sentence of imprisonment in 2013.

33. Section 2 of the Criminal Justice Act 1993 provides the legislative framework within which to consider a review of a sentence for undue leniency and it states the following: -

"(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 Criminal Appeal to review the sentence.

...

(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."

34. The principles governing the law in relation to undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993 were summarised in a judgment of the Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v Derrick Stronge* [2011] 5 JIC 2301 where it was stated that: -

"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are: -

(i) the onus of proving undue leniency is on the DPP:

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former:

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate:

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal:

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise:

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

The relevant cases are *The People (D.P.P.) v. Byrne* [1995] 1 ILRM 279, *The People (D.P.P.) v. McCormack* [2000] 4 I.R. 356 and *The People (D.P.P.) v. Redmond* [2001] 3 I.R. 390."

35. In approaching the question of sentencing in this case, it is clear from an examination of the transcript that the sentencing judge applied the principle of proportionality and also sought to reconcile that principle with the penal aim of rehabilitation. However in light of the overall offending committed by the respondent the point on the scale where the sentencing judge placed these offences amounted to an error in principle as he failed to give sufficient weight to the many aggravating factors.

36. Notwithstanding the care taken by him, it is the view of this Court that the sentence imposed by the sentencing judge in this case constitutes a substantial departure from what would be the appropriate sentence in the particular circumstances of the case. Accordingly, the Court holds that the sentence was unduly lenient.