



THE COURT OF APPEAL

Record No. 48/2016

Birmingham J.
Mahon J.
Edwards J.

Between/

The Director of Public Prosecutions

Respondent

- and -

Eric Harcourt

Appellant

JUDGMENT (ex tempore) of the Court delivered on the 1st day of December 2017 by Mr. Justice Mahon

1. On the 2nd February 2016 at the Circuit Criminal Court in Dublin the appellant was unanimously found guilty by a jury on two counts, namely endangerment contrary to s. 13 of the Non Fatal Offences Against The Person Act 1997, and the unlawful use of a mechanically propelled vehicle contrary to s. 112 of the Road Traffic Act 1961 (as amended). In respect of the first count, the appellant was sentenced on the 5th February 2016 to four years imprisonment with the final eighteen months suspended on conditions, while the second count was taken into consideration. It was directed that the sentence commence on the termination of an earlier sentence of four years and six months (with the final twelve months suspended), imposed in the Dublin Circuit Criminal Court on the 8th December 2015, with the result that the cumulative custodial term from 8th December 2015 was six years. This judgment is concerned with the appellant's appeal against sentence. His appeal against his conviction was dismissed by this Court in March 2017.

2. The background facts are briefly as follows. In the early hours of the morning of the 23rd September 2014 gardaí patrolling in an unmarked garda car in Darndale in Dublin came across a motor car parked in a cul de sac with its lights on. One of the gardaí approached the motor car on foot, and as he did so, the driver of the car accelerated brushing against the garda and sped away. The garda was not injured. The only evidence against the appellant was identification evidence by three gardaí.

3. As of the date of his sentence, the appellant was already serving a sentence of four years and six months imprisonment with the final twelve months suspended in respect of very similar charges. At the time of the commission of the offence which is the subject matter of this appeal the appellant was on bail in relation to the earlier offences.

4. The appellant is twenty one years old and has sixty seven previous convictions. He was first in trouble with the law at the age of thirteen when he was involved in stealing a car. Many of his previous convictions relate to the theft of cars and other road traffic offences. The appellant has ADHD. His childhood was difficult and his education erratic.

5. The sole ground of appeal to this Court is that the learned sentencing judge failed to apply the principles of totality and proportionality. It was submitted that the headline sentence of seven years and six months is at the very highest level and was therefore inappropriate. Emphasis was placed on the fact that no one was injured in the commission of the offence.

6. In arriving at her sentence, the learned sentencing judge referred to the serious nature of the offences and the appellant's *deplorable record of previous convictions for serious driving offences*. She expressed her belief that it was only a matter of time before a fatality would occur as a result of the appellant's driving. She also noted that Garda Cassidy was fortunate to have avoided serious injury. In the course of her sentencing judgment the learned sentencing judge said:-

"The accused in this case is twenty years of age and comes before this Court with sixty seven previous convictions. It is clear from the somewhat dated psychological report that he comes from a challenging background and suffers from ADHD. His earliest convictions were recorded from when he was only twelve years of age and it is clear that since then he has spent prolonged periods in custody. He is currently serving a three and a half year sentence in respect of similar charges, those offences having been committed on the 12th August 2014. He was on bail in respect of those charges when these offences were committed, thereby necessitating the Court to impose a consecutive sentence. However, in so doing, the Court must have regard to the principles of proportionality and totality. In determining the appropriate sentence the Court must also have regard to the serious nature of the offences and the deploring record of previous convictions for serious driving offences. In addition, the Court is also mindful of the fact that the accused man is now only twenty years of age and is therefore serving a sentence in respect of similar offences to which he entered a plea, such offences having occurred only weeks before the matters before this Court."

7. The appellant has amassed a very significant number of previous convictions and is clearly addicted to offending involving motor vehicles. As a result, he has become a very real danger on the public roads and there is a significant risk of reoffending and that someone will be very seriously injured or even killed. His counsel, Mr. Kelly, has emphasised that the long history of offending was confined to, in effect, the dangerous driving of cars without injury to other road users and absent also offending involving violence.

8. The suggestion by Mr. Kelly that credit should be afforded to the appellant because no physical injury resulted from his offending is stretching things to their limits. The fact is a member of An Garda Síochána doing his duty escaped injury because he was quick footed and lucky. The appellant made no effort to avoid injuring him and by all accounts probably intended to do so in order to prevent a pursuit by the gardaí. These are matters which the learned sentencing judge was entitled to take into account and almost certainly did so. Section 143(1) of the Criminal Justice Act 2003 provides as follows:-

*"In considering the seriousness of any offences, the Court must consider the offenders culpability in committing the offence and any harm which the offence caused, **was intended to cause or might foreseeably have been caused.**"*
(emphasis added)

9. Mr. Kelly also submitted that insufficient consideration was afforded by the learned sentencing judge to rehabilitation in circumstances where the appellant had spent lengthy periods in prison at a very young age.

10. The principle of totality requires a Court to consider the overall impact of a sentence been imposed and is particularly relevant where a consecutive sentence is been considered. It is quite evident from the learned sentencing judge's remarks that that principle and the principle of proportionality were foremost in her mind in arriving at what she considered to be the appropriate sentence.

11. Having regard to the circumstances particular to this offence, and its very serious nature, coupled with the appellant's appalling record, a sentence of four years imprisonment was not unreasonable by any measure. On its face, given that the appellant had fully contested the charges, the suspension of eighteen months or about 40% might be regarded by many as a generous discount. However, the obvious explanation or justification for structuring the sentence in this manner was that it was a sentence necessarily tagged on to an existing and recently imposed sentence which would result in an overall six year custodial term. The two sentences making up the total custodial term of six months were imposed, and necessarily so, for separate groups of offences and must be considered in that light. Each required a relatively severe sentence and any effective reduction in the custodial element of the second of final sentence in respect of the totality principle must itself be proportionate and sufficiently reflect the seriousness of the second set of offences, being those which are the subject matter of this appeal.

12. Mr. Kelly has made the point that the additional (to the six year custodial sentence) eighteen months suspended period is itself a real punishment for the appellant because of the risk of reactivation. But, that risk is very much within the control of the appellant. If it is reactivated in whole or in part it will be because the appellant commits one or more offences in the future. Equally, if he does not again offend he will not have to worry about spending even more time in custody. The choice is his.

13. Ultimately, for this Court to intervene, it is necessary to identify an error of principle in the sentence being appealed against. The Court is satisfied that no error has been established and so it will not interfere with the sentence. The sentence imposed was in all the circumstances fair, reasonable and proportionate.

14. The appeal is therefore dismissed.