



THE COURT OF APPEAL

RECORD NO. 237CJA/16

**Mahon J.
Edwards 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 -

DANIEL KAVANAGH

RESPONDENT

JUDGMENT of the Court delivered on the 2nd day of May 2017 by Mr. Justice Mahon

1. On 6th July 2016 at Dundalk Circuit Criminal Court the respondent pleaded guilty and was convicted of two counts, namely:-

- Possession of a double barrelled sawn off shotgun with intent to commit an indictable offence contrary to s. 27(b)(i) of the Firearms Act 1964 as substituted by s. 60 of the Criminal Justice Act 2006, and amended by s. 39 of the Criminal Justice Act 2007.

- Robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

2. The respondent was sentenced on 21st July 2016 to a term of imprisonment of four years, with the final two years of the sentence suspended on conditions in respect of the first count. Count two was taken into consideration.

3. This is the appellant's application for a review of sentence pursuant to s. 2 of the Criminal Justice Act 1993 on the grounds that it was unduly lenient.

4. Both counts arose from an incident which occurred on 20th April 2015 at a Mace Store at Clogherhead in Co. Louth. The store included a sub post office. At about 12.30p.m. two individuals entered the premises when there were present three staff members and some customers. Both wore hoods. One carried a sawn off shotgun while the second, the respondent, carried a plastic bag. One of the individuals demanded cash from the staff member in charge of the post office section of the premises. The individual carrying the shotgun used it to strike the glass panel at the post office unit causing it to shatter. The shotgun was also pointed directly at a staff member, Miss Rafferty, and a sum of €2,250 in cash was handed over. On leaving the premises, the raiders were challenged by Det. Gda. Carey who had been sitting outside in an unmarked garda car. He produced his official issue firearm, in response to which the raider carrying the shotgun pointed it directly at him. The man then dropped the shotgun, and he and the respondent, and the driver of the raider's vehicle, who had remained in the car during the robbery, escaped.

5. The respondent ran towards the back of the premises where he was later apprehended. The raiders' car was driven at Det. Gda. Carey who was forced to jump out of its way. He was nevertheless struck on the hip and ankle but not injured. The cash was recovered at the scene.

6. The respondent cooperated, to an extent, with the gardaí. He refused to name his fellow robbers. He told the gardaí that the raid had been planned only a couple of hours before hand.

7. The respondent has fifteen previous convictions for a variety of offences including drugs convictions and two for possession of firearms and ammunition in July 2015 for which he received a prison sentence of five years. This offence was committed just three months subsequent to the instant offence.

8. Section 2 of the Criminal Justice Act 1993 provides as follows:-

"2(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."

9. A summary of the grounds on which this application is brought is as follows:-

(i) The failure by the learned sentencing judge to sentence in accordance with the provisions of s. 27B and s. 27C of the Firearms Act 1964, as amended. In particular, it was contended that there was a failure to engage with the requirement of s. 27B(4) which provides for a minimum terms of five years imprisonment unless a sentencing court is satisfied that there are *exceptional and specific circumstances relating to the offence, or the person convicted of it* which would render such a minimum term unjust.

(ii) It is submitted that a sentence must be imposed for each offence in respect of which a person is convicted. It is contended that the learned sentencing judge erred in taking into consideration count two, namely robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and ought instead have separately sentenced in relation to that count.

(iii) The learned sentencing judge failed to attach appropriate weight to a number of aggravating factors, including, the planning of the robbery, the wearing of gloves to avoid leaving fingerprints, the contribution to the intimidating conduct within the premises in the course of the robbery, the effect on the victims, the fact that he was part of a common design when the firearm was pointed at Det. Gda. Carey and the fact that a firearm was used, and was used to threaten.

(iv) Undue weight was attached to the respondent's plea of guilty in that he was effectively caught red handed, and the other mitigating factors.

The firearms offence

10. The relevant provisions of s. 27(B) of the Firearms Act 1967 are as follows:-

"(1) It is an offence for a person to have with him or her a firearm or an imitation firearm, with intent:-

(a) to commit an indictable offence, or

(b) to resist or prevent the arrest of the person or another person,

in either case while the person has the firearm or imitation firearm with him or her.

(2) A person guilty of an offence under this section is liable on conviction on indictment:-

(a) to imprisonment for a term not exceeding 14 years or such shorter term as the court may determine, subject to subsections (4) to (6) of this section or, where subsection (8) of this section applies, to that subsection, and

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3) The court, in imposing sentence on a person for an offence under this section, may, in particular, have regard to whether the person has a previous conviction for an offence under the Firearms Acts 1925 to 2006...

(4) Where a person (other than a person under the age of 18 years) is convicted of an offence under this section, the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person.

(5) Subsection (4) of this section does not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of it, which would make the minimum term unjust in all the circumstances, and for this purpose the court may have regard to any matters it considers appropriate, including:-

(a) whether the person pleaded guilty to the offence and, if so:-

(i) the stage at which the intention to plead guilty was indicated, and

(ii) the circumstances in which the indication was given,

And

(b) whether the person materially assisted in the investigation of the offence.

(6) The court, in considering for the purposes of subsection (5) of this section whether a sentence of not less than 5 years imprisonment is unjust in all the circumstances, may also have regard, in particular, to:-

(a) whether the person convicted of the offence has a previous conviction for an offence under the Firearms Acts 1925 to 2006...

(b) whether the public interest in preventing the unlawful possession or use of firearms would be served by the imposition of a lesser sentence.

(10) Section 27C of this Act applies in relation to proceedings for an offence under this section and any minimum term of imprisonment imposed under subsection (4) or (8) of this section in those proceedings."

No specific sentence for count two

11. The respondent pleaded guilty to counts one and two, but was only specifically sentenced in relation to count one, the count relating to the possession of the double barrel sawn off shotgun. The maximum sentence for this offence is fourteen years imprisonment. Count two was merely taken into consideration and was not the subject of a separate sentence. The offence in question carries a maximum sentence of life imprisonment.

12. Section 8 of the Criminal Justice Act 1951 provides that:-

"(1) Where a person, on being convicted of an offence, admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the Court may, if the Director of Public Prosecutions consents, take it into consideration accordingly.

(2) If the Court takes an offence into consideration, a note of that fact shall be made and filed with the record of the sentence, and the accused shall not be prosecuted for that offence, unless his conviction is reversed on appeal."

13. The requirement that the Director must consent before an offence is taken into consideration was inserted by the Criminal Justice (Miscellaneous Provisions) Act 1997.

14. In *DPP v. Grey* [1986] IR 317 at 328, Griffin J. stated:-

"The purpose of (section 8) is in my opinion clear - to enable the judge, in passing sentence, where offences other than those for which an accused person has been convicted had been committed by him, and were still untried and were admitted by him, to impose a sentence appropriate to the offence of which he was convicted having regard to and taking into account the other offences of which he then admitted his guilt."

15. In his book *Sentencing Law and Practice* Prof. O'Malley states, at p. 578:-

"When a person is convicted whether by plea or otherwise, of several offences, he should be sentenced separately for each even if it is intended that some or all of the sentences should run concurrently. It was so held by the Supreme Court in DPP v. Higgins (unreported, Supreme Court, November 22nd 1985), where it appeared that the accused having been convicted of several offences arising from the same incident had been sentenced on one count only with the others taken into consideration. Finlay C.J. described this arrangement as undesirable and unsatisfactory in view of the possibility that the conviction on one of the counts, including perhaps the one in respect of which a definite sentence was imposed, might be set aside or appeal or review. Convictions on other counts would remain intact so it was important to be able to identify the sentences which remained in being."

16. A similar view was also expressed by the Australian High Court in *R v. Pearce* [1998] 194 CLR610 at 624.

17. In the instant case the learned sentencing judge decided to take the second count into consideration without first seeking the consent of the appellant, nor was such consent forthcoming. The issue was not raised in any shape or form by either side either before or after sentencing. It is apparent from the transcript that the decision to take the second count into consideration was almost an afterthought on the part of the learned sentencing judge, prompted by prosecution counsel reminding him that there was a second count to be dealt with. The learned sentencing judge responded thus:-

"Oh, yes, two counts, I beg your pardon. In relation to the robbery charge, I'll take it into consideration."

18. It is certainly the case that it is common practice that all types of offences are taken into consideration with one or more offences in respect of which specific sentences are handed down. It is not done on the basis that such offences are ignored; rather, they are accounted for within the overall or effective sentence imposed in relation to one or more specific counts. The practice is, if nothing else, a useful means of giving effect to the principles of totality and proportionality. It is a practice often adopted as a way of dealing with minor counts in circumstances where one or more counts of a more serious nature are being dealt with, for example, a count of dangerous driving causing death will frequently be the subject of a specific sentence while accompanying less serious counts such as, for example, leaving the scene of an accident or driving without a driving licence are simply taken into consideration.

19. That said, the court is satisfied, that it is appropriate, and is required by law, that each count of which a person stands convicted should be the subject of a separate and distinct sentence unless the court relates to a minor offence that would ordinarily attract a relatively insignificant penalty. The logic for doing so is well illustrated in the remarks of Finlay C.J. in *Higgins* (see above). It makes particular sense to do so where serious offences are concerned such as, as in the instant case, the offence of robbery.

20. While the failure on the part of the learned sentencing judge to specifically sentence the respondent in respect of the robbery offence constitutes an error of principle, the court is anxious to emphasise that it was an error made perfectly understandably in circumstances where the issue in question was not brought to his attention.

The sentences under review

21. In the course of his sentencing judgment, the learned sentencing judge described the extent of the respondent's previous offending as *worrying*. He considered the respondent to have been 80% cooperative with the gardaí and that his refusal to identify other persons involved was borne out of fear. He also noted that the victims were badly affected by their experience, mentioning specifically Ms. Rafferty who was five months pregnant at the time. He went on to say:-

"...Having had regard to all of the circumstances of this case, I am satisfied that Mr. Kavanagh falls outside the remit of the mandatory provisions of section 27(D) of the Firearms Act (as amended); he never actually held the gun and did cooperate with the gardaí when arrested. In that context, I believe that an imposition .. of a sentence of four years with the last two years suspended for a period of twenty six months ..."

22. The principles governing a review of a sentence pursuant to s. 2 of the Criminal Justice Act 1993 are well established. In *DPP v. McCormack* [2000] 4 I.R. 356 at 359, Barron J. stated:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save for perhaps in exceptional circumstances have been caused by an obvious error in principle."

23. It is necessary, therefore in order for a sentence to be deemed unduly lenient, that it be established that there has been a substantial departure from what would have been regarded as an appropriate sentence. Judges are entitled to exercise leniency when imposing sentence, and have a wide discretion as to how they structure a sentence. A sentence is not unduly lenient simply because this court, or individual members of this court, might have imposed a different sentence. It is not sufficient for the appellant to show that a sentence imposed was lenient, or even very lenient; it is necessary to establish that it was unduly lenient.

24. A core criticism of the sentencing judgment in this case is based on the contention that the learned sentencing judge did not adequately engage in *"any analysis of those provisions of the Firearms Act 1964... as part of the complex sentencing process"*. While he did not deal with the issue in detail or identify any headline sentence before engaging in any discounting process, it is nonetheless the case that the learned sentencing judge did indeed consider whether there were in existence exceptional and specific circumstances which permitted him to impose a sentence less than the mandatory minimum term of five years. Submissions were made to him on the issue by prosecution counsel and a copy of the relevant legislative provisions was handed to the learned sentencing judge for his consideration over the lunch break.

25. The sentencing judgment itself suggests that the various aggravating and mitigating factors were considered prior to imposition of sentence. The learned sentencing judge also referred to the adverse effect on the victims of this crime and the negative effect such offending has on members of the public going about their ordinary business. Ultimately, what has to be considered by the court is whether a sentence of four years, with the last two years suspended was an appropriate sentence for the firearms offence with due regard to the particular circumstances in which the offence was committed and, more particularly, was the sentence not merely lenient, but unduly lenient.

Conclusion

26. It is the court's view that the sentence was unduly lenient, and outside the wide discretion enjoyed by the learned sentencing judge because of the particularly serious nature of the offences and the circumstances in which it was committed. Even if the learned sentencing judge had imposed a separate and distinct sentence in respect of the second count, and which ought to have been done, the sentence imposed in respect of the first count would remain unduly lenient. The extent of that undue leniency is however more marked because it was a sentence imposed, in effect, on a *full facts* basis, and included the circumstances in which the robbery was undertaken. The maximum sentence for the first offence was fourteen years imprisonment. While the offence did not fall into the most serious category of this offence in terms of its gravity, it nevertheless must rank well above the half way mark, and with due regard to the respondent's previous convictions required a sentence of between seven and nine years.

27. The Court will therefore quash the sentence imposed by the learned sentencing judge and will resentence as of the present time. In addition to the mitigating factors known at the time of sentencing, this Court has been provided with a number of certificates of achievement awarded to the respondent since entering custody and which are particularly impressive when considered in their entirety. The Court will therefore impose, in respect of count one a sentence of seven years imprisonment with the final two years suspended on terms similar to those directed by the Circuit Criminal Court.

28. In relation to the second count, and for the reasons already stated, the Court is satisfied that the proper course to have been taken by the learned sentencing judge was to impose a separate and distinct sentence in respect of this offence. This offence carries a maximum sentence of life imprisonment. The particular circumstances in which the offence was committed by the respondent make the offence particularly serious. While it is accepted by the Court that there existed some element of fear on the part of the respondent which contributed to his participation in the robbery, it was nevertheless an incident in which he freely participated. He knew that a shotgun was to be produced for the purposes of terrorising staff and customers, and the use of the shotgun in this manner coupled with his own aggressive behaviour in the course of the robbery serves to emphasise the seriousness of the offence.

29. In respect of the second count, the Court will also impose a sentence of seven years imprisonment with the final two years suspended on similar conditions to those imposed in respect of the first count. Both sentences will be concurrent, and will date from the 21st July 2016.