THE COURT OF APPEAL

[167CJA/17]

Birmingham P.

Mahon J.

Edwards J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 199

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

v.

CIAN WALSH

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 1st day of June 2018 by Birmingham P.

1. This is an application by the DPP pursuant to s. 2 of the Criminal Justice Act, seeking to review on grounds of undue leniency a sentence that was imposed on the appellant. The sentence sought to be reviewed is one of six years imprisonment with two suspended. Such sentences were imposed in respect of three counts of threat to kill and in respect of two counts of possession of a firearm in suspicious circumstances, the firearm being a sawn-off double-barrelled shotgun. The sentences were imposed on 30th May 2017. They were imposed in a situation where signed pleas of guilty had been entered in the District Court and that had been confirmed in the Circuit Court.

2. The offences all related to events that occurred on 25th May 2016. At the heart of the matter before the Court, was that the appellant had turned up at a suburban address in Cork, intoxicated. That was the home of Ms. Janice McGreanor. When he did so, he pointed a sawn-off shotgun at Ms. McGreanor. In the course of the incident, one round was discharged "seemingly unintentionally". That does in fact seem to be the case, in that it appears that what happened is that during the course of this incident, he tripped over the family dog.

3. After the incident, he escaped in a vehicle which was driven by a co-accused who had been waiting for him and that vehicle was then driven in a highly reckless manner, leading to a situation where the co-accused and the appellant appeared before the Court in relation to a number of charges each.

4. The background to his appearance at that suburban location was a fight that had occurred earlier in the day between Mr. Walsh and another gentleman, a Mr. Healy. It is accepted that Mr. Walsh suffered some injuries during the course of that incident, but he was content to leave matters go there and he returned, seeking to take the matter further.

5. What he decided to do was to go to the home of Mr. Healy's ex-partner. In the course of the hearing this morning, it has been suggested that that may have been in a situation where he had not realised that the relationship between Mr. Healy and his ex-partner was no longer current. He was very clearly under the influence of drink and drugs at the time, a fact that was very evident to the injured party. In the victim impact statement, she describes the firearm being held under her chin "he then pointed the gun under my chin which scared me so much he threatened to kill me". Two of the three counts of threatening to kill relate to the earlier incident involving Mr. Healy, but the other relates to that threat to Ms. McGreanor and one of the two, the possession of firearms offences, relates to the brandishing of the sawn-off shotgun at the home of Ms. McGreanor.

6. Following the incident there, he was driven off at speed by his co-accused, and in the course of the getaway, went to St. Joseph's Cemetery where he left the firearm, the sawn-off shotgun, loaded, behind a tombstone from where it was recovered some days later as a result of Gardaí examining CCTV footage. He himself was apprehended more or less immediately after the incident involving Ms. McGreanor, but it was some days before the firearm was recovered. The fact that a round was discharged, albeit unintentionally, establishes that the firearm that was brought to the home of the injured party, Ms. McGreanor, was loaded and also establishes that the safety catch was not applied. Likewise, when the firearm was eventually retrieved from the cemetery, the safety catch was not on. There was evidence that the cemetery is one to which the public has access, that people walk and cycle through it and that from time to time children play there.

7. So far as the appellant's personal circumstances are concerned, he is 29 years of age, he is in a long-term relationship and is the father of a child. He is unemployed and there are 183 previous convictions recorded. All of those were recorded at District Court level and it must be said that the very significant majority relate to road traffic matters – 106 are road traffic – but they also include two for assault, four for possession of knives, 27 offences for s. 3 of the Misuse of Drugs Act and 11 for s. 15 of the Misuse of Drugs Act.

8. When the judge was sentencing, he was dealing with two accused and the structure of the sentence hearing was slightly unusual in that he dealt with the co-accused, who was before the Court essentially on driving-related offences, and did that to a conclusion including taking bonds. The relevance of that is that he had prefaced his sentencing remarks in relation to the co-accused by making some remarks of a general nature about his approach to sentencing and what he saw as the obligations of a sentencing judge.

Counsel for the appellant, Ms. Fawsitt SC, says, and we think says correctly, that those remarks should be regarded as applicable also to Mr. Walsh.

9. At the sentencing hearing, immediately before the judge imposed a sentence, counsel for the DPP reminded him of the statutory regime applicable to firearm offences i.e. a maximum of 14 years imprisonment and a presumptive mandatory minimum of five years from which the judge could depart in the circumstances stipulated by statute. In the course of his sentencing remarks, the judge did not refer to the presumptive minimum, but imposed a sentence less, a sentence of four years imprisonment to be served as against the presumptive minimum of five years. There may be circumstances, we acknowledge, where the core issue in a particular case is whether there is a basis for departing from the statutory minimum and if a judge decides so to do, or indeed if he decides not to do, then it may be possible, with some confidence, to infer what conclusion he had formed on that issue.

10. This not really such a case. It is not clear to this Court what basis could be found for departing from the statutory minimum in respect of the offences at Noonan Road, the suburban location where the round was discharged from the firearm. That is so in respect of both the firearm offence and the threat to kill offence. The threat to kill offence was not subject to the statutory minimum, was itself a very serious offence. Likewise, so far as the leaving of the loaded sawn-off shotgun in the cemetery without the safety catch, it is not obvious what basis there would have been for departing from the presumptive minimum. It also has to be said that Mr. Walsh did not have a great deal going for him, apart from the very significant fact that he had come before the Court on foot of signed pleas.

11. The Court has concluded that there was an error, that there was, in the Court's view, just no basis for departing from the presumptive minimum. The sentence of six years, which was where the judge started, would have been an appropriate sentence, and indeed, if a somewhat higher sentence of 7 or 7 and a half years' imprisonment had been imposed, then it is unlikely that this Court would have been in a position to intervene.

12. Notwithstanding our view that a sentence of six years would have been the appropriate sentence, the Court is conscious that we are resentencing someone who is now into his sentence and who believed that he knew the release date to which he was working. In those circumstances, we will limit the extent of our intervention, but we feel we must intervene, but will limit it to the extent of imposing the presumptive statutory minimum.

13. We will quash the sentence of the Circuit Court and substitute a sentence of five years imprisonment *simpliciter* to date from the same day as the sentence in the Circuit Court.