



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Record No 230 CJA/16

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN:

THE PEOPLE OF THE SUIT DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

KEITH CHRYSAL

RESPONDENT

Judgment of the Court (ex tempore) delivered the 19th day of June, 2017 by Mr. Justice Edwards

Introduction:

1. In this case the respondent pleaded guilty before Carlow Circuit Criminal Court to one count of robbery, contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001; one count of assault causing harm, contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997; one count of possession of an imitation firearm contrary to s. 9A of the Firearms and Offensive Weapons Act 1990; one count of unlawfully using a mechanically propelled vehicle, contrary to s. 112 of the Road Traffic Act 1961 as amended; and one count of criminal damage contrary to s.2 of the Criminal Damage Act, 1991.

2. The respondent was sentenced to two years and six months imprisonment for the offence of robbery, one year of imprisonment for the offence of assault causing harm, one year of imprisonment for the offence of possession of an imitation firearm, and two years and six months imprisonment for the offence of criminal damage, all sentences to run concurrently and to date from 03/03/2016. The offence of unlawfully using a mechanically propelled vehicle was taken into consideration.

3. The applicant now seeks a review of the said sentences pursuant to section 2 of the Criminal Justice Act 1993 (the Act of 1993) on the grounds that they were unduly lenient.

The Facts

4. In the early hours of the morning of the 1st of March 2016 a motor car, which was parked outside the home of its owner, a Mr Ali Agwara, was stolen. This was the subject matter of the s.112 charge to which the respondent pleaded guilty. The vehicle was subsequently used in the course of an armed robbery of the post office at Leighlinbridge, Co Carlow.

5. At approximately 10am on the same morning as the car was taken, a Mr Art O'Connor, who is the postmaster at Leighlinbridge Post Office, was working in his post office premises as normal. He went into a back room for a brief moment and, upon his return to the shop floor, he observed that two raiders wearing balaclavas had entered the premises. One was carrying what appeared to be a handgun and the second raider was carrying what appeared to be a hammer.

6. Both raiders issued threats to Mr O'Connor and the person with hammer broke up the cash register and also smashed CCTV equipment. Mr O'Connor was then bundled into the back office where the cash register would have been. They did so in an aggressive manner and they continued to threaten him. The raiders then stole a sum of €6,856 in cash.

7. At one stage Mr O'Connor tried to resist which resulted in him receiving a blow to the head with an object. He is unable to say whether he was struck by the gun or the hammer. He was bent over at the time.

8. Both raiders then left the post office premises and Mr O'Connor sounded the alarm, using a panic button within the post office premises. There was an independent witness who was going to the post office at the time, a Ms Lily O'Brien, and she observed the two raiders getting into a white car and leaving the area.

9. Once the Gardai were notified a Garda report went out in respect of the white car and a search was conducted for the raiders. A short time later Gardaí at Carlow Garda Station received a report in relation to a car being on fire in Carlow town. A witness had observed two males running from this burning car and proceeding in a particular direction. Gardaí were alerted and gave chase. In the course of this pursuit Garda Ryan and Garda Ruth observed two males crossing a river towards Burrin Manor Estate in Carlow. They relayed this information to other gardai in the area. A search of the area was conducted by the gardai and as a result the respondent was located hiding in a ditch along the riverbank and his clothes were observed to be wet from him having been in the river. He was arrested on suspicion of robbery and was taken to Carlow Garda Station.

10. A number of follow up searches were carried out in the course of which the following items were recovered at a location close to where the respondent had been arrested: a realistic imitation handgun, a hammer, a balaclava and a large quantity of money.

11. The respondent was interviewed on six separate occasions while detained at Carlow Garda Station by gardai and he made admissions in relation to his involvement in this robbery, and identified himself as the person who had the imitation firearm.

The respondent's personal circumstances

12. The respondent was 27 years of age at the time of the offences.

13. At the time of sentencing the respondent was a married man with two children, aged six years and two years, respectively, one of whom is profoundly deaf.

14. The respondent is addicted to heroin and alcohol, and was abusing both at the time of the offences. However, he has been off

both since going into prison and has evinced a resolve to stay clean when he is eventually released. He is getting on well in prison and has been given work as a cleaner.

15. The sentencing court was told that the respondent has 50 previous convictions, including twelve for public order offences; six convictions for dangerous driving; four conviction for unauthorised taking; three for burglary; four for theft; three for failing to appear; one for attempted robbery; two for criminal damage, one for drunk driving, and fourteen for miscellaneous other road traffic offences.

16. Most recently prior to the imposition of the sentence in this case the respondent had, on the 9th of March 2016, received two sentences of ten months imprisonment from Naas District Court, to be served consecutively *inter se*.

17. The offences the subject matter of the present appeal were committed while the respondent was on bail for the offences giving rise to the two consecutive 10 month sentences imposed by Naas District Court. However, this was not brought to the attention of the sentencing judge.

The impact on the victim

18. The victim elected not to give evidence at the sentencing hearing, but provided a victim impact statement instead which was handed in. The report states (*inter alia*):

"My name is Arthur O'Connor, I am the postmaster for Leighlinbridge Post Office and I have been in Leighlinbridge Post Office since 1994. On the 1st of March 2016 the post office was robbed by two armed raiders. One was carrying an axe and the other a gun. During the course of the robbery, I was assaulted and struck with something on the back of my head and body. They stole approximately €6,800, property of An Post. This was a very frightening ordeal for me. I was assaulted during this incident and I attended Dr Pascal O'Dea approximately a week after the incident with pain in my head, shoulder and arm. I am in the process of obtaining a medical report and should have this available for a Court. After this incident, I had a lot of sleepless nights. When I am in the shop I am very apprehensive, aware and nervous. When I am at home I find but it's different when I'm in the shop -- I'm fine but it's different when I'm in the shop. I had to address the security aspect in the shop. I had to have a whole new refit which I had to fund by myself as I am an An Post contractor. I put in a new counter, new safe room, iron bars and a bulletproof glass in the shop. Since this incident, I've had issues with my shoulder and arm. At that particular time I thought I was fine but, as time goes by, I've had problems with my arm and shoulder which has given me certain restrictions. I am making good progress. I turn into work every day and shall continue with my hobbies, albeit less often. My life has become limited since this robbery. I would like to thank members of An Garda Síochána for assistance in this investigation. Thank you for your time."

19. A medical report was also submitted in respect of the victim's physical injuries. The victim's doctor reported that:

"He attended me at the surgery on the 1st of March with abrasions over his temple 3.7 cm, 1.5 cm wide. Non-tender and swelling over occiput with tenderness where he was struck by assailant ..."

The sentencing judge's remarks

20. In the course of sentencing the respondent the sentencing judge commented as follows (*inter alia*):

JUDGE: Well, on the 1st of March, Mr Art O'Connor was going through his everyday business as a postmaster and he was confronted when he came back into his shop by two raiders, one with a -- both with balaclavas, one with a handgun and a hammer. They bundled Mr O'Connor into the post office. They manhandled him and they assaulted him and they continued to threaten him. There was 6,856 taken. He received a blow to the head from an object. He's not sure what exactly hit him, whether it was the gun or the hammer. It was due to the good work of the gardaí that this -- these men -- or this man was apprehended. There was a report from an independent bystander of men leaving, I think that's correct, leaving -- leaving the post office firstly and then as car on fire and then two men running, so the public also played a part in apprehending these men. Garda Ryan and Garda Ruth then observed two males crossing the river and a search ensued. Mr Chrystal was located hiding in the ditch on the riverbank.

There was a follow-up search of the area. The handgun, the balaclava, the hammer and a large quantity of cash was found. The handgun was a realistic imitation. He was interviewed a number of times and he made admissions in relation to his own involvement and identified himself as the -- the person with the imitation firearm. He has 50 previous convictions. For a man of 27, it's a lot, including 14 RTAs, public order, dangerous driving, section 112, burglary, theft, failing to appear, criminal damage, dangerous driving and there's a -- is it drunken driving there somewhere; isn't there, drinking driving, and attempted robbery.

This man has been addicted to drugs and alcohol. He made an attempt to come off drink and heroin and he spent 14 months in a rehabilitation centre. However, very soon thereafter he relapsed when he came out in 2011 and he was on drinks and drugs up until -- on and off up until he was convicted in relation to a burglary charge and in custody -- put into custody in relation to this matter. Together with the previous matters mentioned, I also take into account that he is currently in prison and he is -- he's got a job cleaning which means that he has to be clean.

He has two children of six and two and one profoundly deaf. He made an early plea which is a big mitigating factor. He has realised the wrong he did. He has now again -- he's now free of drugs again with the assistance of the prison, those in prison who are helping him. He apologises.

However, Mr O'Connor, his life has been changed since this and he must have got an awful fright. So in relation to robbery, this is a robbery of 6,000 -- sorry, 6,856. It isn't the highest amount of money but it's a serious enough offence where there is violence included. So, in relation to that offence, the appropriate sentence is seven years. Taking into account the early plea, it comes down to four and a half years. I have to take into account the fact that this man is trying to come off drugs and has had some success and is back trying again; that he has young children who need his company and his guidance -- good guidance I might add -- and that one of them is profoundly deaf. Taking all the other mitigating factors into account, the appropriate sentence comes down to two and a half years.

Section 3 assault is five years, but this was a very frightening episode for Mr -- for Mr O'Connor. However, the injuries though an extremely frightening event luckily are not that serious. The appropriate sentence in this matter is three years; with the early plea, it comes down to two and a half -- no, two years, two years. Sorry, it comes down to 18 months. And taking into account all the rest of the mitigating factors, it goes down to 12 months, so the appropriate

sentence in relation to count 2 is 12 months.

In relation to the firearms, it wasn't an authentic firearm but it was an imitation and it was a good imitation. In relation to count No. 3, the appropriate term of imprisonment is three years. Taking into account the early plea, 18 months; and then all other matters, it goes down to 12 months.

Section 112, I'm taking that into account. Criminal damage, what -- tell me, what was the criminal damage?

MR O'DOHERTY: The criminal damage was the car he set on fire.

JUDGE: Oh, yes. Well, that's a serious matter, setting someone's car alight. That's 10 years; that goes down to fire years; early plea brings it down to three years. Taking all matters into account, it goes down to two and a half years, and that's on count No. 5; is it? Yes, count No. 5. All sentences to be served concurrently."

The grounds of appeal.

21. The applicant, in contending that the sentences were unduly lenient, makes two main complaints.

22. It is complained first of all that the sentencing judge erred in failing to attach appropriate weight to the aggravating factors in the case and in doing so under assessed the gravity of the offences, and in particular the robbery offence, resulting in each case in them being placed at too low a point on the scale of seriousness. Secondly, it is complained that the sentencing judge attached undue weight to mitigating factors

Discussion

23. After careful consideration we do not consider that the sentencing judge was in error in her approach to the assessment of the gravity of the offences at issue in this case. We are satisfied that, with the exception of the fact that these offences were committed while the respondent was on bail - a matter to which we will return, the relevant aggravating factors, including the premeditation involved, the respondent's previous convictions for attempted robbery, theft, and burglary, the violence actually used, and the impact on the victim Mr O'Connor were all properly taken into account. The sentencing judge fixed what we consider to be an appropriate headline sentence in each instance, from which she later discounted for mitigation.

24. However we agree with counsel for the applicant that the sentencing judge afforded too much discount overall, and in each instance both for the pleas of guilty and the other mitigating circumstances including the respondent's co-operation, his family circumstances and his addictions.

25. While there is no hard and fast rule as to the discount to be afforded for a plea of guilty, experience indicates that it normally attracts a discount, depending on the circumstances of the case, of between 15% and 30% from the headline sentence. In this case however the sentencing judge had discounted for the plea by 36% in the case of the robbery, by 50% in the case of both the assault causing harm and the possession of an imitation firearm, and by 40% in the case of the criminal damage offence. She then went on to further discount for mitigating factors other than the plea by 29% in the case of the robbery, by 16% in the case of both the assault causing harm and the possession of an imitation firearm, and by 10% in the case of the criminal damage offence. The aggregate discounts were therefore 65%, 66%, 66% and 50%, respectively.

26. We consider that these discounts were both excessive overall but also indicative of internal inconsistency in the sentencing judge's approach to discounting for mitigation. Given that all of the offences arose out of the same incident, they should all have received the same percentage discount for the plea. Moreover, there was no basis for allowing greater or lesser discount for the other factors depending on the offence under consideration. If the appellant's personal circumstances entitled him to a certain percentage discount when he was being sentenced for the robbery offence, then logically he should receive the same percentage discount for the same factors when being sentenced for the other offences.

27. In our view the overall discounts for mitigation were excessive in this case, and a clear departure from the norm.

28. The sentences imposed were in the circumstances unduly lenient and outside of the sentencing judge's legitimate margin of appreciation.

29. We will therefore proceed to quash the sentences imposed and to sentence the appellant afresh. In accordance with established jurisprudence, the parties in this case were invited to put before the court on a contingent basis any additional materials that they might wish to have taken into account in the event of the court having to proceed to a re-sentencing. It was in this context that we were made aware of the fact that these offences were committed while the respondent was on bail.

30. Starting with the robbery offence for which there was a headline sentence of seven years, we are prepared to discount from that by three years for the mitigating factors in the case, leaving a net sentence of four years imprisonment.

31. In the case of the offences of assault causing harm, and possession of an imitation firearm, respectively, for which there were headline sentences of three years, we are prepared to discount from those by fifteen months, in each instance, for the mitigating factors in the case, leaving net sentences of twenty one months imprisonment for each offence.

32. In the case of the offence of criminal damage, for which there was a headline sentence of five years, we are prepared to discount from that by two years for the mitigating factors in the case, leaving a net sentence of three years imprisonment.

33. All sentences are to run concurrently *inter se* but, to reflect the fact that they were committed while on bail, are to be consecutive to the second of the sentences of ten months imposed by Naas District Court and referred to earlier in this judgment and which it is understood the respondent is still serving.

34. Finally, in circumstances where we have felt compelled to impose consecutive sentences we will, in addition, and in order to reflect the totality principle in sentencing, suspend the last six months of each sentence on the respondent's own bond in the sum of €100 to keep the peace and be of good behaviour for a period of twelve months from the date of his release.

35. The s.112 offence will once again be taken into consideration, and the consequential disqualification from driving will remain in place as ordered by the court below.