



**THE COURT OF APPEAL**

**Birmingham J.  
Edwards J.  
Hedigan J.**

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

**238CJA/16**

**Respondent**

**V**

**Michael Hanney**

**Appellant**

**JUDGMENT of the Court delivered on the 17th day of July 2017 by**

**Mr. Justice Birmingham**

1. The matter before the Court sees an application by the Director of Public Prosecutions to review, pursuant to s. 2 of the Criminal Justice Act 1993, sentences that were imposed on the respondent, Mr Hanney, on grounds of undue leniency. The sentences in question were imposed on 19th July, 2016, and were in respect of matters dealt with on Dublin Circuit Court Bill Number 259/2016. There were seven counts on that indictment, Counts 1 – 3 involved offences of possession in suspicious circumstances relating to a firearm, silencer and ammunition respectively contrary to s. 27A of the Firearms Act 1964. Counts 4 – 6 on the indictment dealt with possession of the same items without a certificate contrary to s. 2 of the Firearms Act 1925 as amended. These offences related to the 13th July, 2015, while count 7 on the indictment related to the possession of an air pistol without a certificate contrary to s. 2 of the Firearms Act 1925 as amended on 13th May, 2015. The sentences imposed that are now sought to be reviewed were ones of five years imprisonment with the final two years suspended and with the requirement that upon release, the respondent would be under the supervision of the Probation Service for a period of 18 months.

2. The ground of appeal as set out in the written submissions are as follows:

1. The judge erred in principle in imposing an unduly lenient sentence in all the circumstances.
2. The judge erred in law and fact in failing to attach appropriate weight to the aggravating factors in the case.
3. The judge erred in law and fact in attaching undue weight to the mitigating factors in the case without having appropriate regard to all of the circumstances particular to the case.
4. The judge erred in law and fact in failing to have regard to the position of the respondent's co-defendant who had been the passenger in the vehicle driven by the respondent when the items in question were found and who had committed these offences while on bail for an armed robbery.
5. That the judge erred in law and fact and in principle in failing to have appropriate regard to the range of sentences appropriate to such cases in his approach to sentencing.
6. The judge erred in law and in fact in failing to have appropriate regard to the presumptive mandatory minimum sentencing regime applying to offences pursuant to s. 27A of the Firearms Act 1964 as amended.
7. That the judge erred in law and in fact and in principle in determining that five years with the final two years suspended with provision for probation supervision for a period of 18 months was the appropriate sentence having regard to its place on the spectrum of seriousness for offences of this kind.
8. The judge erred in law and fact and principle in failing to sufficiently incorporate elements of both general and personal deterrents in the sentence having regard to the maximum sentence proscribed by the Oireachtas.
9. The judge erred in law and in fact and in principle in failing to have proper or adequate regard for the issue as to whether the public interest in preventing the unlawful possession or use of firearms would be served by the imposition of such a sentence.

3. As far as the background facts are concerned, the first matter in time, though the less serious in an overall context, related to the fact that on 13th May, 2015, an air pistol was recovered at the respondent's home address. He was only arrested and questioned about this matter after his involvement in the second incident which occurred on 13th July, 2015, came to light. When eventually questioned about the air pistol he said that he had been trying to shoot a magpie and expressed surprise that it was illegal. The more serious matters occurred on 13th July, 2015. On that occasion the respondent was driving a vehicle registered in his name along with a passenger. The attention of the gardaí was drawn to the vehicle which was believed to be acting suspiciously and it was stopped in the Sillogue area of Ballymun close to the Ikea store. When the occupants of the vehicle were advised that the car was going to be searched, the respondent volunteered that there was a firearm in a bag in the passenger footwell of the vehicle. He took responsibility for the weapon, saying that the passenger had nothing to do with it. When the bag was opened there was a silver metal case inside which contained a hand gun, a silencer and ammunition. Both occupants were arrested and detained and interviewed during the course of their detention. Admissions were made by the respondent to the effect that he was transporting the items on foot of a request and that he had in fact opened the case and a shot had been discharged by him accidentally. Gardaí followed up this aspect by going back to the location referred to by the respondent but no evidence was recovered to confirm the suggestion that a firearm had been discharged there.

4. The firearm located at the respondent's home address was a .22 calibre Westlake break barrel air pistol, designed to discharge .22 calibre lead pellets. In terms of the items recovered from the car, the firearm was a Russian-made pistol in good condition, the serial number of which had been deliberately erased and was beyond restoration. The muzzle of the barrel was threaded to accept a

silencer and the pistol was designed to discharge 9 x 18 mm calibre ammunition such as the ammunition located with it. The silencer recovered was suitable for use in conjunction with the firearm that it was found with.

5. In terms of the accused's background and circumstances, he was born on the 21st day of May, 1993. He had two previous convictions recorded which had been dealt with in May, 2013 in the District Court, in fact the Children's Court, these being an offence of violent disorder and a s. 3 Non-Fatal Offences Against the Person Act 1997 assault. These matters were dealt with by way of a community service order. A number of documents were put before the Circuit Court at the sentencing stage. There was a letter from an electrical contractor indicating that he was prepared to offer Mr Hanney a position as a first year apprentice electrician. The letter from the would-be employer stated that Mr Hanney had informed him of his current situation and in view of his honesty towards his would-be employer, the offer was still available. There was a letter from another employer who was involved in the refrigeration business who had been providing part time employment since October, 2015. That letter indicated that the employer was very happy with Mr Hanney and with his attitude to work and that it was hoped to make the part time employment full time in the near future. There were references from a number of community groups in the Ballymun/Poppintree area, including Ballymun Central Youth Facility, a pigeon fanciers club and a local soccer club. There was also a letter from his partner of four years which referred to the fact that they had come together through their shared love of animals. There was also a letter from Mr Hanney's mother referring to his positive role in supporting her but more particularly his role in supporting a younger brother who had very serious and it seems long term medical difficulties. Also before the Court was an "unsung hero" certificate from 2017 signed by the Lord Mayor of Dublin that year which related to services that Mr Hanney had provided for disadvantaged persons in his local community over a period of years.

### Judge's approach to sentencing

6. The judge's sentencing remarks were very brief and merit quotation:

"On the particular day, the guards were interested in this particular car. They stopped the vehicle and there were two men in the car. It seems on further examination, and obviously with disclosures from the defendant, it appears that there was a firearm, ammunition and a silencer being transported. It seems the guards can accept that he was transporting this firearm. Obviously Mr Hanney must have known that this firearm was going to be used to either kill somebody or injure them, or threaten them at least, so what he was doing was quite serious.

Now, in relation to Mr Hanney he has good mitigation. He has pleaded guilty. He has a couple of previous convictions, obviously modest when compared to this present conviction. He has good references. It seems that he is willing to work and it seems to me that he is making a contribution to his family and to his general area.

Now there is a – I believe there is a mandatory or a presumptive mandatory minimum sentence of five years for this type of offence. It seems that the DPP is of the view that it is in the middle range, some place between seven and ten, and obviously I must take that into account in deciding what to do about Mr Hanney. I must also take into account to some degree that I have previously sentenced another individual for this offence, this very offence, transporting this particular gun and silencer. Now, I have no great recollection of the sentencing hearing but it seems that the other gentlemen had a robbery conviction to his name and obviously I took that into account in deciding what to do about this man. What to do about Mr Hanney? It seems there is good reason to believe that he can be reformed and therefore it seems to me the appropriate sentence, taking all the factors into account, is a term of imprisonment of five years. By reason of the mitigating factors, I am going to suspend the last two years of that sentence."

7. Counsel for the prosecution interjected, saying:

"Just for the record, Judge, if I can be clear in respect of the co-accused, he was yet to be sentenced on the robbery matter."

To which the judge responded:

"Oh I know that, yes."

The judge confirmed that he was aware of that but sought confirmation that the co-accused had pleaded guilty to the armed robbery, which confirmation was forthcoming.

### The DPP's submissions

8. The Director draws attention to the trial judge's remarks that what Mr Hanney was doing was "quite serious". She submits that this was a clear and obvious error and indicative of the failure of the judge to address the real gravity of what was occurring. She said this was not a situation of behaviour that was quite serious but that the behaviour here was very serious indeed. It was also submitted that taking five years as the starting point was also a serious error. Five years, it was pointed out is the mandatory presumptive minimum and it is also the low point of the range suggested in *DPP v. Ryan* [2014] IECCA 11 for low category offences.

9. At this stage the jurisprudence that applies in the case of applications for sentence reviews on grounds of undue leniency is well known and indeed has not seriously been in dispute right back to the first such case in the case of *DPP v. Byrne* [1995] 1 ILRM 279.

10. At the start of this appeal the Court indicated to the parties that it had read the papers and the submissions and its preliminary view was that this was obviously a serious matter, that the sentence imposed was a lenient one, indeed a very lenient one but that the real question was as to whether it was or was not so unduly lenient as to cause the Court to intervene. The Court has not departed from its preliminary view. It regards this as a very serious incident indeed, the aggravating factor being that the firearm with serial number erased, ammunition and silencer were all located together in the same silver case. The Circuit Court was told by counsel for the Director that the offence was seen as mid range, i.e. one meriting a sentence of between seven and ten years before mitigation, bearing in mind that there was a silencer there and the manner in which the items were being conveyed.

11. In the course of its judgment in the case of *DPP v. Daniel Prenderville* [2015] IECA 33, the Court referred to the fact that a silencer was attached to the semi-automatic pistol which was recovered in that case as adding an additional dimension of concern. This Court therefore has to see the sentence imposed as a lenient one, indeed a very lenient one indeed. However, there were significant factors present in favour of the then accused. There was first of all the way in which he met the case which started with telling gardaí before they commenced their search that there was a firearm in the car, and then proceeding to take responsibility for the firearm. This was followed up by an early plea of guilty. The Court has to regard the admissions and the plea as significant. Where prohibited items, firearms, drugs or whatever are recovered and there are a number of individuals present at the time, the prosecution can sometimes encounter difficulties in establishing possession on the part of any one individual. For that reason the manner in which this case was met, the admissions and the early plea have to be regarded as valuable. Relevant too was that he was a young man,

twenty two years at the time of the offence. There was evidence before the Court about the substantial and positive role that he played in his family, a family that was experiencing difficulties and his community involvement over a number of years. There was also significant evidence about his success in obtaining work and building on that and the fact that there was an apprenticeship available which was being kept open for him even where the would be employer was aware of the difficulties that Mr Hanney had got himself into.

12. It seems to the Court therefore that there was provision in this case for a reduction in sentence from the headline sentence first identified as appropriate and it was one of those cases where there was scope for part suspension of the sentence. In this case the judge did not identify his starting point but given the significant factors present in ease of Mr Hanney, it must logically have been higher than five years. If he took seven years, being the starting point for mid range offences before mitigation identified in the Ryan case, there was certainly scope for bringing that back to five years.

13. In addition there was scope for considering part suspension. The Court is in no doubt that it was open to the judge to conclude, as he seems to have done, though he was not very explicit about this, that there were factors present which meant that he should depart from the mandatory presumptive minimum. The sentence eventually arrived at, five years with two suspended, was as already stated lenient, indeed very lenient. It might be said that the leniency extended was at the absolute outer limits of leniency. However, the Court has not been persuaded that the sentence was so unduly lenient that it should be set aside.

14. Accordingly, the Court will refuse the application by the Director to review the sentence.