



THE COURT OF APPEAL

[207CJA/17]

Birmingham J.

Mahon J.

Hedigan J.

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

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

v.

PATRICK FRIEL

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 17th day of May 2018 by Mr. Justice Birmingham

1. On 3rd May 2015, the appellant pleaded guilty to two counts on the indictment, a count to possession of a firearm without a certificate and a count of assault causing harm. There was a third count on the indictment, a count of endangerment, but a *nolle prosequi* was entered in respect of that count, although the matter is expressly dealt with on a full facts basis. The sentencing process was concluded on 13th July 2015 and the Probation of Offenders Act 1907 was applied. Two issues are raised on the appeal. The Director, seeking a review on grounds of undue leniency, says that the procedures that are required to be followed in order for the Probation of Offenders Act to be applied were not in fact followed. She says that this of itself is an error. But, secondly, and perhaps more fundamentally, she says that this was not an appropriate case for applying the Probation Act.

2. The background to the case is that the respondent, Mr. Friel, and the victim, Mr. Sweeney, were neighbours who were in dispute over a right of way which Mr. Sweeney claims to have over a laneway owned by Mr. Friel. Prior to the date when the incident occurred, Mr. Friel had obstructed access to the laneway. On the day of the incident, Mr. Sweeney was on the laneway with his digger clearing the obstruction. Mr. Friel approached, armed with a shotgun, which was legally held, and the prosecution case was that he aimed it at the victim. Mr. Friel admitted to knowing that the shotgun was loaded with two cartridges. Mr. Sweeney rang 999 and reported that he was being threatened with a shotgun. Gardaí made their way to the scene. While en route, Gardaí rang Mr. Sweeney and learnt that he had been shot. When Gardaí arrived at the scene, they found that the victim was bleeding and distressed and the Court heard medical evidence of injuries that he had suffered which involved fragments of pellets into his face and in his eye. At that stage, Mr. Friel had left the scene, but he was located by the Gardaí following discussions with his wife and with his solicitor. He returned voluntarily and he pointed out where he had put the shotgun. Gardaí also discovered an unlicensed air rifle which was the subject of Count 2 on the indictment. Mr. Friel admitted taking the shotgun to the scene in temper and admitted that he had intended to frighten his neighbour. He claimed that the firearm went off accidentally. A ballistic report indicated that the weapon could not be discharged accidentally if the safety catch was engaged.

3. During a sentence hearing on 15th June 2017, the judge became aware that there were civil proceedings in relation to the dispute of right of way and he decided to postpone imposing sentence until after he had heard the civil proceedings. These were listed in the Circuit Court in Buncrana on 12th July 2017. When the criminal matter came back before the Court for completion of sentence on 13th July 2017, it was indicated that the parties had settled the civil proceedings and the judge then proceeded to deal with the sentence. He dealt with it by applying the Probation of Offenders Act in respect of both counts in the indictment.

4. It seems clear that the judge took the view that because the civil case had settled that there was no need to impose any punishment on the accused for the crimes committed. He commented:

"While it would appear to be very lenient in the circumstances, in my view, it is a fair way to discharge this particular matter. I do not believe that any punishment should be endured as a result of what had happened."

We then set out here s. 1(2) of the Probation of Offenders Act:

"(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

It will be noted that the section requires the entry into a recognisance, but that did not happen and the Director says that this is the

first error.

5. Before making an order under the 1907 Act, the Court has to be satisfied that it is justified in doing so on account of the character; antecedent; age; health and condition of the defendant; the trivial nature of the offence and the extenuating circumstances under which the offence was committed. The Director says that while the Probation of Offenders Act is available in respect of all indictable offences, that does not relieve the judge of the obligation of imposing an appropriate and proportionate sentence. She says that this offence was all together too serious to be dealt with by applying the Probation of Offenders Act.

6. This Court is in complete agreement with the Director's fundamental position, that this was never a case for the Probation of Offenders Act. It was, and this must be stated clearly and unequivocally, a case of considerable seriousness. It was a case of such seriousness involving, as it did, the discharge of a firearm that a significant custodial sentence would have had to be considered even though it was the case that Mr. Friel was appearing before the Court without previous convictions. The fact that he no previous convictions, that he was in fact a person of previous exemplary character, as was established through a number of routes, and the fact that he had by that stage taken steps to resolve the underlying dispute might have provided a basis for suspending a significant portion, though not all of the sentence. In the Court's view, this was a case which should have seen a significant sentence of the order of three years imposed, though the Court, having identified such a sentence, would have been entitled to suspend the greater part of it.

7. Having concluded as we have that there was an error of principle and that the sentence imposed was unduly lenient, this Court is required to resentence as of today's date, and indeed it is the case that the Court heard this morning from a character witness and we have regard to that evidence. The real question for the Court is as to whether the respondent, Mr. Friel, must now be required to serve a period in custody, and if so, what the duration of that period should be.

8. At an earlier hearing, the Court asked the prosecution to canvass Mr. Sweeney's views in relation to the making of a compensation order. That has happened and Mr. Sweeney has reminded us, as have heard earlier, that he had issued civil proceedings and he has indicated that he is looking towards those civil proceedings to secure compensation and that he does not want to see this Court make a compensation order. This Court is of course fully respectful of Mr. Sweeney's position and we take it fully into account, but we are nonetheless firmly of the view that it is in fact an appropriate case in which to make a compensation order. The Court takes that view because it is anxious that there should be a payment made at this stage within a clearly defined timeframe. The duration of the civil proceedings is uncertain. There has to be a possibility of an appeal. If the proceedings are successful, there may be issues in relation to enforcement of any judgment. So, what the Court has in mind to do and will do is to make an order directing payment of compensation within a specified timeframe. We want to make clear that the making of the compensation order does not in any way prevent Mr. Sweeney from proceeding with his civil proceedings. Compliance with the compensation order will be a condition of the suspension of the prison sentence which the Court will be imposing. If the order relating to compensation is not complied with, then the prison sentence will actually have to be served. If the civil proceedings proceed and if they are successful and if they result an award against Mr. Friel, then he will have credit for the amount which by that stage will have been paid on foot of this Court's order.

9. According, the Court will deal with the matter by imposing a sentence of three years imprisonment which it indicated earlier it regarded as the appropriate sentence. However, it will suspend that sentence. The suspension will be subject to the usual conditions about keeping the peace and being of good behaviour during the period of the suspended sentence. There will be conditions relating to avoiding contact with Mr. Sweeney and the members of his family, and in addition it will be a requirement that a sum of €30,000 be paid within a time to be specified. If payment is not made within the time specified, then the sentence will have to be actually served.