



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

Appeal No.: 320/2012

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

Joseph Warren

Appellant

Judgment (ex tempore) of the Court delivered on 25th July 2016 by Mr. Justice Mahon

1. The appellant was convicted by a jury at Dublin Circuit Criminal Court on 7th November 2012 of a single count of Conspiracy, contrary to s. 71 of the Criminal Justice Act 2006, and s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The appellant appealed that conviction and in a judgment of this Court delivered on 4th July 2016 that appeal was dismissed.

2. This is the appellant's appeal against severity of sentence. He was sentenced on 14th November 2012 to a term of imprisonment of eight years, to date from 7th November 2012. He has not appealed a second sentence of six years for a firearms offence imposed on the same day, and which was directed to be served consecutively to the sentence under appeal. The final three years of what then became a total sentence of fourteen years was suspended on conditions.

Background facts

3. An attempt to steal cash from a Chubb cash in transit vehicle at Celbridge in Co. Kildare on 2nd November 2007 was thwarted when the attempt was intercepted by gardaí who had earlier been engaged in a surveillance operation. The subject of that surveillance operation included the appellant and five other men. These men had travelled in vehicles in convoy from Ballymun, Co. Dublin, to Chubb's headquarters in Sandyford, Co. Dublin, and from there followed the cash in transit van to a shopping centre in Celbridge. The appellant and one of the other men were seen to approach the vehicle when it stopped at the shopping centre and unsuccessfully attempted to open its door. At this point the gardaí intervened and the men, including the appellant, were arrested at or close to that location.

4. In the course of the trial, the appellant maintained that his involvement in the attempted robbery was under duress, but this was rejected by the jury, as suggested by its guilty verdict.

Grounds of appeal

5. It is contended on behalf of the appellant that the learned sentencing judge erred in a number of respects in terms of the matters that he, improperly, it is submitted, took into account in identifying the aggravating facts, including:-

(i) That the appellant was a member of an organised criminal gang in circumstances where this is a distinct offence that could not fall to be proven and in any event amounts to an offence with which he was neither charged nor convicted.

(ii) That the said gang wore "black paramilitary attire" at a subsequent funeral. In fact the photographic evidence indicated that the accused and others wore black suits as is customary at a funeral.

(iii) That the wearing of such suits "was a chilling manifestation of their intent and discipline, as opposed to an observance of customary attire for a funeral".

(iv) That the said gang was a "disciplined, criminal gang operating with an expertise in this area as indicated of drug dealing and movement, armed robbery and the carrying out of contract killings as necessary".

(v) That the words set out in the transcript at pp. 25, lines 21 – 26 amounted to "a significant feature of this case.. to put forward his best position". This is contended, amounts to an criticism of the appellant for not pleading guilty and accordingly gives rise to an objective perception, which it is supported was what actually incurred, that the appellant was penalised for exercising his right to plead not guilty and require the prosecution to prove its case against him.

6. In his sentencing judgment, the learned sentencing judge recalled in some detail the circumstances in which this offence was committed, and the appellant's involvement in it. He described the appellant as a "*willing participant*" in the attempted robbery. He also stated in relation to the sentences imposed in respect of this offence and that imposed in respect of a later firearms offence:-

"The sentences I impose today must be significant to represent the significant role played by Mr. Warren in this gang, the fact that he was in pursuit of crime in that organised and determined way, and also they must be significant because they must be consecutive..."

7. He went on:-

"Having regard to everything I have said, measuring as best I can in fairness to him what has been said on his behalf and what I have read in the notes in respect of the conspiracy charge, I impose a sentence of eight years imprisonment and that is allowing for the only factor I presume allowable at this stage or I believe is allowable at this stage the fact that he has a relative fair record, is hard working, has a potential and has a supportive family to help him after conclusion."

8. It is contended for on behalf of the respondent that the sentence of eight years was proportionate and reasonable in all the circumstances. The respondent in her written submissions to the court emphasised that the appellant was engaged in criminality at the very upper end of culpability, that he had offered no co-operation, and had been found guilty after a second trial.

9. The central thrust of the submissions made on behalf of the appellant are threefold:-

- (i) The appellant was not a central or lead figure in the attempted robbery of the cash in transit van, and his involvement was essentially because of his skill in operating cutting equipment intended to be used in forcibly opening the cash in transit van.
- (ii) The appellant was sentenced on the basis that he was part of a well organised gang involved in drug dealing, armed robbery and contract killing, and this view did not reflect the facts in that the appellant had not been charged or convicted in respect of such criminality or anything suggesting that level of involvement in gang activity.
- (iii) The sentence of eight years is disproportionately high when compared to sentences imposed on the appellant's two co-accused, and in particular one of them who appeared to have played a lead role both in planning the attempted robbery of the cash in transit van, and in the conduct of the operation of the day in question.

10. The sentences imposed on the two co-accused, Alan and Wayne Bradley, were respectively, nine years with the final two years suspended, and seven years with the final eighteen months suspended. These sentences were subsequently reduced by the Court of Criminal Appeal to, respectively, eight years with the final twelve months suspended, and six years with the final twelve months suspended. These sentences were imposed in circumstances where Alan Bradley was considered to have been involved in the planning and organisation of the attempted robbery of the cash in transit van.

11. A clear and obvious distinction that must be emphasised at the outset, as between the sentencing of the Bradley brothers and the appellant, is the fact that the Bradley brothers pleaded guilty while the appellant very much contested the charges against him resulting in a lengthy trial. The extent to which the appellant contested his trial was clearly foremost in the learned trial judge's mind when he imposed the eight year sentence. Indeed, he remarked that had he pleaded guilty he might have emerged "*at the lower end of the scale*" in terms of his sentence. The learned trial judge did not however indicate what that point on the scale would have been in terms of sentence had he pleaded guilty.

12. It does appear to be the case that the appellant's involvement in the crime was that of an individual engaged by a gang because of his skill and training in using cutting equipment. Certainly, there was no evidence to suggest that he was involved in any way in the planning of the operation. He did not play a lead role in the enterprise. His lack of serious previous convictions tends to support his position.

13. It was in the circumstances appropriate that the appellant's sentence ought to have reflected the fact that he was a member of the gang on the day in question, but did not have a leadership role, and as a person with a relatively good record, certainly in terms of serious criminality. This does not appear to have occurred in this case and on that basis, an error of principle has been established.

14. Based on the appellant's actual involvement and role in this crime, and its place on the gravity scale, the appropriate headline sentence is one of seven years. Such would be in line with the headline sentences identified by the Court of Criminal Appeal as being appropriate in the cases of the appellants' two co-accused.

15. Having so found, it is necessary for this Court to re-sentence the appellant as of today. As already indicated, the appropriate headline sentence is one of seven years. Because the appellant has spent nearly four years in prison to date, this court, unlike the court below, has had the benefit of considering reports from the Prison Authorities as to the appellant's behaviour in prison, and activities undertaken by him while in prison. It must be said that these reports are impressive and present a picture of a person very positively engaging with the various opportunities available to him while in prison. In effect, he is a model prisoner. He also has a very fulsome and genuine family support and excellent prospects of worthwhile employment when released from prison. There are therefore excellent prospects for rehabilitation, and clear evidence that rehabilitation is already underway.

16. It is important that these matters be given due recognition as strong mitigating factors. The Court will therefore reduce the seven year term which it has indicated is the appropriate term for this offence, by six months. The sentence imposed by this court will therefore be one of six years and six months imprisonment to date from 7th November 2012.