



## THE COURT OF APPEAL

Sheehan J.  
Mahon J.  
Edwards J.

Appeal No. 168/11

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Paul O'Connor

Appellant

**Judgment of the Court (ex tempore) delivered on the 21st day of July 2015, by Mr. Justice Edwards**

### Introduction

1. In this case the appellant was convicted on the 15th of July 2011 of a single count of robbery, contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 by the 11:1 majority verdict of a jury at Cork Circuit Criminal Court.
2. The appellant was sentenced to a term of ten years imprisonment to date from the 1st of June 2010.
3. The appellant now appeals against the severity of his sentence.

### The circumstances of the crime

4. The offence occurred on Sunday the 28th of June 2009. On that morning Mr Maurice Carey, the manager of Victor Chandler's Bookmakers at Douglas West, Douglas in the city of Cork, arrived at his business premises in preparation for opening it up later on that date. As Mr Carey approached the front door of the premises he was approached from behind by a male who informed him that he had a gun, and Mr Carey felt something pressing on his lower back. Both Mr Carey and the raider then entered the premises. While inside the raider required Mr Carey to open the main safe. Within that safe was a secondary safe that had a 20 minute time lock. Disarming the time lock required the inputting of a code, which Mr Carey was made to do, following which it was necessary to wait 20 minutes for the time lock to then release the door to the secondary safe. Eventually both safes were open and the raider took a sum of €10,340 in cash before leaving the premises.
5. As he was leaving the raider instructed Mr Carey not to contact the Gardaí for 30 minutes. The raider specified to Mr Carey the address at which his (i.e., Mr Carey's) family lived. Mr Carey was informed that there was a car watching that address and he threatened that Mr Carey's partner and young child would be harmed if the Gardaí were contacted before the 30 minutes was up.
6. The Gardaí were in due course contacted and following an investigation the appellant's home was searched on foot of a search warrant on the 9th of July 2009. A number of items were seized including a sum of €2,000 found in a wallet in the appellant's bedroom. Fingerprints were found on some of the money seized that linked it to the bookmaker's premises. At the time of the search the appellant indicated that he had earned the money in question in Strabane. However, at his trial the appellant indicated acceptance that the money had come from the bookmaker's premises although he did not go so far as to admit involvement in the robbery.
7. The appellant was arrested on the 31st of May 2010 and was detained and questioned over two days. He denied all involvement in the robbery and claimed that he was at home asleep in bed at the material time with his partner. He served an alibi notice and a statement was taken from his partner. However, she did not give evidence at the trial.
8. At the trial, Mr Carey was cross-examined on the basis that he had been involved in the theft of the money from Victor Chandler's bookmakers himself, and that he indeed had masterminded the whole thing. It was put to him that the proceeds of what it was contended was a theft rather than a robbery had later been split between Mr Carey and the appellant.

### The impact of the crime on the victim

9. Mr Carey did not personally give evidence as to how he was impacted by the crime, nor did he provide a victim impact statement in writing. However, he gave an oral account of how he was affected to Sergeant Grace, the investigating Garda, and he asked Sergeant Grace to convey that account to the court, which he duly did. Sergeant Grace informed the court that Mr Carey had stated that the crime had had a very adverse effect on himself and on his family. His partner had expressed huge fears after the crime, and at the time she was six months pregnant. Further Mr Carey himself became very afraid after the robbery. In fact, he made a will five days after the crime was committed. He suffers from insomnia since the offence happened.

### The appellant's antecedents and personal circumstances

10. The Court heard evidence from Sergeant Grace concerning these matters. The Sergeant commenced this aspect of his testimony by stating:

" he's a prolific career criminal with a lengthy list of previous convictions and believed to be dangerous by the Garda Síochána. He's spent almost half his life in prison. He resides in Ireland but has also resided in Northern Ireland and in the United Kingdom. He's unemployed. He lives with his partner Joanne Slattery and her four children. I am aware that he's had drug issues in the past. I'm not aware of his present position in respect of this."

The witness then went on to give evidence that the appellant had a total of 80 previous convictions, the overwhelming majority of which had been dealt with in the District Court but some of which had been dealt with on indictment in the Circuit Court.

11. The latter included a conviction on the 10th of May 1999 of handling the proceeds of a robbery of a jewellers shop. As there was some uncertainty as to the length of the sentence actually imposed the sentencing judge stated that he would exclude it from his consideration. The Sergeant also gave evidence that on the 11th of November 1998 at Cork Circuit Court the appellant was convicted

of assault causing harm for which he had received one year and six months' imprisonment; and that on the 22nd of April 1993, he was convicted of possession of a firearm with intent to rob arising out of an attempted robbery of a Securicor van in Wilton in Bishopstown, and of the malicious wounding of an off-duty garda who was standing at a bar in Glanmire and who was stabbed in the back. He received five years imprisonment for the latter two offences, which were to run concurrently.

12. Apart from these matters dealt with on indictment, the appellant's other convictions included eighteen convictions for theft and handling offences, four convictions for assault, one for obstructing a garda performing his duties under section 30 of the Offences Against the State Act, and two convictions for assaulting a garda.

13. Counsel for the appellant, in cross-examining Sergeant Grace, indicated unhappiness with the Sergeant's characterisation of his client, stating :

"Certainly I take issue with the entitlement of the gardaí to ask the judge to take into consideration the garda opinion, as it were, of the defendant. I have no difficulty about them giving evidence of the previous convictions and even the summary manner in which it's been done but their own opinion is not a matter which, in my submission, the Court should take issue with, by which I believe he meant that the court should take account of."

### **Mitigation**

14. It was conceded by counsel for the appellant that nothing specific could be advanced in mitigation. Counsel stated:

"The matters that I'd ask the Court to take into account are one, obviously the defendant is entitled to put the prosecution on proof of the offence. I accept the Court is also entitled to take into account the manner in which the matter was defended, that in relation to his previous convictions, the sentence or in relation to this, the sentence should reflect the particular offence, in other words, one of straightforward robbery, notwithstanding the circumstances or any implications in relation to it. The only offence of which he was charged was robbery. In relation to his previous convictions, while they are relevant in terms of how the Court considers it, in relation to the armed robbery - which is, in my submission, a significant difference, it's the equivalent of aggravated robbery - a sentence of five years was imposed. I'd ask the Court to take into account in relation to that that the defendant has been in custody for approximately 14 months."

15. The sentencing judge indicated that credit would be given for time served and that any sentence imposed would therefore date from the 1st June 2010.

### **The sentencing judge's remarks**

16. In sentencing the appellant to ten years imprisonment, the sentencing judge stated:

"Now, this man has been convicted by a jury of robbery. Robbery, a person is guilty of robbery if he or she steals and immediately before or at the time of doing so, and in order to do so, uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force. A person guilty of robbery is liable on conviction on indictment to imprisonment for life. In this case, it is quite obvious that this man is a cool, calculating, professional criminal, as was evidenced during the case. He raided on a Sunday morning when there'd be very few passersby. He knew that the manager was likely to be on his own on a Sunday morning. He said, as Mr Carey was putting the key into the lock, Mr O'Connor came up behind him saying, "This is a robbery. There is a gun to your back," and Mr Carey felt a nudge in his lower right back. Not alone did Mr O'Connor intimidate Mr Carey, the manager, but also sought to intimidate his partner and their child by insisting that Mr Carey would not notify the gardaí for half an hour after Mr O'Connor had departed the bookie's shop. It is quite obvious to me that Mr O'Connor knew the geography of the area, and he certainly knew it better than Mr Carey, as is shown by he arranging with a taxi to meet him in Galway's Lane by the Douglas GAA behind the bookmakers. He arranged with his girlfriend or his partner for a false alibi. He changed his clothes, dumped the SIM card and the gear bag and he told blatant lies to the gardaí in the course of their investigations. There is no doubt that Mr Carey has had severe adverse effects both for himself and his family as a result of this incident. He was very afraid after the robbery. Apparently he is suffering from insomnia. And there is no doubt that Mr Carey, the manager of VC Bookmakers on the day, his reputation is untarnished, as is amply proven by the jury verdict here today. To add further exacerbation to this very serious crime, this man has a total of 80 previous convictions, give or take, including three convictions or sets of convictions here in the Circuit Court. I am sentencing him for this particular offence only."

17. At this point in response to a concern raised by counsel for the prosecution, the sentencing judge then clarified that in referring to the accused seeking to intimidate Mr Carey's partner and child, he was alluding to the threat communicated to Mr Carey, and he was accepting that there had been no contact between the accused and the partner and the child. The judge then continued:

"Which in many ways could be even more disturbing to Mr Carey than a threat to himself. We've had evidence of the previous convictions which included possession of a firearm with intent to rob, for which he got five years, and malicious wounding, for which he got five years. There are several others: handling, assault, theft and so on. There is very little to be said in mitigation. Overall, the appropriate sentence is 10 years, to commence on the 1st of June 2010, when he went into custody on this offence."

### **The grounds of appeal**

18. The appellant appeals against the severity of his sentence on two main grounds. He complains firstly that the sentencing judge located the case at too high a point on the scale of seriousness. Secondly, it is complained that the sentencing judge, having heard inadmissible evidence from Sergeant Grace concerning the Garda view of the appellant's alleged dangerousness and propensity to violence, to which evidence specific objection had been taken by counsel for the appellant, failed to make clear that he was excluding such evidence from his consideration in sentencing the appellant, such that in the circumstances this Court could not foreclose on the possibility that the sentencing judge had been influenced by that evidence.

### **The ground relating to the seriousness of the case**

19. Although counsel for the appellant sought to argue that the judge had over rated the seriousness of the case, he conceded in argument before the Court that a 10 year sentence for the offence in question, while severe, was to quote him "in the range" as he put it. He had earlier sought to emphasise that no weapons or firearms had actually been used. Moreover, although the victim, Mr Carey, was psychologically traumatised, there had been no gratuitous violence and he had not been physically injured.

20. The range of potential penalties was fourteen years. By any yardstick this was a bad case. The circumstances of the crime indicated significant premeditation, and a willingness to instil fear in, and to intimidate, the immediate victim. In addition, a substantial sum of money was stolen, the majority of which was not recovered. It was perpetrated by an offender with a very bad record, involving some 80 previous convictions. There was nothing that could be offered in mitigation. There had been no plea of guilty. Moreover, the trial had been fought on the basis that the victim had in fact masterminded the crime himself and had been in league with the appellant, an account rejected by the jury and an approach consistent only with a complete lack of remorse. The Court agrees with the position as conceded by counsel for the appellant that while the headline sentence of ten years was at the severe end of the available range, it was still within the range of what was permissible. Accordingly and in the circumstances the Court is not disposed to uphold the first ground of appeal.

#### **The ground relating to the inadmissible evidence**

21. As regards the second ground of appeal, the Court accepts that the impugned evidence given by Sergeant Grace should not have been given. While there is nothing on the transcript to suggest that the sentencing judge was in fact influenced in any way by the inadmissible evidence given by Sergeant Grace, the Court is concerned that a dispassionate and independent observer sitting in court during the sentencing hearing might have had a concern in that regard. The well known maxim that justice must not only be done but be seen to be done is not to be regarded as a mere cliché.

22. The appellant has referred the Court to, and relies upon, the following passage from para. 22 of the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions v. O'Neill* [2012] IECCA 37 (unreported judgment 15th February 2012) in which the judgment of the Court was delivered by Mr. Justice Finnegan. At para 22 of that judgment, the presiding judge stated:-

"While the sentencing judge is entitled to receive hearsay evidence and opinion evidence, he or she must also be astute to ensure that extraneous matters whose evidential value is inherently more prejudicial than probative so far as the accused is concerned are thereby excluded. Should this not prove possible, a trial judge should then expressly state the extent to which such material is being disregarded in the course of the sentencing process."

23. While the *O'Neill* decision is somewhat distinguishable on its facts from the present case, this Court nevertheless endorses the remarks cited and agrees that they are equally apposite to the circumstances of the present case.

24. Consequently this Court considers that the sentencing judge erred in failing to expressly state that he was excluding from his consideration the inadmissible evidence given by Sgt. Grace, and accordingly will set aside the existing sentence on the basis that the possibility that the sentencing judge may have been influenced by the inadmissible evidence that he heard cannot be foreclosed upon.

25. At the hearing of this appeal the court invited the parties on a contingent basis to submit to it any materials that they might wish to have taken into account in the event of the court finding an error of principle and setting aside the sentence that was imposed by the Circuit Court judge.

26. In response to that two documents have been submitted on behalf of the appellant. One is a certificate from a chartered forensic psychologist at The Midlands Prison certifying that the appellant was referred to The Irish Prisons Service Psychology Service in September 2011, that he has attended twenty four sessions with a counselling psychologist since February 2012 and that he has engaged in mental health and offence focussed work.

27. The second is a report from a Mr. Pat Brennan, an addiction counsellor at Portlaoise Prison, who reports that the appellant was referred to the addiction counselling team in January 2012 who assessed him and deemed him to be suitable for counselling, that since that time the appellant had been engaging with the addiction counselling team on an on-going basis, that he has completed an eight week relapse prevention group programme, attending all sessions and participating well in the group setting, and that he has displayed a willingness to deal with his addiction problems and has made considerable progress. Mr Brennan further stated that the addiction counselling team is currently working on strategies to deal with the appellant's unresolved childhood issues and anger management. It was further reported that the appellant's attitude has changed completely, that he maintains that he is tired of his previous way of life and that he is making plans for a crime free future. In Mr. Brennan's assessment the appellant is now drug free and has been so for some time.

28. These are really quite positive reports and they are indicative of a positive engagement by the appellant with the rehabilitative services on offer to him since going into prison.

29. In the circumstances this Court would wish to incentive the continuation of that process and to encourage the appellant to continue along the road upon which he is now, albeit somewhat belatedly, embarked.

30. Accordingly, the Court will impose a sentence of ten years imprisonment on Mr. O'Connor but will suspend the last eighteen months thereof and the period of the suspension shall be for the un-served remainder of his sentence and for a further two years after his release. The suspension will be contingent on him entering into his own bond in the sum of €100 to keep the peace and be of good behaviour and to comply with a regime of supervision by the Probation Service and following his release and indeed continuing co-operation with the addiction counselling team while he is serving the balance of his sentence in prison.