



## THE COURT OF APPEAL

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

**Record No.: 152/2015**

**Between/**

**The Director of Public Prosecutions**

**Respondent**

**- and -**

**John Kinsella**

**Appellant**

### **JUDGMENT (ex tempore) of the Court delivered by Mr. Justice Mahon on the 5th day of December 2016**

1. The appellant pleaded guilty on the 6th February 2015 at Wexford Circuit Criminal Court to one count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was sentenced on the 21st May 2015 to six years imprisonment from that date, with the final one year suspended on him entering into a bond before the Governor to keep the peace and be of good behaviour for a period of two years from the date of his release from prison. This is an appeal against that sentence.

2. On the afternoon of 17th May 2013 gardaí received a telephone call in relation to an armed robbery at an Aldi supermarket in Gorey, Co. Wexford. The appellant had entered the store armed with a kitchen knife with his face covered by a scarf and a hooded top over his head. The store at the time were approximately four members of staff and thirteen customers. The appellant approached a cashier and forced her to open the till. As she did so he approached and threatened another cashier and forced a second till to be opened. The threats against the second cashier increased when she had difficulty in complying with his demand to open the till. He threatened her with a knife and shouted at her. He then left with money from the first till.

3. On arrival at the supermarket gardaí were pointed in the direction in which the appellant had fled. They pursued and arrested the appellant. In the course of being interviewed at Gorey garda station the appellant made full admissions as to his involvement in the robbery. The amount stolen was €955, and €925 was found in the appellant's possession. One of the staff provided a victim impact report. The court was told that staff members were given counselling. The assistant manager, Mr. Brady, said that he was now more fearful while working in the shop as the result of his experience. The appellant was thirty five years old. He is the father of five children, two of whom are in care. He resides in Gorey with his partner and mother.

4. He has a long history of offending and has accumulated fourteen previous convictions over a period of approximately seventeen years. Offences include theft, possession of knives (three offences), possession of an article with the intent to cause injury (three offences), robbery (three offences) and a drugs offence. He had received a number of prison sentences of varying lengths of up to five years as well as suspended sentences on previous occasions. Convictions for offences in the previous two years included one for theft and one for possession of knives, and in respect of both he was given suspended sentences.

5. The grounds of appeal been relied on by the appellant are as follows:-

(i) The learned sentencing judge failed to apply correctly the general principles and policies which govern the imposition of a proportionate sentence.

(ii) The learned sentencing judge gave excessive weight to the aggravating factors as outlined during the course of the sentence hearing.

(iii) The learned sentencing judge failed to attach sufficient weight to the mitigating circumstances in the case and in particular but not limited to the plea and mitigation, the appellant's co-operation, his plea of guilty at the earliest opportunity, his expression of remorse and his attempt to become drug free in a relatively short period of time, and his personal circumstances.

6. A focus of the appeal is that no consideration appears to have been given by the learned sentencing judge to structuring the sentences in a manner more amenable to rehabilitation. Another strong contention is that the plea of guilty alone deserved a greater suspended element than just twelve months.

7. In the course of his sentencing judgment the learned sentencing judge observed as follows:-

*"It has to be said that Mr. Kinsella has an appalling past history of bad previous convictions. It makes very very sad reading. He has a number of previous convictions for threatening and abusive behaviour, production of an article, that is obviously a weapon, in the course of a dispute, possession of knives and other articles, production of an article in the course of a dispute. On 9th October 2013 which is not long before this, possession of knives and other articles, he got a part suspended sentence."*

8. He noted the probation service report dated 28th April 2015 and its reference to the appellant's need to address his ongoing addiction issues, his lack of gainful activity, his ongoing contact with other addicts and those involved in criminal activity and his anger management issues. Whilst describing the offence as "most serious" the learned sentencing judge expressed the view that he had to impose an appropriate custodial sentence. He sentenced the appellant to six years imprisonment and to facilitate rehabilitation he suspended the final year of that sentence for a period of two years.

9. This offence was particularly serious. It involved the use of a large bladed knife and supermarket staff being threatened very aggressively at close range with the knife, as well as being shouted at aggressively. Relevant recent decisions of this Court have been brought to our attention by the respondent including *DPP v. Crawford* where the appellant robbed a Subway sandwich bar at

knifepoint resulting in a sentence of seven years imprisonment with the final two years suspended. In delivering the judgment of this Court, Edwards J. suggested that the offence was deserving of a headline sentence falling within the upper half of the effective range, of between six and eight years imprisonment. In another case, *DPP v. Daly* [2016] IECA 257, the appellant robbed a supermarket in Balbriggan at knifepoint forcing staff to give him €400 from the till. He received a sentence of five years imprisonment in respect of the robbery and two years imprisonment, consecutive to the five years, in respect of the burglary. On appeal, this Court upheld the sentence of five years imprisonment in relation to the robbery charge, and reduced the consecutive sentence for the burglary in the interests of proportionality.

10. It is suggested that the robbery and the use of the knife to threaten were not pre-mediated acts, and that the decision to leave home with a long bladed kitchen knife was taken for self protection. Frankly stated, this is hard to accept as credible, and undoubtedly the decision to enter the supermarket premises armed with a knife was more than a last minute decision on the appellant's part. At most, the actual premises to be targeted may have been opportunistic.

11. Unfortunately, the learned sentencing judge did not clearly structure the sentence in a manner which indicates what, if any, discount he allowed for the guilty plea. His stated reasoning for suspending the final year of the sentence was to facilitate rehabilitation, an absolutely appropriate decision in the circumstances. However, it is nevertheless clear that the learned sentencing judge very much applied his mind to the mitigating factors, including the plea of guilty, the remorse and co-operation with the Probation Service, immediately prior to imposing the six year sentence. It is probable therefore that in arriving at the six year sentence the learned sentencing judge did indeed discount for the guilty plea and the other mitigating factors.

12. The grave seriousness of this offence needs no repeating. The threat, firstly to the cashiers, and secondly, and less directly, to the customers can only have been terrifying. Knife crime has become a terrible scourge in recent years and the courts have no choice but to deal severely with offenders who rob or attempt to rob while armed with knives, not solely for the purposes of punishing them, but also, and very much in the public interest, to deter others from offending in a similar fashion. In *DPP v. Mahon* [1979] I.R. 214, Gannon J. stated:-

*"The first consideration in determining sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others, but also by affording a compelling inducement and an opportunity to the offender to reform. The punishment should be appropriate not only to the offence committed, but also to the particular offender."*

13. When the appellant's previous bad record is entered into the mix, a headline sentence of seven and a half years or eight years would have been justified. That said, the net custodial sentence imposed, being five years, represents in reality a discount of possibly one third from an appropriate headline sentence. No error of principle has therefore been identified in the court below.

14. The appeal is dismissed.