



THE COURT OF APPEAL

Finlay Geoghegan J.
Sheehan J.
Hogan J.

[111CJA-14]

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

AND
MARK O'REILLY

RESPONDENT

JUDGMENT of the Court delivered on 16th February 2015 by Mr. Justice Hogan

1. This is an appeal by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act 1993 ("the 1993 Act") against the sentence imposed by the Circuit Court in the present case on 7th April 2014. The offender, Mark O'Reilly, had pleaded guilty on 14th March 2013 to counts 1 and 2 of the indictment, namely, attempted robbery contrary to common law and possession of an imitation firearm with intent to commit an indictable offence, namely, attempted robbery, contrary to s. 27B of the Firearms Act 1964 (as substituted by s. 60 of the Criminal Justice Act 2006 and as amended by s. 39 of the Criminal Justice Act 2007).

2. The offence of robbery carries a maximum sentence of life imprisonment and the firearms offence carries a presumptive minimum penalty of at least five years. Section 27B(4) of the Firearms Act 1964 ("the 1964 Act") (as inserted by s. 39 of the Criminal Justice Act 2007))("the 2007 Act") provides that:

"in view of the harm caused to society by the unlawful possession and use of firearms, a court, in imposing a sentence on a person (other than a person under the age of 18 years) for an offence under this section, shall specify as the minimum term of imprisonment to be served by the person a term of not less than five years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence or the person convicted of it, it would be unjust in all the circumstances to do so."

3. Section 27B(5) provides that for this purpose have regard to any matters it considers appropriate, including-

- "(a) whether the person pleaded guilty to the offence and, if so –
 - (i) the stage at which the intention to plead guilty was indicated, and
 - (ii) the circumstances in which the indication was given, and
- (b) whether the person materially assisted in the investigation of the offence."

4. The Court is also empowered by s. 27B(6) to have regard, in particular, for this purpose to:-

- "(a) whether the person convicted of the offence has a previous conviction for an offence under the Firearms Act 1925 to 2006, the Offences against the State Acts 1939 to 1998 or the Criminal Justice (Terrorist Offences) Act 2005, and
- (b) whether the public interest in preventing the unlawful possession or use of firearms would be served by the imposition of a lesser sentence."

5. The learned Circuit Court judge imposed a sentence of three years with the last eighteen months suspended for a period of five years. This sentence took effect from the date on which Mr. O'Reilly went into custody on 14th March 2013.

6. The background to the present appeal is that at approximately 3 a.m. on 11th March 2012 at a service station at Fortunestown, Tallaght, Dublin 24, the offender, Mr. O'Reilly, pointed a realistic imitation firearm which looked like a handgun to the head of another person and demanded money. It was accepted that Mr. O'Reilly had been both drinking and taking drugs prior to this attempted robbery. The attendant, Mr. Rizman Ali, was quick thinking and realised that the customer was in truth, a participant in this attempted robbery. The "customer" had feigned to purchase cigarettes from Mr. Ali, but Mr. O'Reilly came up from behind and pointed the imitation firearm to the head of the other "customer". Mr. Ali silently pressed the emergency button and counted the money which had been demanded slowly while facing increasing threats from Mr. O'Reilly. The Gardaí arrived quickly and no money was actually paid over. The other "customer" was also charged with certain offences and pleaded guilty and, we have been told, received a suspended sentence.

7. When the Gardaí arrived they produced firearms and announced that they were armed Gardaí. It is clear that Mr. O'Reilly did not put down the imitation firearm and it is not in dispute but that he pointed the firearm at the two Gardaí, Detective Garda McGrath and Garda McGuinness. What is clear, however, is that Mr. O'Reilly ran and was ultimately hauled to the ground by the Gardaí and then arrested. Mr. O'Reilly made no admissions while he was in subsequent detention but he did say "the other lad was innocent: I stuck a gun to his head". It is only right that this Court should pay a tribute to the conspicuous bravery of both Mr. Ali – who stalled the activities of Mr. O'Reilly and who obtained valuable time in the process – and to the individual Gardaí, Detective Garda Kieran McGrath and Garda McGuinness, who fearlessly responded to a potentially very dangerous situation.

8. As far as the personal circumstances of the offender are concerned, he was aged thirty four at the time of the offence and he is an early school leaver. He has twenty seven previous convictions including five for robbery, seven for burglary and for false imprisonment. He is a chronic drug addict, as he addicted, *inter alia*, to heroin. Eighteen months of the three year sentence was suspended for a five year period by the Circuit Court judge by reason of the offender's substance abuse. One of the key terms of the suspended sentence was that the accused should participate in a drug and alcohol treatment programme.

9. At the hearing of this appeal we were informed that Mr. O'Reilly had been initially released on 11th April 2014, but that the suspended part of the sentence had been re-activated on the application of the Probation Service a few days earlier on the ground that he had not fulfilled the conditions attaching to that sentence. Mr. O'Reilly is accordingly presently serving out the balance of the 18 month suspended sentence.

10. So far as the victims of the crime were concerned, Mr. Ali was very understandably shocked and, as it happens, he sought time off work to cope with the aftermath of this incident. It would appear that no real assistance was forthcoming and he left the job after four years employment there. At the sentencing hearing Mr. O'Reilly, through his counsel, tendered an apology to Mr. Ali.

The sentence imposed by the Circuit Court judge

11. The sentencing judge commenced his ruling by noting that having regard to the fact that an imitation firearm was used that he was required to "consider a mandatory minimum of five years." The judge further regarded the production of a realistic imitation firearm as an aggravating factor.

12. There were also mitigating factors. These included the plea of guilty (with its timing affected by other charges of which the accused was subsequently acquitted), but also the fact that the accused had what was described as "a severe and chronic drug addiction". This drug addiction affected his personality and the judge was obviously swayed by a letter from the offender's mother to the effect that his behaviour was quite normal when he was not taking drugs. The judge was told by counsel for the accused that he was instructed that since he was in custody (just over a year) the accused was drug free. The judge suspended the last eighteen months of the sentence for a five year period so that it would be an incentive to the accused to behave himself and to address his addiction habits. The suspended sentence was itself subject to certain rigorous conditions, not least a requirement that the accused was to undergo a drug and alcohol treatment programme and to comply with all the requirements of the Probation Service. The judge further gave liberty to the Probation Service to apply to have the suspension of the sentence lifted in the event of non-compliance with these conditions. We have already noted how this sentence was subsequently re-activated on the application of the Probation Service.

Was the sentence imposed unduly lenient?

13. The starting point in any analysis of whether the sentence was unduly lenient is to note that, in the words of O'Flaherty J. in *Director of Public Prosecutions v. Byrne* [1995] 1 I.L.R.M. 279 "nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

14. In examining this question, the Court must next consider the inherent gravity of the offence, namely, the production and use of a firearm (albeit an imitation firearm) in the course of an attempted late night robbery when measured against the sentencing parameters prescribed by the Oireachtas in s. 27B(4) of the 1964 Act. Applying then the factors thus enumerated by statute, we can note the following.

15. First, the offender did plead guilty as a relatively early date. It nevertheless cannot be said that he co-operated materially with the investigation.

16. Second, while the offender has a large number of convictions for serious offences (mainly burglary and theft), he has, in fact, no previous convictions for firearms offences or under the Offences against the State Act 1939-1998 or the Criminal Justice (Terrorist Offences) Act 2005.

17. Third, the most important ingredient of this sentence was a recognition by the trial judge that at least *so far as this particular offender was concerned* his drug addiction was the pre-dominant reason why he resorted to crime. Put another way, if this offender could remain drug-free the likelihood of his re-offending would be substantially diminished. It follows, accordingly, that the sentencing judge was entitled to consider in the particular circumstances of this case that the public interest would be better served by a sentence lower than the presumptive statutory minimum if the sentence could be structured in such a manner as to address Mr. O'Reilly's chronic addiction problems.

18. Counsel for the Director of Public Prosecutions invited us to have regard to some contemporary decisions of the Court of Criminal Appeal dealing with firearms offences following the sentencing changes effected by the 2007 Act. In the first of these, *The People (Director of Public Prosecutions) v. Clail* [2009] IECCA 13, the accused was found in possession of a semi-automatic pistol which had been adapted so that (unknown to anyone but the user) it was no longer capable of firing, along with a fully functioning revolver. The Court of Criminal Appeal regarded these offences as "very serious", so that the appropriate sentence fell within the range between "seven to eight years", before any consideration was given to mitigating factors.

19. In the second of these cases, *The People (Director of Public Prosecutions) v. Dwyer* [2009] IECCA 13 the appellant was found to be in possession of a Kalashnikov assault rifle, along with twenty rounds of ammunition. The Court of Criminal Appeal noted that while the accused had pleaded guilty, he had in effect been caught red-handed, so that the plea was to that extent devalued. While the court of trial had imposed a sentence of four years, with some credit given for the belated plea. The Director of Public Prosecutions had appealed against that sentence on grounds of undue leniency in accordance with s. 2 of the Criminal Justice Act 1993.

20. The Court noted that the presumptive statutory minimum sentence contained in s. 47A(4) was one of five years, unless there were exceptional and specific circumstances which would render it unjust in all the circumstances to impose that minimum sentence. In the circumstances the Court could find no grounds on which it would have been entitled to depart from this statutory minimum. Specifically, the Court in that case could find no mitigating factors in favour of the accused and it accordingly increased the sentence from four years to five years.

21. There is, of course, an obvious contrast in terms of the inherent gravity of the respective offences between possession of a fully functioning revolver (as in *Clail*) and an assault rifle with ammunition (as in *Dwyer*) on the one hand and an imitation firearm on the other. The fact, however, that, unlike those two cases, the offender in the present case actually used the imitation firearm and pointed it at Gardaí who courageously responded at night to the call of duty in a dangerous situation are seriously aggravating factors.

22. There is no doubt at all but that this was a lenient sentence. In many circumstances, a sentence of this kind for this type of offence might well be regarded as unduly lenient so that it amounted to "a substantial departure from the appropriate sentence" in the manner enunciated by the Court of Criminal Appeal in *Byrne*. Yet the sentencing judge was plainly influenced by the statutory test contained in s. 27B(6)(b) of the 1964 Act (as amended), namely, whether the public interest would be served by the imposition of the lesser sentence than the presumptive statutory minimum. He considered that this was such a case, since drug addiction was the root cause of this offender's criminal behaviour. The sentence was accordingly structured in such a manner as sought to persuade and encourage the offender to wean himself from his drug addiction.

23. The sentence in the present case may thus be said to offer an example of where rehabilitative considerations were properly to the fore. The suspended element of the sentence was designed to operate – and did in fact operate – as a real deterrent to the offender, as the subsequent re-activation of the sentence in the days leading up to this appeal plainly shows.

Conclusions

24. In conclusion, therefore, while this Court considers that the sentence for this offence was undoubtedly a lenient one, we nonetheless consider that the sentencing judge had substantial grounds to justify the manner in which this particular sentence for this particular offender was structured. In this case, the public interest would be best served were this offender's drug addiction habit to be addressed, as if that had occurred the likelihood of further recidivist behaviour might have been substantially reduced.

25. In these particular circumstances, we cannot say that this admittedly lenient sentence constituted such a departure from the norm as to amount to an unduly lenient sentence within the meaning of s. 2 of the 1993 Act. It follows, therefore, that for these reasons, the present appeal by the Director of Public Prosecutions must be dismissed.