



THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No: 241CJA/16

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

THE PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

AND

WARREN NOLAN

RESPONDENT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 21st of March 2017

Introduction

1. On the 9th of May 2016 the appellant pleaded guilty to possession of a firearm in suspicious circumstances contrary to s. 27A of the Firearms Act 1964 as substituted by s. 59 of the Criminal Justice Act 2006 and as amended by s. 38 of the Criminal Justice Act 2007. He also pleaded guilty to an offence in relation to unlawful possession of a controlled drug for the purpose of sale or supply contrary to ss. 15 and 27 of the Misuse of Drugs Regulations made under s. 5 of the Misuse of Drugs Act 1977, as amended. The appellant was sentenced to five years imprisonment in respect of the firearms offence and to 18 months imprisonment in respect of the drugs offence, both sentences to run concurrently, with the final 18 months of the five year sentence in respect of the firearms offence suspended. The Director of Public Prosecutions now seeks a review of the sentence of five years imposed with 18 months suspended imposed in respect of the firearms offence on the grounds that it was unduly lenient.

The Circumstances of the Case

2. On the 8th of June 2015 Garda Gavin Curran and Garda John McQueeney were on patrol in a vehicle being driven by Garda Dominic Dowling as part of the drugs unit at Ronanstown Garda Station. At approximately 18:40 they were in the Clondalkin area when a black Hyundai *Trajet* taxi was observed travelling at speed in a bus lane.

3. Garda Curran observed three young males in the back of the taxi. The Garda vehicle followed the taxi as it travelled along Greenfort Avenue. The rear left-hand seat passenger and middle seat passenger were observed looking out the back window a number of times. They appeared to be acting suspiciously. The siren and blue lights were activated to indicate to the taxi driver to stop.

4. At this point, the rear left-hand seat passenger was observed standing up and he appeared to be rummaging. Garda Curran recognised this passenger as the Respondent Mr Warren Nolan. The taxi came to a halt on Greenfort Avenue.

5. Garda Curran exited the patrol vehicle and ran around the back of the taxi to the rear passenger door. He pulled the handle, which was locked. Garda Curran looked through the rear passenger window and observed Mr Warren Nolan looking at him pointing a shotgun directly at his face. Garda Curran was two feet from the barrel of the gun at the time. He retreated and shouted a warning at his colleagues that the Respondent had a gun and he crouched for safety at the rear of the taxi as he believed the Respondent was going to kill him. Garda McQueeney drew his official firearm and went to the rear of the taxi and shouted "*Armed Gardai. Drop the gun.*" Two of the males exited the taxi with their hands in the air shortly afterwards. Garda Curran observed Garda McQueeney restraining the Respondent on the ground. He was arrested for an offence under the Firearms Act of 1925. His pockets were searched as a result of which a number of bags of suspected cannabis herb, a bag of suspected diamorphine, and a small yellow Kinder Egg container containing deals of suspected cocaine were found. A pump-action shotgun was retrieved from the rear of the taxi. A small black towel was also recovered. Mr Nolan was conveyed to Ronanstown Garda Station and detained. Nothing of probative value emerged from the detention.

Impact on the Injured Parties in the Case

6. Garda McQueeney in his Victim Impact Statement characterised this as having been the worst incident he had experienced during his employment with An Garda Síochána having attended many incidents involving firearms offences. He said that "*On the evening in question, Warren Nolan pointed a pump-action shotgun at Garda Curran before then pointing it at me. This was the most stressful, distressing and pressurised incident in my life. I firmly believed that Warren Nolan was going to shoot me.*" He went on to say that he was in shock for a number of hours and that he was more apprehensive, nervous and anxious at work since this incident. In respect of life changes, he said that he was also nervous and anxious in his personal life.

7. Garda Curran in his Victim Impact Statement indicated that this was a very distressing time for him. He stated that it was the worst incident he had experienced in his time as a member of An Garda Síochána and that he had experienced psychological distress as a consequence. He said that the gun, a pump-action shotgun, had been pointed in his face. He thought he was going to be shot. It was one of the most frightening experiences he had ever had in his life and certainly during his career. He was an unarmed member of An Garda Síochána in plainclothes on the date in question and not in a position to defend himself.

The Respondent's personal circumstances

8. The respondent was a young man aged 20 at the time of sentencing. He had had a difficult family life. His mother raised him and his sister as a single parent until, in 2011 at the age of 14, he discovered his mother's dead body. Afterwards he was raised by his maternal grandmother. While he was in custody and up to the date of his sentencing his grandmother had been his sole visitor. His father was not a regular or reliable presence in his life and suffered from addiction problems, which the sentencing judge was told he was tackling. The respondent's paternal grandfather, described by the respondent's counsel as "*the only stable paternal influence in his life*" had also died and the court was told that the respondent "*took that death quite badly also*".

9. The respondent left school without any certified educational attainments and his attempts to engage in continuing education had failed. He had previous convictions mostly for minor offences, but his counsel recognised and acknowledged at the sentencing hearing

that the present offence represented an increase in the seriousness of his offending. Moreover, we note that the offence the subject matter of this prosecution occurred just four days after his involvement in a series of other serious offences involving a high speed chase and the endangerment of the public.

10. At the time of the offence he was said to be "hopelessly addicted to drugs" but, it was suggested, he was now making progress in custody towards addressing his addiction problem. In that regard the sentencing judge had adjourned the matter for a period and had ordered the respondent to undergo urinalysis over the period of the adjournment. The urinalysis had returned negative results for illicit drugs.

11. The sentencing court also had the benefit of a Probation Report which assessed the respondent as being at high risk of re-offending but which also recorded his expression of a determination to try and turn his life around. Concerns were expressed, however, about persisting risk factors including unresolved grief following the untimely death of his mother, his substance misuse, association with criminalized older males, lack of training/education, ongoing conflict with the law, his lack of engagement with community based services, his living arrangements and his lack of involvement in structured pro-social activity. Mr Nolan's detachment from his emotions was also stated to be a cause for concern.

12. In addition the sentencing court had a report from a consultant clinical psychologist which indicated that he is functioning in the low average range of intellectual ability, and that he was not suffering from any current severe psychological problems. The court also had a letter from Fr Peter McVerry indicating a willingness to assist the respondent in accessing a drug treatment programme before his eventual release from prison, as well as testimonial letters from the respondent's maternal grandmother and a paternal aunt.

The Sentencing Judge's Remarks

13. In the course of sentencing the respondent the sentencing judge, having rehearsed the evidence, went on to state:

"This is a serious offence before the Court. The Director of Public Prosecutions has indicated through counsel that she regards the offence as being at the top end of the range of offending for this offence which would place it within a range of 10 to 14 years' imprisonment. The People at the suit of the DPP v. Kieran Ryan was opened to the Court. That's a decision of the Court of Criminal Appeal delivered by Mr Justice Clarke on the 18th of March 2014. The Court has considered the judgment in question. In addition, this Court has given significant consideration to all of the facts of evidence in this case including all of the documents furnished and other authorities. The matter before this Court is an offence contrary to section 27A(1) of the Firearms Act as amended. The offence prohibits the possession or control of a firearm or ammunition in suspicious circumstances. The maximum sentence is a term of imprisonment of 14 years and a fine. In the absence of exceptional and specific circumstances, there is a minimum presumptive sentence of five years. Mr Justice Clarke, at paragraph 7, stated: "Before considering any appropriate adjustment to reflect mitigating factors, it seems to this Court that, in general terms, an offence at the lower end of the range ought to attract a sentence of five to seven years; in the middle, seven to 10 years; and an offence at the top of the range a sentence of 10 to 14 years."

The Court has to consider the aggravating and the mitigating circumstances. The aggravating circumstances in this case are as follows, and the Court must consider the gravity of the offence, the nature of the offence, and the nature of the offence on which two members of An Garda Síochána are carrying out their lawful duty and I've outlined the details of the offence already. The nature of the weapon in question: Mr Justice Finnegan in Walsh regarded the nature of the weapon as being a significant factor in determining the seriousness of the offence: a semi-automatic single barrelled shotgun. This weapon was brandished at a member of An Garda Síochána. This is a very serious aggravating factor. Gardaí need to be protected from this type of behaviour and there has to be a deterrent.

The Court must also consider the impact on the victims, Garda Curran and Garda McQueeney, and I have already outlined those.

But the Court is also conscious of the fact that the offending was of very short duration and that no ammunition was found either in the firearm, or in the vehicle in question. And just in relation - just bear with me, please. Now, in accordance with rights where jurisprudence in the area of sentencing, the Court is compelled to consider the circumstances of the accused. As Mr Justice Barron stated in the often quoted case of People (DPP) v. McCormack, [2004] IR 359: "Each case must depend upon its own special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime but the appropriate sentence for the crime because it had been committed by the accused. And so the Court must consider the personal circumstances of the accused."

The Court considers the plea of guilty. There was no evidence of co operation so the mitigation which co operation might have attracted is not available to Mr Nolan.

The age of the accused at the time of the offence. This accused was 18 years at the time. The Court regards his age as being very significant. This young man has had an unfortunate start in life. His mother suffered with serious ill health - that is apparent from the letters which have been submitted by family members to the Court - and she required regular hospitalisation. His father did not feature in his life although it appears that his father is becoming more involved in supporting his son latterly. His grandfather, whom he had a close relationship, passed away prior to his mother passing away. He was 14 years of age when he found his mother dead and this has, no doubt, had a profound impact on him and his absence of an opportunity to address his grief has been referred to both in - and his absence of addressing his grief has been referred to in both the probation report and in Mr Dempsey's report. His grandmother has brought him up and despite her best efforts has been able to exert little enough - little control over him. And I have already gone through the contents of Mr Dempsey's report and Father McVerry's willingness to work with him and the probation report which indicates that there has been a failure on his part to engage in the past. However, they are willing to work with him.

Considering all of the above, and considering -- having put significant time into considering the authorities in relation to this matter, the law which was opened to the Court, the facts, the impact on the victims and all of the - everything which has been opened to the Court, the Court does not agree with the Director of Public Prosecutions that this is in the high range of offending, and I say that in circumstances where I have already dealt with the duration of the offending and the fact that the firearm was -- there was no ammunition found. Now, as I've said already, during sentence hearings in relation to this matter, that was of little benefit, or comfort, to Garda Curran and Garda McQueeney at the time, in particular Garda Curran who was two feet away from a weapon being brandished at him. But it is a matter of

fact that the firearm did not contain ammunition. And, as I've said, I have considered everything and in great detail and I have listened back to the content of the sentence hearing also in relation to this."

.....

"Considering the mitigation outlined, the Court would have sorry, prior to considering the mitigation, the Court would have considered that this is in the medium -- the Court is of sorry, the Court is of the view that this is in the medium range of offending and I say that in circumstances where the duration was of such a short period and where there was no ammunition. Without mitigation, the Court would have considered imposing a sentence of seven and a half years. Considering the mitigation outlined, in particular the young age of the accused, his personal circumstances, the fact that his previous offending has been of an entirely different nature, his plea of guilty, this Court is of the view that it must provide for rehabilitation in a person so young. Balancing all of those matters with the deterrent aspect which must be built into any sentence where gardaí carrying out their duties in such a courageous fashion must be protected and society must be protected, the Court will impose a sentence of five years of imprisonment and allowing for the possibility and hope for rehabilitation on the part of this young man, I will suspend 18 months for a two year period on condition that he enter into a bond of €200 to keep the peace and be of good behaviour from today's date for a period of two years post release; that he engage with the Probation Service for 12 months, post release; that he attend all appointments and follow all directions made to him by the Probation Service; and that he continue to engage with drugs rehabilitation during his time in prison."

... ..

"And I have tried to structure this sentence to provide for the fact that this is a young man and that I have to provide for the fact that there is hope that this young man will -- there is an opportunity for rehabilitation. He has a very supportive family who the Court has observed in court on all of the occasions when this sentence has been before the Court, including from his father who seems to be providing support at this late stage, but is providing support and his grandmother who has been referred to as such a positive influence on him. But I have structured it in such a way that should Mr Nolan not take this opportunity which is being afforded to him to rehabilitate, he will serve the remainder of the sentence and, sadly, should he not take this opportunity to rehabilitate, this Court has little doubt but that he will serve other sentences also if he doesn't, at this point, cease his behaviour and take the chance he has been given."

Grounds of Appeal

14. The applicant raises two main issues. She contends on the one hand that the sentencing judge was in error in rating the seriousness of the offending conduct as falling within the mid-range as identified by Clarke J. in *The People (Director of Public Prosecutions) v. Kieran Ryan* [2014] IECCA 11 and contends that having regard to the aggravating factors in the case she should have placed it in the high range. She then contends on the other hand that the discount from the headline sentence of seven and a half years identified as appropriate by the sentencing judge to reflect mitigating factors and to incentivise rehabilitation was simply too great and was unjustifiably generous in the circumstances of the case.

Discussion and Analysis

15. In support of the first point the applicant points to the nature of the weapon involved, it being a pump-action shotgun albeit unloaded and without ammunition; the fact that the respondent pointed it at persons in a menacing fashion and directly in the face of one person who was no more than two feet away from him; the fact that those persons were members of An Garda Síochána who were performing their duty; the fact that an armed Garda was obliged to draw and rely upon his weapon in a public place; and the fact that drugs for sale or supply, albeit an admittedly small quantity, were found on the person of the respondent.

16. Counsel for the respondent, while acknowledging that the offence was serious, contends that it was not in the higher range and instanced cases where multiple weapons might have been involved, where a gunman would have ammunition available to him, where the gun might be actually loaded, or where the gun might have actually been discharged, all of which he contends would potentially be even more serious variants of the present offence. It was contended that the absence of even more egregious aggravating factors such as those postulated justified placing the offence in this case in the mid-range rather than in the high range. It is said that while the headline sentence of seven and a half years determined upon by the sentencing judge was towards the lower end of the mid-range and was therefore lenient, it was within the range of the sentencing judge's legitimate discretion to locate it there and it was not to be regarded as unduly lenient.

17. We agree with counsel for the respondent that this case belonged in the mid-range; although for reasons we will enumerate, this Court, if it had been sentencing at first instance, might have nominated a headline sentence towards the upper end of the mid-range. Although the sentencing judge correctly identified deterrence, both general and specific, as an important factor we feel it important to record our view that general deterrence was a particularly important consideration in the circumstances of this case where the immediate injured parties were members of An Garda Síochána engaged in the performance of their duties. To have pointed a pump-action shotgun at anybody was in itself a serious aggravation of the basic offence of possessing such a weapon in suspicious circumstances. However, to have pointed it with menace at members of An Garda Síochána in the performance of their duties further aggravated an already egregious crime. All the more so, when it caused a Garda to legitimately draw and deploy his officially issued firearm in a public place.

18. The existence of various legislative enactments rendering certain acts of violence or threatened violence against members of An Garda Síochána acting in the course of their duty to be standalone crimes bearing substantial, and in some cases very substantial, penalties makes it clear that as a matter of public policy in this State conduct such as occurred in this case is to be especially deplored and deprecated. We consider that the need for general deterrence in furtherance of that policy and in support of An Garda Síochána could therefore have justified a somewhat higher headline sentence than that selected by the sentencing judge. However, be that as it may, we are also persuaded that the headline sentence selected by the sentencing judge did not represent such a departure from the norm as to represent an error of principle in itself.

19. We now turn to the second point made by the applicant, namely that there was too much discount afforded for mitigation and to incentivise rehabilitation. The available mitigation, such as it was, comprised a plea of guilty, the respondent's young age (he was almost 19 at the date of the offence and was 20 at the date of his sentencing), his substance abuse issues and the adversities in his early life. However the plea of guilty was offered in circumstances where the respondent had been caught red handed and it was not a case where the plea was likely to spare the victims additional trauma as the victims were members of An Garda Síochána and as such were well used to going to court and to having to give evidence. In addition the sentencing judge had expressly found that

there had been no co-operation. The respondent also had previous convictions and so was not entitled to a discount for being of previous good character.

20. Insofar as turning over a new leaf was concerned, the respondent had expressed through his legal team a willingness to address his substance abuse problem. In response to that the sentencing judge had adjourned the case and had ordered urine analysis over the period of the adjournment and the urine analysis results proved to be negative for illicit drugs.

21. We consider it to be an important point that the Oireachtas has provided for a presumptive mandatory minimum sentence of five years imprisonment for the offence of possession of a firearm in suspicious circumstances. A sentencing judge is entitled, exceptionally, to depart from and to go below the presumptive mandatory minimum sentence where he or she is satisfied that there are exceptional and specific circumstances relating to the offence or the person convicted of it which would make it unjust in all the circumstances to impose the minimum term. For this purpose the Court may have regard to any matters it considers appropriate including:

(a.) Whether the person pleaded guilty to the offence and, if so, the stage at which the intention to plead guilty was indicated and the circumstances in which the indication was given, and

(b.) Whether the person materially assisted in the investigation of the offence.

22. In the present case the sentencing judge was clearly alive to the policy of the legislature. Indeed she specifically referred to it. Her initial discount of two and a half years, that is a discount of a third, from her headline sentence of seven and a half years imprisonment would, if she had confined it to that, have resulted in a net sentence that was concordant with the express policy of the legislature and which did not go below the presumptive mandatory minimum tariff. However she could only have gone below the mandatory minimum sentence as she purported to do in suspending an additional 18 months of the sentence if she was satisfied that there were exceptional specific circumstances relating to the offence or the respondent which would make it unjust in all the circumstances to impose the minimum term. Regrettably she makes no express finding in that regard.

23. While counsel for the respondent has argued that we may infer from the fact that she specifically alluded to the policy of the legislature and from the fact that she felt able to suspend an additional 18 months of the sentence that the sentencing judge must have been so satisfied, we face the difficulty that it is hard to see on what basis she might have been so satisfied. Counsel for the respondent points to the existence of the plea. However there was no material assistance. He also points to the respondent's age and the adversities in the respondent's early life as possibly having provided the necessary basis for such a conclusion. The difficulty with that however is that these factors had already been expressly taken into account in the initial discount from seven and a half years to five years. Moreover, the initial discount had been a relatively generous one. It could not therefore be said that justice required going below the presumptive mandatory tariffs, certainly in terms of reflecting those circumstances as actual mitigation.

24. While the sentencing judge may have been concerned that the justice of the case further required that the respondents be afforded an opportunity to rehabilitate himself and that in order to facilitate that objective it was necessary to go below the five year presumptive mandatory minimum sentence, she does not state that in terms and we feel it would be speculative to so conclude.

25. In *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279 it is emphasised that a reviewing court on an application such as the present should afford great weight to the reasons provided by the judge at first instance for the sentence he or she has imposed. However the difficulty here is that the sentencing judge has not explained the basis on which she felt free to depart from the presumptive mandatory minimum sentence. She did explain that she was anxious to incentivise his rehabilitation, but having regard to the express statutory requirements which represent pre-conditions to any exercise of a judicial discretion to go below the presumptive minimum, that was not enough. We find that the trial judge erred in principle in not satisfying herself, and expressing herself to be so satisfied, that there were exceptional and specific circumstances relating to the offence or the respondent which would have made it unjust in all the circumstances to impose the minimum term and in not identifying what those circumstances were.

26. We readily acknowledge that the sentencing judge approached the exercise of sentencing this accused conscientiously. However, notwithstanding the obvious care she took in attempting to arrive at a just and proportionate sentence, we are nonetheless persuaded that the overall discount afforded in this case which was in excess of 50% of the headline sentence, which itself was at the lenient end of the available range, was more than was justified in the circumstances of this case, even taking account of the need to incentivise rehabilitation. To have afforded such a discount on the available evidence constituted a clear departure from the norm and was a further error of principle.

27. In the circumstances we consider that the net sentence of five years with the final 18 months thereof suspended was unduly lenient.

28. We will therefore quash the sentence imposed by the court below and proceed to re-sentence the respondent. In accordance with our usual practice we have invited the parties to put before us on a contingent basis any additional materials that they might wish to have taken into account in the event of a re-sentencing. We have been told that the appellant remains drug free and that there have been no disciplinary offences recorded against him while he has been in prison.

29. Although, as we have indicated, we consider both that a higher headline sentence than that fixed by the court below could be justified and that even before account is taken of the suspended portion that a lower discount for mitigation than that allowed by the court below could be justified, we have decided in the light of the time that has passed and the fact that the respondent is seemingly doing well in prison not to interfere with either the headline sentence or with the initial discount of two and a half years. However, we consider that the discount of two and a half years was quite sufficient to reflect both the available mitigation and the need to incentivise rehabilitation. The new net sentence will therefore be a sentence of five years imprisonment *simpliciter*.