



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 110

Record No. 105CJA/16

**Birmingham J.
Mahon J.
Edwards J.**

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DECLAN CHRISTIE

APPELLANT

JUDGMENT of the court delivered on the 31st day of March 2017 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted on the 8th December 2015 to one count of arson contrary to s. 2(1) of the Criminal Damage Act 1981, at Dublin Circuit Criminal Court. He was remanded on bail to the 22nd January 2016 for sentence. He was further remanded to the 11th April 2016, and on that date a sentence of three years imprisonment was imposed, and suspended in its entirety for a period of three years on the respondent entering into his own bond of €100 to abide by certain conditions. This is the appellant's appeal pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of the sentence imposed, on the grounds of undue leniency.
2. On the evening of the 12th November 2012, Garda Cadden responded to a call to the effect that there was a fire at no. 12, North Circular Road, Dublin 7, and that there were possibly residents in the dwelling. On arrival, she found that the Dublin Fire Brigade were present and there were large plumes of smoke coming from the roofs of no. 12 and 14, North Circular Road. She was informed by the Fire Officer that it appeared that the fire originated in the top floor flat of no. 12. Residents of the buildings were evacuated. The respondent was found lying in the back garden of no.12 having apparently jumped or fallen from an upstairs window. He was not seriously injured.
3. On the previous evening, the fire alarm in the respondent's flat went off on two occasions. On the second occasion other residents entered the respondent's flat and stamped out a fire which had been started from old newspapers and books on the floor. The respondent was in an agitated state. In the early hours of the following morning, noise was again heard from the respondent's apartment. Residents discovered the respondent's flat engulfed in flames and the respondent lying on the ground outside.
4. The respondent made a statement to the gardaí to the effect that he had lost his keys and had become angry. He said that he had consumed a type of drug called "Snow Blow" and had broken up and set on fire some papers and DVD's on the floor of his flat. He claimed he was depressed and paranoid, and that he jumped out the back window. He claimed that the incident had taken place without premeditation and had stemmed from an intention to commit suicide. A note to this effect was found in the flat. Significant damage was caused to both properties. No. 12 suffered damage to the extent of €9,000 and was not insured. No. 14 suffered damage to the extent of €22,531.65 which was ultimately recovered from an insurance company.
5. The respondent was aged forty five at the time of the offence. He had nineteen previous convictions between 1986 and 2006, including five for robbery, four for larceny, two for criminal damage, one for attempted robbery, one for assault, one for trespass, one for unauthorised taking of a motor vehicle and one for possession of offensive weapons. More recently, in June 2011, the respondent was unconvicted of two offences for producing an article in the course of a dispute and for assault causing harm. He received a two year fully suspended sentence in respect of those offences on the 19th February 2015.
6. The grounds on which this application is brought are as follows:-
 - (i) The learned sentencing judge failed, when imposing a fully suspended sentence on the respondent to give due and adequate weight as an aggravating factor to the fact that the said offence of arson involved causing substantial damage to two houses without regard to the safety of any persons who resided at the said properties;
 - (ii) the learned sentencing judge erred in principle by stating that the offence was not premeditated or planned where there was evidence adduced to the court at the sentence hearing that the respondent had started a number of fires in his apartment on the previous evening leading up to the main arson which caused two houses to be evacuated of a number of residents;
 - (iii) the learned sentencing judge placed excessive weight upon the personal circumstances and mitigating factors raised on behalf of the respondent and inadequate weight to the aggravating factors;
 - (iv) the learned sentencing judge failed to have any or any adequate regard to the gravity of the offence and in particular the potential danger or loss of life as regards the residents of the said properties;
 - (v) the learned sentencing judge failed to impose a sentence of imprisonment on the respondent which reflected the seriousness of the offence in the circumstances in which the offence was committed, and

(vi) the learned sentencing judge imposed a fully suspended sentence which is a clear divergence from the normal sentences which could properly have been imposed upon the respondent having regard to the details of the offence and the maximum penalty available and the personal circumstances of the respondent and his previous convictions and thereby justifies the intervention of this court.

7. Section 2 of the Criminal Justice Act 1993 provides as follows:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of (Appeal) to review the sentence."

8. It is well established that this court will not interfere with a sentence which is merely lenient, and will only do so where it is satisfied that the sentence is unduly lenient. Neither will it interfere simply because it, or its members individually, would have, if hearing the case at first instance, imposed a different sentence. In *DPP v. McCormack* [2000] 4 I.R. 356, at p. 359, Barron J., in giving the judgment of the court stated:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle."

9. The appellant criticises the approach taken by the learned sentencing judge in determining the appropriate sentence to be imposed on the appellant in that she did not rank the offence in terms of its seriousness and proceed to identify an appropriate headline sentence before imposing the fully suspended three year term. It is, as this court has often indicated, best practice that the process of determining an appropriate sentence in any case be approached in this manner. In any event, ultimately, the court must consider the sentence actually imposed, and decide if, in all the circumstances, the sentence imposed is outside the parameters of the discretion available to the sentencing judge.

10. In her sentencing judgment, the learned sentencing judge was clearly motivated to give the respondent the opportunity to rehabilitate and to deal with his personal problems, including, particularly, problems with drugs and substance abuse. She acknowledged the strides that had been made by him in becoming drug free, and she was obviously impressed by the extraordinary support provided by Mr. and Mrs. Dermody. The following extract from the sentencing judgment can usefully be quoted at this juncture:-

"At the heart of my considerations as to what the appropriate sentence is there are three factors: one is that you have made huge strides - in trying to become drug free and it is the drugs that called the instance - the burglaries and things that - is there a problem? And so, I have to acknowledge the strides that you've made in becoming drug free and going down that road to try and become drug free and I might commend you for that. The other factor that is important is that you now have safe accommodation and that clearly, from your own evidence, was an important factor for you and a very significant one and so things are a bit more structured now with that in place. And the final thing is that you have supports; you have the extraordinary support given to you by Mr. and Mrs. Dermody and that has to be acknowledged. So I take those into account in arriving at what to me seems an appropriate sentence."

11. The learned sentencing judge then went on to suspend the three year term for three years and imposed strict conditions, including proposals set out in the report of the Probation Service. She also had regard to the report of Mr. Glenville, consultant clinical psychologist.

12. While not strictly relevant to the determination of whether or not the sentence was unduly lenient it is nevertheless noteworthy that the trust invested by the learned sentencing judge in the respondent's prospects for rehabilitation has paid off to a significant degree in that the respondent has to date complied with the conditions imposed and has not come to the attention of the gardaí in the past year, or indeed, in almost five years since the commission of the offence. He lives in sheltered accommodation and is fortunate to have the ongoing support of Mr. and Mrs. Dermody.

13. Arson is undoubtedly a crime of the utmost seriousness and all the more so when it is committed in or close to a residential building. In this case, there were many residents placed in jeopardy and, furthermore, the area in question was a generally built up residential suburb of the city. The potential for serious injury and death was significant.

14. Arson is also a crime which is sometimes associated with mental health difficulties, and in which the motivation for the offence can be difficult to identify, and in many instances it is not associated with gain, revenge or provocation. Consequentially, sentencing for this category of arson will on occasions require what might be described as a novel approach. There is however another category of arson offences which are motivated by factors such as revenge or a fraudulent effort to recover compensation from an insurance company, to mention just two. In *DPP v. Flynn* [2015] IECA 290 the motivation was a deep rooted opposition to the existing of a head-shop in Capel Street, Dublin. The consequential damage to three buildings was in the region of €1m., of which approximately one third was uninsured, and enormous disruption to businesses resulted. There was also a risk to lives of residents of nearby buildings. This court deemed the appropriate sentence in that appeal to have been one of a net five years imprisonment. However, *Flynn* is in many important and obvious aspects distinguishable from the instant case.

15. In *DPP v. Harcourt* [2011] the Court of Criminal Appeal did not take issue with the decision to entirely suspend a prison sentence in an arson case where the property damage was a multiple of the loss in the instant case, although it increased the duration of the sentence subject to suspension. The arson in that case was the result of a very determined and premeditated attack on a car dealership premises and, when apprehended by the gardaí, the accused failed to cooperate with their investigation. It is of course the case that in *Harcourt* there was no immediate threat to human life.

16. In the court's view, the imposition of an entirely suspended sentence in this case was lenient, indeed very lenient. Nevertheless, the sentence was for a significant period of time and was suspended for, also, a significant period of time. A suspended sentence is a real punishment and one that can, and often is, activated in particular circumstances. For a person who, like the respondent, has struggled with drugs and living at what might be described as at the edge in social terms, a sentence suspended for a lengthy period and subject to fairly onerous terms is, while not involving immediate liberty deprivation, nevertheless challenging. The sword of Damocles' affect of a suspended sentence can in many cases be very usefully used to turn would be offenders into law abiding citizens.

17. In the particular and somewhat unusual circumstances of this case the Court does not consider the sentence imposed to have been unduly lenient, and will therefore dismiss the application.

