



THE COURT OF APPEAL

RECORD NO. 1 54/2016
Birmingham J.
Mahon J.
Edwards J.

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

JASON FREYNE

RESPONDENT

JUDGMENT (ex tempore) of the Court delivered on the 20th day of February 2017 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted at Limerick Circuit Criminal Court on 10th December 2015 to four counts, namely:-

Count one:

Possession of a firearm with intent to endanger life contrary to s. 15(1)(a) of the Firearms Act 1925 as substituted by s. 42 of the Criminal Justice Act 2006 as amended by s. 35 of the Criminal Justice Act 2007.

Count two:

Possession of ammunition with intent to endanger life contrary to s. 15(1)(a) of the Firearms Act 1925 as substituted by s. 42 of the Criminal Justice Act 2006 as amended by s. 35 of the Criminal Justice Act 2007.

Count three:

Possession or control of a firearm in circumstances given rise to an inference of an unlawful purpose contrary to s. 27A(1) Firearms Act 1964 as substituted by s. 59 Criminal Justice Act 2006 and as amended by s. 38 Criminal Justice Act 2007.

Count four:

Possession or control of ammunition in circumstances given rise to an inference of an unlawful purpose contrary to s. 27A(1) Firearms Act 1964 as substituted by s. 59 Criminal Justice Act 2006 and as amended by s. 38 Criminal Justice Act 2007.

2. The respondent was sentenced on 6th May 2016. He received prison sentences of eight years in respect of counts one and two to date from 9th May 2015, with the final two and a half years of that term suspended on conditions for eight years from the date of sentence. Counts numbered three and four were taken into consideration.

3. This is the appellant's application for a review of sentence pursuant to s. 2 of the Criminal Justice Act 1993 on the grounds that the sentence imposed was unduly lenient.

4. On the afternoon of the 9th May 2015 the respondent discharged a sawn off shotgun at Joseph McCarthy in a residential part of Limerick city. Mr. McCarthy sustained gunshot injuries to the right side of his body. Prior to doing so the respondent had loaded the shotgun, placed it in a backpack and cycled to the Hyde Road area of the city. The respondent left his rucksack containing two shotgun cartridges and some gloves at the scene. The incident occurred outside the house of the Casey family. There was apparently an ongoing dispute between the Casey family and the family of the respondent's girlfriend. On the following day the gardaí chased and apprehended the respondent, while still armed with the same shotgun discharged earlier. At the point of arrest he was attempting to remove the shotgun from his rucksack. Two cartridges were found in addition to a hoodie and gloves. He was also wearing a bullet proof vest when arrested.

5. The respondent told the arresting gardaí that earlier in the day he had shot a man in the face when that man had pulled up alongside him in a car and pointed a gun at him. It transpired that no such event had occurred.

6. The respondent claimed that he had discharged his shotgun having first been fired on by another man and that he was carrying a loaded shotgun because he had been previously shot at.

7. The respondent was born on 13th August 1992 and was thirty three years old at the time of the offence. He has a number of previous convictions including unauthorised taking, attempted robbery, possession of knives and stolen articles, attempted interference with a mechanically propelled vehicle, obstruction, possession of drugs for the sale or supply, criminal damage and a number of road traffic convictions. He has received a number of short prison sentences, the longest being one of three years imprisonment with one year suspended for the sale or supply of drugs, in June 2011.

8. 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...on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(2) *An application under this section shall be made on notice given to the convicted person within 28 days from the day on which the sentence was imposed.*

(3) *On such an application, the Court may either:-*

(b) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(c) refuse the application."

9. Section 15 of the Firearms Act 1924 as amended provides for a maximum penalty of life imprisonment, but with a prescriptive mandatory minimum sentence of ten years. The relevant provisions of s. 15 are as follows:-

"(4) Where a person (except a person under the age of eighteen years) is convicted of an offence under this section, the Court shall, in imposing sentence, specify a term of imprisonment of not less than ten years as the minimum term of imprisonment to be served by the person.

(a) The purposes of sub section (5) and (6) of this section is to provide that in view of the harm caused to society by the unlawful possession and use of firearms, a court, in imposing sentence on a person (except a person under the age of eighteen 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 ten 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.

(5) Subsection (4) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of it, which would make a sentence of imprisonment of not less than ten years unjust in all the circumstances, and for this purpose the court may subject to subsection (6) 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,
(ii) the circumstances in which the indication was given, and*

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

(6) The court, in considering for the purposes of subsection (5) of this section whether a sentence of not less than ten years imprisonment is unjust in all the circumstances, may have regard, in particular, to:

(a) ...

(b) whether the public interest in preventing the unlawful.. possession or use of firearms would be served by the imposition of a lesser sentence."

10. Having reviewed in some detail the circumstances in which the offence was committed and the manner in which the respondent was apprehended by the gardaí, and noting that the respondent had been of material assistance to the gardaí and had given a very early indication of his intention to plead guilty, the learned sentencing judge expressed his satisfaction that the case "*fell within the statutory framework of s. 15, ss. 5(a) and (b)...*". He proceeded to sentence the respondent to a term of eight years imprisonment, with the final two years and six months suspended on conditions. The learned sentencing judge did however add the following comment:-

"I don't often comment on cases, but what is extremely alarming about this case is the fact that this young man thought it appropriate to be riding around the streets of Limerick wearing a bullet proof vest and carrying an adapted sawn off shotgun which he was prepared to use, and did in fact use in public. Again, by way of comment, it is notable that the accused has not, in fact, expressed any remorse for his actions which is disturbing to say the least."

11. The focus of the appellant's appeal is the decision of the learned sentencing judge to sentence the respondent to a net custodial term of five and a half years. The point is also made that the respondent entered his plea of guilty in circumstances where he was faced with coercive evidence of guilt, thereby significantly reducing the value of his plea in those circumstances.

12. It is accepted by the appellant, albeit somewhat reluctantly, that the learned sentencing judge was entitled, because of the existence of exceptional and specific circumstances, to sentence the respondent without invoking the prescriptive minimum ten year sentence, but that having doing so ought then to have identified the appropriate headline sentence as being one of ten years, before discounting for the relevant mitigating factors.

13. While the court does not take issue with the decision of the learned sentencing judge to approach sentencing on the basis that there were sufficient reasons to avoid the imposition of a custodial term of ten years or more, it is nevertheless also satisfied that an appropriate headline sentence was one significantly greater than eight years.

14. This is a case where an individual planned and executed an armed attack on one or more people minding their own business outside a house in a built up area. Having arrived at the location the respondent ran towards the group before discharging the shotgun at the injured party. This event could so easily have resulted with one or more deaths and it is simply down to luck that this did not happen. Had it happened the respondent would now be serving a sentence of life imprisonment.

15. The Court is satisfied that the sentence imposed was unduly lenient, and ought to have been one of at least ten years before any reduction being applied for mitigation. The court will therefore replace the sentence of eight years with one of ten years. While a two and a half year suspended element of the ten year sentence is, in the Court's view, not warranted to fairly provide for the mitigating factors, the Court will however, and reluctantly, apply the same suspended element as was applied in the court below. In part it is doing so in recognition of the fact that having received his sentence in the court below some ten months ago the respondent is now

faced with that sentence being significantly extended. The Court is also impressed with the progress made by the respondent and his good behaviour in prison.

16. The Court has also noted that the respondent has acknowledged through his legal representatives that the feud which lay behind this offence is, as far as he is concerned, over.

17. The remaining sentences remain in place, all to run concurrently. The suspended element of the sentence will be subject to similar conditions to those directed in the court below.