



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**145CJA/14**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Wayne Ellis**

**Appellant**

**JUDGMENT of the Court delivered on the 25th day of July 2016 by**

**Mr. Justice Sheehan**

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, for a review of the sentence imposed on the respondent at the Dublin Circuit Criminal Court on the 25th May, 2014, on grounds of undue leniency.
2. On the 8th April, 2013, Wayne Elli pleaded guilty to two counts on in the indictment. Count 1, possession of a firearm in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964, as substituted by s. 59 of the Criminal Justice Act 2006, as amended by s. 38 of the Criminal Justice Act 2007. Count 2 possession of certain articles contrary to s. 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001. Following a number of adjournments, the appellant was finally sentenced on the 26th May, 2014. He received a fully suspended five year sentence in respect of the charge on count 1 and he received fully suspended sentence of three years imprisonment in respect of the charge on count 2.
3. Following his plea of guilty Mr. Ellis's case was adjourned until the 7th May, 2013, for sentence. On that date evidence was given by Detective Garda Shane Graham that on the 5th July, 2012, as a result of confidential information an operation was put in place and as a consequence of that gardaí monitored the movements of a particular car namely a Ford Focus 00 4 451 which was kept this car under surveillance. The occupants of the car included the accused and his two co-accused Paul Walsh and Alex Irwin. The three men proceeded to the Penny Hill Pub area of Lucan where they met an innocent party and purchased a car from him. They then left with both vehicles. Paul Walsh drove the Audi 95 D 29009 to Oldmill Court, Tallaght, where he was met by Mr. Irwin and Mr. Ellis in the Ford Focus and they all then left in the Ford Focus, but returned some time later having been dropped off by a fourth person in the Ford Focus. The three men then got into the Audi motor car registration No. 95 D 29009. The gardaí continued to monitor this motor car and shortly afterwards it was observed in the vicinity of the Knocklyon Shopping Centre. It turned into the car park of that shopping centre and drove slowly past the post office and a cash in transit van that was parked nearby. It then continued on to the bottom of the car park, turned and headed back in the direction of the post office and cash van. At that point the gardaí were in position of the car park of the shopping centre and decided to intercept the vehicle. The Audi was surrounded by armed gardaí who looked into the car and observed a shotgun and a sledge hammer in the rear passenger seat foot well. There was an unlabeled bottle which contained a yellow substance which proved to be petrol in between the front seat of the car.
4. Detective Garda Monaghan arrested and detained Wayne Ellis and conveyed him to Tallaght garda station. The respondent was interviewed but nothing of probative value emerged.
5. Garda Graham told the court that Paul Walsh was the driver, that Alex Irwin was in the front passenger seat and that the respondent was the sole occupant of the rear of the car. The sawn off double barrelled loading breach shotgun which was unloaded was sent to the ballistics section where it was examined and found to be in fair condition. It was designed to discharge suitable 12 gauge shotgun.
6. With regard to the personal circumstances of the respondent the court was told that he was 31 years of age at the time of sentence and that he had 26 previous convictions which included a conviction in 2003 for carrying a firearm with intent and robbery. A sentence of six year imprisonment with the final five months suspended was imposed in respect of these charges. The court was also told that he had a further conviction in 2009 for carrying a firearm in the course of a robbery as a result of which he received a sentence of seven years imprisonment with the final two years suspended.
7. On the 7th May, 2013, a plea of mitigation was addressed to the court by defence counsel which focused primarily on the fact that the respondent had successfully engaged with the Coolmine Therapeutic Community, completed a rehabilitation programme and was in the process of dealing with his addiction.
8. The sentencing judge adjourned the matter for finalisation to the 29th July, 2013 and ordered urine analysis reports.
9. On the 29th July, 2013 sentencing of the respondent was further adjourned to facilitate his continued drug rehabilitation at the Coolmine Therapeutic Community and at the Ashling Centre and the respondent was remanded on bail initially to the 21st October, 2013, but later of the 18th November, 2013, the 17th February, 2014 and finally then to the 26th May, 2014. On that date the learned sentencing judge imposed a sentence of five years imprisonment on count No. 1 and a sentence of three years imprisonment on count No. 2 and suspended both sentences in their entirety on the respondent entering his own bond of €200 to keep the peace and be of good behaviour for a period of five years.
10. While counsel for the Director of Public Prosecutions advanced a number of grounds in support of her application that the sentence imposed was unduly lenient, the principal argument focused on whether or not the Circuit Court judge was entitled to

suspend the sentence of five years imprisonment imposed on count No. 1 in view of the fact that the respondent had a previous conviction for a firearms offence.

11. In order to consider the submission of counsel for the Director of Public Prosecutions that a mandatory minimum sentence of five years imprisonment applied in the present case, it is necessary in the first instance to set out the statutory framework in which a court imposes a sentence in a firearms case.

12. The following are the relevant portions of s. 27A of the Firearms Act 1964 (as inserted by s. 59 of the Criminal Justice Act 2006) and provides as follows:-

"...

(2) A person guilty of an offence under this section is liable on conviction on indictment.

(a) to imprisonment for a term not exceeding fourteen years or such shorter term as the court may determine, subject to s. 27A(4) - (6) and

(b) ...

(3) The court, in imposing sentence on a person for an offence under this section, may, in particular, have regard to whether the person has a previous conviction for an offence under the Firearms Acts 1925 to 2006, the Offences against the State Acts 1939 to 1998 or the Criminal Justice (Terrorist Offences) Act 2005 ....

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

(4A) the purpose of subsections (5) and (6) is to provide that in view of the harm caused to society by the unlawful use of firearms, a court, in imposing a sentence on a person ... for an offence under this section, shall specify as the minimum term of imprisonment to be served by the person 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, would be unjust in all the circumstances to do so.

(5) Subsection (4) does 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 the minimum term 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 s. 27A(5) whether a sentence of not less than five years imprisonment is unjust in all the circumstances, may have regard, in particular, to:

(a) Whether the person convicted of the offence has a previous conviction for an offence under the Firearms Acts 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.

(7) Subsections (4) to (6) of this section apply and have effect only in relation to a person convicted of a first offence under this section ... and accordingly references in those first-mentioned subsections to an offence under this section are to be construed as references to a first such offence.

(8) Where a person...—

(a) is convicted of a second or subsequent offence under this section,

(b) is convicted of a first offence under this section and has been convicted of an offence under section 15 of the Principal Act, section 26, 27 or 27B of this Act or section 12A of the Firearms and Offensive Weapons Act 1990, the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person."

13. It should be noted at this point that when this appeal was originally listed for hearing before us, counsel on behalf of the respondent told the court that proceedings had been instituted challenging the constitutionality of the relevant section and the court granted an adjournment to the respondent on the basis that those proceedings would be prosecuted speedily.

14. This duly happened and judgment was delivered on the 9th May, 2016. On that date the High Court (Twomey J.) upheld the constitutionality of s. 27A(8) 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 200. The High Court also refused a declaration pursuant to s. 5(1) of the European Convention on Human Rights Act 2003, that the mandatory minimum five years prison sentence for a second firearms offence was incompatible with the European Convention on Human Rights.

15. At the sentence hearing in the Circuit Court the appellant was 33 years of age and had 26 previous convictions including relevant previous convictions for firearms offences in 2003 and 2009. The sentencing judge believed at the time of sentence that she was entitled to suspend the mandatory minimum five year sentence which the respondent was liable to following his earlier firearms conviction. The appellant had a young child and partner and by the 26th May, 2014, when sentence was imposed in this case he had been drug free for a period of two years. There had been evidence before the court that the appellant had been a heroin addict, had been abusing illegal substances since the age of thirteen, and had spend most of his 20's in prison. The fact that the appellant had been drug free for a period of two years was something which seriously influenced the sentencing judge. When finalising sentence she stated as follows:-

"We are now at a period nearly two years after the date of the offence and in light of his prior history it is significantly to his credit that there is no information of any offending in the interim. . . . As indicated Mr. Ellis has remained in the community without reoffending. He has used all the services provided to him and the testimonials before the court confirm that not only did he participate, but he participated well with the various agencies that he used in the interim so in that regard I will suspend the operation of the sentence of five years imprisonment for a period of five years."

16. The principle issue before us in this appeal was whether or not the Circuit Court judge was entitled to depart from the minimum five year sentence given the evidence before her of previous convictions of firearms offences. That matter has now been settled. The trial judge was not entitled to suspend any part of the five year sentence imposed on the firearms offence and we must approach sentence on the basis that the starting point is a sentence of five years imprisonment. We allowed the appeal to be adjourned to enable proceedings to be taken in the High Court by the respondent to test the constitutionality of the relevant legislation. The appellant did so and was unsuccessful, the judgment of the High Court being delivered on the 9th day of May 2016, by Twomey J. in which he upheld the constitutionality of the mandatory five year sentence for a second firearms offence.

17. We are satisfied therefore that the trial judge was not entitled to suspend any part of the five year sentence imposed on the firearms offence and we must approach sentence on the basis that the starting point is a sentence of five years.

18. This respondent has made a significant breakthrough in his life. While we were told at the conclusion of the oral hearing at this appeal that he may have committed an offence since his release on bail, it is of significance that there appears to be no more than one slip up. He appears to have made huge strides in overcoming his addiction. The court is satisfied that there is no need to impose any sentence in excess of the mandatory minimum sentence of five years imprisonment on the five year firearms charge.

19. The court therefore will accede to the application by the Director of Public Prosecutions for a review of this sentence. We will set aside the original sentence on the firearms charge and impose in lieu thereof a sentence of five years imprisonment from today. Credit to be given for the time spent in custody on this matter.

20. With regard to the second count on the indictment, we propose to uphold the suspended sentence imposed here by the trial judge for the following reasons. The offence committed by the appellant at the Knocklyon Shopping Centre was without doubt extremely serious. It is clear that an armed robbery was intended and the appellant was part of a group which also intended to destroy forensic evidence following the commission of the crime. The previous convictions of the appellant are such that in normal circumstances an immediate custodial sentence was to be expected. The fact that an experienced trial judge decided that this was one of those unusual cases where the public interest was best served by a suspended sentence arose in circumstances where there was evidence before her that the appellant had struggled successfully to rehabilitate and had become drug free. In our view the trial judge marked the huge significance of this by effectively giving the appellant an opportunity to further prove he could become a productive member of society albeit with the inducement of a suspended sentence hanging over him. This occasional imposition of a suspended sentence in circumstances where one might normally expect immediate imprisonment has always been part of Irish sentencing practice. O'Malley, in *Sentencing Law and Practice* (2nd Ed.) at para. 6.51 says under the heading "*Last Chance Principle*"

"Some authority exists for the proposition that a person with a criminal record and perhaps a lengthy one should be given a last chance if there are indications that he is now intent on relinquishing a criminal way of life. This was clearly the view of the Court of Criminal Appeal in *People (DPP) v. Jennings*, where the applicant was given a two and a half year prison sentence, with provision for review for his role in a robbery. Reducing his sentence the court per O'Flaherty J. said:

'But there comes a time in everyone's life and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this his last chance perhaps, he will hopefully take it and rehabilitate himself, get employment and become a useful member of society.'

(Ex tempore, Court of Criminal Appeal 15th February, 1999)"

21. For the reasons set out in the above quotation from O'Malley, we will not interfere with the sentencing judge's order on the second count.