



THE COURT OF APPEAL

[312CJA/18]

**The President
McCarthy J.
Kennedy J.**

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

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MICHAEL FERRIS

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered on the 2nd day of December 2019 by Birmingham P in Cork

1. This is an application pursuant to s. 2 of the Criminal Justice Act 1993 brought by the DPP, seeking to review on grounds of undue leniency a sentence that was imposed. The legal principles that are applicable to such reviews are not in dispute between the parties, and indeed, those principles have not been the subject of any serious dispute since the first such case of this type, the case of DPP v. Byrne in 1995.
2. The sentence that is sought to be reviewed is one of six years imprisonment with the final year of the sentence suspended that was imposed on 3rd December 2018 in the Central Criminal Court following a sentence hearing that had taken place some days earlier, on 28th November 2018. The sentence hearing took place following the conviction by a jury of the respondent of the offence of manslaughter. The verdict of guilty of manslaughter came after the respondent had stood trial in the Central Criminal Court sitting in Tralee, charged with the offence of murder. The accused's (at the time) response was to offer a plea of guilty to manslaughter on the basis of provocation, but the plea offered was not acceptable to the DPP.
3. The background facts to the sentence hearing are at the same time highly unusual and quite horrific. They are to be found in events that occurred on 4th April 2017. On that occasion, the deceased, Mr. Anthony O'Mahony, was unlawfully killed at Rattoo, Ballyduff, County Kerry. The deceased was a local bachelor farmer, his date of birth was in February 1944, so he was aged 73 years when he met his death. He had a number of parcels of land in the general area, including 75 acres of tillage in the Rattoo area, and he lived elsewhere in Ballyduff. For a considerable number of years, there had been tensions and

difficulties between the deceased and the accused, now respondent, relating to the use by the deceased of a Crow Banger.

4. The Crow Banger was used by the late Mr. O'Mahony every planting or sowing season and every harvesting season for some three or four weeks on each occasion. When in use, the Crow Banger would be activated from dawn to dusk. It is said that the pattern of activity had extended over something of the order of 30 years. On this particular occasion, the Crow Banger had been active for nine or ten days prior to the events of the day in question.

The operation of the Crow Banger was a source of great annoyance to Mr. Ferris, the respondent, and it also seems to have been a source of annoyance, grief and distress to a number of other people living in close proximity to the tillage holding.

5. Mr. Ferris was also a bachelor farmer and he lived along the lane that leads to Ratoo Round Tower. There, he farms, in his case and in the case of his brother, Paddy, the farming is dairy farming. Mr. Ferris was born on 23rd January 1955, so he was aged 63 years at the time of the sentencing hearing. It can be said immediately and without fear of contradiction, that Mr. Ferris was man of previous good character, indeed, exemplary previous character who has no recorded convictions or anything remotely of that nature.
6. On the day in question, he placed a Teleporter, which is a forklift-type machine with protruding forks, across the narrow country lane off which he lived which was the same lane which Mr. O'Mahony would use to access his tillage holding. The respondent left the Teleporter in place and went away for a period, it appears, returning to his farmhouse. Mr. O'Mahony came onto the lane, came upon the Teleporter blocking his path and hooted his horn. Mr. Ferris left his farm and returned to the machine, entered the cab and he then drove the Teleporter at Mr. O'Mahony's vehicle, knocking it back up the public laneway for a considerable distance by repeatedly striking it with the prongs or forks. The prongs or forks penetrated the car, and indeed, penetrated the body of Mr. O'Mahony, causing injuries of a horrendous nature which were described in the course of the trial by State Pathologist, Dr. Bolster.
7. In the aftermath of the incident, Mr. Ferris went to the home of a neighbour, told them what he had done. They contacted Gardaí on 999 and Gardaí made their way to the scene and to the home of the residents who had reported the incident. At the neighbour's home, two members of the Gardaí, Detective Sergeant Horgan and Garda Sugrue, spoke with Mr. Ferris. After they cautioned him, the following exchange occurred:

"Q. Will you tell us what happened today?"

- A. Anthony O'Mahony was going to be coming down the road with a Crow Banger. This is always a problem with him for years. It would wake the dead. I had spoken to him years ago about it. Today, I blocked the road with a Teleporter to stop him from coming down. I parked it sideways, he started hooting. I was not in the

Teleporter, I sat up on the Teleporter, I didn't talk to him, no good in talking to him. The pallet forks on it, I made for the car and drove into it."

The accused was arrested there and taken to Listowel Garda station where he was detained, and in the course of detention, questioned on a number of occasions. In the course of detention, the respondent made admissions which were consistent with those that he had made to Gardaí at the scene shortly after the killing. Once again, he told Gardaí that the incident had happened over a Crow Banger which had been active for approximately a week at that stage and which was annoying him. He said he had blocked the road with his Teleporter and when he heard a car hooting, he knew that it was Anthony O'Mahony and then returned to the Teleporter. He confirmed his intention was to drop the forks of the Teleporter down onto Mr. O'Mahony, that he had been thinking about this for a few days, but had decided to do this on that morning. He said that he drove the Teleporter into the car while Mr. O'Mahony was in it, and that he accepted that he had wanted to kill him.

8. The judge's approach to sentencing involved, first of all, referring to the fact that the accused had stood trial, charged with murder, but that a verdict of manslaughter had been returned and that that verdict was returned on the basis of provocation. The judge referred to the fact that the circumstances of the case were unique, and as she put it, particularly gruesome. In considering the nature of provocation at issue, she pointed out that provocation did not necessarily involve wrongful acts or gross or extreme conduct on the part of the deceased. The judge then went on to observe that anyone who had sat throughout the duration of the trial, as she, of course, had done, would be aware of the stress and the anguish of those in the area in question and the impact that the noise levels associated with the operation of the Crow Banger had on their lives.
9. The judge felt that the offence, for sentencing purposes, fell in the upper range of sentencing, but at the lower end of the upper range. It is to be noted that the judge was imposing sentence prior to the delivery of the decision of the Supreme Court in the case of DPP v. Mahon, and to that extent, the judge was operating without the benefit of that decision. For this offence, at the lower end of the upper range, she felt that a headline sentence i.e. a pre-mitigation sentence of 12 years was appropriate. The judge referred to the fact that a plea of guilty was offered, but not accepted, and she said that the approach of the courts in that situation required that what was offered be dealt with as a guilty plea. She felt that a reduction of one-third in the nominated sentence would be appropriate in respect of the guilty plea. That a further reduction of two years was appropriate in respect of other mitigation that she identified which included the expression of remorse and regret which had been expressed on behalf of Mr. Ferris by his counsel. While these were expressed for the first time during the course of the sentence hearing, a fact which was not lost on the family members of the deceased who presented victim impact statements, the trial judge accepted the genuine nature of the apology and the genuine nature of the expression of remorse. The judge referred to the age of the respondent, to his previous good character, his behaviour in the aftermath of the incident – going to neighbours and disclosing what he had done. The judge felt a further reduction

of two years for this was appropriate which had the effect of bringing the starting sentence of 12 years, which had been reduced to eight years by reason of the offered plea of guilty, down to six years. Finally, the judge said as part of the overall sentence, in order to encourage the rehabilitation of Mr. Ferris back into society, in particular, back into the society from which he came, Ratoos, Mr. Ferris knew no other society than Ratoos, he had spent his whole life there, she would suspend the final 12 months of the sentence.

10. The DPP says that by reference to the Mahon decision, that this case fell into the worst cases band where a headline sentence should have been in the range of 15 to 20 years. The Director says that if the Court is not prepared to place it into the worst cases band, then the alternative is that it fell at the very top, or close to the very top, of the high culpability band. So, it is submitted that the headline sentence of 12 years should have been significantly higher. The Director says that a reduction of a full one-third in respect of the plea offered was a further error, and that those errors, she says, were compounded by the decision, as she puts it, for no apparent reason, to further reduce the sentence by an additional two years down to six years. Then, the Director says that in the circumstances of this case, the decision to part-suspend the sentence while suspending the final year was a further error.
11. The respondent and his legal team disagree fundamentally. The headline sentence, they contend, was an appropriate one. It had the effect of placing the offence in the higher category. The reduction of one-third by way of a plea of guilty was appropriate and certainly fell well within the range of appreciation available to the sentencing judge. The offer of the plea could have avoided a lengthy trial. In the event, the trial took some two weeks, and it would have freed up the Court to deal with other important business. Counsel on behalf of the respondent says that the judge, in sentencing, was required to respect the jury verdict and he protests that the DPP seeks to go beyond the verdict and to undermine the jury verdict. He says that this is unacceptable, that just as a judge must respect the jury verdict when sentencing, that the constitutional order requires that the prosecution must likewise respect the verdict, as indeed, must this Court when dealing with a review or an appeal.
12. We have made reference in this judgment to the Mahon case. In the course of his judgment in that case, Charleton J sought to review the approaches of the courts to manslaughter sentencing. His analysis led him to place manslaughter cases into four bands. So, he identified what he described as "worst cases", observing that "some unlawful killings are close to indistinguishable in culpability for murder and that cases involving the highest level of culpability attract an appropriate sentence of between 15 to 20 years". Charleton J added further that a life sentence is also possible. For the category below that, which he referred to as the "high culpability category", he says that such cases tended to attract a punishment of between 10 and 15 years as a headline sentence. The judge commented that "medium culpability" offences saw headline sentences tending to be between four and ten years. These were sometimes imposed where there was a high level of culpability, but where aggravating factors are either absent or are

considerably less than in the higher range. Then the final category was that which Charleton J labelled as “lower culpability” and he said that manslaughter cases which fall into this category generally result in the imposition of a sentence of up to four years imprisonment. It is to be noted that some caution is required when referencing this decision because at some points, what are addressed are headline or pre-mitigation sentences, and at other stages, what is addressed is actual sentences that are imposed, sentences required to be served.

13. In considering this case, it has to be said that this was a somewhat unusual provocation case. Frequently, indeed, fairly, it can be said, typically, provocation cases will involve a sudden and immediate loss of control, will involve a response spontaneously to the triggering events. Here, there was a degree of pre-consideration. Mr. Ferris had been thinking about the situation for some days and there was some element, at least, of premeditation. This, together with the extreme and gross nature of the violence deployed, exemplified by the evidence of Dr. Bolster, means that the offence has to be placed high up indeed on the scale of manslaughter cases. A further reason why we say that is that unlike many manslaughter cases, here, there was an intention to kill.
14. In our view, the sentence arrived at, six years with one suspended, so, a net sentence of five years, simply failed to reflect the enormity of what had occurred, the taking of a human life in the circumstances described.
15. In the Court’s view, the headline sentence should have been in the order of 15 years, certainly not less than 14 years. So far as the plea was concerned and the extent to which that required to be addressed, in our view, discounting the sentence by one-third was excessive. This was a case where a plea to manslaughter was inevitable. There was simply no other option available if the murder charge that Mr. Ferris faced was to be contested. Yes, we acknowledge that there were other factors present by way of mitigation. There was his prior exemplary character, his age, the fact that he was a first time offender who would be entering prison for the first time and would, in all likelihood, experience difficulties adjusting to life there, these were all factors to be considered.
16. In our view, the aggregate of these factors, together with the plea, meant that the discount available could not exceed one-third. The effect of this would have seen a sentence in double figures, and in our view, a sentence in double figures would have been an appropriate sentence for an offence of this seriousness. To the extent that the sentence imposed departed so very considerably from that, we are of the view that the sentence was in error and that the error was such that it requires intervention from this Court and that we should intervene to quash it, and we will do so.
17. We are, therefore, required to resentence. We are conscious of the fact that resentencing Mr. Ferris at this stage into his sentence must be a source of considerable disappointment to him, and indeed, a source of considerable disappointment to all those who are close to him.

18. In the circumstances, we feel that the least sentence that we can impose is one of nine years imprisonment. We have considered whether part of the sentence should be suspended, whether, on the basis of imposing a somewhat higher sentence of ten or perhaps 11 years, and part-suspending, but we feel that that is not appropriate, nor do we feel that there is any basis for suspending so as to reduce the net sentence below that of nine years. We take the view that suspension is neither appropriate nor required because we do not believe that this is a case where Mr. Ferris will experience any difficulty in rehabilitating into society.
19. In sentencing, as of today, we have taken into account the information we have been provided with about the fact that Mr. Ferris has been using his time in custody responsibly and constructively. He has been in custody since these events occurred. He did not take up his bail, and in custody, he has achieved enhanced status, illustrated by the fact that he works in the vegetable gardens putting his skills and talents in that area at the disposal of the prison community.
20. In summary, then, we quash the sentence imposed in the Central Criminal Court and we substitute a sentence of nine years imprisonment. That sentence will date from the same day as the sentence in the Central Criminal Court.