



**THE COURT OF APPEAL**

**[245CJA/19]**

**Birmingham P.  
McCarthy J.  
Ní Raifeartaigh J.**

**BETWEEN**

**THE PEOPLE [AT SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]**

**RESPONDENT**

**AND**

**GERARD GLYNN**

**APPELLANT**

**JUDGMENT of the Court delivered on the 22nd day of June 2020 by Mr. Justice McCarthy**

1. This is an application brought by the Director of Public Prosecutions under s.2 of the Criminal Justice Act, 1993, seeking to review a sentence imposed on the grounds of undue leniency. After entering a plea of guilty, the respondent was convicted of count No. 1 and count No. 2 on the indictment. Count No. 1 was an attempted robbery on the 25th of June 2017 at Queen's Road in Dún Laoghaire, Co. Dublin. Count No. 2 was a threat to kill, carried out on the same date; both offences arose out of the same incident. A sentence of four years was imposed, the last two years of which was suspended. The sentence was imposed on the 1st of November 2019 and backdated to the 12th of March 2019, the day on which the respondent was charged and remanded in custody. This means in any event that, assuming normal remission, his release date is the 29th of September 2020.
2. At the time of sentencing, the respondent had been serving a prison sentence of four and a half years, eighteen months of which was suspended, for attempted robbery, which was imposed on the 8th of April 2019 by Her Honour Judge Codd, on Bill number 0755/2018, and backdated to the 27th of March of 2018 (the backdating was due to the fact that the respondent had been in custody on remand in respect of such offence) and that was after a trial.
3. In addition to the attempted robbery for which he was serving a sentence the respondent had eighteen previous convictions at the time of sentencing including three for robbery, two for burglary, one for assault.
4. The background to the case herein is that a Mrs Doyle was at an ATM with her husband when they were approached by the respondent who attempted to grab the money she collected from the ATM. Whilst they were in the queue, Mr Doyle had noticed the respondent with his hood pulled up, standing close by. He felt uneasy as the respondent was at his shoulder. Mr Doyle said he was suspicious that something was going on, and

that the respondent was blocking him from his wife. He said to the man, "What are you at?", and the suddenly, the accused lunged forward towards Mrs Doyle, who was in front of him using the ATM. Mr Doyle said, "He was pushing up against my raised arm", and the respondent said, "If you don't eff off, I'll stick you." Mr Doyle took this to mean that the respondent was going to stab him, and that he was extremely concerned for the safety of himself and his wife. Mr Doyle stated that the accused again shouted at him "I'll Stick ya. I'll Stick Ya". He says he swung backwards in an effort to pull the accused away from his wife. The accused then lunged towards Mrs Doyle, and in the course of intervention both men fell to the ground. The respondent then fled the scene and ran towards the DART station. He was later arrested. The respondent denied his involvement in the offence when in custody.

5. The respondent was 39 years of age at the time of sentencing. He has a 16-year-old son who lives in the United Kingdom with whom he is in frequent contact. He left school aged 12. He began dabbling in drugs at age 12, smoking cannabis and drinking. The respondent was exposed to a horrific incident at the age of approximately 14 whereby his mother's then partner, who was using heroin, injected him with heroin. Drugs then took hold of Mr Glynn, and he suffered significant periods of homelessness. He left the jurisdiction to go to the United Kingdom in the year 2000, where his circumstances improved. He stayed in the UK from the year until 2009, and then returned to Ireland. In 2012, he attempted to detoxify from benzodiazepine, but said that he had attempted that detoxification "too quickly"; he had a seizure, hit his head, and lost much of his hearing. He now has hearing aids. He went to the Coolmine rehabilitation centre in 2015, when at that point he not have hearing aids and in group therapy he asserts that this caused significant problems leading to frustration, and he says this ultimately meant he left Coolmine. Now that he has the benefit of hearing aids, things have improved.
6. Counsel correctly submitted on the evidence that since the respondent has been in custody, he has utilised his time well. He is an 'enhanced' prisoner in what is known as "the Progression Unit" and is attending school. He commenced the latter in April of 2019 and he has studied Arts, Crafts, Philosophy, Crime Awareness FETAC Level 2, Setting Learning Goals FETAC Level 2. He has attained his Junior Certificate. He is also partaking in drugs counselling; he had self-referred to the drug treatment centre Merchants Quay. He has reduced his dose of physeptone from 140 millilitres to 60 millilitres per day. At the date of sentencing, the trial court had sight of a number of reports, including a favourable Governor's Report, and also heard about his plans, once this matter is finalised, to access to access further programmes while he is in custody. He is testing negative for controlled drugs on urinalysis. He has obviously made very significant progress, especially having regard to his background.
7. The President of the Circuit Court (as Judge Ryan now is) gave judgment as follows: -

*"The aggravating factors obviously are that this is a crime of violence and there are two injured parties involved. The mitigating factors are his age, his particular*

*circumstances, the efforts he's made to rehabilitate himself, his plea of guilty and he has spent his time in custody well."*

and continued:-

*"The Court, bearing in mind the penalties, or the maximum penalties on each of the matters and taking into account the two-stage process, as indicated as best practice by the Court of Appeal, will impose a prison sentence on each of the matters of four years' imprisonment, but to suspend two of those.."*

8. The appellant relies on the following grounds of appeal:-

- (1) The sentencing judge erred in failing to identify a headline sentence;
- (2) The sentencing judge made a number of errors in structuring a sentence which failed to properly balance the mitigating circumstances of the accused and the aggravating elements of the attempted robbery and threat to kill;
- (3) The sentencing judge imposed a sentence that in all of the circumstances was unduly lenient.

We will deal with all of the grounds together.

9. The appellant submits that the sentencing judge did not identify a headline sentence nor did she identify where this where this offence lay in terms of gravity and that given the actual violence and use of force, this offence may be considered to be in the mid-range for offences of this nature. Failure to indicate the gravity of an offence may constitute an error in sentencing: in his text '*Sentencing Law and Practice*', Professor O'Malley states that if robberies were notionally divided into three broad categories, as has been done for serious assault and firearms offences, those at the lowest category may attract sentences ranging from a non-custodial sentence up to two years imprisonment, those in the middle category sentences ranging from three years to ten years imprisonment and those in the highest category sentences ten years to life imprisonment. He also points out that attempted robbery will not necessarily be less serious than the completed offence, referencing the case of *DPP v Delemere* (Unreported, Court of Criminal Appeal, 4 February 2008), which prosecuting counsel says is relevant.

10. The respondent submits that using the scale cited by Counsel for the Director in his submissions, the matter falls at the lower end of the scale. If it is correct that the offence lies on the 'lower-mid to mid-range for this type of offending', that would open a sentencing range of 3-10 years according to the scale cited by the Director in submissions. The ultimate sentence in this case is one of four years, which implies a headline of more than that; the final two years were suspended to encourage the extensive rehabilitation already undertaken by the respondent. Therefore, if the headline is more than four years by definition, brought down ultimately to four years by mitigation, and this falls in the portion of the scale with a range of 3-10 years as cited by Counsel for the Director, it is extremely difficult to identify a valid complaint.

11. The appellant also submits that the sentencing judge erred in her consideration of the mitigating factors of the respondent. Whilst the appellant accepts that the respondent has used his time in custody in a positive manner, it is said that the respondent is still at a high risk of reoffending. It was further submitted that the accused's drug free status and efforts to rehabilitate have only occurred while in the structured regime of a prison setting and hence and that it is unknown whether this will translate into continued progress upon release. Further, the appellant submits that the age of the respondent herein was not a relevant factor in mitigation, as the respondent is not a very young or particularly old offender. It is further submitted that the fact that the respondent was in custody for another offence at the time of sentencing is not a factor to be considered in mitigation, but rather is an aggravating factor.
12. The respondent contends that there was no use of a 'weapon' in the instant case, neither a syringe nor an imitation firearm. Violence was certainly threatened and Mr Doyle was afraid that he would be stabbed. The respondent had his green and yellow lighter in his hand and whilst Mr Doyle thought that there was a weapon, this was not so. The respondent also submits that the admittedly aggravating factors are significantly lessened by the actual facts of the case, a point, however, for which we have little sympathy. It is further submitted that merely because a sentencing judge does not list each and every factor, both mitigating and aggravating, prior to imposing sentence does not mean automatically that she has fallen into error a proposition with which we agree and this is such case. The Court must, of course, on any appeal look at the substance and not the form adopted, important though the latter might be. It is with the substance, after all, with which both prosecution and accused are concerned as a matter of reality.
13. Effectively, in her written submissions, the gravamen of the appellant's complaint is that imposition of a sentence of four years with the final two years suspended for this offence of attempted robbery with an offensive weapon or imitation weapon (it was neither, in the event, although may have been so perceived by Mr Doyle), given the other aggravating factors (and for the threat to kill) was in all of the circumstances unduly lenient, subsumed as it is in part by the sentence being served for the unrelated offence.
14. The respondent further submits that there was no requirement for a consecutive sentence in this case. The learned sentencing judge was required to structure a sentence which reflected the facts of this crime and the circumstances of this offender, whilst keeping in mind the principles of proportionality, and encouraging rehabilitation, which is what the judge did. Mr Le Vert rightly stresses the fact that the President is an extremely experienced judge, and, effectively, that she acted within her discretion such that this Court ought not to interfere.
15. In respect of the aggravating factors, that most strongly pressed by the appellant was the fact of commission of the offence of attempted robbery after the present offence but before the respondent was charged; it is submitted by Mr Le Vert that the present offence was brought to the attention of the trial judge for that second offence, on sentencing, and that she proceeded to sentence in that second case taking into account as an

aggravating factor the commission of the present or first offence. Thus, it does not arise as an aggravating factor in the present case although other offences as referred to above are such, being offences of the same class.

16. Mr Le Vert said that the judge had due regard to the principles of totality and proportionality, and the risk of institutionalisation. Given the progress that Mr Glynn has made (and continues to make), the sentence passed was one 'where rehabilitative considerations were properly to the fore'. The judge structured a sentence which would hopefully encourage that to continue.
17. It seems to us that the sentence of four years two of which were suspended was indeed very lenient. However, we are not persuaded that it was, *per se*, so lenient as to be regarded as unduly so. We recognise that in deciding on this sentence the President put the issue of rehabilitation and hopes in that regard to the forefront. We do feel however that where she fell into error was in her decision to backdate the sentence. In our view, the effect of that step was that the sentence became unduly lenient and we so hold.
18. Some confusion arose on the hearing of this appeal as to when the appellant was to be released after serving the custodial element of the sentence of 4 ½ years (three years in custody) in respect of the attempted robbery imposed as aforesaid by Her Honour Judge Codd and the sentence under appeal. From our experience we calculated that the release date, allowing for the normal remission, would be 25th June 2020 in respect of this earlier sentence and the 11th of September next in respect of the case before us. On this basis an additional, though a very modest additional, period in custody would fall to be served by the respondent. Neither side can explain why but it appears that the respondents release date has been calculated by the prison authorities as 25th June next, both sentences having come to an end. We are compelled to proceed on the basis that this is correct: this leaves us with the difficulty that even the most nominal additional period in custody does not arise in respect of the present offence.
19. Notwithstanding the error, if the position was that the respondent was to serve an additional period in custody in respect of the present offence we would not interfere. However, as this is not so we do so to the extent necessary to ensure that he serves a number of additional months in custody beyond 25th June and in particular, the short additional period which we conceived would in the ordinary course have arisen but which, for some unexplained reason, does not so do in the present case. We achieve this by the mechanism of reducing the sentence of four years originally imposed to one of two years and four months, the last two years of which we suspend and making that sentence consecutive to that imposed on Bill number 0755/2018. The practical net effect of this intervention is to ensure that the release date of the appellant of the respondent, allowing for remission, is next September, the precise date being calculated by the prison authorities in the normal way.
20. We limit our intervention as set out above for several reasons; the appellant has continued to make, it appears, very significant progress towards rehabilitation, and has, we are informed, obtained a place in Priorswood House through the agency of Fr.

McVerry's Trust and, indeed, pending such a place, he will be supported by it. Having regard to the relative proximity of the release date, the disappointment factor is particularly relevant in this case. In addition, we think that society would not be well served by a further period of imprisonment having regard to the importance generally of the principle of rehabilitation. We also take into consideration the fact that an additional period of suspension will arise, thus encouraging further rehabilitation with an immediate sanction of imprisonment, should there be a failure in pursuing it or a breach of the law.