



THE COURT OF APPEAL

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

Record No: 43/2020

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

V

TONY CAULFIELD

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 7th day of July 2020 by Mr. Justice Edwards

Introduction

1. On the 8th of June, 2017, the appellant pleaded guilty before Cork Circuit Criminal Court to eleven counts on Bill No CKDP0107/2017, being:
 - Count No 1: Endangerment, contrary to s. 13 of the Non-Fatal Offences Against the Person Act, 1997;
 - Count No 2: Criminal Damage, contrary to s. 2 of the Criminal Damage Act, 1991;
 - Count No 3: Failing to keep a vehicle at or near the scene of an occurrence of an injury to a person for a reasonable period, contrary to s. 106 (1) (b) and (3) of the Road Traffic Act, 1961 (as amended);
 - Count No 4: Driving without insurance, contrary to s. 56(1) and (3) of the Road Traffic Act, 1961 (as amended);
 - Count No 5: Driving without a driving licence, contrary to s. 38 of the Road Traffic Act, 1961 (as substituted by s. 12 of the Road Traffic Act, 2006);
 - Counts No's 6 to 10, inclusive, and count no 12: Dangerous driving, contrary to s. 53(1) of the Road Traffic Act, 1961 (as substituted by s. 4 of the Road Traffic (No 2) Act, 2011).
2. On the 30th of June, 2017, the appellant received concurrent sentences of four years imprisonment on counts 1, 2, and 3 respectively, with the final eighteen months thereof suspended in each case on conditions that the appellant should keep the peace and be of good behaviour for a period of five years from that date, and further that he should within

72 hours of being released from custody place himself under the supervision of the Probation Service for a period of eighteen months, and engage with them and comply with all of their directions until discharged. In addition, the appellant was disqualified from driving for five years on count no 3.

3. For completeness, although not centrally relevant to the present appeal, the appellant further received concurrent sentences of one month's imprisonment, and disqualifications for five years, on each of counts no's 6, 8, and 12; and six month's imprisonment, and disqualifications for five years, on each of counts no's 7, 9, and 10. Counts no's 4 and 5 were taken into consideration.
4. None of these sentences were appealed.
5. The appellant was subsequently released from prison having served the immediate custodial portion of his sentence. However, during the five year period for which his four years sentences had been part suspended with respect to the final eighteen months thereof, the appellant reoffended; and on the 26th of February, 2020, he received three concurrent sentences of three months' imprisonment from Cork District Court for offences contrary to s. 113 of the Road Traffic Act, 1961 (allowing himself to be carried in a stolen vehicle), and a further three concurrent sentences of six months' imprisonment for theft offences contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
6. These convictions triggered a re-entry of the matters in respect of which he had received part suspended sentences on the 30th of June, 2017, before Cork Circuit Criminal Court, pursuant to s. 99(8A) of the Criminal Justice Act, 2006 ("the Act of 2006") as inserted by s. 2 of the Criminal Justice (Suspended Sentences of Imprisonment) Act, 2017 ("the Act of 2017").
7. The re-entered matter was dealt with on the 28th of February, 2020, by a different judge to the judge that had originally sentenced the appellant on the 30th of June, 2017. The outcome was that the entirety of the suspension was revoked pursuant to s. 99(8C) of the Act of 2006, as inserted by s. 2 of the Act of 2017, and the appellant was ordered to serve the concurrent periods of eighteen months imprisonment that had originally been suspended consecutive to the sentences that had been imposed for the triggering offences on the 26th of February, 2020.
8. The appellant now appeals to this court against the s. 99(8C) revocation order.

Background to the Matter

9. At the original sentencing hearing on the 30th of June, 2017, evidence was received from Sergeant Michael O'Halloran that on the evening of the 8th of August, 2016, the appellant purchased a motorcar, registration number 00 D 93666, a Honda Accord. Just after midnight, on the 9th of August, 2016, Garda Anthony Maloney was driving an official Garda patrol car accompanied by Garda Gavin Driscoll, when they observed the Honda in question turning to Killala Gardens, Knocknaheeney, Cork. They signalled to this vehicle to pull over, and when it failed to do so, Gardaí activated their blue lights and sirens and

began pursuit. However, the vehicle in question continued driving towards Knocknaheeny Avenue on to Harbour View Road, failing to stop at the junction of Knocknaheeny Avenue and Harbour View Road.

10. The pursuit continued with the appellant's vehicle driving over the roundabout at the Courtown Drive and Harbour View Road junction, and then continuing on and failing to stop at red lights at the junction of Harbour View Road and Tadhg Barry Road. Having passed through that junction the appellant's vehicle again failed to stop at red lights at the junction of Blarney Road and Harbour View Road, instead continuing through those lights and turning right onto Shanakiel Road and then left onto Mount Prospect, Shanakiel, following which it entered a cul-de-sac and came to a stop.
11. The pursuing Garda patrol car pulled up behind the appellant's motor car and, as the Gardaí were about to get out of their vehicle, the appellant then reversed at speed into the front of the Garda patrol car. He did this a total of five times, pushing the Garda patrol car out of the way so as to give himself enough room to make good his escape. As this was happening, Garda Anthony Maloney identified the driver of motorcar 00 D 93666 as being the appellant. Both Gardaí in the patrol car received personal injuries in this part of the incident. Damage was also caused to the Garda patrol car amounting to €4,680.
12. Sergeant O'Halloran told the court that he and a Garda Gary Morris were in another Garda patrol car and had been positioned on Sunday's Well Road when they learned of this incident. Upon learning of it they set off towards Mount Prospect to render assistance. While en route there they became aware that motorcar 00 D 93666 had left Mount Prospect and was now driving towards them in the direction of Sunday's Well. They sought to intercept the appellant's vehicle as it approached them at speed by attempting to block its path, but had to take evasive action at the last minute to avoid a collision. The appellant then succeeded in getting away.
13. However, arising out of Garda Anthony Maloney's identification of him as he was deliberately ramming the patrol car in the cul-de-sac at Mount Prospect, the appellant was stopped by Gardaí later that evening when they demanded production of his driving license and insurance. He refused to produce same. Later, on the 23rd of November, 2016, whilst the appellant was imprisoned in Cork prison in respect of an unrelated matter, he was arrested in respect of the offences committed by him in the early hours of the 9th of August, 2016, and was taken to Mayfield Garda station, where he was detained and interviewed. While being so interviewed he made full admissions in relation to his involvement in the incident on the 9th of August, 2016.

The Personal Circumstances of the Appellant

14. The sentencing court heard that the appellant had twenty previous convictions. The following breakdown was given:

- six convictions for dangerous driving;

- six convictions for unlawful taking of a motor vehicle, contrary to section 112 of the Road Traffic Act, 1961;
 - three convictions for criminal damage;
 - five miscellaneous other convictions, which included driving without insurance.
15. The appellant's most recent prior convictions were recorded on the 10th of May, 2016, at Cork City District Court, in respect of one offence contrary to s. 112 of the Road Traffic Act, 1961, and six counts of dangerous driving, for which he received ten months' imprisonment. He was also disqualified from driving for five years on that occasion and had had numerous previous disqualifications. The appellant was on temporary release in respect of that sentence of ten months' imprisonment when he committed the offences with which we are presently concerned.
16. The appellant was born on the 13th of December, 1996, and accordingly was nineteen years old at the date of the incident, and is now twenty-three years old. He is understood to have long-standing addiction issues, and his counsel informed the sentencing court that the appellant was admitting to having been intoxicated at the time of the incident. He had been in a relationship and has a young child who was eighteen months of the date of his sentencing on the 30th of June, 2017, and with whom it was said he had some contact. The court was informed that the appellant had some work history, having spent a period of time working as a tiler. He was unemployed at the time of his sentencing. The sentencing court was asked to structure a sentence which would allow him to engage with the possibility of residential drugs and alcohol treatment.
17. There was a probation report before the court. He told his probation officer that having been released on temporary release not long before the incident, he had purchased a car for €100 euros to drive around local fields. He said that when Gardaí signalled to him to pull over he had panicked as he had been drinking and had no tax or insurance.
18. The report recorded that he had a long history with the probation service, and he was considered to have engaged "*part of the time*". In the past he had been supported in attending education courses and attempted rehabilitation by attending at the Ashling Treatment Centre in respect of his substance abuse problems. On this occasion the appellant told the probation officer that he had self-referred to an addiction counsellor and was in a pre-entry group for Coolmine Treatment Centre. The probation officer was successful in confirming that he had indeed made contact with that service via telephone. He was unable to say how close the appellant was to receiving a place in treatment, but noted that the appellant was asserting that he was providing urine samples which were still exhibiting traces of cannabis. The appellant was noted by the probation officer to be exhibiting signs of stress, and his presentation was recorded as being "*chaotic*". The appellant himself alluded to "*family issues*" as being an ongoing stressor. The report concluded:

"Due to attendance issues and his presentation in interview I have been unable to conduct some aspects of the assessment and I feel I am unable to make any recommendation at this time. I am in the hands of the court on the matter."

The Impact on the Victims

19. Neither of the two Gardaí who were injured in the ramming incident in the Mount Prospect cul-de-sac provided victim impact statements. However, the court heard that they had suffered minor soft tissue and back injuries which necessitated some medical attention. They had attended The Mercy Hospital to get a number of scans, and were both absent from work for a period of time.

The Remarks of the Sentencing Judge

20. In sentencing the appellant on the 30th of June, 2017, the Circuit Court judge had stated:

"JUDGE: Very well. Okay, he entered the plea in respect of these matters, the most significant of them being breach of an offence contrary to section 13 being intentional or reckless conduct which poses a substantial risk of death or serious harm to another. And then the criminal damage charge which is count No. 2. The section 13 carries a maximum sentence of seven years' imprisonment. Criminal damage carries a maximum sentence of 10 years' imprisonment. I'll have regard to the other matters presently. I'm not fettered as to the imposition of a minimum sentence.

At this sentencing hearing, therefore, having listened to the evidence adduced and having read the probation report and what was impressed upon me by Mr Kelly, the first matter I've got to consider is whether there are aggravating circumstances present. And clearly, there are aggravating circumstances present because he was disqualified from driving when he committed these driving offences and the offences contrary to section 13 of the Non-fatal Offences against the Person Act. He was not only disqualified but he had multiple disqualifications, one upon the other. He was also on temporary release in respect of a matter which was also a driving offence, an unlawful taking of a motor vehicle where he gave his bond when leaving the prison that he would behave himself. He breached that as well. These are aggravating circumstances. Therefore, they inform the first exercise I must do here and that is to scale the offences in terms of seriousness.

In my view, they belong, particularly, the section 13, between the mid to the high end of the scale. So, that's where I am placing it for the purposes of this determination. And therefore, on preliminary examination and having regard to the scaling that I've just applied and before I take into account the mitigating and other circumstances, the offence contrary to section 13, in my view, attracts a sentence of six years' imprisonment.

There are mitigating factors. He denied that he was the driver until when he was arrested subsequently but he did enter a plea in early courses, we would describe it, and that saved the State some difficulty and time. He was recognised by one of the gardaí who had to jump out of the way and who received some element of

injury above in Killala Gardens. That was the venue, wasn't it? Mount Prospect, Shanakiel. There are personal circumstances then that I must take into consideration. He is a person -- he is 20 years of age so he's a young -- I won't use the word young person because that's a technical designation -- he is a person of young years, let's put it that way, a young adult. He has, however, many previous convictions associated around the use of vehicles. Six for dangerous driving and six for unlawful taking. I presume they are conterminous with the other charges, that they're not separate events, as it were. And he is not to be re-sentenced, clearly, in respect of those matters but they do inform the Court's ultimate consideration. He is a person who has, of his own reporting, addiction issues and on the night in question, was intoxicated. He is the father of an 18-month-old child and is now or was returned to prison as a result of this breach of his temporary release. He wants to engage with treatment services and that is a positive thing and the services, seemingly, are not immediately available. When he made contact with the service is unclear because the probation officer is unable to particularise that beyond a certain point. As I say, he has these previous convictions and he is supported by his family here today. That's a good thing. He has not appeared before this Court previously. I am not told he was on a suspended sentence when he committed this offence but he was on temporary release. He was not on bail.

Therefore, in light of the mitigating factors and other circumstances that have been highlighted in the case, the appropriate sentence, having pronounced the headline sentence of six years in respect of the section 13, clearly, I must have regard to the danger he posed to the two gardaí. And they were injured and they were off work and that will have its own working out within their employment. I have some difficulty in looking at what sentence can have traction on his behaviour other than a significant custodial sentence. And the Court must mark the Court's disapproval of the behaviour of Mr Caulfield on the night in question, particularly as a certain confidence was placed on him that he would behave himself and that what he did, he went out and he did something even worse than what he was incarcerated for. The appropriate sentence, therefore, in my view, is, in respect of the section 13, four years' imprisonment.

Mr Kelly has impressed upon me to give some hope and some structure to Mr Caulfield and the Court will clearly, having regard to his age and what has been outlined, will assist in that regard. The appropriate sentence, therefore, is four years' imprisonment with the latter 18 months suspended provided for a period of five years, he is to be bound over under bond pursuant to section 99 of the 2006 Act as amended, pending amendment, to keep the peace and be of good behaviour and to come up for sentence if called upon to do so. And to report within 72 hours with the Probation Service and to remain under their supervision for the period of 18 months and remain engaged with them until they discharge him. And to take any directions they give in respect of addiction issues. So, just to keep it simple, the sentence is four years. The latter 18 months, he will not have to serve and he

will be bound over. The period of being bound over is five years and the reason it is longer than the period of the suspended sentence is to ensure compliance and to aid his rehabilitation. Now, that is the section 13."

21. The Court then went on to take the appellant's bond, and to impose the lesser, but concurrent, sentences on the other counts as outlined at the beginning of this judgment.

Re-entry before Cork Circuit Criminal Court.

22. The matter having been re-entered before Cork Circuit Criminal Court on the 28th of February, 2020, the prosecution led evidence from Inspector Sean McCarthy concerning the appellant's breach of his bond. Under cross-examination he accepted that the appellant had a history of addiction difficulties.

23. A short plea in mitigation was then presented in the following terms:

"He is a 23-year-old man, Judge. He has a four-year-old son and he was engaging with a drugs counsellor while in prison, Judge. Upon release, Judge, he tells me and instructs me that he was engaging with the probation and welfare services, Judge, and was doing so successfully, Judge. He had enlisted with the Churchfield Trust, Judge. He had difficulties at home, Judge, insofar as he had to avoid conflicts there, Judge, and he did that and was living with others, Judge. That's the best situation I can put forward in the circumstances, Judge. I'd ask the Court to bear in mind his difficult circumstances, Judge, when considering the re-entry in the circumstances, Judge. I can't put it any further than that."

24. The presiding Circuit Court judge then enquired for how long the appellant had been out of prison before he re-offended, and he was told "approximately, six months". The following exchanges then occurred:

"JUDGE: Well, I'll raise the suspension and it will be 18 months consecutive on the sentence that was imposed on him on the 26/02.

DEFENCE COUNSEL: Would you consider, perhaps, raising a portion of the suspended sentence, Judge, in the circumstances, Judge?

JUDGE: No, in this case, it's 18 months. I will impose it all.

DEFENCE COUNSEL: To give him some light at the end of the tunnel, Judge, no?

JUDGE: No."

The Grounds of Appeal

25. The appeal is advanced on two grounds:

- (a) That the Circuit Court judge erred in fact and in law in re-entering the entirety of the balance of the suspended sentence;

- (b) That the Circuit Court Judge erred in fact and in law in failing to have regard to the principle of totality.

Discussion and Decision

26. The court received helpful written submissions from both sides for which it is grateful. These were briefly amplified by counsel for the appellant in oral submissions at the hearing, with counsel for the respondent being content to rest upon her written submissions.
27. Counsel for the appellant has submitted that the Circuit Court judge failed to address the circumstances of the offender in deciding to revoke the entirety of the partial suspension of the sentence imposed by his colleague on the 30th of June, 2017. Reliance was placed on the appellant's young age (although he has been an adult now for some years) and his addiction issues. We are not impressed with this submission. This was a Circuit Court judge who was highly experienced in criminal law. The age of the appellant was manifest, and it was expressly elicited by counsel for the appellant in cross examination of Inspector McCarthy that the appellant had addiction issues. However, it begs the question as to what the relevance of these two issues to the question of possible revocation of the suspension of a portion of the earlier sentence. No explanation or excuse was put before the Circuit Court judge, and he was not provided with any basis for linking the appellant's age or addiction issues to the triggering offences. As one member of our bench pointed out to counsel for the appellant, this was not like a case in which a person is driven to reoffend to feed an addiction. The triggering offences here were road traffic offences. We accept that there may be some degree of relationship between a person's offending and a chaotic lifestyle but in this case the connection was too tenuous and remote to have influenced the decision in respect of revocation. We are satisfied that the personal circumstances of this accused were patent as far as the Circuit Court judge was concerned, and are confident that they were taken into account. No cogent case was made as to why there should not be a total revocation of the suspension of part of the earlier sentence. We are not therefore disposed to uphold this ground of appeal.
28. The second ground of appeal relied upon suggests that the Circuit Court judge erred in not considering totality after he made the revoked suspended sentence consecutive to the sentence imposed for the triggering offence. It was accepted that under the applicable legislation the Circuit Court judge had no discretion with respect to consecutivity, but it was argued that he should have reduced the total or aggregate period in the interests of proportionality. It is regrettable that the Circuit Court judge made no express reference to having considered the totality principle. We consider that he was in error in not doing so. However, it is not enough for an appellant to demonstrate an error at first instance. He or she must go further and demonstrate that such an error resulted in an incorrect sentence. In our view the total or aggregate sentence which this appellant was required to serve following the revocation of the suspended portion of his earlier sentence was not in any sense disproportionate, and no adjustment was in fact required in the circumstances of this case. The appellant had been treated most leniently on the 30th of June, 2017. He had been given a chance which he had not taken. He had offered no excuse or

explanation for his reoffending. It was entirely appropriate in the circumstances of the case that the entirety of the suspended portion of the earlier sentence should be revoked and made consecutive to the sentence for the triggering offence. We do not consider that the resultant total of two years to be served (i.e. the eighteen-month period previously suspended, and the six months sentence imposed in the District Court for the triggering offences) was in any way disproportionate in the circumstances of the case. We are not disposed to uphold this ground of appeal.

29. The appeal is dismissed.