



THE COURT OF APPEAL

Record Number: 158/2020

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

ENDA GAVIGAN

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 8th day of April 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. On the 26th June 2020 at Roscommon Circuit Court the appellant was sentenced to a cumulative sentence of 7 ½ years with 15 months suspended in respect of 3 counts on the indictment, namely, count 1; criminal damage contrary to section 2(1) of the Criminal Damage Act, 1991, count 2; production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act, 1990, and count 3; making a threat to kill or cause serious harm contrary to section 5 of the Non-Fatal Offences Against the Person Act, 1997.
2. The court imposed a sentence of 3 years in respect of the Criminal Damage count and 2 years in respect of the s.11 offence, concurrent *inter se*. On the count of making a threat to kill or cause serious injury, a 4 ½ year sentence was imposed consecutive to count 1, with the final 15 months of that sentence suspended on terms.

Background

3. On the morning of the 10th of October 2019 between the hours of 4:45 am and 10:30 am, the appellant called to the house of the injured party, Ms Galvin, in a Ford Mondeo on three separate occasions. Ms Galvin and the appellant were not known to each other, however, she was renting the house from the appellant's uncle. Ms Galvin lived in the house with her daughter and her daughter's partner. They were all present on the morning in question.

4. On the first occasion, the appellant banged on the door of the house and put his fist through a small window in the door. He also broke Ms Galvin's bedroom window with a wheel brace. The appellant was shouting to be let in.
5. The appellant returned 10 minutes later in the Ford Mondeo and got out of the car. On this occasion he broke the sitting room window and two other bedroom windows.
6. On the third occasion, at approximately 10:30 am, the appellant broke more windows on the front door and other windows with a wheel wrench. He also threw bricks into the house.
7. An Garda Síochána were called and arrived at the scene shortly before 10:40 am. They observed the Ford Mondeo and that all the front windows of the house had been smashed. Gardaí spoke with Ms Galvin, then proceeded to arrest the appellant and handcuff him. The appellant appeared to Gardaí to be very intoxicated.
8. The appellant was put into a caged cell in the rear of a Garda Patrol van. He resisted Gardaí and had to be forcibly put into the cell. The journey to Castlerea Garda Station took approximately 25 minutes, during which time, the appellant stood up in the cell area, constantly kicked the Perspex walls of the cell area and verbally abused and threatened the Garda driving the van, Garda Hickey. He told the Garda that he knew his childminder, that he knew where he lived and that he would come to his home and burn him and his family. The appellant made further deeply offensive remarks about Garda Hickey and made various threats in relation to the Garda's children, including that he would sexually interfere with them and that he would destroy Garda Hickey's face and that he would destroy his children. These insulting remarks and threats continued for the duration of the journey.
9. On arrival at Castlerea Garda Station, the appellant continued to be aggressive and threatening and he spat directly into Garda Hickey's face.

At 11:20 am, he was detained and deemed medically unfit for interview for a period of five hours, as a result of his alcohol consumption. At 5:10 pm, the appellant was brought from the cell area to have a telephone conversation with his solicitor and his verbal abuse of Garda Hickey resumed. At 6:35 pm, Gardaí sought to interview the appellant, however, he was still volatile and refused to cooperate. He repeated the threat to call to Garda Hickey's house and said: "I'm going to hurt you Vincent, you know I am."

10. Ms Galvin made a victim impact statement detailing the extent of the property damage to the house; 12 windows on the house were broken, amounting to a total cost of €1,000. This was paid by the appellant's brother. The report further details the psychological impact of the offending on Ms Galvin.
11. To conclude the background material, Garda Hickey also made a victim impact statement, dated the 26th March 2020, detailing the effect of the incident on his psychological well-being and his confidence in his job. It is particularly noteworthy that he stated:-

"I took the threats extremely seriously as they were not issued randomly in an uncontrolled fit of rage or loss of control. They were issued in a very direct and purposeful manner over a prolonged period of time, extending over more than eight hours."

In addition to the stress of having to inform his family of the threats, Garda Hickey said:-

"In conclusion, I have been a member of An Garda Siochana for over 30 years and I accept that in the course of my duties I will and have encountered violent incidents and I accept that in many incidents people can become threatening and make threats in the heat of the moment, which they have no intention of following through. However, in this case, this is the first occasion when I can say I felt genuinely fearful that there was true intent in the contents of the threats made by Enda Gavigan towards me and members of my family."

12. The appellant has been in custody since the 10th October 2019.

Personal circumstances of the appellant

13. The appellant was 34 years of age at the time of the commission of the offences contained herein. He has three young children, one of whom he is in regular contact with. He is said to come from a good family who have always been very supportive of him.
14. The appellant is described as having a chronic case of alcoholism which he has never made a significant attempt to address. As a result of his rampant addiction, the appellant has managed to engage in stable accommodation and hold down employment for short periods of time only.
15. The appellant is a man with a 69 previous convictions, including, *inter alia*; six convictions for section 2 assault, one conviction for section 3 assault, two convictions for obstruction of a peace officer, two convictions for drink driving, two convictions for section 2 criminal damage, one conviction for section 4 theft and 24 general road traffic convictions.

The sentence imposed

16. The judge identified as aggravating factors the impact on the victim in each case, the fact that the threat to kill was made against a Garda acting in the course of his duties, that there were circumstances that made the threat credible and the fact that both offences were sustained over time; and a sustained threat to kill extending over approximately nine hours in respect of Garda Hickey.
17. The judge fixed a headline sentence of six years' imprisonment in relation to the offence of threat to kill and a headline sentence of three years in respect of the criminal damage offences.
18. In terms of mitigation, the judge took into account the fact of the appellant's guilty plea and his apology to Garda Hickey. In taking into account culpability, the judge stated that these offences were born out of alcoholism.

Grounds of appeal

19. While the sentence was appealed on two grounds, the appellant proceeds solely on the second ground:-

2. That the judge erred in imposing a consecutive sentence for the offence of making threats contrary to section 5 of the Non-Fatal Offences Against the Person Act, 1997, in particular, in circumstances where the prosecution never articulated at which time the said offence occurred during the course of a number of hours.

Submissions of the appellant

20. In terms of the second ground of appeal, Mr Dockery submits that the single count of making a threat to kill or cause serious harm concerns only the comments made in the patrol van. He says that the judge erred in his view that the single count encompassed all of the threats made by the appellant in the van and the Garda Station where the latter remarks in the station had not been the subject of charge. He says that this amounted to an error where an offender may only be sentenced in respect of offences with which he/she is charged.

21. Mr Dockery agreed that the remarks in the Garda Station could be considered as aggravating the offence alleged, which it is said is confined to the threats in the patrol van, but that the judge should not have treated the comments in the station as forming part of a continuous offending.

22. In essence, the appellant says it is a step too far for the judge to have taken into account what was said in the Garda Station as enabling the court to depart from the single transaction rule. If that were not done, Mr Dockery says while a higher sentence may have been nominated for the offence of making a threat, it would not have been imposed on a consecutive basis.

23. In this way, the appellant submits that the evidence which was led before the court of what was said by the appellant at 6:35pm that evening was instead background evidence which was capable of aggravating the offence but that those threats did not form part of the offence alleged. In those circumstances, it is submitted that it was not open to the sentencing judge to treat the later remarks as being part of a single, unfolding threat to kill or cause serious harm.

24. The appellant quotes from the transcript as follows:

“It seems to me on the evidence before me, there could have been multiple counts of making threats against Garda Hickey. **I take it that this one count encompasses all the threats** and that it was a continuous and sustained threat made against Garda Hickey across the period”

It is submitted that this was an error in principle and that the court was not entitled to look at the overall conduct, no matter how abusive or insulting and determine that the threat to kill or cause serious harm charged on the indictment encompassed all of them.

It is reiterated that the remarks made after 6:35 pm did not amount to threats to kill or cause serious harm.

3. Reliance is placed on the following dicta of Charleton J in *People (DPP) v FE* [2019] IESC 85:

"In many instances, but even still sensibly looked at, a criminal event may consist of several different offences. The accused could be a male burglar who breaks into a house in order to steal. In doing so he will be carrying housebreaking implements, he will criminally damage doors and windows to enter and make good his escape, he will steal, he may threaten to kill the householder if confronted, he may tie her up, thus assaulting and falsely imprisoning her. That may take half an hour. It is still one event. While separate charges may be sensible in case the jury are inclined to reject part of the narrative, such as the threat to kill, each crime informs the seriousness of the others in the set. It would be wrong in principle for a sentencing court faced with four convictions out of the same events to split these up for tariff purposes and make each term consecutive to the other. That would be to act artificially. The event of the crime was clearly very bad and deserves an appropriate sentence. It is not appropriate to treat the events as separate and requiring consecutive sentences."

Charleton J further states that the existence of a gap in time forms part of consideration to be made in the decision whether to impose a consecutive sentence as opposed to making all sentence concurrent.

25. The appellant submits that, applying the above principles, the appellant's case should be seen as one single instance of offending and treated as one transaction, albeit with two victims, from the production of dangerous articles to his being deemed unfit for questioning. It is contended that there was no "gap in offending" where an offender might take stock and deserve further punishment for not having corrected his conduct after the first offence, but a "gap in time" where the appellant had the opportunity to take stock and correct his conduct after the previous offending but failed to do so by resuming his verbal abuse and threats whilst falling short of threatening to kill or cause serious harm.

Submissions of the respondent

26. In response to the appellant's second ground of appeal, it is submitted that the judge gave careful consideration to the issue of whether the sentence imposed in respect of count 6 should be imposed consecutively or concurrently with the sentences imposed for the offences against Ms Galvin and that the judge correctly understood the charge to encompass the entirety of the appellant's conduct and sentenced accordingly. It is also noted that the appellant pleaded guilty on a full facts basis.
27. The appellant's submission that the judge erred in principle by treating the threats made after the suspension of questioning expired as threats to kill or cause serious harm to Garda Hickey is wholly rejected by the respondent. It is stated that the later threats cannot be considered in isolation from the context of the more explicit threats that

preceded them and that even if considered in isolation, threats to lie in wait outside someone's place of work and to visit their home, combined with the explicit threat "I'm going to hurt you, Vincent, you know I am" clearly amount to threats to kill or cause serious harm.

28. It is submitted that the true issue is whether the judge was entitled to impose consecutive sentences. O'Malley on *Sentencing Law and Practice* is cited in this regard, as follows:

"[W]here two or more offences are committed in the course of a single transaction, all sentences in respect of those offences should be concurrent rather than consecutive. Difficulty lies in establishing a sufficiently precise definition of the concept of a single transaction.... The essence of the one transaction rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest."

29. It is submitted that this case clearly involved offences against two distinct legally protected interests, the protection of Ms Galvin's dwelling and the protection of a member of An Garda Síochána carrying out his duties. Further reliance is placed on the case of *R v Fitter* (1983) Cr. App R (S) 168. On the basis of the principles arising therefrom and from O'Malley it is submitted that the judge was entitled to impose a consecutive sentence in respect of count 6, whether the threats persisted for the period they did or not.

In conclusion, the respondent submits that the appellant was sentenced in relation to two very serious, distinct, sets of offending and that the total sentence imposed proportionately reflected the gravity of those offences.

Discussion and Decision

30. It is unnecessary to address the Criminal Damage offence or the offence of the Production of an Article further in this judgment as Mr Dockery SC for the appellant takes no issue with the penalty imposed for those offences. Rather, the issues concern the penalty imposed for the offence relating to Garda Hickey, upon which we will expand hereunder.
31. The appellant advances a net point in that it is said that the judge erred in determining that it was appropriate to impose a consecutive sentence for the offence of making a threat to kill. In advancing this argument, it is said that the single count related to the threats and vile comments made by the appellant in the patrol van en route to the Garda Station but did not include the comments made in the Garda Station in and around 6.35 pm, some eight hours or so after his arrest.
32. Therefore, it is argued that the latter remarks did not form part of the count on the indictment and it was not open to the judge to treat those comments as part of a single unfolding threat to kill or cause serious harm. In effect, that the judge erred in treating what occurred in the patrol van and in the Garda Station as one continuous ongoing offence, whereas, the only offence charged related to the threats in the van. The events

which led to the charges of criminal damage, production of an article and the making of threats should have been considered as a single transaction.

33. An offender may only be sentenced for the counts charged on an indictment and, in doing so, a count must take into consideration the circumstances surrounding that offence. Mr Dockery says that the comments in the Garda Station could be considered as a factor which aggravated the offending in the van, but were not part and parcel of the offence itself. If the Court were to find merit in this argument, it is said, this would lead to the conclusion that there was no gap in the offences and thus the single transaction rule would require consideration.
34. It is clear that the judge considered the count preferred to include the threats made over the entire period as part of continuous offending rather than looking to the latter comments as aggravating the offending in the patrol van.
35. In our view, the distinction in the present case is a very fine one. The evidence was heard on a full facts basis which included the threats in the Garda Station. The fact that this was so, however, does not mean that the latter threats formed part of the offence itself rather than operating to aggravate the offence.
36. We are aware that there is a very fine line between sentencing an offender for an offence with which he has not been charged, or convicted or asked to be taken into account and taking account of background and circumstances surrounding an offence which may incorporate evidence of another offence or offences in order to inform the gravity of the offence charged; this dividing line must be respected.
37. In the present case, there was scope to prefer a separate count to cover the events in the Garda Station and we believe that there is merit in the argument advanced by Mr Dockery in that the judge erred in considering this offence to be one which included the events in the station as opposed to taking the latter into account as circumstances surrounding the offending in the patrol van and thus informing the assessment of the gravity of that offence.
38. Consequently, we find an error of principle and will quash the sentence imposed on count 6 on the indictment and proceed to re sentence the appellant.
39. The judge nominated a headline sentence of 6 years on this count in circumstances where he was minded to impose the sentence on a consecutive basis and where he considered that the appellant's alcoholism operated to extenuate his culpability.
40. The aggravating factors in this case were manifestly obvious, the nature of threats in the patrol van alone were odious and vile, the fear as stated by Garda Hickey, which he felt for his family was entirely justified on the evidence, the vitriolic attack was personalised and sustained. Indeed, Garda Hickey, a man simply doing his duty, remarked in the impact statement that the threats issued over a protracted period and that in his 30 years

of service, he had never, in effect been so fearful that there was true intent in the threats made to him.

41. Taking all factors into account, including the conduct in the Garda Station, which aggravates the offending, and in circumstances where we are satisfied to impose a sentence on a concurrent basis, we nominate a headline sentence of seven years' imprisonment on count 6.
42. There are mitigating factors present, the most significant being the plea of guilty. The appellant is remorseful, he apologised in what was termed as "in a roundabout way", he is a chronic alcoholic and he engaged with his addiction counsellor whilst in custody. A Prison Governor's Report was furnished to the court below, indicating that he has no P.19's and has Enhanced Prisoner Status. An updated Prison Governor's Report was furnished to this Court and it appears that he has continued to avail of addiction support in custody and that he has completed a referral/assessment with Cuan Mhuire and is on a waiting list for residential treatment.
43. Taking account of the mitigation, we will reduce the headline sentence to one of 6 years' imprisonment imposed on a concurrent basis and we will suspend the final year of that sentence for a period of 2 years to incentivise rehabilitation on the condition that he will remain under the supervision of the Probation Service for that period of 2 years.