



THE COURT OF APPEAL

[71CJA/22]

Neutral Citation No: [2023] IECA 5

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

LORCAN MERRIMAN

RESPONDENT

JUDGMENT (*Ex tempore*) of the Court delivered on the 13th day of January 2023 by Birmingham P.

1. Before the Court is an application brought by the Director seeking to review a sentence on grounds of undue leniency. The sentence that is sought to be reviewed is one of four years imprisonment with the final 18 months suspended, that was imposed on 30th March 2022 in the Central Criminal Court in respect of an offence contrary to s. 7(2) and (4) of the Criminal Law Act 1997, as amended (“the 1997 Act”): the offence of impeding the apprehension of an offender. The case involved a plea of guilty to the offence which was entered during the course of murder trial. The assistance in question involved the disposal of a firearm used in the murder of Mr. Thomas Farnan who was shot dead at his home at 11, Kilcronan Close, on 25th April 2016.

Background

2. During the course of the murder investigation, the respondent emerged as a person of interest. His dwelling was searched, and a pair of jeans and a jacket were taken from his bedroom by Gardaí. When forensically examined, firearms residue was located on the clothing containing the same range of elements as the residue that had been found on discharged bullet casings found at the scene of the murder.

3. Shortly after this, the respondent was arrested in execution of number of bench warrants. He has been in custody on one basis or another since. The bench warrants would seem to relate to a number of District Court appeals where the respondent had failed to present himself to prosecute his appeal.

4. On 28th May 2016, a further search of the respondent's dwelling was carried out and this search uncovered a submachine gun, two magazines and 25 rounds of ammunition.

5. On 26th March 2018, the respondent was charged and subsequently pleaded guilty to two counts of possession of firearms and ammunition in suspicious circumstances, these counts arising from the search. On 5th July 2018, in respect of these offences, the respondent was sentenced to five years imprisonment which was backdated to 26th March 2018. It is to be noted that the firearm located in the course of the search was not the firearm that was used in the course of the murder.

6. On 26th October 2021, the respondent went on trial charged with the murder of Mr. Farnan. On 11th November 2021, during the course of the trial, the respondent pleaded guilty to an offence contrary to s. 7(2) of the 1997 Act. A sentence hearing then took place on 16th March 2022, at which the trial judge heard a number of victim impact statements from family members of the deceased. The judge took time to consider the matter, and proceeded to impose sentence on 30th March 2022.

The Sentence Imposed

7. In imposing sentence, the judge indicated that he saw the offending as being in the middle of the upper range of this type of offending and that the appropriate headline sentence was one of eight years imprisonment. He came to that view having identified a number of aggravating factors, including:

- (i) that the underlying offence, an assassination-style shooting of a defenceless man at his front door, was a cold-blooded one;
- (ii) that the circumstances surrounding the disposal of the firearm used in that murder were never elucidated by or on behalf of the respondent and that factor compelled the judge to take a more serious view of the gravity of the offence. Referencing *DPP v. Ryan* [2014] IECCA 11, the judge held that, in his view, the circumstances indicated that the offending arose out of serious criminality rather than being specific to the respondent's personal circumstances;
- (iii) that the respondent's offence had achieved its objective, a clearly foreseeable objective, in that the apprehension and prosecution of Mr. Farnan's murderer had been successfully impeded;
- (iv) that the consequences were "as serious as they could be";
- (v) the devastating effect the offending had on the family and friends of the deceased;
- (vi) that the accused had expressed neither remorse nor contrition for his actions.

8. On the other side of the coin, the sentencing judge identified the mitigating factors as being: the respondent's plea of guilty; his personal circumstances; and, his efforts at rehabilitation while in prison.

9. Having initially identified a headline or pre-mitigation sentence, that being one of eight years, but then having regard to the factors that he saw as aggravating and mitigating, the sentencing judge indicated that, in his view, the appropriate sentence was one of six years imprisonment with the final 18 months suspended. At that point, the trial judge determined to make the sentence consecutive to a sentence earlier imposed on the respondent by another Court due to the seriousness of both offences. That decision is at the heart of the present application to review, because the Director says that the judge erred when he went on to reduce the sentence originally indicated as appropriate, by reference to the principle of totality, and did so to such an extent that the respondent ultimately received a sentence of shorter duration than he would have received if the instant sentence had not been made consecutive.

10. The Director also contends that the judge was in error in failing to consider the respondent's previous convictions for offences contrary to the Firearms Act 1964 as being a serious aggravating factor.

Personal Circumstances of the Respondent

11. In terms of the respondent's background and personal circumstances, he was born in September 1996; thus he was 19 years of age at the time the offence was committed and was 25 years of age at the time of the sentence hearing. The Court was told that there was a stage at which the respondent was a promising soccer player, that he left school after his Junior Certificate, and proceeded to drift into both drug use and criminality. Approximately 60 previous convictions were recorded in respect of the period of 2016 to 2019 for offending behaviour that seems to have occurred from 2014 onwards. Most, if not all, of the convictions were recorded were from the District Court and were for matters such as theft, robbery, burglary, criminal damage, unauthorised taking of motor vehicles, interference with motor

vehicles, offences of public disorder and offences relating to misuse of drugs. The matter of real substance on the list relates to the charges under the Firearms and Offensive Weapons Act 1990, committed on 26th March 2018, resulting in the imposition of a five-year sentence of imprisonment on 5th July 2018, backdated to 26th March 2018.

12. The sentencing Court had before it a Governor's report from the Governor of Mountjoy Prison. It indicated that, while the respondent was the subject of a number of disciplinary reports during the period 2018 to 2019, his last such report was in February 2020. At that point in time, he appeared to begin meaningful engagement with the prison education programme. He completed a First Aid training course and received a Gaisce award. He had achieved enhanced prisoner status and was being considered for transfer to the progression unit within the prison.

Calculations

13. In relation to the conviction under the Firearms and Offensive Weapons Act 1990, where the sentence was commenced on 26th March 2018; if that sentence was served in full, without any remission, that would see the respondent released on 25th March 2023. However, the respondent was in fact entitled to remission, and the result was that he was released on 26th December 2021, or on a date proximate to that, *i.e.* before the sentence hearing in the present case.

14. In relation to the sentence that was actually imposed by the judge, now the subject of this review, with the provision that it was to be consecutive to the offence under the Firearms and Offensive Weapons Act 1990, it was calculated that, with remission, the expected release date would be early November 2023; or, with no remission, October 2024.

15. Had the judge imposed a sentence of six years with 18 months suspended, which he had indicated was what he regarded as the appropriate sentence, before having regard to the

principle of totality, then if the sentence was dated from the date of sentence hearing, that would give rise to an expected release date in August 2025; if it was dated from the date of the plea, a release date in March 2025; and, if dated from when the matter was first listed for trial, June 2024. If one considers the position without remission, which seems more appropriate, then, if the sentence was to date from the sentence date, that would involve a release in September or October 2026; or, if to date from the date of the plea, a release in May 2026.

16. The Director's position has been that she accepts that the identification of a headline or pre-mitigation sentence of eight years was appropriate, which was arrived at following an exercise which placed the offence at the middle of the upper range. In relation to the decision to then reduce that sentence to one of six years with 18 months suspended, she says that that has to be seen as a lenient sentence, but she specifically accepts that it was one that fell within the discretion of the sentencing judge.

17. As noted above, at the heart of the application to review was the decision to make the sentence in relation to the offence under s. 7(2) of the 1997 Act consecutive to the Firearms sentence, and then linked with that, the additional decision to further reduce very substantially the sentence that had been arrived at as being appropriate by reference to the principle of totality.

18. The judge's sentencing remarks merit more detailed scrutiny. Having identified eight years as the appropriate headline sentence, on the basis that the offence fell in the middle of the upper range, the judge then referred to the need to give appropriate credit for a plea which had brought an end to a potentially lengthy, complicated and expensive trial, thereby freeing up resources. He referred to the previous record to which there has already been reference, and when dealing with the firearms conviction that was recovered, he noted specifically that while the search warrant that had issued had been issued in the course of the murder

investigation, the machine pistol found in cause of search was not the weapon used in the course of the murder. He referred to the personal circumstances of the appellant at the time of the offence; he was 25 years of age at the time of sentence hearing, and 19 years at the time that the offence was committed. The then accused had been living with his father following his parents' separation when he was in his mid-teens, but his father had passed away. The judge noted that he still engaged with and had a good relationship with mother and with his siblings. A promising soccer player at one time, he left school after his Junior Certificate and drifted into drug use and criminality. The judge noted specifically that as of the time of the sentence hearing, that he had been in custody serving sentences for some six years approximately. He referred to the Governor's report which had detailed a difficult period for the accused when he initially went into custody, but noted that the last report was in February 2020, and that there had been a marked change in his behaviour thereafter. The judge summarised that situation by saying that there was a strong suggestion, which he accepted, that 2020 was a turning point for the respondent. The judge then said that giving full credit for the personal circumstances and the mitigating factors described, he was disposed to impose a sentence of six years, which would involve reducing the headline sentence by 25%, but he further indicated that in order to incentivise rehabilitation, and in recognition of the positive engagement with the services in prison and in recognition of the activities that he was now engaging in, he was disposed to suspend 18 months of the sentence. Of note is that the suspended portion of the sentence was specifically linked to the question of incentivising rehabilitation and stated to be in recognition of the positive engagement with the services in prison.

19. At that point, the judge went on to address the link between the sentence for the offence with which he was dealing, and the sentence for the firearms offence:

“It has been urged upon me on behalf of [the respondent] and perhaps also, to some extent, by the prosecution that the impeding the apprehension of an offender offence now before me, committed in April 2016, and the possession of firearms in suspicious circumstances offences committed in May 2016, are somehow interlinked. I cannot accept that submission. Although the commission of each was close in time, they represent separate serious offences. When Dublin Circuit Criminal Court sentenced [the respondent] to five years’ imprisonment on the firearms offences to run from the 26th of March 2018, when [the respondent] was charged with and went into custody on those charges, it quite properly had no regard whatsoever to the offence now before me, with which [the respondent] had not yet been charged. If I were mechanically to backdate the sentence I propose for the offence now before me to either the 26th of March 2018, when Mr Merriman went into custody on the firearms’ offences, or the 18th of January 2021, when this case was first listed for trial, the sentences for each of those offences would, in effect, be running entirely or largely concurrently by default, in circumstances where no thought would have been given by either this Court or the Dublin Circuit Criminal Court to whether that is appropriate, since the offences would never have been considered for the purposes of sentence in conjunction with one another. Therefore, it seems to me that I must consider whether it’s proper to characterise those two separate offences as arising from the same incident, for which concurrent sentences for different offences would usually be imposed, or as arising from separate and unrelated incidents, for which consecutive sentences for different offences are the norm. Upon considering the matter, I am forced to the conclusion that the two separate offences do not come within what is known as the single transaction principle. The machine pistol recovered from [the appellant’s] home that was the subject of the firearms charge, is not the firearm that

was used in the murder of Mr Farnan, the disposal of which is the subject of the impeding the apprehension of an offender charge now before me. If I were to treat those two offences as part of a single transaction for the purpose of imposing what would be, in effect, wholly or largely concurrent sentences, that would be to provide a two-for-one discount in respect of two quite separate, serious offences. I do not believe that it would be right or just to do so. Thus, I would order that the sentence I intend to impose will commence upon the expiration of the sentence of five years' imprisonment imposed upon [the respondent] by the Dublin Circuit Criminal Court [...] which, according to my understanding, is the Bill Number in respect of the offences for which the Dublin Circuit Criminal Court imposed two concurrent sentences of five years' imprisonment. Having resolved that that is the appropriate course, I must next have regard to the totality principle. That means that I must stand back to review the overall sentence to which [the respondent] would be subject, to ensure that it fairly reflects the totality of his offending. Taking account of the overall impact of his sentence, the moral blameworthiness of [the respondent] and the prospect of his rehabilitation, I accept that the two consecutive sentences imposed should be less than the sum of their parts. For that reason, I will reduce the six-year sentence of imprisonment that I was going to impose on [the respondent] to one of four years' imprisonment, and I will suspend the last eighteen months of that sentence, subject to the mandatory statutory condition that [the respondent] keep the peace and be of good behaviour during the period of his imprisonment and the period of suspension of the sentence that I have imposed. That is the sentence of the Court.”

Discussion

20. It seems absolutely obvious from the passage quoted that the judge believed that making the sentences consecutive would avoid what he described as “two-for-one discount”, and the effect of making the sentences consecutive would see the then accused serving a sentence of appropriate duration referable specifically to the offence with which he was dealing; the offence of assisting an offender.

21. It does seem to us that the sentencing judge fell into significant error in that at the time of the sentencing hearing, the respondent was not actually serving a sentence, because the firearms offence sentence had by that point in time been served in full. It seems to follow that the appropriate cause of action, therefore, would have been to impose the sentence that had been identified as appropriate, that being one of six years with 18 months suspended, and then to address the question of the date from which that sentence should run.

22. Counsel on behalf of the respondent today says that the circumstances where regard will be had to the totality principle, a regard which not infrequently would result in a reduction of sentence, will not be confined to cases where the question of consecutiveness is in issue. While that may be so, it is undeniably the situation that here the basis for having regard to totality was based on a significant error. Here, the judge had identified as appropriate a sentence which was stated to have regard to the personal circumstances of the then accused, which of course included: his age at the time of the offence; his age at the time of the sentence hearing; and the fact that he had by that stage spent a significant period indeed in custody.

23. We agree with the Director that the sentence of six years with 18 months suspended would have to be regarded as lenient; indeed had we been sentencing at first instance, we might well have been somewhat less lenient. In our view, the reduction from a sentence of six years with 18 months suspended to one of four years with 18 months suspended was not

justified, and it has resulted in a sentence that fails to reflect the seriousness of this offence committed by this offender. It thus constitutes an error, and one requiring intervention.

Re-sentencing

24. We will impose the sentence of six years with 18 months suspended. The question arises then as to what should be the commencement date thereof. While it might have been that the sentencing Court might have decided, and that it might have been appropriate for, the sentence to have been commenced as of the date of the sentence hearing, we, for our part, intervening at the point in time that we are, have taken the view that we will commence the sentence from the date when the previous sentence expired: 26th December 2021.

25. There is one further matter which merits reference. The provisional sentence provided that there should be a suspended portion of the sentence *simpliciter*; *i.e.* that the provision for suspension would be unqualified. It seems to us that in the circumstances of this case it would be more appropriate that during the suspended portion of the sentence that the respondent should be under the supervision of the Probation Service.

26. In summary then, we will quash the sentence that was imposed in the Central Criminal Court, and we will substitute a sentence of six years imprisonment with 18 months of that sentence suspended, the sentence to commence on the date identified as the expiry of the previous sentence. In relation to the 18-month suspension period, the respondent is to be under the supervision of the Probation Service.