APPROVED JUDGMENT

NO REDACTION NEEDED

THE COURT OF APPEAL

Record No: 170/2021

Neutral Citation: [2025] IECA 18

Edwards J.

McCarthy J.

Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

TREVOR BYRNE

Appellant

JUDGMENT of the Court delivered *(ex tempore)* by Mr. Justice Edwards on the 13th of January, 2025.

Introduction

1. Having been unsuccessful in his appeal against conviction (see judgment bearing neutral citation [2024] IECA 218), Trevor Byrne (i.e., "the appellant") now appeals against the severity of the sentence imposed on him by the Special Criminal Court on the 29th of July 2021.

2. The appellant was found guilty by the Special Criminal Court in respect of five charges namely:

(i) one count (count no. 1) of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001 (i.e., "the Act of 2001");

(ii) one count (count no. 2) of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997 (i.e., "the Act of 1997");

(iii) one count (count no. 3) of threatening to kill contrary to s. 5 of the Act of 1997;

(iv) one count (count no. 4) of carrying a firearm with intent to commit an indictable offence contrary to s. 27B of the Firearms Act 1964 (i.e., "the Act of 1964"), as substituted by s. 60 of the Criminal Justice Act 2006 as amended by s. 39 of the Criminal Justice Act 2007, and;

(v) one count (count no. 5) of unlawful seizure of a vehicle contrary to s. 10 of the Criminal Law (Jurisdiction) Act 1976 (i.e., "the Act of 1976").

3. The Special Criminal Court passed sentence on the 29th of July 2021, on which occasion the appellant was duly sentenced to concurrent terms of imprisonment of varying lengths, but effectively amounting to an aggregate carceral term of 8 and a half years imprisonment, which was to date from the lawful expiration of a sentence the appellant was serving arising out of a separate matter imposed on the 21st of December 2020.

4. In his Notice of Appeal dated the 27th of August 2021, the appellant advanced the following ground in support of his appeal against severity of sentence:

> *"3. The sentence imposed by the learned trial Court was in all the circumstances excessive and severe, and in particular the Court erred in imposing a consecutive sentence on the appellant and further erred failing to have sufficient regard to the totality principle when imposing sentence on the appellant."*

Factual Background

5. This Court in its judgment dismissing the appellant's appeal against his conviction has already provided some detail in respect of the factual background to the matter (see [2024] IECA 218 para. 4 et seq.). As this judgment may be read in conjunction with our earlier judgment it is unnecessary to rehearse ad longum the facts underlying the present appeal as adduced in evidence before the Court below.

6. In summary, on the 19th of March 2010, the appellant and an accomplice were alleged to have committed a robbery at Boyles Sports in the Applewood area of Swords, County Dublin, with additional offences arising out of their escape. This occurred towards the end of the working day. Just prior to the shop closing.

7. Both men were alleged to have gone into the toilets of the bookmakers, whereupon they came out approximately thirty-five minutes later brandishing firearms and demanding the contents of the tills which amounted to €1,490. In the course of the robbery one of the assailants jumped over a counter causing him to drop his mobile phone. The men then attempted to leave through the front of the shop but were unable to do so because the shop had closed. They left through the back of the store and emerged onto a side alley.

8. At this time, a Ms. L was passing in her car and the two men jumped in front of her car brandishing what she thought were firearms. They got into her vehicle and drove off with her in the car. During the course of that journey, at least one of the men threatened that he would kill Ms. L and, having driven for approximately fifteen-minutes, they let her out of the car and drove off. Before doing so they took a document containing her address from the car. They also asked her if she had children. It was made clear to Ms L that if she did not follow to the letter instructions given to her that she should delay raising the alarm following being released, to enable her assailants make their escape, that they knew where she lived and that she, and those belonging to her, would be harmed. The car was later found burnt out.

Victim Impact Statement

9. Two victim impact statements were prepared and handed into the sentencing Court, however, both victims had asked that these statements not be read aloud in Court and only handed in to the Court and received as evidence. The sentencing court duly took them into account.

Personal Circumstances of the Appellant

10. The appellant was 40 years of age at the time of the sentencing hearing. He was reared by his mother and has four siblings, three of whom died in tragic circumstances. His background, according to his counsel, Mr. Fitzgerald, is one which was marked by chaos and tragedy.

11. At the time of sentencing, he had been in a long-term relationship of 22 years with his partner. They have three children together, the youngest of whom was four at the time. Mr. Byrne has worked in construction and as a labourer. In the past he had difficulty with drugs but that is not a feature of his life at present. Mr. Fitzgerald, his counsel, indicated that he does not intend it to be going forward. It was also pointed out that the earliest previous convictions recorded were when Mr. Byrne was a minor.

12. The appellant has 44 previous convictions. Sergeant Murray, who gave evidence on the sentencing hearing, took the sentencing Court through these. As indicated, some of these offences, including firearms offences, date back to when Mr. Byrne was legally a minor. A significant number of these offences relate to road traffic matters. Mr. Byrne's previous convictions for offences, include larceny, burglary, robbery, and offences in connection with the unauthorised taking of a vehicle. More relevant offences relate to crimes which were committed on the 17th of July 2004 which involved the unlawful seizure of vehicles, including an unmarked garda car and a taxi, possession of firearms and robbery, for which he was convicted on the 28th of April 2005 and received a sentence of 8 years imprisonment. He was released from prison in respect of that matter in November 2009, and the offences the

subject matter of the present appeal were committed in March 2010. He further has recorded convictions , having pleaded guilty before the Special Criminal Court, dated the 21st of December 2020, for offences committed on the 15th of November 2019, involving possession of firearms and ammunition in suspicious circumstances, with counts of money laundering and other matters that were taken into consideration, and for which he received an aggregate sentences amounting to 9 years imprisonment to date from the 15th of November 2019.

Sentencing Court's Remarks

13. On the 29th of July 2021, the Special Criminal Court passed sentence on the appellant. The sentencing Court noted the factual background of the case as described in evidence. The personal circumstances of the appellant were then noted, including his 44 previous convictions.

14. The sentencing Court then considered the maximum sentence for each offence and noted that it must consider the headline sentence in respect of each of the offences, given their nature, the culpability of Mr. Byrne and the harm inflicted by the commission of the offences and thereafter take into account any factors which might be said to be either in aggravation or in mitigation of that headline sentence. The sentencing accepted that there was no mandatory consecutive element to its sentencing.

15. When considering the headline sentence for the offences, the sentencing Court stated that it "*must give consideration as to whether it is appropriate in all of the circumstances, given the principles of totality and proportionality, to impose concurrent or consecutive sentences*". The sentencing judge then identified the relevant aggravating factors at play in this case as follows:

> *"In assessing the culpability of Mr Byrne, the Court notes that this was an intentional robbery in the sense that there was nothing reckless or negligent about it. It was premeditated and planned. Mr Byrne was one of two participants, they came armed,*

they brought face coverings. They remained in the betting shop toilets where they climbed into the ceiling crawl space for over half an hour. They chose the late afternoon of the day of the Cheltenham Gold Cup when the bookies would have been particularly busy. It transpired that they robbed €1,470 but the value of the haul was less than they might have been expecting at that time and such a busy day. This was an armed robbery in the presence of staff of the bookies and customers, all of whom were placed at risk and threats were used, which caused significant psychological injury to the manager in particular.

There is also clearly relevant previous convictions from July 2004, which is, in itself, an aggravating factor, as set out in The People v. Casey 2018. As there are a number of aggravating factors present, the Court assesses this offence as lying at the very top of the middle range for these offences and fixes the headline on notional sentence at 10 years. In relation to the false imprisonment and other offences in relation to the passing motorist, the maximum sentence for false imprisonment is also life imprisonment and, again, we will treat it as an effective maximum of 15 years. In respect of the firearms offences, there is a presumptive minimum sentence of five years, as a result of the two previous firearms offences, with a maximum of 14 years. Hijacking of a motor vehicle carries a maximum of 15 years sentence and the threats to kill 10 years.

As these offences are interconnected and to avoid any double punishment in respect of them, the Court intends to take a global view of them. In assessing the gravity of these offences, the Court notes that while the actual passing motorist, the victim, the hijacking may have been unplanned, it seems to the Court that it must have been premeditated that a vehicle would be hijacked for the getaway. While the duration of the imprisonment was relatively short, the use of the firearm in false imprisonment was

clearly an aggravating factor, as was her abandonment in a dark and isolated area, as were the threats to her and she has suffered impact and significant psychological impact and trauma from these offences. And, again, the previous conviction in July 2004 in respect of that robbery is also clearly an aggravating factor to be taken into consideration."

16. The sentencing Court identified the gravity of these offences at the top of the middle range and identified the headline sentence in respect of the false imprisonment to be 10 years, eight and a half years for the firearms offence, nine years for the hijacking and seven and a half years for the threats to kill.

17. In relation to mitigation, the sentencing Court made the following remarks:

"The next stage is for the Court to address whether there are mitigating factors for Mr Byrne personally, which should result in the reduction of the above headline sentences. We have regard to and take into consideration the tragic family circumstances of Mr Byrne, outlined to us by Mr Fitzgerald, and also that he has a young family of his own. We also take into consideration that the trial in this matter has been going on and hanging over him for a considerable period and that he's had the stress of the earlier trials. In the circumstances we will reduce the headline sentence for each offence by six months to reflect those factors."

18. Having regard to the jurisprudence in respect of consecutive and concurrent sentencing and the overall requirement of proportionality, the sentencing Court ordered that all of these sentences run concurrently with each other. The sentencing Court then went on to state that these matters should run consecutively, with the nine-year sentence imposed in December 2020. Considering the principle of totality, the sentencing Court made the following adjustments:

"…we will reduce the sentences for each of these matters by one year, leaving a sentence of eight years and six months on each of the robbery and of false imprisonment, seven years six months for the section 10 unlawful seizure, seven years and six months for the section 27 possession of firearm and six years and six months for the threats to kill, all of which are to run concurrently."

Submissions on Appeal

Appellant's Submissions

19. The appellant does not take issue with the headline sentence nominated in respect of each count referenced at para. 15 above. Nor does the appellant argue that the ultimate sentences imposed after the appropriate deductions were made were excessive or amounted to an error in principle. The sole issues in this appeal are an alleged failure to have sufficient and appropriate regard to the totality principle when making the sentence consecutive to the earlier sentence imposed on the 21st of December 2020, and, to the extent that there was some adjustment purportedly for totality, the ostensible conflation of adjusting for totality with the provision of a level of discount to incentivise rehabilitation..

20. The appellant notes that the sentence imposed on the 21st of December 2020 related to offences committed on the 15th of November 2019, some nine-and-a-half years after the offending the subject matter of this appeal. That sentence was backdated to the 15th of November 2019.

21. The appellant contends that the ultimate deduction of one-year was not specifically referrable to an adherence to the principle of totality but was rather a combination of the totality principle and a desire to incentivise rehabilitation. The appellant submits that the sentencing Court fell into error by combining these factors as opposed to arriving at a proportionate sentence to reflect mitigation and then further adjusting downwards to reflect the totality principle.

22. When considering the principle of totality, the appellant refers the Court to a number of cases such as *R v. Gordan* (1994) 71 A. Crim. R. 459; *DPP v. SC* [2019] IECA 348; *People (DPP) v. Farrell* [2010] IECCA 68; and *People (DPP) v. KC* [2019] IECA 126.

23. When discussing the avoidance of a crushing sentence, the appellant refers the Court to the case of *DPP v. Crowley* [2021] IECA 178 at paras. 62 and 84 respectively.

24. The appellant also placed reliance on the case of *DPP v. MJ* [2022] IESC 50 and *DPP v. Stokes* [2023] IECA 213.

25. It was further submitted that any discounting on account of totality was simply insufficient to render the overall sentence a proportionate one.

26. The appellant further submitted that the failure of the sentencing Court to rationalise the necessity for such a lengthy consecutive sentence and the failure to adequately adjust the sentence downwards to reflect the totality principle, and avoid a crushing sentence, are errors in principle which merit intervention by this Court.

Respondent's Submissions

27. The respondent rejects the appellants contention that the sentencing Court failed to have regard to the principle of totality when imposing sentence and submits that the sentence imposed by the Special Criminal was "*wholly appropriate, just and proportionate in the circumstances*". The respondent maintains that no error in law nor in principle has been established by the appellant herein.

Grounds 1 & 2 – Consecutive Sentences and the Principle of Totality

28. The respondent refers to the cases of *DPP v. S.C.* [2019] IECA 348 and *DPP v. F.E.* [2019] IECA 85 and submits that the sentencing Court properly applied the well-established principles when imposing sentence in this case. It is submitted that the sentencing Court was correct in determining that the sentence for this offence should be made consecutive to the

sentence already being served. The respondent notes that the offences concerned were committed nine years and eight months apart from each other; the locations and the identities of the injured parties were entirely different in both cases; and accordingly, there was no question that the offences were "*separate and unrelated*".

29. In response to the appellant's submission that the deduction of one year was not specifically referrable to the principle of totality but was rather a combination of totality and a purported desire to incentivise rehabilitation, the respondent submits that such a view misunderstands the intention of the sentencing Court. The sentencing Court referred to rehabilitation only as one of the fundamental principles which underpin the entire sentencing process. The sentencing Court stated as follows:

> "…*having regard to the totality principle and the function of sentencing being not only to punish the offender and protect society but also to offer some prospects of rehabilitation, we will reduce the sentences for each of these matters by one year...*".

30. The respondent submits that there is no conflict between the above statement and giving full and specific consideration to the principle of totality. It is stated that it is clear from the sentencing Court's ruling that the reduction of one year was made post mitigation.

Ground 3 – The total sentence imposed by the Court amounts to a "crushing sentence" rather than a proportionate one

31. The respondent rejects this ground of appeal in its entirety and submits that the sentence imposed was one that properly accounted for both the circumstances of the case, including the exceptionally serious nature of the crimes and their effect on the victims, the appellant's personal circumstances and the criminal antecedence of the appellant.

32. The respondent refers the Court to the cases of *People (DPP) v. Casey* [2018] 2 IR 337, *People (DPP) v. Delaney* [2020] IECA 15, and *DPP v. Byrne* [2018] IECA 120.

33. It was submitted that, in the circumstances, the sentencing Court had the discretion to impose consecutive sentences. In recognition of the principle of totality to avoid a 'crushing' sentence the sentencing Court reduced the appellant's sentence by twelve months, and the respondent notes that similar to *Delaney*, this reduction was within the sentencing Court's margin of appreciation.

34. It is further submitted that the sentencing Court was cognisant of the decision of this Court in *Byrne*, as quoted when it deemed the offending in the current case as being "*at the very top of the middle range for these offences*".

Ground 4 – The Court failed to adequately articulate the basis for imposing consecutive sentences

35. The respondent rejects this ground of appeal and submits that such a contention is not a correct interpretation of the sentencing Court's ruling at the sentence hearing.

36. The respondent submits that the sentencing Court provided a clear reason for imposing consecutive sentences, and one which was "*patently obvious*", stating as follows:

> "…*these offences are clearly unrelated to the offences which he was arrested on the 15th of November 2019 and for which he is currently serving a nine-year sentence imposed by this Court last December, the Court considers that the sentences in these matters should run consecutively, with the nine-year sentence imposed in December 2020*".

37. Given the separation of time of 9 years and 8 months between the offences and that they involved entirely different locations and victims, the respondent submits that it was unnecessary for the sentencing Court to articulate any further reasons for imposing a consecutive sentence.

38. Ultimately, it is submitted that the appellant raises no error in law nor principle. The final sentence imposed adequately recognises the principles of proportionality and totality.

39. .

Court's Analysis & Decision

40. This appeal as it ultimately unfolded before us reduces to two net points.

41. The first is whether the sentencing court was in error in making a deduction to reflect a combination of both the totality principle and to allow for the incentivisation of rehabilitation. We are satisfied that there was no conflation of purposes. It is perfectly legitimate to make an adjustment to the ultimate sentence for more than one stated purpose. The important thing is, insofar as totality is concerned, that there has been the necessary standing back and consideration of proportionality. We are completely satisfied that the Special Criminal Court did that in this case. The fact that having done so, and the Court having decided to make a modest adjustment for totality, that adjustment might also serve a secondary purpose, and that this was acknowledged, is of no moment or significance in so far as we are concerned. There was absolutely nothing wrong with making a final adjustment to the proposed sentence for more than one stated purpose. We find no error of principle in how the Special Criminal Court proceeded procedurally in its consideration of totality. We are satisfied that there was a proper consideration of totality.

42. That being so the only remaining question, and it is the second of the two net points to which we alluded, is whether there was a sufficient adjustment for totality.

43. In oral submissions to this court, counsel for the respondent has submitted that the appellant was a career criminal. He had been convicted of a very serious crime in 2004 for which he had already served a lengthy sentence. He committed this crime within four months of being released from that lengthy sentence. For various reasons he was not ultimately convicted of the present matters until May 2021. These included the first trial in the circuit

Court in the course of which there was a disagreement, a second trial before the Circuit Court which collapsed due to an issue with a juror, a third listed trial before the Circuit Court in respect of which the appellant failed to appear leading to the issuance of a bench warrant, and subsequently the transfer of proceedings to the Special Criminal Court before which there was a fourth and final trial be at which he was convicted. The point is made that the matter was contested at all stages. Counsel submitted that the special criminal court would have been well within its rights to have imposed a substantially higher sentence, if it had not been minded to do have recourse to consecutive sentencing. We completely agree. In our view there was a strong case having regard to the history of this matter for consecutive sentencing and we consider that the Special Criminal Court's reasons for structuring its sentence in that way are pellucid, albeit briefly stated. We find no error of principle in the Special Criminal Court's decision to have recourse to consecutive sentencing. We have considered the totality of the overall sentences imposed upon the appellant, after the modest adjustment made by the Special Criminal Court, and we do not regard them as disproportionate. There was no legitimate basis for any greater adjustment in our view. In our assessment the cumulative sentences imposed, and which the appellant is required to serve, are entirely proportionate having regard to the nature of the offending and the overall circumstances of the case.

44. For the avoidance of doubt we expressly reject the suggestion made by counsel for the appellant that the judgement of the Special Criminal Court displays insufficient rigour in its reasoning. We are satisfied that their consideration of what sentences to impose was rigorous and we find no error of principle in their approach.

45. The appeal is dismissed