

UNAPPROVED

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THE COURT OF APPEAL

[101CJA/21]

Neutral Citation No: [2021] IECA 326

**The President
Edwards J.
Donnelly J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

STEPHEN O'CONNOR

RESPONDENT

**JUDGMENT of the Court delivered (electronically) on the 2nd day of December 2021 by
Birmingham P.**

1. On 10th May 2021, the respondent appeared before the Dublin Circuit Criminal Court for sentencing in respect of three counts of possession of a firearm in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964 (as amended). He was sentenced to a term of four years imprisonment, which sentence was suspended in full. The Director has applied, pursuant to s. 2 of the Criminal Justice Act 1993, to this Court seeking a review of the sentence on grounds of undue leniency.

Background Events

2. The background to the case relates to events that occurred on 7th September 2019 at an address in Donaghmede on the north side of Dublin. On that occasion, Gardaí had obtained a search warrant in respect of the dwelling of the respondent. Nothing of significance was found in the course of the search, however the respondent was encountered driving a vehicle close to his home, and at that stage, he was in possession of keys belonging to another vehicle – a van – which was parked at the rear of the respondent’s dwelling. A warrant to search that vehicle was obtained. During the search, Gardaí discovered a sports bag, concealed in a Hoover, which contained two packages wrapped in cling film. Each package contained a semiautomatic pistol, with fifteen live rounds of ammunition.

3. The respondent was arrested and during the course of his detention in Coolock Garda Station, he was interviewed on eight occasions. During the course of the last interview, he referenced mental health difficulties that he had been experiencing. It is fair to say that the respondent’s approach was one of cooperation, and he followed this up by entering an early plea. During the course of the sentence hearing, it was accepted by investigating Gardaí that the respondent had been targeted by criminal elements to become involved, and that he was a vulnerable individual. The Court heard that there was a long history of mental health difficulties, including several suicide attempts: in 2004; in April 2019; and, most recently, in June 2019. The Court heard that apart from the respondent’s own mental health difficulties, which the investigating Garda described as “well documented”, it was also the situation that two of his brothers had died as a result of suicide.

4. In terms of the respondent’s background and personal circumstances, he was 45 years of age and had no previous convictions. The Court heard that he had a good work record, including a lengthy period running his own business which was involved in sanding floors.

5. At the sentence hearing on 26th March 2021, a number of reports were put before the Court, including a report from a consultant psychiatrist and a psychologist, and a probation report.

The Sentence

6. At a relatively early stage of the sentence hearing, the judge indicated that she was not proposing to finalise matters that day, but was going to take the reports and consider them further. In that regard, the judge commented that she found this to be “a difficult case”, involving, on the one hand, very serious offending. As she put it, there were “no two ways about it”; the find of guns with ammunition attached was “as serious as it gets”. The judge added that they were “ready for use and ready for collection” and that “this is what the legislation [the Firearms Act 1964] is about”. On the other hand, the judge noted that this respondent has a “documented serious history of mental illness”. She said that the link between the two is the vulnerability of the individual who was asked to store these items. The sentencing judge was cognisant of all these issues, and explained that she found it difficult to balance those issues and to determine how society was best served in dealing with the matter.

7. The judge then commented that she did not view the exceptional circumstances as extending to a fully suspended sentence. However, she proceeded to say that she was conscious of the fact that the probation report had said that the then accused was doing well, had achieved stability, and that the consultant psychiatrist was impressed with the efforts that had been undertaken. The judge referred to the fact that at that time, when people were remanded in custody, they were put into isolation immediately because of the pandemic, and she felt that this would be a penalty over and above what an ordinary individual without the history of mental illness that the accused had would have to bear. In light of that fact, the

judge was disposed to adjourn the matter to an early date at beginning of the following term for the imposition of sentence.

8. On 10th May 2021, the judge proceeded to sentence the respondent, nominating a headline or pre-mitigation sentence of seven years imprisonment, which she then reduced to four years, and then suspended in full.

The Appeal

9. In seeking to review the sentence on grounds of undue leniency, no issue is taken by the Director with the headline sentence nominated, nor, as we understand it, does the Director dispute the fact that there were significant grounds for mitigation, to the extent of justifying a departure from the mandatory presumptive minimum. However, the Director says that the circumstances were not so wholly exceptional so as to justify a fully suspended sentence.

10. The respondent submits that it is clear from her ruling and from the transcript of the sentence hearing that the sentencing judge had appropriate regard to the gravity of the offence at all stages of the sentencing process, and gave each of the mitigating factors their due consideration in arriving at a fully suspended sentence, which sentence was within the discretion of the judge to impose. The judge decided that this was a truly exceptional case and the respondent says that the judge was entitled to so conclude.

11. The legal principles applicable to reviews of sentence were not in dispute between the parties and those principles have not been the subject of controversy since the first review in the case of *The People (DPP) v. Byrne* [1995] 1 ILRM 279.

12. In the present case, the sentencing judge expressly commented that she found this to be a particularly difficult case and she explained why that was so. It should be noted that this Court has also found this to be a particularly difficult case for the same reasons identified by the sentencing judge, and it is very clear that the sentencing judge gave the case particular

care and attention with the sentence hearing being spread over three sitting days. The offending was, to quote the words of the sentencing judge, “as serious as it gets”. Indeed, it is a case which would attract a very significant headline or pre-mitigation sentence. In that regard, the judge identified a headline or pre-mitigation sentence of seven years, and in the course of this review application, neither side has taken issue with that. Ordinarily, one would expect that when mitigation is applied, it would still result in a substantial and immediate custodial sentence. However, there are, undoubtedly, unusual features to this case.

13. The respondent was cooperative and entered an early plea, which – without diminishing the significance of that – it is not of itself unusual. The tone of the Garda evidence at the sentence hearing was notably sympathetic, referring in the course of his direct evidence to the fact that the then accused had been very cooperative, had remained in contact with the Gardaí, had been accessible at all times, and had struck the investigating Garda as a man who was standing up to face the charge. The Garda also confirmed to prosecution counsel that in terms of his level of involvement, the accused was at the lower end. Counsel asked:

“And I think you'd accept that he's a vulnerable person and other persons would have seen that vulnerability and exploited it to an extent?”

To that, the investigating Garda responded: “I believe it may have been an influence from outside”. When asked by prosecution counsel whether there was anything else he wanted to add in terms of the personal circumstances of the then accused, the Garda said:

“All I can say is during the course of this I have dealt with his family. They're very respectable. He comes from a very respectable home. He has a lot of support. There has been a lot of troubles in his life. And that's all I can say at this time.”

14. The sentencing judge referred to the documented serious history of mental illness and, referencing the prosecution case, to the seriousness of the offending itself. The report of the

consultant psychiatrist put before the Court refers in detail to the respondent's psychiatric history. He was first seen by a psychiatrist as an outpatient at St. Ita's Hospital, Portrane, when he was in his early twenties. The report then makes reference to a number of suicide attempts, the first being in 2004 when the respondent attempted to poison himself with car exhaust *via* a hosepipe. On that occasion, the respondent was discovered and brought to St. Ita's Hospital by Gardaí where he was admitted under the Mental Health Acts. During his admission to St. Ita's, he made a second attempt and sought to hang himself in the ward toilet, but was prevented from doing so by nurses breaking in and cutting him down. The report makes reference to two further attempts involving overdoses of sleeping tablets in the period of 2004 to 2005.

15. The report notes that towards the end of 2018 and the beginning of 2019, the respondent's mood worsened dramatically. It seems that this was linked to issues experienced with his sanding business. He stopped body-building training and going to the gym, which had been an important part of his routine, and by March 2019, his mood was so low that he began entertaining suicidal ideas again. This episode of low mood culminated in him "seriously cutting his wrists" in the back of his van which required 45 sutures. He was then admitted as an inpatient in the psychiatric unit of Beaumont Hospital in Dublin. The respondent spent approximately a month in hospital, at which point his medication was changed. However, two further suicide attempts were made; one in June 2019, when he attempted to hang himself in a garage, and a second attempt in Malahide when he tried to hang himself with a rope that he had placed around a high branch of a tree. He suspended himself and lost consciousness, before being noticed by a passer-by who called the emergency services.

16. Dr. John Kelly, the consultant forensic psychiatrist and author of the report, referred to the fact that the appellant has a long-standing diagnosis of recurrent depressive disorder. A

combination of severe depressive symptoms and anxiety features have often led the appellant to engage in dangerous suicidal attempts, some of which, the doctor noted, nearly proved successful. The report notes that the respondent was likely to be “biologically predisposed to depression” in light of his family history, including the death of his two brothers, aged 30 and 31 years, from suicide. In addition to the severe mental illnesses to which he had made reference, Dr. Kelly is also of the view that the appellant would satisfy the international criteria for diagnosis of an adult personality disorder. Dr. Kelly refers to the fact that on 18th September 2019, some eleven days after his arrest for this offence, there was a further attempt by the appellant to self-harm by cutting his wrists, but notes that soon after this last act, his mood improved significantly. Dr. Kelly accepts, and this was also the view of the appellant himself, that the change in mood was due to changes to his antidepressant medication, which had been put in place several months earlier, “kicking in”. Since then, the respondent’s mood has remained stable and the psychiatrist expresses the view that he has, in effect, been in remission from his underlying depressive disorder, albeit still at risk of a recurrence.

Discussion and Decision

17. We have previously made reference to the fact that during the course of the sentence hearing of 26th March 2021, while referring to the difficulties posed by the case, the sentencing judge indicated that, at that stage, she did not view the exceptional circumstances as extending to a fully-suspended sentence.

18. It is this Court’s view that it would not have been at all surprising if the judge had felt it necessary to impose an actual custodial sentence, though perhaps with part of the sentence suspended. Had she chosen that course, it is unlikely that there could have been any successful appeal against severity of sentence. Indeed, this was undoubtedly a case where the

imposition of an actual custodial sentence would not have been inappropriate. However, the question for determination by this Court is whether the sentencing court fell into error in concluding that there were exceptional circumstances justifying a fully suspended sentence. This Court can well see how the judge might have taken the view that while there were significant factors present by way of mitigation, they were not so wholly exceptional as to permit an entirely suspended sentence in respect of offending of such seriousness. Other judges, faced with the same facts, might likewise have found it necessary to impose a custodial sentence.

19. The Court of Appeal has frequently made the point that something in the nature of an error in principle must be identified before it will intervene. It is not sufficient to justify an intervention that individual members of the Court, or the Court collectively, if called on to sentence, might or would have adopted a different approach.

20. In this case, the decision of the sentencing judge to suspend the sentence in its entirety was an unusual and exceptional one, and it is clear that it was not a decision that the judge took lightly. It seems to this Court that the facts of the case were so wholly exceptional that the approach decided upon by the sentencing judge was one that was available to her. It seems to us that the evidence before the Court as to the extent of the mental health difficulties, in particular, the documented very serious attempts to commit suicide, against a background of two suicides in the family on the part of brothers of the respondent, certainly puts this case into a very exceptional category. We believe that the evidence in that regard was so significant that we cannot say that the judge fell into error in concluding that the case was so wholly exceptional as to permit a fully suspended sentence.

21. In the circumstances, we are not disposed to accede to the Director's application to review the sentence on grounds of undue leniency.