



**THE COURT OF APPEAL**

**Record Number 10/2020**

**APPROVED**

**Edwards J.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**DARREN COSS**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 8<sup>th</sup> day of June 2020 by Ms. Justice Kennedy**

1. This is an appeal against sentence. The appellant was convicted of a count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997, a count of threatening to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act 1997 and a count of production of an article capable of inflicting serious injury contrary to s.11 of the Firearms and Offence Weapons Act 1990. The appellant received a total sentence of four years and six months' imprisonment with the final six months suspended on terms.

**Background**

2. On the 11<sup>th</sup> August 2017 the injured party, Mr. Byrne had parked his lorry outside his house. He observed the appellant from his window interfering with the lorry, went out to challenge him and when he did so, the appellant became very aggressive with him and produced a flick knife, according to Mr. Byrne, a screwdriver according to the Probation

Report, but nonetheless it was an implement that he produced and as a consequence of its production, caused injury to the hand of Mr. Byrne. The appellant also made very serious threats to Mr. Byrne to burn his house and burn his truck telling him “you are dead; you’re dead”. The appellant then fled the area and the Gardaí were contacted. There was also CCTV footage of the incident. On the 7<sup>th</sup> September 2017, the appellant was arrested and taken to Portlaoise Garda Station where he was detained and questioned. He made no admission during this time.

### **Personal circumstances of the appellant**

3. The Court heard that the appellant has a date of birth of 3<sup>rd</sup> September 1993. It was established that the appellant went into care early in life and he has been in trouble with the Gardaí from a young age. The appellant suffers from a chronic heroin addiction and at the time of sentencing he had amassed 75 previous convictions, all of which were District Court summary convictions. The appellant has a number of children with his partner. One of his children had leukaemia and died during the year while the appellant was out on bail for the present offences.

### **The sentence**

4. In determining the sentence, the sentencing judge identified the following as aggravating factors: the use of a knife or screwdriver, the aggressive and violent manner of the appellant, the use of serious and frightening threats which had a negative impact on the victim, the high risk of reoffending identified by the probation report which is influenced by his addiction issues, his numerous previous convictions, his propensity to criminality, his association with negative peers and a lack of motivation to reform. The sentencing judge also noted that the appellant did not engage with the Merchant Quays project and was not drug-free. A further aggravating factor identified was that while on bail for the offences in

question the appellant committed further offences which were dealt with in the District Court.

5. In terms of mitigating factors, the sentencing judge identified the following: the early plea of guilty, the expression of remorse and apology offered by the appellant, albeit somewhat late in the day and the difficult upbringing of the appellant which resulted in him and his siblings engaging in a cycle of criminality. The sentencing judge noted that the appellant had suffered the loss of one of his children during the year which was a huge upset for the appellant and his partner and the sentencing judge did recognise that a custodial sentence would result in the appellant being separated from his partner and children.

6. The sentencing judge nominated a headline sentence of six years in respect of the threat to kill, a headline sentence of three years and six months in respect of the assault causing harm and a headline sentence of four years in respect of the production of a weapon. Taking into account the mitigating factors he reduced the sentences by eighteen months and ordered them to run concurrently, ultimately he imposed a sentence of four years and six months on the offence of making a threat to kill, the final six months of the sentence suspended, two years in respect of the assault charge and two and a half years concerning the production of weapon.

7. The sentencing judge was also to deal with the issue of two District Court sentence appeals in respect of offences committed while the appellant was out on bail. The sentencing judge noted that these sentences would run consecutive to the four-and-a-half-year sentence and taking into account the totality principle he suspended the sentences in the District Court matters.

#### **Submissions of the appellant**

8. The appellant submits that the sentencing judge erred in identifying a headline sentence of six years in respect of the threat to kill. It is submitted that the acts described on

the threats to kill or cause serious harm charge do not properly fall to be considered in the upper range or the upper mid-range and the main thrust of the appellant's offending behavior was captured by the counts indicting assault causing harm and possession of a knife.

**Submissions of the respondent**

9. The respondent submits that the headline sentence was not inappropriate. The circumstances of the threat to kill are that it was issued in circumstances of aggression, violence and menace on the part of the appellant who was armed with a knife when making it and consequently could not be deemed to be in any way casual or 'throw-away' in character.

10. Furthermore, it is submitted that were this appeal allowed in the terms presented and the District Court appeals left with their sentences suspended fully, the overall effect would be undue leniency in respect of a number of offences, all of which had been determined to merit custodial sentences and some of which were required by law to be consecutive to the sentences under appeal.

**Discussion**

11. There is no issue taken by the appellant with the sentences imposed on the assault or production of a weapon offences. The appellant contends that the headline sentence nominated for the offence of making a threat to kill is excessive at six years. It is said that the aggravating factors which may be present for such an offence were absent in this case.

12. For the Director of Public Prosecutions, Mr. Fennelly BL says that the headline sentence for this offence was high but that it is not such so as to constitute an error of principle. He says that the offences cannot be considered in isolation and must be considered in light of the District Court appeals which were also before the Court.

13. The sentences imposed by the District Court were suspended in their entirety by the sentencing judge. Mr. Fennelly argues that it is now artificial to attack the severity of the sentence imposed for the offence of making a threat to kill.

14. This Court's hands are tied insofar as the District Court appeals are concerned. The judge suspended the entirety of those sentences, which sentences ought to have been imposed on a consecutive basis. However, while the judge undoubtedly sought to consider the totality principle in suspending the sentences imposed in the District Court, we do not believe that he ought to have done so, but perhaps of greater concern is the fact that the offences before the Circuit Court were committed first in time and therefore s.11 of the Criminal Justice Act 1984 mandated that the sentences in respect of the District Court matters should have been consecutive to the sentences imposed in respect of the Circuit Court matters. By not doing so the judge did not give effect to s.11 of the Criminal Justice Act 1984. While we cannot interfere with the sentences imposed on the District Court matters, this is a circumstance relevant to our consideration of the severity of the sentence imposed.

15. We look to the nature and the circumstances of the incident on the date in question. It is our view that this was a serious incident involving as it did an assault, the production of a weapon and a threat to kill. We do not see any error in the pre-mitigation sentence identified by the judge regarding the offences of assault and the production of a weapon, nor do we see an error in the sentence ultimately imposed for those offences and indeed no such errors advanced by the appellant. However, we have concerns regarding the headline sentence nominated for the offence of making a threat to kill.

16. The assessment of gravity incorporates a consideration of the culpability of an offender which includes both aggravating and extenuating factors. In this case there were many aggravating factors present including the impact on the victim, and the fact that the appellant

has relevant previous convictions for assault contrary to s.2 of the Non-Fatal Offences Against the Person Act 1997. The incident took place in circumstances which involved the interference with the injured party's truck. However, while the threats made by the appellant were serious, such threats as made, and, more significantly, the *manner* in which they were made, were not in our view of the most egregious kind.

17. We have considered the particular circumstance that the appellant was on bail when he committed the District Court offences in our overall consideration.

18. In the circumstances, we are of the view that the headline nominated was excessive and as such amounts to an error in principle. We will therefore quash the sentence and proceed to resentence the appellant.

19. Having considered all matters, we are of the opinion that the appropriate headline sentence is that of five years' imprisonment. We are cognisant that the appellant was on bail when he committed the District Court offences and thus the sentences on those offences ought to have been consecutive to this sentence. We would have been minded to reduce the sentence to an actual sentence of three years if that had not been the case.

20. Taking into consideration the mitigating factors including an additional document submitted on behalf of the appellant to this Court to the effect that he has been engaging with the Merchants Quay project, we will reduce the sentence to one of four years' imprisonment and suspend the final six months of that sentence on the appellant entering into a bond before the Governor of the Prison in the sum of €500 for a period of two years on the usual conditions and on the condition that he remain under probation supervision for that period and comply with all directions from that service. We give liberty to apply if any difficulty should arise regarding the bond.

Isabel Kennedy  
26<sup>th</sup> June 2020