THE COURT OF APPEAL

Record No's: 252 & 253 CJA /18

Birmingham P.
Edwards J.
McCarthy J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

DAVID NOONEY AND EDWARD O'BRIEN

RESPONDENTS

-AND-

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

ALSO/

Record No's: 240, 251 & 254/18

Birmingham P.
Edwards J.
McCarthy J.

BETWEEN/

KEVIN HANNAWAY, EVA SHANNON, SEAN HANNAWAY,

APPELLANTS

-AND-

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT (ex tempore) of the Court delivered on 14th of February 2020 by Mr Justice Edwards.

Introduction

1. For the avoidance of confusion, this judgment will refer individually by name to Kevin Hannaway, Eva Shannon, Sean Hannaway, David Nooney and Edward O'Brien, respectively, alternatively refer to them collectively as "the accused"; and will refer to the Director of Public Prosecutions simply as "the DPP"; rather than using designations such as applicant, appellant and respondent.

2. On 29th June 2018, following a fifty-day trial, Kevin Hannaway and Eva Shannon, were convicted of the offence of providing assistance to an unlawful organisation contrary to s. 21A of the Offences Against the State Act 1939, as inserted. On the same date and in the same trial Sean Hannaway, David Nooney and Edward O'Brien, were convicted of the offence of membership of an unlawful organisation, contrary to section 21 of the Offences Against the State Act 1939.

3. On 31st July 2018, following a sentencing hearing which took place on 24th July 2018, the Special Criminal Court, sentenced Kevin Hannaway to a term of three years and nine months imprisonment, Eva Shannon to a term of four years imprisonment, Sean Hannaway to a term of five years and six months imprisonment, David Nooney to a term of three years and nine months imprisonment, and Edward O'Brien to a term of sixteen months imprisonment.

4. The accused have each appealed unsuccessfully against their respective convictions, and this Court has already given judgment on the 6th of February 2020 dismissing those appeals. Kevin Hannaway, Eva Shannon and Sean Hannaway have also appealed against the severity of their respective sentences. In the cases of David Nooney and Edward O'Brien, the Director of Public Prosecutions has sought to review the sentences imposed on them on grounds of undue leniency.

Background to the matter

5. The background to this matter is fully set out in the reserved judgment of this court delivered on the 6th of February 2020 in respect of the conviction appeals by the accused, and it is not proposed to repeat it. Accordingly, these remarks should be considered, and any record of this *ex-tempore* judgment should be read, in conjunction with the said reserved judgment.

Submissions

6. The Court has received detailed written submissions on behalf of all of the accused, and on behalf of the DPP. These have amplified in oral submissions made to us today, and we wish to express our appreciation to counsel on all sides for their assistance.

The Undue Leniency Reviews

7. It is convenient to deal in the first instance with the undue leniency reviews. Both David Nooney and Edward O'Brien were convicted of the offence of membership of an unlawful organisation, contrary to s. 21 of the Offences Against the State Act 1939. The legislation sets the maximum penalty for that offence at eight years imprisonment. Accordingly, the spectrum of penalties available to a sentencing court ranges from non-custodial options up to imprisonment for a maximum of eight years. In truth, given the intrinsic gravity of the offence, it will only be in rare cases that a sentencing court would not determine upon a custodial sentence as representing the starting point or headline sentence.

8. In the present case the headline sentences set in respect of David Nooney and Edward O'Brien were five years imprisonment and three years imprisonment respectively. Counsel for the DPP indicated that her client was raising no issue with respect to these headline sentences. However, the DPP was contending that the sentences ultimately imposed were

in each case unduly lenient. It follows therefore that her quarrel was with the extent or degree of discounting from the headline sentence to reflect mitigation and to incentivise rehabilitation.

9. The law with respect to the conduct of undue leniency appeals is well-settled at this stage. The jurisdiction to review a sentence on the grounds that it was unduly lenient derives from s. 2 of the Criminal Justice Act of 1993, as amended, which (to the extent relevant) provides:

> 2.—(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Appeal to review the sentence.
>
> (2) An application under this section shall be made, on notice given to the convicted person, within 28 days, or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine, from the day on which the sentence was imposed.
>
> (3) On such an application, the Court may either—
>
> (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or
> (b) refuse the application.

10. In terms of the general principles governing such reviews, the leading authority is *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2 of the Act of 1993, and in it, O'Flaherty J giving judgment for the court, sets out a number of principles and considerations relevant to the conduct of such reviews. He said:

> "In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.
>
> Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J has termed the 'constitutional principle of proportionality'

(see *People (DPP) v. W.C.* [1994] 1 ILRM 321), his decision should not be disturbed.

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle. And that is because, as submitted by Mr Grogan SC, the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

11. Since then, the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R.356. In that case Barron J. stated:

> "In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error of principle.
>
> Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of potential penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

12. More recently in *The People (Director of Public Prosecutions) v Stronge*, [2011] IECCA 79, McKechnie J. distilled the case law on s. 2 applications into the following propositions:

> "(i) the onus of proving undue leniency is on the D.P.P.;
>
> (ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;
>
> (iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

13. It is appropriate to consider the discounts afforded in cases of David Nooney and Edward O'Brien separately.

David Nooney

14. The ultimate sentence imposed in David Nooney's case was one of three years and nine months imprisonment. In circumstances where the court had set a headline sentence of five years or 60 months, this indicates that the discount for mitigation was of the order of 15 months or 25%. The mitigating circumstances in David Nooney's case were principally the fact that he had no relevant previous convictions, and some medical difficulties in the nature of a chronic back condition. He was born in 1963. The court below had heard that he had until recently been caring for his late mother.

15. On the issue of previous convictions David Nooney did have some non-relevant previous convictions that were recorded in the District Court in the 1980s. While in theory these could engage the principle of progressive loss of mitigation we consider that they were so old that the court below was right to disregard them and no complaint has been made about that.

16. We have given careful consideration to the issue as to whether a 25% discount was excessive in Mr. Nooney's case. For the DPP to succeed in demonstrating that Mr. Nooney's ultimate sentence was unduly lenient she would have to persuade us that affording a discount of 25% for the mitigating circumstances in Mr. Nooney's case was "outside the norm". We are not persuaded that it was. Some might possibly characterize it as a generous level of discount in the circumstances of the case (although we are not to be taken as necessarily agreeing with that) but even if that were so we are in no doubt that it was a discount within the sentencing court's reasonable margin of appreciation. We find no error of principle and do not consider that the discount afforded resulted in a sentence that was outside of the norm.

17. We therefore dismiss the application in Mr. Nooney's case.

Mr Edward O'Brien.

18. In Edward O'Brien's case the court below determined on a headline sentence of three years or 36 months imprisonment. It is then discounted from that by 20 months or 56% to take account of mitigating circumstances and to incentivise rehabilitation. Once again, the DPP contends that the sentence ultimately imposed which was one of 16 months imprisonment was unduly lenient. As in the case of Mr. Nooney it follows that the DPP's contention is that a discount of 56% from the headline sentence was excessive in Mr. O'Brien's case and outside of the norm, resulting in an ultimate sentence which was also outside the norm and unduly lenient on that account.

19. The discount of 56% was afforded in circumstances where Mr. O'Brien also had no relevant previous convictions. Moreover, he had a series of medical problems which were supported by a medical report from a Doctor Desmond Kennedy. These included chronic obstructive pulmonary disease, irritable bowel syndrome, asthma, hyperlipidemia, hypertension and left ventricular hypertrophy. The report indicated that Mr. O'Brien was on 10 different prescribed medications. The court below heard that Mr. O'Brien is a married man with two teenage children. He was born on 23 October 1973 and by trade was a self-employed kitchen fitter. A number of positive testimonials were supplied to the court below which it also took into account. Once again it was the case that Mr. O'Brien had some non relevant convictions dating from the 1980s and again we consider that the court below was justified in the circumstances of the case in disregarding these and in effect treating Mr. O'Brien as a person with no previous convictions.

20. While it is undoubtedly true that a discount of 56% was generous, indeed very generous, in Mr. O'Brien's case we have not been persuaded that the sentencing court exceeded its margin of appreciation and that it was outside of the norm. Moreover, we would observe that while it might perhaps have been better if some of the discount afforded to Mr O'Brien had been effected by means of a part suspension of the sentence, the fact that his sentence was structured in the manner in which it was structured is not something that would per se justify us in intervening in the context of a s.2 undue leniency review. Accordingly, we are not disposed to uphold the claim of undue leniency in Mr. O'Brien's case either.

The Severity Appeals

21. Sean Hannaway, Eva Shannon and Kevin Hannaway have each appealed against the severity of their respective sentences and it is appropriate to consider their situations both collectively and individually. These cases may be considered collectively to the extent that they each complain that the sentencing court over assessed the gravity of their respective cases and, in particular, treated as aggravating certain circumstances which they say ought not properly to have been treated as aggravating.

22. The first thing to be said is that this court recognizes that Sean Hannaway was convicted and faced sentencing for the offence of membership of an unlawful organization, whereas Eva Shannon and Kevin Hannaway were each convicted of the different offence of providing assistance to an unlawful organization. Nevertheless, the legislature in enacting s.21 and s.21A of the Offences Against State Act 1939 chose to afford those two separate

offenses an equal ranking in terms of their cardinal seriousness. Both were afforded a potential maximum penalty of imprisonment for up to eight years. As is usual, no specific guidance was provided by the legislature in respect of how offenders were to be sentenced for such offences. The ordinal ranking of the severity of individual cases was left to the courts.

23. In the case of Sean Hannaway the court below fixed a headline sentence of seven years. In the case of Eva Shannon it fixed a headline sentence of 5 ½ years in circumstances where it considered that her culpability was slightly lower than that of Sean Hannaway and Kevin Hannaway on the evidence. Finally, in the case of Kevin Hannaway it fixed a headline sentence of six years.

24. The differentiation between each accused was in part explained, and is in part to be inferred, from the judgment of the court below, and it was quite nuanced. The court looked at the activity that was underway in which all three had participated, albeit at slightly differing levels of culpability. They were satisfied that this was the conduct of an IRA inquiry requiring the attendance of persons for the purpose of interrogation and the conduct of inquiries of the sort revealed on the audio recordings. As counsel for the DPP pointed out to us in the course of her oral submissions it was clear that there was a high level of planning and prior organization and that all of those involved were acting in concert. The court was entitled to regard this as criminal conduct that justified placing the offenses in the high range. This was not just passive assistance or support for an illegal organization, or passive membership of such an organization. All of the participants were actively engaged in the furtherance of the activities of an illegal organization, either as a member (in one instance) or persons providing assistance/support. Each of the accused has complained that the court below effectively "tarred them all with the same brush" (this court's characterization) in that it attributed activities identified as having been performed by specific individuals to all of the accused. An example in that regard is that the renting of the property, which was clearly identified as having been the work of David Nooney. Despite this the fact that a property had been rented for the purpose of conducting an IRA inquiry was treated as an aggravating factor in all cases.

25. We do not consider that this criticism stands up to critical analysis. The court below was perfectly entitled to take an overview of the nature of the illegal activity that was being conducted. It did not treat all accused in the same way, either with respect to the assessment of gravity or with respect to discounting for mitigation.

26. Sticking for a moment with the assessment of gravity, the court was perfectly entitled to treat Sean Hannaway and Kevin Hannaway as having been the most culpable. However, in circumstances where Sean Hannaway was not merely a participant in conducting the inquiry, but was so engaged in his capacity as a member of the unlawful organization for whom the inquiry was being conducted, the court was justified in fixing a marginally higher headline sentence in his case than in Kevin Hannaway's case. There was also a possible basis for differentiating somewhat between the culpability of Sean Hannaway and Kevin Hannaway on the one hand, and that of Eva Hannaway on the other hand. This was

acknowledged and reflected in the judgment of the sentencing court, in as much as the headline sentence in Eva Hannaway's case was set at six months lower than Kevin Hannaway's in circumstances where the court below, which had heard evidence in the case over 50 days, considered that that differentiation was justified on the evidence. The court below was best placed to make that assessment and we are not disposed to interfere with it.

27. Accordingly, we are not disposed to uphold the complaints of Sean Hannaway, Eva Shannon and Kevin Hannaway, respectively, in so far as they relate to the assessment of the gravity of their offending conduct.

28. At this point is appropriate to consider their further complaints in respect of alleged insufficient discounting for mitigation. Regarding this facet of the case the circumstances of each accused need to be considered separately.

Sean Hannaway

29. In Sean Hannaway's case there was a discounting from seven years (or 84 months) to five years and six months (or 66 months), representing a discount of 18 months or in percentage terms 21%. In his case the mitigating circumstances were the absence of previous convictions, a good work history and his family circumstances. While the discount was modest we consider that it was within the range of the sentencing court's margin of appreciation. Even if this court would itself have been prepared to grant a somewhat greater discount if it had been sentencing at first instance, that is irrelevant. What is relevant is whether the level of discount afforded was adequate having regard to the evidence. We are satisfied that it was and find no error of principle. Accordingly, we dismiss Mr Sean Hannaway's appeal against the severity of his sentence.

Eva Shannon

30. In Eva Shannon's case there was a discounting from a headline sentence of 5 ½ years (or 66 months) imprisonment to an ultimate sentence of four years (or 48 months) imprisonment. This represented a discount of 27% in circumstances where she also had no previous convictions and it had been represented to the court that she would most likely be required to serve her sentence in Limerick prison and that it would be difficult for her family to visit her there. (As we noted during the hearing, Eva Shannon was in fact transferred to the Dòchas Center in Dublin within a short time of being committed. That, however, has no bearing on the issue before us today) We consider that the discount afforded to her was well within the Special Criminal Court's margin of appreciation and that there was no error of principle. In the circumstances we also dismiss Ms Eva Shannon's appeal against the severity of her sentence.

Kevin Hannaway

31. The situation of Kevin Hannaway is the most complex. He received a very substantial discount, of the order of 37.5%. This was in circumstances where he had no relevant previous convictions, was 70 years of age, and had an unfortunate history of having been subjected to torture in Northern Ireland at the hands of the security services there many years ago. This has left him with post-traumatic stress disorder, and the court has the

benefit of a very detailed medical report from Professor Harry Kennedy in relation to that. It is appropriate to quote briefly from the Opinion section of that report:

> *"9. Mr. Hannaway is now 70 years old. I understand that he has suffered two cardiac events and one transient ischemic attack (minor stroke with left-sided hemiparesis).*
>
> *9.1 Mr. Hannaway has marginal impairments of memory, likely related to cardiovascular disease and his minor stroke.*
>
> *9.2 Mr. Hannaway describes episodes of anxiety attacks related to his posttraumatic stress disorder which are accompanied by symptoms strongly suggestive of angina pectoris. These are currently being triggered by aspects of his current imprisonment. For example he is confined in a wing where there is a constant undercurrent of the noises of a prison institution and in particular the white noise of an air conditioning system. These are triggering intrusive memories, nightmares and emotions associated with his arrest and interrogation in 1971.*
>
> *10. The coinciding of triggered anxiety attacks due to PTSD and angina pectoris triggered by the anxiety attacks of PTSD is in my opinion particularly life-threatening and requires urgent investigation. I have written today to the General Practitioner at Portlaoise Prison.*
>
> *11. I would respectfully recommend to the Court that Mr. Hannaway is not fit for imprisonment in the conditions of E wing at Portlaoise Prison."*

32. While counsel for Kevin Hannaway accepts that his client received a significant discount he contends that Mr. Hannaway's circumstances are so unusual and exceptional that the sentencing court would have been justified in imposing a wholly suspended sentence on Mr. Hannaway, or at least in affording him an even greater discount for mitigation that he was in fact afforded. We do not consider that there was any error of principle. The issues arising from Mr. Hannaway's PTSD were matters for the prison service in so far as they related to his management and care while in prison. It was for the Prison Service to manage and implement any sentence lawfully imposed on him. There was no evidence put before the court below that the prison services would not be able to accommodate Mr. Hannaway's situation. The proper concern of the court below was to sentence him appropriately, i.e., impose a sentence on him that was proportionate both to the gravity of his offending conduct and to his personal circumstances. Mr Hannaway was certainly entitled to some extra discount on the basis that prison would be harder for him to bear in the light of his particular physical ailments and his psychological/psychiatric difficulties. In that regard, however, he received a significant amount of additional discount, compared to his co-accused. We consider that neither a wholly suspended sentence, nor a greater level of discount than he was in fact afforded, would have been warranted in the circumstances of his case. The sentence imposed was in our judgment appropriate both to the gravity of the offence and the circumstances of Mr. Hannaway. We must therefore dismiss his appeal also.