THE COURT OF APPEAL

Record No. 2020 / 79
Neutral Citation Number: [2021] IECA 157

The President
Woulfe J.
McCarthy J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

PAUL CROSBY

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Woulfe on the 26th day of May 2021

1. This is an appeal against the severity of the sentence imposed on the appellant, who pleaded guilty on the 22nd April, 2020 to an offence of arson, contrary to section 2(1) of the Criminal Damage Act, 1991. He was also charged with possession of stolen property, contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The appellant was

sentenced on the same date as his arraignment at Dundalk Circuit Criminal Court during the Covid 19 lockdown, and he received a sentence of 5 years' imprisonment with 6 months suspended in respect of the arson count with the other count of possession of stolen property taken into consideration.

Background

2. It may be useful to outline a chronology of the events that led to the sentence. The incident in question involved events which occurred at a car park of an industrial estate on the Ballymakenny Road in Drogheda on the 10th May, 2019. Gardaí were engaged in a surveillance operation in the Drogheda area and observed three individuals arriving at the car park around 1.40 pm in a white BMW. Already parked at the location was a Volkswagen Polo (VW Polo) motor vehicle which had been stolen in Dublin and fitted with false registration plates. The later damaging of this VW Polo by fire was the subject matter of the arson count.

3. On arrival at the VW Polo attempts were made by the three individuals to start the vehicle, by way of pushing and attempting to jumpstart the vehicle. Upon getting the vehicle running the BMW and the VW Polo left the industrial estate and turned in the direction out of the town. The two cars drove in convoy to private farmland nearby and the VW Polo was driven through one field and into a second field away from the public road and left there. The BMW was then driven to a nearby Maxol filling station where some accelerant was purchased by one of the three individuals, and it then returned to the area where the VW Polo had been parked.

4. At this point one individual (not the appellant) was observed to leave the BMW, and go into the field with the bottle of liquid to the VW Polo and shortly return to the BMW which drove off away from the scene. The three occupants, including the appellant, were shortly

thereafter stopped by members of An Garda Síochána on the road. The appellant was seated in the front passenger seat of the BMW.

5. The BMW when stopped by the Gardaí was a couple of miles away from the field where the VW Polo had been parked. Smoke could be seen rising from this field and it became apparent that the vehicle had been set alight using the accelerant that had been purchased at the Maxol filling station. The VW Polo was a complete write-off afterwards.

6. The VW Polo was valued at €10,000 and the owner reported the car stolen when he awoke at approximately 4 am on the 14th April, 2019 to see his car being driven out of his driveway. The theft of the car appears to have been dealt with separately by the Courts at an earlier trial.

Remarks of the Sentencing Judge

7. The sentencing judge considered the nature of the offence and the aggravating factors. The circumstances in relation to setting a car alight in the middle of farmland allowed her to infer that the burning of this car away from public eyes was for suspicious purposes, and for nothing else. In those circumstances she found the whole expedition on the 10th May, 2019, quite sinister in its overall effect but also, clearly, one which involved an element of planning. The common design incorporated an extensive element of planning in relation to moving the car from a car park where it had been left and then bringing it to the field.

8. In terms of further aggravating factors, the sentencing judge noted that the appellant had a number of previous convictions which were relevant involving criminal damage and road traffic matters. She noted also that he was unable to offer any compensation. She took the view that the appropriate headline sentence, bearing in mind the aggravating factors, would be one of seven years.

9. As regards mitigating factors, the sentencing judge noted in particular the early plea of guilty. The appellant was not the driver of the BMW, nor was he the individual who

purchased the accelerant and set the VW Polo on fire. It was to his credit that he was the first of the three individuals to plead guilty. He was not obstructive with the Gardaí in terms of his dealings with them from the time he was arrested. The sentencing judge noted that the appellant had apologised to the injured party, and she accepted that the apology was both sincere and genuine.

10. The sentencing judge also noted the appellant's own personal circumstances and his age. He was now 24 years of age. He had a cocaine addiction. Part of his growing up was that he was absent a father figure, and that led him down the road in relation to his own drug addiction and criminality. He had had some type of labouring work history in the past, and he had received some certificates.

11. The sentencing judge felt that she had to structure the sentence in a particular manner, so as to have regard for the need to address the appellant's rehabilitation in respect of his drug addiction. In relation to sentencing someone for an arson offence, which is a very grave offence, she had to incorporate the principles of deterrence, both general and specific. Taking all of that on board and to encourage the appellant's rehabilitation, she imposed the sentence in respect of the arson count of five years' imprisonment, with the final six months suspended on terms that he keep the peace and be of good behaviour and remain under probation supervision for a period of six months following his release. The Court took into consideration the other count on the indictment.

Submissions of the Parties

12. Eight grounds of appeal were set out in the appellant's written submissions in respect of severity of sentence. These were ultimately consolidated, so to speak, during the oral submissions into two grounds, namely, that the sentencing judge erred in determining that a headline sentence of seven years was appropriate, and erred in not affording the appellant sufficient credit for the guilty plea.

13. As regards the headline sentence, the appellant submitted that the sentencing judge placed this arson offence too high on the scale of such offending at seven years. Reliance was placed on the *ex tempore* judgment of this Court in *DPP v. Rae* (Court of Appeal 2018/190) as a relevant comparator. In that case the sentence under appeal was one of five years' imprisonment, with the final year of that sentence suspended, that was imposed in respect of an offence of criminal damage/arson on the 14th June, 2018, in the Dublin Circuit Criminal Court. The appellant had appeared for sentence on three counts, a count of criminal damage to the wall and sitting room window of a dwelling, a count of criminal damage to a motor vehicle, and a count of endangerment. The Circuit Court was invited by counsel for the prosecution to deal with the matter on the basis of imposing sentence in respect of one count, count no. 1 of criminal damage, and to take the other two into consideration. The facts were that the accused had gone to the family home of the injured party, and had set fire to the family car with a plastic petrol bottle. There was damage caused to the front of the dwelling, and it seemed that smoke had spread to the front of the house. The Court of Appeal felt that CCTV footage taken from a nearby house showed that this was in essence a petrol bombing.

14. The sentencing judge's approach to sentencing in *Rae* was to identify a headline sentence of seven years, then having regard to mitigating factors, including the plea, to reduce that to five years and then to go on to suspend the final year of that sentence. The Court of Appeal was not persuaded that the sentence imposed involved an error in principle and not persuaded that it fell outside the permissible range.

15. Counsel for the appellant submitted that the facts of the *Rae* case were more serious than the present case. In this case the appellant was not the driver of the BMW, nor the person who doused the other car, although she accepted that it was clearly a joint enterprise. While with any arson offence the danger created by fire is of obvious concern, there was not same element of imminent danger to the public where the car was burned out in a field without

dwelling houses in the vicinity, and this spoke to where on the scale of offending one should place this offence.

16. As regards the guilty plea, counsel for the appellant highlighted that this was a very early plea during the Covid-19 pandemic on the 22nd April, 2020, and that the appellant was the only one of the individuals involved who had pleaded guilty at that point. She submitted that the sentencing judge had not afforded the appellant sufficient credit for the guilty plea, and on the contrary had diluted the credit attaching to same by assessing that he was effectively "caught red-handed".

17. In his replying submissions, counsel for the respondent submitted that several aggravating factors clearly weighed in the sentencing Court's mind, including the detailed planning that went into what could fairly be viewed as a sinister operation, the loss amounting to €10,000 occasioned by the offending, and the number of previous convictions including a number of convictions of relevance. Taking all of these factors into account, it was respectfully submitted that the headline penalty of seven years was entirely reasonable in the circumstances. As regards *DPP v. Rae*, while it was accepted that the facts as stated had some parallels with the instant case, there were significant gaps in the detail which make a complete comparison difficult.

18. As regards the guilty plea, the respondent acknowledged that one has to have regard for the particular value of a plea during the currency of the Covid pandemic. However, it was not accepted that the sentencing judge devalued the early plea, and on the contrary it was submitted that an analysis of the mitigation she found suggests the very fullest taking into consideration of what was available to her. Overall, while accepting that it was certainly not a lenient sentence, it was submitted that it was well within discretion and ought not to be disturbed.

Decision

19. Dealing first with the headline sentence of seven years, the Court took the view that this was excessively high and outside the permissible range having regard to all of the facts, and therefore amounted to an error of principle by the sentencing judge in the present case.

20. We note that the legislature opted for life imprisonment as the maximum penalty for arson, which as the sentencing judge stated indicates the inherent seriousness with which the legislature views the offence. However, we do not think that the offence in the present case fell within the highest range, or even the highest end of the mid-range, as the sentencing judge appeared to view it, although she did not expressly classify it as such. We feel that the sentencing judge placed disproportionate weight on certain aggravating factors. While the circumstances were somewhat mysterious and even sinister, we do consider the location of the burning out of the car in the field to be of significance as regards the reduced danger to the public, in comparison to the more serious circumstances in the *Rae* case.

21. As regards the guilty plea, while some of the language in the sentencing judge's ruling taken in isolation might suggest that she gave reduced or insufficient credit for the guilty plea, the Court is satisfied, however, that overall sufficient credit was given for same and the error in this case relates to the headline sentence.

22. We therefore allow the appeal, quash the sentence imposed and proceed to re-sentence the appellant. It seems to us that the appropriate headline sentence in this case, in the particular circumstances, should have been one of five years. Thereafter, having regard to the mitigating factors, especially the early plea during Covid, we would reduce this to three and a half years. Furthermore, in order to incentivise rehabilitation we would suspend the final six months, on the same conditions previously imposed by the Circuit Court.

23. Accordingly, we will quash the sentence of five years with six months suspended on the first count and substitute therefor a sentence of three and a half years, with the final six months suspended on the same conditions as were previously imposed , i.e. on the appellant entering into a bond to keep the peace and be of good behaviour for a period of twelve months post release on his own surety of €100, and further to remain under the supervision of the Probation Service for a period of six months after release. Credit is to be given for time served in this matter only, as directed by the Court below. The bond may be entered into before the Governor or Assistant Governor of the prison, if any difficulty arises, liberty to re-enter before this Court.