



THE COURT OF APPEAL

Record No: 63/2020

**Edwards J.
McCarthy J.
Donnelly J.**

Between/

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

RESPONDENT

**V
GERARD DUNNE**

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on 29th day of June, 2021 by Mr Justice Edwards.

Introduction

1. On the 12th of February, 2020, the appellant came before the Dublin Circuit Criminal Court to be sentenced in respect of two offences on Bill of Indictment No 1021/19 to which he had pleaded guilty on the 22nd of January, 2020. Count No 1 charged endangerment, contrary to s. 13 of the Non-Fatal Offences Against the Person Act, 1997, while Count No 2 charged possession of an article with intent to cause injury to, incapacitate or intimidate another, contrary to s. 9(5) of the Firearms and Offensive Weapons Act, 1990.
2. The appellant was sentenced to 4 years' and 6 months' imprisonment, with the final 6 months suspended on conditions, on Count No 1, and 3 years' imprisonment on Count No 2, both sentences to run concurrently but consecutive to the legal expiration of a sentence of 4 months' imprisonment imposed in District Court No 8, The Criminal Courts of Justice, on the 22nd of July, 2019, in case No 2018/103662(2), in circumstances where the offences on Bill of Indictment 1021/19 were committed while the appellant was on bail.
3. The appellant now appeals against the severity of his sentences.

The Circumstances

4. Detective Garda Eoin Colbert testified that on the 29th of April, 2019, Garda Karl Kelly was attending at the scene of an incident involving a black jeep on the Link Road in Dublin 17. He had located the black jeep, which was emitting a burning smell, and while

he was there the Fire Brigade arrived and extinguished a fire in the vehicle. Garda Kelly then set about making arrangements for the vehicle to be towed away.

5. He was awaiting the arrival of a representative of Gannon's Recovery when he observed a group of 8 to 12 people congregating at the Belcamp Darndale Centre close to the church. He also observed a male, unknown to him at the time, of slim build, wearing a light grey hooded tracksuit and light grey tracksuit bottoms. This male was on a distinctive silver, white and pink pedal bike. He was cycling round in circles for a period of time on the grass verge just across from where Garda Kelly was standing. He appeared to be on the phone. At one point this male had an interaction with a younger male who was also on a pedal bike.
6. Garda Kelly formed the view that the male in the grey tracksuit was acting suspiciously. He made a second call to Gannon's Recovery, and moments after completing that call he observed the male in the grey tracksuit come out from behind some shrubbery. He was holding an ignited item in the air and he then threw it in the direction of Garda Kelly. Garda Kelly, who had seen the item about to be thrown in his peripheral vision, managed to take evasive action and was not struck. However, the item, which transpired to be a petrol bomb, just missed a vehicle that was driving on the roadway, before landing and smashing on the roadside kerb where Garda Kelly had been standing moments earlier.
7. The man who had thrown the item then ran away. CCTV recordings were harvested from the area in the course of a subsequent garda investigation. Further, later that day a Garda Hynes observed a male riding a distinctive looking bike matching the description of the bike ridden by the man in the grey tracksuit. This male was signalled to stop, but failed to do so. Garda Hynes and his colleagues then searched the immediate area for signs of the bike and it was found abandoned in the garden of No 20 Moatview Court, Dublin 17.
8. Based on that information Detective Sergeant Colbert obtained a search warrant to search No 20 Moatview Court. Returning to that premises, gardai satisfied themselves that the bike lying in the front garden thereof was the bike used by the assailant in the petrol bombing incident. On entering the premises they found the appellant present in the kitchen.
9. Subsequently, a detailed review was carried out of the CCTV harvested earlier and the male suspect could be viewed on the cameras from 5.58 p.m. until 6.27 p.m. approximately. During the actual incident this person had his hood pulled up to conceal his identity. However, at approximately 6.10 p.m. he could be seen with his hood pulled down with his full face and hair on view. He was then clearly identified as the person whom gardai had encountered in the kitchen of No 20 Moatview Court, Dublin 17.
10. The appellant was arrested on the 4th of June, 2019, and detained. He is a drug addict and was administered methadone while in detention. He was interviewed while in detention. He said at interview, in relation to the incident, *"I don't think I'd throw a petrol bomb at a coper. I'm not that stupid. One part of me said 'I didn't do it'. One part of*

me says 'I did'. But there's two garda who know me a long time saying it's me and one who met me once who said it was me. I don't know".

11. At the sentencing hearing the appellant denied any intention of throwing the item directly at Garda Kelly, maintaining through his counsel that he had thrown it at the black jeep.
12. A ballistics expert had reported that *"The item portrayed in the footage is, in my opinion, some form of firebomb consisting of an unknown container holding an accelerant. An example of such a device would be a petrol bomb"*.
13. The actual incident was captured in full on CCTV and the footage was played to the sentencing judge.

Impact on the Victim

14. Garda Kelly provided a victim impact statement in which he stated (inter alia):

"I am a 32-year-old member of An Garda Síochána since February 2017. Starting my career at Coolock Garda Station in April of 2019, I was lucky to have been selected to be part of the Darndale policing unit which is responsible for tackling anti-social behaviour within the Darndale area of Dublin 17.

Following my experience of this incident, my views have changed towards my job and duties within An Garda Síochána as well as my dealing with members of the public. It has made me more alert but also more wary on how I deal with people and judge character. Initially at the time of the incident, I felt safe as I was close to the main road and I felt I was out of harm's way, but as the incident occurred I was in shock as to how easily it happened. I still don't understand how someone with motive can directly attempt to cause harm to me during the course of my duties. Since the incident has occurred I have thought about it on many occasions and realised how lucky I was to observe with my peripheral vision the flame travelling towards me which led me to taking evasive action. I have often thought had I not taken this evasive action I may have ended up with life-changing injuries.

Thankfully due to the support of family and work colleagues I was able to discuss with them the incident and deal with my emotions effectively allowing me to continue with my duties within An Garda Síochána".

The Appellant's Personal Circumstances

15. The appellant was born on the 26th of July, 1987. He was 31 at the time of the offences and 32 at the date of his sentencing. The sentencing court heard that the appellant is unemployed, a heroin addict and has a history of mental health problems, specifically psychosis. He is estranged from his father, and his mother is in a nursing home suffering from dementia. The family home was given up when his mother went into nursing home care. He has spent much of his life in prison. According to counsel he has a sister who will offer him accommodation when he is eventually released from custody.

16. The appellant has 97 previous convictions, 24 of which were prosecuted on indictment in the Circuit Court, particularised as follows: two for endangerment, one for assault causing harm, one for attempted robbery, two for s. 2 criminal damage, four for failing to comply with the direction of a member of An Garda Síochána, five for being intoxicated in a public place, one for s. 15A possession of drugs for sale or supply, two for s. 15 possession of drugs for sale or supply, six for s. 3 possession of drugs, three for possession of knives, four for having custody or control of counterfeit notes, three for theft, one for threatening to cause criminal damage, three for threatening to kill or cause serious harm, twelve for threatening or abusive behaviour in a public place, one for trespassing under the Public Order Act, one for violent behaviour in a garda station, one for violent disorder, five for dangerous driving, one for driving whilst disqualified, five for driving without a driver's licence, three for failing to produce a driving licence, two for failing to appear before a court, four for failing to produce insurance, two for failing to wear a crash helmet, ten for driving with no insurance, two for non-display of a motor tax or insurance disc, three for having no road tax and one for a hit-and-run.
17. The appellant declined an offer by the sentencing court to put the case back for preparation of a Probation Report, because he would be unable to apply for escorted visits to see his mother until the matter was finalised. He therefore wanted it finalised straight away if possible. The Court was told by counsel that the appellant had previously been under probation supervision and had kept to the terms of that supervision. This was counsel's mere assertion; no evidence being adduced to support it.

The Sentencing Judge's Remarks

18. In sentencing the appellant the sentencing judge stated:

"This is a case in which the accused has pleaded guilty to two offences relating to events which took place on the 29th of April 2019, the details of which the Court has just heard and CCTV footage, of which I have had the benefit of seeing, it shows the accused in broad daylight engaged in an exercise of scoping and waiting and timing his move when he threw a petrol bomb towards Garda Kelly, who was a lone member of An Garda Síochána carrying out his duties in relation to a particular vehicle. And it was by sheer good fortune that his peripheral vision enabled to see the petrol bomb coming in his direction and thereby enabling him to take evasive action and move away from it. But this was undoubtedly a very serious incident of endangerment which could have had extremely serious consequences for Garda Kelly.

There are aggravating factors which are extraneous to the commission of the offence itself in the form of previous convictions for endangerment, of which there are two, and also arising from the fact that the accused was on bail for 18 offences when these offences were committed. He comes before the Court still a very young man, but with 97 previous convictions of which 24 were Circuit Court convictions. And he has spent a very significant amount of his adult life in prison serving sentences for a variety of offences, including a number of very serious matters.

He is somebody who has had quite an amount of adversity in his life. He has a mother who is suffering from dementia and who has now left the family home. He is estranged from his father and his brother sustained a very debilitating accident in 2005. He enjoys, apparently, the support of his sister who will provide him with accommodation following his release. And he has a very long history of addiction which has led to psychotic behaviour on his part, and he has more recently become addicted to heroin.

This incident he claims not to specifically recall. He has, by virtue of viewing the CCTV footage, formed the view that the guard, Garda Kelly, was not his target but that in fact it was the vehicle in question. How he is able to say that when he claims not to have any recollection, I do not know, but that is his appraisal of the events.

I am told that since going into custody he has managed to wean himself off drugs. That is not substantiated by any urinalysis, but I am prepared, based on his appearance, to give him credit for the fact that he appears not be under the influence of drugs at this point in time. He has again, by his own account, had a successful period of engagement with the Probation Service and maintains that he is apologetic and remorseful for his actions.

So, in terms of where this offence lies, I have identified the aggravating features of the evidence, the degree of risk to which Garda Kelly was exposed, the inherently dangerous destructive nature of the item which was hurled towards Garda Kelly, and the extraneous aggravating factors which I have identified. And in view of those factors, I am going to set a headline sentence of five and a half years in respect of the matter, and I do so taking into account the case of Christopher Maguire which has been handed into me which in my view is a case of some antiquity and was a case involving gardaí who were involved in a riot and were suitably attired and equipped to deal with items of this kind as opposed to Garda Kelly who had no expectation of being put in such danger.

I am going to give Mr Dunne credit for his plea of guilty which was entered at an early stage. I also take into account the role that his addiction issues have played in relation to his offending on this occasion and on previous occasions. I also take into account the fact that he appears to be behaving himself in custody and making some progress in terms of addressing his addiction, and I also take into account the difficult family circumstances which have been identified to me by Mr Monahan in the course of his plea in mitigation.

So in all of the circumstances of the case, I propose to impose a sentence of four and a half years. I am going to suspend the final six months of that four and half year period. I am going to suspend it for a period of 12 months on the accused entering into a bond to keep the peace and be of good behaviour for a period of six months and he -- sorry, for a period of 12 months. And he is to furthermore undergo a period of 12 months' probation supervision during which time he is to

comply with all lawful directions of his probation officer, in particular in relation to addressing his drug addiction but also in relation to addressing his accommodation, employment and training needs. And the sentence of four years is to run consecutively to the four-month sentence which was made consecutive to a six-month sentence on the 22nd of July 2019 in Court 8. So, in reaching those figures and in so doing I am applying principles of proportionality and totality. So it's a net sentence of four years.

Then in relation ... to count No. 2 on the indictment, again this is an event which ranks towards the top of the scale for an offence of its type. I am going to set a headline sentence of four years in respect of count No. 2, and allowing for the same mitigating factors, I am going to impose a sentence of three years, and that is to run concurrently with the sentence of four years imposed in respect of count No. 1."

Grounds of Appeal

19. The appellant appeals on the following grounds:

- (i) the sentencing judge erred in fixing a headline sentence which was too high in the circumstances;
- (ii) the sentencing judge failed to give sufficient weight to mitigation i.e., he failed to take into account adequately or at all the fact that the appellant had been cooperative with gardai in the investigation of the offences and had entered an early plea of guilty;
- (iii) the sentencing judge erred in not suspending a greater portion of the sentence imposed by him in order to facilitate the appellant's rehabilitation;
- (iv) the sentencing judge erred in imposing a sentence that was disproportionately high and unduly severe in all the circumstances of the case.

Submissions

20. The court has received helpful submissions from both sides and in this judgment will refer to these to the extent considered necessary.

21. While the appellant has referred the court to various authorities with which we are well familiar in respect of principles of sentencing law, he has also referred us to a single comparator (being another case involving a petrol bombing) to suggest that the sentence in this case was disproportionately high. The decision in question is an ex tempore judgment of the former Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Maguire* (unreported, Court of Criminal Appeal, 19 February 2008). In that case the applicant pleaded guilty to violent disorder and endangerment, both charges arising from the same incident during a parade by a group from Northern Ireland in Dublin in February, 2006. The endangerment consisted of throwing petrol bombs, one of which reached a group of gardai who were wearing riot gear. He was sentenced to five years' detention for violent disorder, which carries a maximum sentence of ten years, and

three years for endangerment which carries a maximum sentence of seven years. He was eighteen years old at the time of the offences. The court of criminal appeal considered that the overall five-year sentence was appropriate in light of the gravity of the applicant's conduct but concluded that insufficient weight had been given to various mitigating factors arising from his personal circumstances. It therefore suspended the last two years of five-year sentence. One clear aggravating factor was the degree of premeditation and preparation on the applicant's part. He had come to the scene with the paraphernalia necessary to make petrol bombs. Further, he had thrown some of them at the police although the judge made clear that it would be a most serious offence to throw them at anyone. The mitigating factors identified by the Court of Criminal Appeal were the appellant's young age, lack of previous convictions, good employment history and lack of involvement in any organization responsible for the demonstration.

Analysis and Decision

22. We have no hesitation in rejecting the first ground of appeal. This was a very serious incident. It involved an unprovoked attack on a member of An Garda Síochána who was simply carrying out his duty. He was given absolutely no warning. Moreover, Garda Kelly was wearing no protective clothing. The weapon used was potentially lethal, but at the very least could have caused devastating injuries to Garda Kelly if it had directly struck him or if he had been splashed with ignited accelerant. Garda Kelly had a very narrow escape purely by virtue of detecting the thrown item in his peripheral vision at the last minute. As it is, Garda Kelly was traumatised and still suffers the after effects as described by him in his impact statement.
23. Moreover, there were significant aggravating factors. The appellant had previous convictions for offences relevant to the endangerment count, specifically two previous convictions for endangerment, but also convictions for other crimes of violence. He also had convictions relevant to Count No 2, i.e., possession of an article with intent to cause injury to, incapacitate or intimidate another, in as much as he has three previous convictions for possession of a knife. In addition, these present offences were committed while the appellant was on bail for another matter. S. 11 of the Criminal Justice Act, 1984, expressly provides that such a circumstance is to be treated as aggravating by a sentencing court. This is in addition to any question of consecutive sentencing.
24. We completely share the sentencing judge's view of the gravity of the offending conduct in this case. The headline sentence determined upon was both proportionate and appropriate. We find no error of principle with respect to the headline sentence or the assessment of ultimate gravity.
25. With respect to *The People (Director of Public Prosecutions) v Maguire* we regard this decision as being of very limited assistance. The similarities are only superficial, in that both cases involved the throwing of a petrol bomb at a member of the gardai. However, the context was very different in the *Maguire* case. The offence was committed in the course of a demonstration. The gardai were in riot gear. They were on notice that they were in a threatening situation and prepared to deal with it. It was not a case of a garda on his own. In the present case, however, Garda Kelly was alone, doing his duty, in

ordinary uniform, and had no reason to suspect he would be targeted, directly or indirectly. A further difference is that the accused in the present case had relevant previous convictions, whereas the accused in the Maguire case had none. Further, the offence in the present case was committed on bail. That was not true in the *Maguire* case. The accused in the *Maguire* case was just 18 years of age. The accused in this case was a man in his 30's. In our view, given the substantial differences, the present case was unquestionably the more serious of the two.

26. In any case, we have said many times that inviting direct comparison with a single other case or a small number of cases is rarely of any value. The correct use of comparators involves surveying a representative sample of cases involving sentencing for the same offence and seeking to discern a trend in sentencing. In this case we are invited to consider a single other case. It might well be exceptional and not representative. However, without the benefit of a representative survey we cannot offer a view one way or another. Accordingly, we find the *Maguire* case to be of little assistance.
27. As to ground of appeal No 2, which alleges a failure to adequately reflect the available mitigation in the sentence, we also reject that ground. The discount for the early plea was not generous, but it was within the sentencing judge's margin of appreciation. The plea was in the teeth of very strong evidence. The main benefit of it was the saving of police time going through CCTV. However, it did not merit a particularly high discount. We do not consider that the evidence supports the contention that there was meaningful co-operation by the appellant, beyond his decision to plead guilty for which he received appropriate credit.
28. As regards the appellant's addiction difficulties, and the mental health issues he has suffered, he was entitled to have these taken into account as part of his overall personal circumstances, and the sentencing judge did take them into account in that way. However, his addictions and mental health issues do not in any way directly mitigate his culpability. Neither his heroin addiction, nor the psychotic episodes he suffered in the past, caused him to lob a petrol bomb at Garda Kelly. If he was intoxicated at the time, it was self-induced intoxication and he cannot rely on it as offering direct mitigation. There was no direct evidence as to the appellant's family circumstances, but the sentencing judge did accept certain assertions made by counsel in his plea in mitigation and took them into account.
29. We consider that the sentencing judge approached the appellant's sentencing with great care and consideration, and we find no error of principle in terms of how she discounted for mitigation. The most significant item of mitigation was the plea. The appellant's other personal circumstances would have entitled him to but modest additional credit. We are satisfied that while the sentencing judge's overall discount was not generous, it was within the range of her discretion. We find no error.
30. As to the discrepancy in percentage discounts between Count No 1 and Count No 2, respectively, this was clearly the product of the judge's understandable concentration on the more serious offence i.e., Count No 1. Her subsequent discounting by a year on Count

no 2 meant that the appellant was receiving more credit than he was entitled to on a strict pro-rata basis. Strictly speaking, the appellant should have received the same discount on Count No 2 as on Count No 1, but he received more than that as it turned out. As he was not prejudiced by the application of a higher percentage figure by way of a discount on Count No 2 we will not interfere with it.

31. The third ground complains that the sentencing judge erred in not suspending a greater portion of the sentence. We reject that complaint without hesitation. We are not prepared to criticise the sentencing judge for not going further than she did. There was a wholly inadequate evidential basis for doing so. At most the appellant, who had no track record of progress towards rehabilitation, was entitled to a modest part suspension as an incentive to seek assistance while in prison and upon his release. He received that in the form of the suspension of the last six months of his sentence. We reject ground of appeal no 3.
32. Overall, we are satisfied that the sentences imposed were fair and proportionate. The sentencing judge was careful and conscientious in her approach to this case. The appellant has not persuaded us that she erred in any way.

Conclusion

33. The appeal should be dismissed.