



**THE COURT OF APPEAL**

**UNAPPROVED**

**NO REDACTION NEEDED**

[54CJA/17]

Neutral Citation Number: [2021] IECA 211

**Birmingham P.**

**McCarthy J.**

**Kennedy J.**

**BETWEEN**

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

**APPELLANT**

**AND**

**JAMES PRESTON**

**RESPONDENT**

**JUDGMENT of the Court delivered (by remote hearing) on the 21<sup>st</sup> day of July 2021 by Birmingham P.**

1. Before the Court is an application brought by the DPP seeking to review certain sentences on grounds of undue leniency. The sentences sought to be reviewed are sentences which were imposed in the Dublin Circuit Criminal Court on 15<sup>th</sup> February 2017 and 24<sup>th</sup> February 2017.

2. The Circuit Court found itself dealing with two Bill Numbers, Bill No. 475/2015 and Bill No. 1037/2015. On Bill No. 427/2015, the respondent was sentenced to three years

imprisonment with the final 18 months suspended in respect of an offence of attempted robbery which had occurred on 28<sup>th</sup> October 2014.

3. On Bill No. 1037/2015, the respondent was sentenced to 18 weeks imprisonment in respect of charges of dangerous driving, unlawful taking of a vehicle and criminal damage, these offences having occurred on 9<sup>th</sup> May 2015. The sentences were made concurrent to each other, but were consecutive to another sentence which the respondent was then serving for a robbery offence. That matter had been dealt with in the Circuit Court in Roscommon and saw him sentenced to a term of five years with two and a half years suspended on 9<sup>th</sup> November 2015 in respect of an offence committed on 23<sup>rd</sup> December 2011.

### **Background**

4. In respect of the earlier offence in time with which we are concerned, the position is that Gardaí had intelligence to suggest that a crime was going to take place at or near the Seabank Public House in East Wall. The respondent was observed driving around and he appeared to be in convoy with another vehicle. Both vehicles seemed to be engaged in counter-surveillance manoeuvres. The vehicle driven by the respondent was driven into an area where the pub owner's car was parked. At approximately 1.40pm, the owner of the public house emerged from the pub and the respondent parked his car in a fashion so as to block the owner. At that stage, the respondent sprang from the driver's seat. He had a hood over his head, was wearing dark clothing and gloves, and he had a wheel brace and also a Stanley knife. At this point, Gardaí who had the scene under surveillance intervened. In response to instructions by Gardaí, the accused dropped his weapons, but apparently did not get on the ground when directed and had to be subdued.

5. In terms of the impact of this incident, even though Gardaí intervened at an early stage, the incident had a very serious impact, indeed, a lifestyle-changing impact on the injured party, as emerged from a very strong victim impact statement.

6. So far as the later offence is concerned, the situation is that Gardaí were on patrol in an unmarked car in the Finglas area. They drove into a cul-de-sac and observed that a BMW was parked there. A resident of the cul-de-sac was seen in conversation with the occupant of the car, but that resident withdrew when he saw Gardaí entering the area. At that stage, the car reversed aggressively along the footpath and collided with the passenger door of the unmarked Garda car. A Garda who was in the act of getting out managed to get back into the car. The BMW was then reversed a second time and there was a second impact.

7. At that stage, the vehicle was driven off at high speed and in a dangerous and aggressive manner. At various stages, it was driven on the wrong side of the road and other vehicles had to take evasive action. At one stage, it drove over a kerb and a traffic island, and at another, through red lights at a pedestrian crossing. When the vehicle was eventually stopped, it was established that it was showing false registration plates. It was subsequently discovered that the vehicle had been stolen in May 2015. The driver of the vehicle in question was identified as the respondent. The Court heard that he was on bail when he committed these offences: he was on bail in respect of the Roscommon offence when both of the matters before the Court were committed, and on bail in respect of the East Wall attempted robbery when the Finglas offence was committed.

### **Personal circumstances**

8. In terms of the respondent's background and personal circumstances, he had a significant number of previous convictions of which two were from the Circuit Court. For one

of these, he received a sentence of 12 months imprisonment in respect of an unauthorised taking. In respect of a robbery, he received a sentence of five years imprisonment with two and a half years suspended. All told, he had 88 previous convictions of which 61 were for road traffic, one was for robbery, three were for unauthorised takings and one for theft. The sentencing court was told that he had a significant drug habit, and that at the time of the sentence hearing, had been taking heroin for some 15 years. The sentencing court was also told that he was doing very well in custody, having been incarcerated in Castlereagh following his sentence from Roscommon Circuit Court and the plea in mitigation focused on urging the court to give him an opportunity to build on the progress that was being made in custody.

**9.** In the Circuit Court, the plea in mitigation took as its starting point the fact that the accused was a chronic drug user. A large volume of material was provided in relation to how Mr. Preston was faring in custody. The submission was made that Mr. Preston was one of those rare people who come before the Court not with a stated desire to rehabilitate or an intention to rehabilitate in the future, but with actual evidence of a level of rehabilitation, described as an extraordinary level of rehabilitation, achieved during the last two years.

**10.** Also before the Court was a probation report. The report was broadly positive and it made the point that if there was to be any chance of reducing the risk of reoffending and avoiding a situation of the respondent returning to prison, he would have to enter into a long-term, structured residential drug treatment programme immediately on release.

### **The sentence**

**11.** In his sentencing remarks, the judge referred to the attempted robbery as the most serious matter before him. He proceeded on the basis that the respondent had not organised the robbery and that he appears to have been inveigled into this by others who exploited his

desperate need for money to feed his drug habit. He saw it as extremely serious in nature and as meriting a sentence of five years imprisonment before taking into consideration mitigating factors and the fact that the sentence that he would be imposing would have to run consecutively to the one which he was currently serving. In relation to the Finglas matter, he commented that the most serious aspect of the offence was that of dangerous driving. The judge went on to say, and in this regard, he is criticised by the Director, that notwithstanding that the dangerous driving was the most serious element of the matter, the maximum sentence which he could impose for it was one year. He said this would be the appropriate sentence in relation to the dangerous driving and each of other offences – criminal damage and the unauthorised use of the motorcar – before taking into consideration mitigating factors. In fact, the judge was in error when he said that the maximum sentence for dangerous driving was 12 months as it was, in fact, six months, but the Director says that he was in serious error in taking the view that the maximum penalty for dangerous driving provided a cap in respect of the criminal damage and the unauthorised use of the motorcar. The Director says that the criminal damage was very serious, involving the deliberate ramming of a Garda car on two occasions, and that the unauthorised use of the motorcar was a serious offence of its type, as was evidenced by the use of the false number plates. The judge addressed the question of mitigation and indicated that by reason of the plea of guilty and the expression of remorse, that he would reduce the sentence in respect of the attempted robbery by 15 months, bringing it down to one of three years and nine months. Then, factoring in that the sentence would have to run consecutively to the one then being served, and applying the totality principle, he was proposing to reduce the sentence to one of three years imprisonment. He then went on to say that having regard to the extraordinary efforts which Mr. Preston had made in relation to his rehabilitation since his incarceration in Castlerea Prison and to the large volume of

documentation which he had received, including multiple certificates and a very favourable Governor's report, and positive reports from the Probation Service indicating that Mr. Preston had finally come to his senses and was anxious to deal with his serious addiction, that in order to encourage that and to give him an incentive to continue with those efforts, he then proceeded to suspend 18 months of the 3-year sentence and to date the sentence from that day. Some days later, when the matter was re-entered, it was pointed out that the judge had been in error in taking the view that he could direct that the sentence would commence from the date of the sentence hearing rather than from the date of the expiry of the sentence being served.

**12.** Dealing with the Finglas matter, the judge referred to the plea and commented that it was a valuable plea in circumstances where there may well have been an issue about identification. On appeal, the Director says that the judge fell into error here and gave too much attention to the plea, seeing the case as an identification one when there was DNA evidence on a glove found in the car and a fingerprint on the false registration plates.

**13.** At this stage, it is necessary to refer to certain developments since the Circuit Court sentence, which has given rise to this application to review, was finalised on 24<sup>th</sup> February 2017. In May 2018, the now respondent was released from custody. After the imposition of sentence, the Director had moved to review the sentence on grounds of undue leniency. The matter was before the Court in 2019 and the Court put the matter back for a year in circumstances where it was indicated that the very considerable progress that the Circuit Court judge had identified as having been made was being maintained. However, on 1<sup>st</sup> May 2020, the respondent committed an offence contrary to s. 15A of the Misuse of Drugs Act 1977 (as amended). On 15<sup>th</sup> January 2021, he was sentenced to a term of four years imprisonment, backdated to 6<sup>th</sup> July 2020, in respect of the s. 15A offence. Then, the matter

was back before this Court on 26<sup>th</sup> March 2021 when we remanded the respondent in custody from 27<sup>th</sup> July 2020, an order which was made on consent.

**14.** So far as the s. 15A offence is concerned, we have been told that the evidence before the Circuit Court was that this was a very foolish offence, committed as a favour. The Court was told that the respondent's role was as a courier and that his involvement was at the lowest level for offences of this nature. We have been told that this was the evidence with which the prosecution agreed.

**15.** When the Court sat to hear this appeal on 15<sup>th</sup> July, there was an application to further adjourn matters for an updated report from the Probation Service. This was made in circumstances where the most recent report from the Probation Service had been unfavourable, but it was said that this was prepared on the basis of historical engagement with the Probation Service and that an updated report, which it would be expected would reflect the views of an addiction counsellor with whom he had been working in custody, would be of assistance. However, the Court felt that having regard to the protracted history of this case, that it was now time to finalise matters and did not accede to the application for a further adjournment.

### **Re-sentencing**

**16.** Having previously indicated that we regarded the sentences that were imposed in February 2017 as unduly lenient, we are now required to resentence. In doing so, we reiterate our view that both offences were offences of very considerable seriousness and that each one of them required to be met with a substantial effective sentence.

**17.** Resentencing in July 2021 in respect of offending in October 2014 and May 2015 presents difficulties and complexities. We approach our task first by seeking to identify the

appropriate sentence for each of the offences as committed by this offender. This involves having regard to the significant previous record, but also having regard to the significant evidence that there was of very real, and, it appears, for a period, effective efforts at rehabilitation. So far as the attempted robbery at the Seabank Public House is concerned, it is our view that the pre-mitigation sentence should not have been less than six years. Having full regard to all the factors present by way of mitigation, and we repeat our view that the evidence in that regard was very significant, we would be prepared to reduce that sentence to one of three years.

**18.** So far as the Finglas matter is concerned, while there was initially some confusion as to whether the accused was on bail or not in respect of the attempted robbery at the time of committing the Finglas offence, it has now been clarified that he was, and that therefore, the sentence is required to be consecutive by statute. In a situation where there was initially uncertainty on the matter, we had, in any event, formed the view that the offending here was of such seriousness that it required to be dealt with by way of a consecutive sentence. It seems to us that the criminal damage, involving intentional damage to an occupied Garda car, merited a headline sentence of five years, and this we feel would also have been the appropriate sentence in respect of the unauthorised taking. We will provide for a sentence of six months imprisonment in respect of the dangerous driving. The sentences on this Bill will be concurrent with each other. Again, having regard to the fact of the significant evidence in relation to efforts in mitigation, we would reduce this to three years, but to be served consecutive to the attempted robbery matter. We believe that this is the appropriate sentence and we do not see any further adjustment by reference to what is sometimes referred to as the totality principle as called for.



**19.** In deciding on those sentences, we have taken into account what we have been told about the circumstances of the s. 15A offence, and what we have been told about the fact that the respondent had, for a significant period, continued to make impressive progress on the path to rehabilitation. However, we have been told that in early 2020, the respondent took a decision to focus his activities on employment rather than on engagement with support services and that this proved a very unwise decision, perhaps more particularly given that the employment that he had secured in the construction sector came to a halt, falling victim to the Covid-19 shutdown. We propose to deal with the matter by providing that the sentence of three years on Bill No. 475 should date from today's date. The respondent should receive full credit for the period spent in custody, serving the sentence of 18 months up to his release in May 2018, having served that sentence. While the respondent has been in custody by order of this Court on these matters since 27<sup>th</sup> July 2020, he has also been serving a sentence during that period, so we are of the view that the appropriate order is to date the sentence from today's date and that is the order we propose to make.