



**THE COURT OF APPEAL**

**Record Number: 243/20**

**Birmingham P.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

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

**- AND -**

**EVAN STUBBINS**

**APPELLANT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 28th day of June 2021 by Ms. Justice Kennedy.**

1. This is an appeal against sentence. The appellant was sent forward on signed pleas of guilty to three counts, namely possession of explosive substances contrary to section 3 of the Explosive Substances Act 1883, attempted theft contrary to common law and a count of criminal damage. On the 18th November 2020 the appellant received a sentence of five years' imprisonment.

**Background**

2. On the 2nd August 2020, gardaí from Togher, Passage West Garda Station, were on patrol in Carrigaline. At approximately 02:05 hours they were passing the Maxol garage at Ballinrea in Carrigaline. One of the gardaí observed a white Volkswagen Passat parked up very close to an ATM machine. A single male was observed armed with an implement which was later determined to be a screwdriver. This male appeared to be using the screwdriver to damage the front of the ATM machine.
3. Gardaí approached and at this stage, which was approximately 11 to 12 seconds after they had first spotted him, this male suspect was in the vehicle. He was making efforts to start it and to leave the scene. The male was identified as the appellant, Evan Stubbins. He was eventually arrested and at the time of his arrest there were two cannisters strapped into the backseat of the vehicle which were emitting what appeared to be a gas type substance. These were later found to be propane and oxygen and they constitute the explosive substance the subject matter of the explosives charge.

4. The appellant was arrested and interviewed. During the course of interview he stated that he owed a drug debt to certain individuals and it was these individuals who suggested that he carry out this particular type of crime. The appellant described how he carried out research on YouTube. He then travelled to the location the night before and waited for an opportune moment. It was his intention to mix the oxygen and propane and place it in the ATM in order gain access to its contents.

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

5. At the time of sentencing the appellant was 24 years old. The appellant has eleven previous convictions all of which consist of offences against property, save for one previous conviction for possession of a knife.
6. Evidence was given that the appellant had a drug problem and this particular crime was undertaken in order to pay off a drug debt he owed at the time.

#### **The sentence imposed**

7. In terms of aggravating factors the following was cited: at the time of offending the appellant was under a suspended sentence from the District Court, that he used his time to research how to carry out the offending in question, described by the judge as a "mishmash of information, hastily brought down, badly understood." The sentencing judge further considered the whole idea of gathering this equipment for the purpose of effecting an explosion and bringing it to the premises for this purpose as an aggravating factor.
8. In terms of mitigation the sentencing judge identified the following: the signed pleas of guilty, the level of cooperation in interview, and his youth. He is a man with eleven previous convictions, including convictions for handling and burglary, which lead to a progressive loss of mitigation.
9. The sentencing judge identified a headline sentence of seven years in respect of the count of possession of an explosive substance where the maximum penalty is one of twenty years. Taking account of the appellant's signed plea, his cooperation and his age, this was reduced to a sentence of five years. In respect of the criminal damage and the attempted theft, sentences of two years to run concurrently were imposed.

#### **Grounds of appeal**

10. The appellant puts forward three grounds, but in truth, Mr Boland BL for the appellant places the most emphasis on ground 2 with reference to the offence of possession of explosive substances. It is said that the judge erred in:-
  - (1) failing to give a sufficient reduction to the headline sentence having regard to the signed pleas and having regard to the guidance of the Court of Appeal as set out in the *Director of Public Prosecutions –v- Cambridge* [2019] IECA 133.
  - (2) failing to make a second reduction to the sentence to take into account the other mitigating factors, having made a reduction for the signed pleas.

- (3) deeming the lack of sophistication of the offence to be an aggravating factor, rather than a mitigating factor.

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

11. The appellant refers to *The People (DPP) v. Cambridge* [2019] IECA 133 where the Court stated as follows:-

“We again take this opportunity of emphasising the special weight which should be attached to signed pleas whatever the state of the evidence. We think in the circumstances that the appropriate reduction from the headline sentence, because of the signed plea, should be in or about a third, that is to say, two years.”

12. The appellant notes that the reduction afforded to the appellant in respect of all mitigation amounted to 28.5%. This discount is insufficient in light of *Cambridge* and particularly given the circumstances of the instant case where, had the matter progressed to trial, significant expert evidence would have been required and the issue of whether the appellant was *actually* in possession of an explosive substance would likely have constituted a matter of considerable controversy at trial.
13. Linked to the above submission is the appellant’s argument that the sentencing judge ought to have made a further reduction in the sentence in order to account for mitigation beyond the signed pleas. Whilst the appellant’s age, lack of similar convictions and cooperation may have been referred to by the sentencing judge, these factors were not reflected in the reduction afforded to the appellant.
14. The appellant further submits that the sentencing judge failed to refer to the duress suffered by the appellant as a result of his drug debt which was his motivation for the offending.
15. The appellant argues that his lack of sophistication in offending was wrongly treated as an aggravating factor and says that the courts have been consistent in considering the sophistication of offending as an aggravating factor. Although this is typically a factor arising in other forms of offending such as drug offences and burglary, the principles are still salient. The appellant refers to *The People (DPP) v. Sloyan* [2019] IECA 242. This was a drugs case where the Court allowed an appeal on severity on the basis, *inter alia*, that the sentencing judge had placed excessive weight on the sophistication of a drug importation scheme as an aggravating factor.
16. An identified level of planning and sophistication has been consistently treated as an aggravating factor by the Superior Courts and the absence of such sophistication should not be treated as an aggravating factor.

#### **Submissions of the respondent**

17. In respect of the appellant’s reliance on *The People (DPP) v. Cambridge* [2019] IECA 133 the respondent argues that *Cambridge* does not make it mandatory for a sentencing court to follow that judgment exactly, it is exhortatory only, and is no more than an expression

of opinion as to what a sentencing court might have regard for as distinct from making it mandatory that a court should and must follow it.

18. While signed pleas are no doubt valuable, it must be pointed out that this case would not have involved lay witnesses. Furthermore, while it is possible that the issue of possession of explosive substances might have been a controversial issue at trial, it still would have been entirely open to a jury to conclude beyond a reasonable doubt that the appellant had the materials in his possession in circumstances where he intended and believed that he could do what was necessary to combine the materials to cause an explosion.
19. As to the contention that the sentencing judge erred in principal in failing to make a second reduction to the sentence to take into account other mitigating factors, the respondent submits that this must be seen in light of the primary offence which carried a twenty-year maximum sentence.
20. As to the question of the sophistication or premeditation of the offending, it is argued that this factor assumed more significance in the instant cases because the appellant had to take a further step and had assumed possession of the materials in the belief, admitted in his signed plea and affirmation of the same, that he was capable of so combining the materials as to be able to cause the required explosion. As such, this rendered the appellant's level of culpability greater.

#### **Discussion**

21. The maximum penalty for the offence of possession of explosive substances is one of twenty years pursuant to s.3 of the Explosives Substances Act, 1883. The judge referred to the maximum and nominated a pre-mitigation sentence of seven years. No issue is taken with this sentence and while Mr Boland BL for the appellant argues that the appellant ought to have been given a greater reduction for the signed pleas, he focuses on the fact that the judge did not afford any additional reduction for further mitigating factors.
22. It is readily accepted by Mr Boland that any reduction afforded for mitigation is not as a consequence of a mathematical formula and this is of course correct; a judge has a wide discretion in the imposition of sentence in order to achieve a sentence proportionate to the gravity of the offence and the personal circumstances of the offender.
23. This was a serious offence, with considerable planning required. The issue of the element of instruction to carry out the offence falls for consideration as an extenuating circumstance referable to the headline sentence. In our view seven years was entirely appropriate for an offence of this nature.
24. Moreover, when we look to the mitigating factors, while acknowledging the benefit of signed pleas of guilty and that significant credit should be afforded for this, the reduction is not as a result of mathematical calculation. The judge was fully entitled to assess the mitigating factors in the manner he did. The principle at the heart of sentencing is that of proportionality and the assessment of an offender's personal circumstances is central to a

proportionate sentence. A broad discretion is vested in a judge in the imposition of sentence, and while the ultimate sentence imposed may be somewhat on the high side, it is nonetheless one within the margin of appreciation afforded to a sentencing judge.

25. Insofar as it is said that the judge erred in taking account of the absence of sophistication in how the offence was committed as an aggravating factor, it is correct to say in general terms that sophisticated planning of an offence is an aggravating factor, however, in the present case, we do not believe the judge was saying that in general the lack of sophistication was in fact an aggravating factor, but rather, it seems to us that the judge considered that the appellant's conduct in involving himself in this activity could have placed himself and possibly others at risk, which was exacerbated by the absence of sophistication.
26. Accordingly, we are not persuaded that there was an error in principle and dismiss the appeal.