THE COURT OF APPEAL

[94/20]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

SAMANTHA IRWIN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 29th day of July, 2021 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. The appellant herein pleaded guilty to two charges of (1) possession of ammunition without a certificate, contrary to Section 2 of the Firearms Act 1925, as amended by Section 15 of the Firearms Act, 1964, and Section 3 of the Firearms Act 1971 and (2) robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; she was sentenced to five years imprisonment in respect of the robbery, eighteen months of which were suspended. It is with that we are concerned. The period of imprisonment was backdated to when the appellant entered custody. A further count, count 3, possession of a syringe contrary to Section 7(1) of the Non-Fatal Offences Against the Person Act, 1997, was taken into consideration.

2. The numerous appeal grounds as filed were reduced and confined by the appellant's oral and written submission, essentially to the effect that the learned sentencing judge ought to have suspended a larger portion of the ultimate sentence to promote rehabilitation.

3. The robbery took place at the Brazil Shop, Capel Street on the 20th September 2018. The appellant spent approximately ten minutes selecting items from the shelves. She waited for the patrons to leave the store and then she placed the items on the counter. The shop assistant Ms Da Silva entered the items in the cash register and the accused then grabbed Ms Da Silva by the jumper pulling her towards her. She tried to pull away from the appellant, but the appellant held on to her arm and removed a syringe from her pocket, uncapping it; she attempted to stick the syringe into Ms Da Silva's arm but Ms Da Silva

managed to take evasive action. The appellant then demanded cash from the cash register saying "I want all the money" and the manager handed the appellant notes from the cash register - about €55. All of this was captured on CCTV from which several Gardai identified the appellant; a Post It note was dropped by the appellant and a DNA profile obtained from blood found thereon was later found to match that of the appellant. A warrant was obtained at a later stage to search a room occupied by her at Haven House, a hostel. During the course of that search, two 12 gauge shotgun cartridges were found and seized on the 12th of April 2019. A ballistics examination subsequently carried out established that they were "ammunition" within the meaning of section 1 (1) of the Firearms Act, 1925, as amended. The appellant was arrested at the hostel and subsequently detained. She was interviewed in relation to this matter on four occasions and she made no admissions. It was at that stage that the DNA sample was taken. On the 5th of June 2019 the appellant attended Store Street Garda Station voluntarily by appointment in relation to the two shotgun cartridges seized from her bedroom at the hostel. She made full admissions and informed Garda Fitzpatrick that she had taken a jacket belonging to a friend over the course of Christmas 2018 and when she went home she realised there were two shotgun cartridges in it.

4. Ms Da Silva made a victim impact statement which was presented to the court. It details that whilst she did not suffer any serious physical injuries and that she was on edge at work for a number of months post her attack. She was afraid to be in the shop on her own. She was withdrawn in herself and she said "*I find it hard to trust strangers."* She said she was afraid to go out on her own which placed a great deal of stress on her and she found it difficult to sleep for a number of nights after the attack. It took her a significant time to rebuild her self confidence. She suffered some anxiety in relation to what could have happened and with respect to the use of the syringe. In relation to life changes she is reluctant to go out at night and her now husband had to change his work hours so he could meet her and accompany her back home after work as she was afraid to go out alone; she grew up in Brazil in Rio de Janeiro which she relates as a dangerous place and she did not think this would happen here in Ireland. She had to change to day shifts rather than working night hours. Further, the shop had to get extra security staff as a result of this incident.

5. The appellant has 19 previous convictions. 14 of the 19 convictions are under the Road Traffic Act. One conviction is under the Theft Act, three are for failing to appear and one is under the Misuse of Drugs Act. The first conviction this is recorded is that of the 22nd of October 2004 for a road traffic offence.

6. The appellant was 36 years at the time of sentencing. She has two children and she had a partner who has passed away. She came before the courts with a very troubled background which to her credit she had made great strides in overcoming. She was left or forced out of her home at the age of 13 but ultimately proceeded successfully to third level education and established a business with her late partner – it seems to have failed, regrettably, after his death. She no longer has custody of her children however because of her severe addiction to drugs. It seems correct to say that that is at the root of her

personal difficulties in recent years which extended to loss of custody of her children and of her home. She pleaded guilty at an early stage. At the time of sentencing she was availing of hostel accommodation for the homeless. The court had ordered a report and urinalysis and she was clear of any illicit substances. Whilst a place was available to her for residential treatment for her addiction when the matter came before the court on March 5 she was not in a position to take it up for medical reasons. Publicity surrounding the prosecution come to the attention of her grandmother to whom she was close and was deeply affected by it. She herself had a recurrence of bulimia. She was anxious to have the matter dealt with on that date by the judge. It is not in debate but that there was a low level of culpability involved in possession of the cartridges.

7. When sentencing, the judge made *inter alia* the following remarks:-

> *"Ms Irwin comes before the Court with 19 previous convictions. She has no previous history of violence and this offence was apparently committed during an episode -- a very severe addiction. She maintained not to have any express recollection of the incident and has expressed during the course of the proceedings very considerable remorse for her actions. Now, she has in recent times been engaging with the drug services within the prison and had managed to become drug-free and was contemplating taking up bail in order to pursue residential treatment, but the reporting of the case has led to a significant deterioration in her emotional and psychological wellbeing. And I make no criticism of anybody for that, but it is simply a fact that the very serious and alarming circumstances of the offence itself has had some repercussions for her own wellbeing. And the option now of residential treatment is not something that can be realistically addressed at this point in time. But I do acknowledge that Ms Irwin is somebody who will, ultimately, have to take a course of residential treatment if she is to have any success in combatting her dependence on drugs and other substances.*
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> *In terms of her personal circumstances, she has two children. She had a partner who, unfortunately, is deceased. She had episodes where she was very productive in terms of her education and her work life, but her drug addiction has interfered with all areas of her life and her family life. She has no access to her children, and she has experienced homelessness and all of the chaos that is associated with drug addiction…*
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> *I'm going to give Ms Irwin credit for her plea of guilty. I am going to take into account the circumstances under which the offence was committed. I take into account her considerable remorse in respect of the commission of the offence and her resolve never to engage in this type of behaviour again. I also take into account the fact that she doesn't have a history of violent offending. I take into account the elements of her personal history which have been mentioned by me and highlighted by Ms O'Callaghan in mitigation. I take into account the positive steps that she had taken when in custody to address her drug addiction and take into account her desire to be reunited with her children. And I take into account*

the fact that she is currently undergoing something of a difficult episode in terms of her emotional wellbeing and also in terms of her physical wellbeing and the matters which have been opened to the Court in terms of her dental health and the pain associated with that which, undoubtedly, makes prison an even more difficult experience."

8. The judge proceeded to sentence as follows:-

> *"…. I propose to impose a sentence of five years, but I'm going to suspend the final 18 months of that five year period on her entering into a bond to keep the peace and be of good behaviour for a period of 18 months and, furthermore, to undergo a period of residential drug treatment programme, in conjunction with the Fr McVerry Trust, which is to be conducted under the supervision of the Probation Service. Now she is to be supervised in her efforts to address her drug addiction also by the Probation Service for a period of 12 months and she is also to undertake to keep the peace and be of good behaviour for the entire period of the suspension, being one of 18 months. And she is to get credit for all time spent in custody in relation to this matter."*

9. The appellant now submits that the trial judge erred in principle in failing to suspend a lengthier portion of the period of imprisonment. Counsel accepts that this was a very serious offence, but says, however, that her circumstances, conduct and efforts made in the past to rehabilitate and which she was so making at the time of sentencing all provided much reason for a more lenient outcome. It is submitted this could have been better achieved by suspending a larger portion of the sentence.

10. The respondent submits that it is important to consider the nature of the offending behaviour in order to assess whether the sentence imposed was appropriate or otherwise, both in terms of its total length and the length of the suspended portion. It is submitted that the use of a syringe in a robbery is a significant consideration for a sentencing Court in assessing a defendant's level of culpability. In his judgement in *DPP v. Kerrigan* [2019] IECA 78, Edwards J. stated "*Syringe attacks can be particularly frightening for the victims concerned…"*. It is submitted that the use of a syringe in an offensive manner as was done by the appellant is an important consideration.

11. The respondent submits that the sentencing judge had appropriate regard to the rehabilitative steps already taken by the appellant and to the potential for continuing rehabilitation. To provide encouragement and incentive for the appellant in her future rehabilitation, the sentencing judge suspended the last eighteen months of the five-year sentence. It is submitted that both the sentence imposed and its suspended portion were appropriate in the circumstances and were both within the margin of discretion afforded to a sentencing judge.

12. In effect, at the hearing Ms O'Callaghan on behalf of the appellant advanced with economy and skill what was in truth an *ad misericordiam* plea. She could not, in reality, point to any error of principle in the manner in which the circuit judge approached it. We

agree with the respondent's submissions, having carefully considered the evidence and the judgement. Quite properly no issue is taken with the headline sentence nominated of seven years, the reduction afforded for the substantial mitigation was that of two years. The Judge then suspended the final eighteen months of that sentence to enable the appellant to address her drug difficulties. It is clear that the judge approached the matter with great care and went as far as she could, having regard to the necessity for the appellant to serve a term of imprisonment. She properly assessed the mitigation and appropriately reduced the pre-mitigation sentence, and then partially suspended that sentence to encourage and assist rehabilitation. In doing so, we are satisfied that she acted within her margin of discretion.

13. Since no error of principle exists, we accordingly dismiss the appeal.