THE COURT OF APPEAL

[176/21]

The President
Edwards J.
Kennedy J.

BETWEEN

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

RESPONDENT

AND

JAMES DAVY

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2023 by Birmingham P.

Introduction

1. This is an appeal against severity of sentence. It must be said that so far as appeals against severity of sentence go, it is an unusual one.

2. The background to the recent severity hearing is to be found in the fact that the appellant, along with two others, was convicted on 4th August 2016 of the murder of Mr. Toddy Dooley on 12th February 2014. Having been convicted of murder, all three appealed to this Court. Before this Court, the routes followed diverged. One appellant, Mr. Sean Davy, was anxious to get on with his appeal, but the appellant in the present case, Mr. James Davy, and Mr. Matthew Cummins, were anxious, for whatever reason, to avoid an early hearing of the appeal. The preference of this Court to deal with all three appellants at the same time at a single appeal hearing was made clear at various management listings, but ultimately, a date was assigned for the hearing of the appeal in the case of Sean Davy. On 31st July 2018, his appeal against conviction was dismissed. The appeals of the appellant, James Davy, and of Mr. Cummins were heard on 11th May 2021. On 13th July 2021, this Court quashed the convictions for murder, but substituted convictions for impeding the apprehension or prosecution of another contrary to s. 7(2) of the Criminal Law Act 1997 (the "1997 Act"). In accordance with what has become the usual practice of this Court, where the conviction on one count is quashed, but a conviction on another count is substituted, the matter was remitted to the Central Criminal Court for sentence. This procedure has been found to be appropriate because it preserves the right of both sides to a sentence hearing at first instance, and if dissatisfied with what occurred there, the right to come before this Court.

Background

3. The facts surrounding the murder, and more significantly in the context of the convictions, contrary to s. 7(2) of the 1997 Act, *i.e.* what occurred after the killing, were set out in

considerable detail in an earlier judgment of this Court (*DPP v. Cummins & Davy* [2021] IECA 198) and it is not intended to repeat that exercise at this stage. A brief summary will suffice.

4. The appellant, James Davy, and his cousin, Sean Davy, were among a group present together in a public house in Edenderry. At trial, the evidence was that James Davy had possession of a wooden baseball bat. At some point, a decision was taken to leave the public house and to continue socialising at a private residence where they were joined by Mr. Cummins. All three had consumed alcohol and a white powder, either cocaine or a head shop drug, referred to at trial as methadrone. At the dwelling, there were acts of criminal damage and it appeared all three were involved, and all three were requested to leave. Mr. Cummins knew the deceased, Mr. Dooley, having previously been to his home. Shortly after 5am, all three gained entry to Mr. Dooley's home through windows. The three who arrived at the house remained there for approximately one and a half hours before leaving together.

5. On Sunday 16th February 2014, the body of the late Mr. Dooley was found. At that stage, he had been deceased for a number of days, having suffered severe head injuries. It was the prosecution case, and it is not in dispute, that Mr. Dooley had suffered a violent and savage death. The State Pathologist reported on finding burns to the body, where an attempt had been made to set the deceased on fire. After the murder, a number of items were removed from the home of the deceased. CCTV footage showed all three involved in the disposal of articles, including a bloodstained baseball bat, the one brought to the scene of the crime by James Davy, at a recycling centre. Among other items retrieved there were prescription tablets taken from the home of the deceased. Before the start of the trial, the appellant and his co-accused offered pleas to assisting an offender contrary to s. 7(2) of the 1997 Act, but that offer was not acceptable to the Director. At trial, the prosecution case was that all of the accused were jointly involved in the death of Mr. Dooley; it was presented as a case of joint enterprise and common design.

6. In the course of this Court's judgment of 13th July 2021, the conduct of James Davy and Mr. Cummins in the aftermath of the murder was described as "reprehensible". We have referred to the efforts to burn the body, the stealing of property, and the disposal of incriminating items as "deeply unsavoury". The Court felt that while those factors could certainly be pointed to, when considering what evidence there was of the existence of an agreement, they were not determinative of the issue. The Court concluded there was insufficient evidence to infer an agreement to commit murder to which the appellant and Mr. Cummins were party. However, the Court commented that there was overwhelming evidence of guilt insofar as the offences under s. 7(2) of the 1997 Act were concerned.

Bail Application

7. The response of James Davy and of his co-accused, Mr. Cummins, to having their murder convictions quashed and convictions for assisting an offender substituted was to apply to the Central Criminal Court for bail. On 6th August 2021, a bail application was heard, the outcome of this being that the judge directed the appellant be released on bail on 23rd August 2021, at which stage he would have spent a period in custody, which was the equivalent to that which would be spent by someone serving a nine-year sentence. The application for bail on 6th August 2021

focused to a major extent on the fact that calculations carried out by the defence indicated that by 23rd August 2021, he would have served in custody a period equivalent to a nine-year sentence.

8. When ruling on the bail application, the judge referred to the fact that the offence under s. 7(2) of the 1997 Act carried a maximum penalty of ten years. He referred to the fact that both accused before the Court had offered to plead, before trial, to the offence of assisting an offender, so it was the situation that the Court would be obliged to take into account that matters should be treated as an early plea, but said that while not wanting to pre-empt the sentence hearing, which had been fixed for 2nd September 2021 before him, the Court was of the view that it would have to be the case that some discount from the 10-year maximum would have to be given to the accused on the basis of the early plea, and therefore, the Court should proceed on the basis that the sentence would not exceed a nine-year term of imprisonment.

9. Of some significance is that the Court did not admit Mr. Cummins to bail in circumstances where, because of a conviction on another matter, the question of consecutive sentences arose as a live possibility.

Sentence Hearing

10. In the course of the cross-examination of Garda witnesses at the sentence hearing, there was reference to the fact that the appellant had a lengthy psychiatric history, something which was not disputed by Gardaí, and also to the fact that a letter had been sent to the family of the deceased by James Davy, expressing remorse and sympathy towards them. There was reference to the fact that the appellant at times experienced suicidal ideation and to the fact that there had been an attempt to commit suicide when he was in custody.

11. Counsel began his plea in mitigation by pointing to the fact that on the bail application, it had been indicated that if the appellant were to receive a nine-year sentence, his release date would be 23rd August 2021, and the Court had directed that he be released on bail on that particular date. The plea referenced the remorse, in that context, referring to the letter which had been read to the family of the deceased at the time of the sentence hearing in 2016. The plea referred to the fact that there was an extensive psychiatric report, but it was observed that it was somewhat historical, and counsel did not need the Court to go through it. Counsel noted that the appellant had been diagnosed with paranoid schizophrenia.

12. In the unusual circumstances of the case, the Court's sentencing remarks were brief. The Court commenced its remarks by stating that the reality of the situation is that the Court had considered this in some detail in relation to the bail application, adding:

> "This is a very serious offence and the aggravating factors are obviously that you were present when a man was murdered and you aided and abetted the murder by impeding the investigation by removing important evidence and it is right up at the magnitude of the maximum penalty of the offence pursuant to section 7[(2)] of the Criminal Law Act 1997. Obviously the mitigating is that you offered a plea to that offence and it was offered right at the beginning before the murder trial. The Court considers the appropriate sentence is one of nine years imprisonment to date from the time you went into custody […]
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> …

24th of November 2014. Now, what I'm going to say to you, Mr Davy, is that the Court of Criminal Appeal has given you a significant opportunity. They've overturned the murder conviction and substituted this offence contrary to section [7(2)] of the Criminal Law Act 1997. You're a free man now. I'm directing that the sentence is deemed served already because of the time you've spent in custody. As [Senior Counsel for the appellant] has said on your behalf, you've seen what recidivism does, people who come in and out of prison, so you've an opportunity now to turn your life around and I certainly hope you take it. So, the Court sentences Mr James Davy on the offence of section 7(2) of the Criminal Law Act 1997, which is impeding the apprehension or prosecution in the offence of murder. The Court imposes a sentence of nine years imprisonment, which dates from 24th November 2014, and directs and deems that in fact Mr Davy has served that sentence and there is no need for any custodial period. Is there any other matter in Mr Davy's case?"

Senior Counsel for the appellant responded: "Well, no, Judge, apart […] from practical matters in relation to solicitor and counsel." This was a reference to how the legal aid scheme would operate in the unusual circumstances in which the matter had come before the Court.

The Appeal

13. The written submissions on behalf of the appellant begin:

"This is an unusual application – the appellant was sentenced to time served and he has served the sentence in its entirety. The purpose of the application is so that the record will reflect the appropriate sentence marking the appellant's degree of culpability and the mitigating factors in his case so that the accused's criminal record reflects his role in the offence. It is submitted that the sentence which was imposed was unduly harsh and failed to consider the mitigation put before the Court on behalf of the appellant."

Discussion and Decision

14. The first question that arises is whether the judge was justified in dealing with this on the basis that it was a case for a "time served" order, which, certainly on one reading of the bail hearing and the sentence hearing, was what he was being asked implicitly to do, or, whether in taking that course, he fell into error. The next question that arises is whether, if the judge was to have embarked upon a more traditional sentencing exercise, that would have resulted in a sentence which would have differed from the sentence actually imposed to such an extent that the actual sentence would have to be regarded as having fallen outside the judge's margin of appreciation. It seems to us there is a greater link between the two questions than might at first appear. If, in a particular case, the Court is called on to resentence, and by that stage, the period spent in custody significantly exceeds the period, if any, which would have been spent in custody if matters had not taken a wrong turn, few could argue that a "time served" order would meet the justice of the situation. Doing justice would require that a sentence would be imposed which would mean the record would reflect the reality of the offending that had occurred. However, is that the situation here?

15. In the course of his sentencing remarks, the judge appeared to take the view that this was a case which called for a headline or pre-mitigation sentence at the maximum of ten years. For our

part, we are in no doubt about the fact that a headline or pre-mitigation sentence of ten years, being the statutory maximum, was fully warranted. Equally, we are in no doubt that this was not one of those exceptional cases where a maximum sentence would actually be imposed, notwithstanding that a plea of guilty had been forthcoming.

16. So far as the appellant criticises the sentence that was imposed, the criticism focuses on the fact that there was an insufficient discount from the maximum in a situation where there had been an early plea offer, and where there were other factors present to be weighed in the balance, including a history of mental health difficulties, and the significant progress the appellant appeared to have made while in custody. The appellant points out that the only matter specifically mentioned by the judge as being in his favour was the early plea. The discount for the plea at 10% was less than would normally be expected. Insofar as it was the only discount allowed, when taken in conjunction with the other factors present, it was clearly inadequate and resulted in a sentence which was excessive.

17. The written submissions on behalf of the appellant had raised parity arguments in circumstances where the co-accused, Mr. Cummins, had received a sentence of nine years imprisonment, with two suspended. It was said his role in events that occurred post-murder was greater, in that it was he who had attempted to burn the body of the deceased and the chair in which the deceased was sitting. It was said his previous record was much worse than that of the present appellant. However, in exchanges with members of the Court, counsel appeared to acknowledge that the reality was that the post-murder activity was in the context of common design. However, more significantly, the judge dealt with the matter by increasing significantly the period Mr. Cummins had to spend in custody. We have not been provided with the transcript of that sentence hearing, however, in the course of this appeal hearing, we have been given to understand that he was required to spend an extra two years in custody. This was in circumstances where he had re-offended in April and May 2014. These matters were dealt with at Tullamore Circuit Criminal Court by way of the imposition of a four-year sentence, with two years of the sentence suspended, the sentence being backdated to 16th May 2014, the date on which he went into custody in relation to those matters.

18. We have already indicated our agreement with the sentencing judge's remarks in the Central Criminal Court to the effect that this was serious offending meriting a headline or pre-mitigation sentence of ten years, the statutory maximum. Equally, it was clear that the actual period to be spent in custody would have to be significant.

19. In circumstances where the judge decided on the pragmatic approach of opting for a time served order, and where he was certainly not discouraged from taking that approach by the appellant, we have had to carefully consider whether an intervention at this stage is appropriate. The factors that cause us to hesitate about intervening are not just the fact that there appears to have been a shared understanding at sentence stage that a time served order was an option. However, there is the further point that the period served in custody was, in effect, determined by the actions of this appellant and his co-appellant Mr. Cummins in choosing to delay in bringing on their appeal against the murder conviction. Had the appellant brought his appeal at the same time as the appeal in the Sean Davy case, and had the result been that the murder conviction of James Davy was quashed, and a conviction for an offence contrary to s. 7(2) of the 1997 Act been

substituted, it would not have been the case that James Davy would have spent a period of custody which would be the equivalent of a nine-year sentence. On the contrary, the period of time he would have spent in custody would be less than the equivalent time that would be spent in custody if any sentence that would likely have been in contemplation was imposed.

20. However, in circumstances where the merits of the sentencing process have been embarked on, we have decided to address the question of whether a nine-year sentence was appropriate. We have concluded that it was not. If the case was approached on the basis that it was an early plea of guilty, which all accept was the correct approach, then a discount of 10% from the statutory maximum would not seem adequate. On the basis of an offer of an early plea, together with such other factors as were present, including the expressions of remorse, the history of mental health difficulties and the indications that the time in custody was being spent productively, we do not believe that the discount could be less than 20%.

21. Accordingly, we have decided to quash the sentence imposed in the Central Criminal Court and to substitute therefor a sentence of eight years imprisonment, and the sentence will date from the same day as did the sentence imposed in the Court below.