UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

[2/22]

Neutral Citation No: [2023] IECA 37

The President

McCarthy J.

Kennedy J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

CHRISTOPHER KELLY

APPELLANT

JUDGMENT of the Court delivered on the 17th day of February 2023 by Birmingham P.

1. This is an appeal against severity of sentence. The sentence under appeal is one that was imposed on 17th December 2021 at Kilkenny Circuit Court. The sentence in question was one of six years imprisonment, with the final 12 months suspended, imposed in respect of the offence of possession of a firearm in suspicious circumstances contrary to s. 27A(1) of the Firearms Act 1964 as amended ("the 1964 Act"). An offence of possession of ammunition in suspicious circumstances contrary to s. 27A(1) of the 1964 Act was taken into consideration. Of note, in the context of the present appeal, is that on the same occasion, a sentence of five years imprisonment, with the final year suspended, was imposed on a co-accused, Mr. Kealan Madden.

Background

2. The background to the case is to be found in events that occurred on 20th May 2020. On that occasion, members of the Emergency Response Unit were in possession of certain intelligence, and acting on foot of that intelligence, stopped a vehicle in a rural area of Kilkenny. There were three occupants of the vehicle, which was driven by the appellant, one of the others was the co-accused, Mr. Madden, who was a rear seat passenger. As the vehicle was stopped, a small black object was seen to be thrown into hedging from the rear window. In addition, on stopping the vehicle, Gardaí noted that there was a sock between the legs of the co-accused, and in the sock were 47 rounds of ammunition. A search of the hedgerow was undertaken, and a small black pistol was located. This was a 9mm semi-automatic pistol which had originally been designed to fire blanks, but it had been modified so as to be capable of firing live ammunition.

3. Having been arrested at the scene of the vehicle stop, the appellant resisted arrest, to the extent that he had to be taken forcibly from the vehicle. During the subsequent detention, he was interviewed on a number of occasions. He made no admissions, nor did the co-accused during the course of his detention. In the course of direct evidence at the sentence hearing, in response to the question, "were any admissions made by either man?", the investigating Garda said, "[n]o, Judge. There was (*sic*) no admissions made in relation to Kealan Madden. There was some co-operation in relation to Christopher Kelly." Counsel sought to clarify by asking, "[b]ut, in general terms, no admissions made?", to which the Garda responded, "[n]o admissions were made. No."

4. While neither suspect made admissions while in custody, both indicated an intention to plead guilty at an early stage, neither ever sought a trial date, and indeed, there was no suggestion that either of them would contest the case.

Personal Circumstances of the Appellant and Co-Accused

5. Information was provided at the sentencing hearing in relation to the background and personal circumstances of the two men before the court. The appellant was born on 2nd December 1990, and Mr. Madden was born in May 1988. In relation to previous convictions, the appellant had one previous conviction, an offence contrary to s. 3 of the Misuse of Drugs Act 1977. The date of that offence was 16th December 2018, and it was dealt with in Kilkenny District Court on 8th October 2019, when the appellant was fined €1,000. In relation to Mr. Madden, the Court was told that he had 13 previous convictions recorded in total; a number of these were road traffic matters. However, on 26th March 2015, he was convicted of the offence of production of an article during the course of a dispute contrary to the Firearms and Offensive Weapons Act 1990, as amended. The date of that offence was 30th April 2013, and Mr. Madden was fined €300. Further, on 26th March 2009 at Waterford District Court, he was convicted of criminal damage contrary to the Criminal Damage Act 1991, as amended. The date of that offence was 1st January 2008, and it was taken into consideration with a number of other criminal damage matters. It appears those matters were dealt with on the same occasion, by way of a fine of €750. Also dealt with on that occasion were two public order offences.

The Sentencing Hearing

6. Further information was put before the court during the cross-examination of Detective Garda Brennan by counsel for both of the accused. It emerged that, while there had been a number of search warrants following the stop on the roadway, none of the properties covered by the search warrants were the property of Mr. Madden and he did not live at any of those properties. He had not been mentioned in any of the informations sworn in the course of applications for the three search warrants. Counsel for Mr. Madden asked, by reference to what his client had told the probation officer, if it was the case that both men stopped in the

vehicle "were acting on the orders of a more senior and violent man". The Detective Garda confirmed that this was the belief of the Gardaí. He agreed with counsel that counsel's client, as he had told the probation officer, had developed quite a serious alcohol and drug habit during lockdown. The Garda responded by saying he accepted that, and believed that, Mr. Madden had a drugs debt, before adding that while they believed that, it was also the Garda belief that the appellant was active on the drugs scene as well in relation to sale and supply, and it was not just a question of using substances.

7. The appellant's counsel began by referring to the fact that it was set out in the probation report that her client was unaware as to what was in the package he was asked to transport and believed it to be drugs. Counsel asked, "[a]nd you do not disagree that that was the state of knowledge he had at the time; is that correct?", to which the Detective Garda responded, "[y]es, Judge. He stated he was aware he was going to pick up a package, but he didn't know what it was." A further question put by counsel was, "[a]nd [he] was transporting it [the gun] on that day and had been paid a sum of money to do so; is that correct?", to which the Detective Garda responded, "[y]es, Judge. That's -- Yes."

8. In the course of the plea in mitigation, counsel on behalf Mr. Madden referred to the fact that he was the father of two young children, that he appeared to have a work history, though the probation officer had not been in a position to fully check that out. In relation to his client, he commented, "[h]e accepts and told the probation officer he believed that there was cannabis in the bag in question. He admits taking the gun out of the bag and putting it into a box." Counsel on behalf of Mr. Madden referred to the fact that his client was using his time in custody productively. He concluded his submissions by saying that he would say that, overall, the Court could depart from the five-year tariff imposed by the 1964 Act, observing that it was not mandatory as had been pointed out repeatedly by the Court of Criminal Appeal and now this Court.

9. In the course of the plea in mitigation in relation to the appellant, counsel began by referring to the fact of the early plea and stressed that it was a plea of real value, particularly in a case such as this, where the evidence would have been that a group of people were involved in the commission of an offence, and so there would have been issues arising as to the state of mind of particular individuals. She referred to the evidence of the Detective Garda, describing it as "extremely fair" evidence, and summarised it as being that the appellant was in the position that he did not know what the contents of the package he was transporting contained, albeit he knew they were items of an illegal nature. She referred to her client's remorse and submitted it was genuine and made references to certain letters and testimonials. She referred to the fact, so far as the item he came to be in possession of was concerned, that he was transporting it and not doing anything further with it.

10. Counsel referred to the fact that her client's father and his partner were present in court, and drew attention to the details in the documentation about the fact that a child who had always known him as his father – he was in fact his stepfather – had died in tragic circumstances. Counsel suggested this appeared to have precipitated a re-engagement with the use of cannabis. She made reference to a psychologist's report and a medical report which were before the court. The medical report indicated that her client suffered from Crohn's disease. Counsel referred to the positive tone stuck by the probation report and concluded her submissions, as her colleague had done, by saying all the matters the Court had to consider would permit the Court, in the round, to impose a sentence below the presumptive mandatory minimum.

11. The judge indicated that she had been handed a significant amount of documentation to consider and she was going to put the matter back to allow time for consideration.

The Sentence Imposed

12. Two weeks later, when sentence was imposed, on 17th December 2021, the judge began by reviewing the facts of the case. She referred to the fact that a small black object was seen to be thrown into hedging from the rear nearside window, where Mr. Madden was seated, observing, "[t]hat's an important detail." She referred to the sock containing a tray of ammunition found between the legs of Mr. Madden and to the fact that both accused were wearing light, transparent, disposable gloves. She commented that when the vehicle was stopped, apparently the occupants were in shock, there was some resistance and she thought that the appellant had to be taken from the car.

13. The judge recited that both men were detained and interviewed and said she would come back to the issue of cooperation, but observed that there was, "some cooperation" by the appellant. She referred to the fact that both cases were the subject of early pleas, and observed, "[i]t is the case that certain matters arose following arrest in relation to [the appellant]" and that these would be taken into account by the court.

14. The judge first dealt with Mr. Madden and addressed the issues that had been urged on behalf of that accused. She referred specifically to the legislation providing for a mandatory presumptive minimum: the 1964 Act. In relation to Mr. Madden, the judge said she was satisfied that the requirements as laid out in subsection (5)(a) of the s. 27A of the 1964 Act had been met in relation to the plea and the timing thereof, in that it was an early plea. She stated specifically that the Court took the view that this was a case in which there were exceptional and specific circumstances where it would be unjust to impose the minimum mandatory term of imprisonment. Nonetheless, the judge added the Court was dealing with a very serious offence, and then proceeded to impose a sentence of five years imprisonment on Mr. Madden, suspending the final 12 months of that sentence.

15. The Court then turned to the position of the appellant. The judge referred to the early plea and its value, that it was accepted by Gardaí he was not aware of the contents of the

package and believed it to be drugs. While it was accepted that he did not own the gun, he was transporting it, and she said, "notably, he was being paid a sum of money to do it. That distinguishes him from Mr. Madden." The fact that he was being paid for transporting the package was a matter adduced in evidence by Senior Counsel on his behalf, and presumably was introduced to establish his limited, arm's length, relationship with others more involved at a senior level. The judge referred to his personal circumstances, the death of his young child – a tragedy which had exacerbated his use of drugs – his good work history, and she referred to the fact that the Court had documents relating to him and the Court would take those into account. She then referred to some of those documents, those dealing with Crohn's disease, which she said was making his time in custody more difficult, to the fact that his ex-partner, the mother of his child, was in the terminal stage of illness and that this had a bearing on him. Again, she referred to the fact that he appeared to be doing well in custody and she had a letter from his father and his partner.

16. The judge then turned to the statutory architecture where she said as follows:

> "And again, in relation to [the appellant], I am not going to recite the provisions again in relation to [s. 27A of the 1964 Act] but the Court is of the view that there are exceptional and specific circumstances relating to this offender, having regard to all the matters, including [s. 27A, subsections 5(a)(i) and (ii) and (b) of the 1964 Act] in this instance".

17. As aggravating factors, she instanced the fact that the appellant was driving the car, which was being used to transport what he knew to be an illegal activity, the fact that he was wearing disposable gloves and was being paid to move the items. She listed the mitigating factors as the early guilty plea, and observed, "[t]here wasn't meaningful cooperation." She referred to the fact that previous convictions were minor, describing them as "irrelevant really", and referred to the fact that he had no previous convictions in respect of firearms and

had expressed remorse. The judge concluded her remarks by saying, in respect of the appellant, that the Court was not bound by the minimum mandatory sentence, but nonetheless, the Court viewed it as a serious matter and nominated a headline sentence of seven years, but in light of the mitigating circumstances, she would be imposing a sentence of six years imprisonment, of which, in order to incentivise rehabilitation, she would be suspending the final 12 months.

The Appeal

18. In appealing the severity of the sentence imposed upon him, the appellant contends that the sentence was disproportionate to the gravity of the offence with which he was charged and submits – and this is the kernel of his appeal – that there was an unjust differentiation in the sentence which was imposed on him, and the sentence imposed on his co-accused, and that this unwarranted differentiation gave rise to an error in principle. It is because of this argument about an unjustified differentiation, in effect a parity argument, that we have decided to set out more detail than would be usual, the submissions of counsel for, not just the appellant, but also for the co-accused, as well as the judge's observations when sentencing both.

Discussion and Decision

19. The specific statutory provisions in relation to sentencing for firearms offences have been in force for a considerable period and have been considered and applied by both courts of first instance and appellate courts on numerous occasions. It is now accepted that the proper approach of a judge called on to sentence in a firearms matter is to first identify a headline or pre-mitigation sentence. The judge will be assisted in that task by the guidance provided by the Court of Criminal Appeal in *DPP v. Kieran Ryan* [2014] IECCA 11. There,

attention was drawn to the fact that a minimum presumptive sentence of five years applies, though non-mandatory. For low end offences, a headline sentence of five to seven years was indicated. For midrange offences, a headline of seven to ten years was identified, and for the top end of the scale, one of ten to fourteen years. Having identified a headline or pre-mitigation sentence, in the usual way, the judge will turn to the question of mitigation and will eventually arrive at an effective sentence he or she is minded to impose. If the sentence arrived at is five years or higher, no further consideration of the statutory architecture is required. However, if the figure arrived at is less than the presumptive minimum of five years, the judge has to consider whether, by virtue of statute, the sentence that should be imposed should be the statutory minimum. The judge should proceed to impose the statutory minimum unless satisfied that there were exceptional and specific circumstances relating to the offence, or the person convicted, which would make the minimum term unjust in all the circumstances.

20. In this case, the sentencing judge specifically addressed the statutory architecture in the case of both accused she was sentencing. She appeared to conclude that in the case of both men, there was a basis for departing from the statutory minimum. That she chose to address the statute on a specific and individual basis in the case of the appellant, and to reach a conclusion that she was free to depart from the statutory minimum, but to then impose the statutory minimum as the term to be actually served, with a further additional element of the sentence suspended, seems somewhat surprising.

21. In our view, had the judge decided that while there were factors present which were favourable to the two accused, there was nothing specific or exceptional about the case, which would have prevented the imposition of the mandatory minimum, or indeed a higher sentence that would not have been surprising, then it is unlikely that an effective sentence of five years to actually be served would have been interfered with. On the other hand, we can

see how a judge might have concluded this was a case for departing from the mandatory presumptive minimum. Neither accused had any relevant previous convictions. Both had entered early pleas. There were some factors present in terms of the personal circumstances of each of the accused which would evince a degree of sympathy.

22. We have little difficulty in concluding that there was nothing wrong with the sentenced selected for the appellant *per se*. It was a sentence of six years, with one suspended, so that the effective sentence to be served was five years, the statutory minimum; in our view, taken in isolation, it could not be regarded as disproportionate. There remains for consideration the divergence between the sentences imposed on the two offenders. In the course of her sentencing remarks, the trial judge referred to the fact that the appellant was being paid a sum of money for transporting the package, observing, "[t]hat distinguishes him from Mr Madden." We have already referred to the fact that the question of payment was introduced by counsel on behalf of the appellant, presumably because she felt it was to the advantage of her client. No doubt, she felt it was suggestive of a one-off engagement and leaned against any suggestion of involvement on an ongoing basis in the activities of a criminal gang or anything of that nature. We are somewhat at a loss to see how it differentiates the appellant from Mr. Madden. It seems unlikely that Mr. Madden was in the car with ammunition between his legs for the fun of it or was doing it by reason of natural love and affection.

23. In addressing the differentiating factors between the co-accused, in the course of written submissions, the Director referred to the fact that the appellant had to be forcibly removed from the vehicle which he was driving and restrained by armed Gardaí, that he resisted arrest in a highly volatile situation with armed Gardaí present, and where a firearm had been thrown from the moving vehicle by his co-accused, while Gardaí were moving to

intercept the vehicle. The Director refers to the fact that the appellant was the driver of the vehicle which he supplied and that he was paid to transport the illegal materials.

24. In truth, we find it difficult to see that there was any basis for treating the appellant more severely than Mr. Madden. The case against Mr. Madden was probably the stronger of the two; the firearm was thrown from the backseat, where he was the only occupant, and the ammunition was in the sock between his legs. If the appellant had not entered a plea, the prosecution would have had to establish that he knew what was in the possession of his rear seat passenger; that might not have been a difficult task given that he was wearing disposable transparent gloves. Certainly, the plea was no less valuable and arguably was of marginally greater value.

25. The previous record of the appellant – a single s. 3 Misuse of Drugs Act 1977 conviction where the drug in question was cannabis – was certainly no worse than Mr. Madden's, though Mr. Madden's previous convictions were of limited relevance, in that all went back a distance, to 2009 for the most part, and all had been dealt with at District Court level. Mr. Kelly's personal circumstances, including the fact that he was suffering from Crohn's Disease, if anything, appear more difficult than those of his co-accused.

26. Overall, we feel that this was a case where there was little basis for distinguishing between the two men. In a situation where we feel there was little wrong with the actual sentence imposed on the appellant – six years with one year suspended, with an effective five years to be served – we have asked ourselves whether we should intervene. We do accept the appellant is likely to find himself wondering why he was dealt with more severely than was Mr. Madden, and to that extent, is likely to have a sense of grievance. In a situation where the effective sentence to be served by him is the statutory presumptive minimum, the question arises as to whether that can be said to be a legitimate sense of grievance. We have concluded that in circumstances where the judge specifically and directly addressed the relevance of the

statutory presumptive minimum, in the appellant's case, and concluded there was a basis for departing from the statutory presumptive minimum, and then did not do so, that would tend to heighten any sense of grievance.

27. In the circumstances, we have decided to intervene. We are required to resentence. In the circumstances, we have regard to up-to-date information put before the Court which certainly suggests that the appellant is using his time in custody productively. We have also had regard to an impressive and moving letter from his father, as well as a letter the appellant has put before us.

28. Having considered all relevant matters, we have come to the conclusion that the appropriate way to deal with matters at this stage is to quash the sentence that was imposed on the appellant in the Circuit Court and to substitute therefor a sentence of five years imprisonment, with the final 12 months of the sentence suspended, this being the same sentence as was imposed on his co-accused. The sentence will date from the same day as the sentence in the Circuit Court.