



THE COURT OF APPEAL

Record No: 159/2021

**The President.
McCarthy J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

DERMOT O' CALLAGHAN

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 17th day July of 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against sentence. On the 29th July 2021, the appellant was sentenced to 8 years' imprisonment with the final year suspended in respect of one count of possession of an imitation firearm contrary to s. 27B of the Firearms Act, 1964, as amended.

Factual Background

2. The count to which the appellant pleaded guilty arose in the context of a robbery which occurred at Ulster Bank, Stillorgan, on the 27th September 2017. CCTV footage of the robbery was viewed by gardaí who identified the appellant and his co-accused as the perpetrators. The co-accused is seen on the footage holding what is now known to be an imitation firearm which he pointed at a bank staff member. Two other staff members were at cash desks and were told by the perpetrators to empty sums of money into a bag. The perpetrators escaped with the money which was estimated to be in the region of €14,000.

3. Gardaí obtained a warrant for the appellant's home. The appellant was downstairs, and his co-accused was upstairs asleep in a spare bedroom. Two weapons were found underneath the bed, one of which was a replica pistol. Both men were arrested.

4. On the 25th February 2020, the appellant appeared before Dublin Circuit Criminal Court for trial on a sole count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

5. On the 5th March 2020, day 8 of the trial, an amended indictment was lodged by the Director of Public Prosecutions including an additional count of possession of an imitation firearm contrary to s. 27B of the Firearms Act, 1964, as amended. The appellant and his co-accused were rearraigned on the additional count and pleaded guilty on a full facts basis.

6. The matter was listed for sentence on the 31st March 2020, on which date, the appellant indicated to the court that he wished to vacate his guilty plea. Ultimately, that application was refused and on the 29th July 2021, a sentence was imposed. The judge identified a headline sentence of 12 years, which she reduced to 10 years' on account of mitigation. As she was required to impose the sentence consecutively, she had regard to the principle of totality and reduced the sentence to one of 8 years' imprisonment with the final year suspended on conditions.

7. The appellant has relevant previous convictions, he has 22 in all, the convictions which aggravate this offence include three for s. 27B of the Firearms Act, four for robbery and three for burglary. Further aggravating factors were identified by the judge, including, the use of the imitation firearm to instil fear and terror into the persons who were present in the bank on the day of the offence, that the appellant was on bail for similar offending, the offence was committed in the operational period of a suspended sentence, the manner in which the firearm was brandished and used, and the impact on three staff members of the bank.

8. A headline sentence of 12 years was identified, and this in reality forms the substance of this appeal in that it is argued that in imposing sentence the judge erred on a factual issue; in considering the fact that the appellant was on bail was a factor distinguishing him from his co-accused, when this was a factor common to both. A headline sentence of 11 years was nominated for the co-accused. Moreover, it is argued that committing an offence in the currency of the operational period of a suspended sentence should not constitute an aggravating factor.

9. She stated that she placed the headline sentence for this appellant higher than that of his co-accused in recognition of the fact that the appellant was on bail and the suspended portion of a sentence at the time of the offence. She stated that this was despite the appellant's co-accused having more previous convictions than the appellant.

10. In mitigation, the judge took into account the appellant's guilty plea, his background, personal circumstances, history of drug addiction and his ill health associated with such history. She noted that the appellant has a long standing addiction to heroin and has had some successful intervention but has relapsed.

11. Having nominated a headline sentence of 11 years for the co-accused, this was reduced to 9 years in light of mitigation and 18 months of the sentence was suspended, leaving a custodial element of 7 ½ years imprisonment.

12. The actual carceral element of the appellant's sentence is that of 7 years adjusted to that figure to take account of mitigation and the principle of totality.

The Appeal

13. In truth, the ground of appeal relied upon by the appellant is that of ground 2, set out hereunder, in that if the judge erred in nominating a headline sentence of 12 years for the appellant, the ultimate sentence is too high.

"2. The learned trial judge erred in fact and in law in failing to give an equivalent sentence to that of the appellant's co-accused in line with the parity principle."

14. In addition to the two points raised concerning the factual error and the issue concerning the operational period of a suspended sentence, it is emphasised by the appellant that the appellant's co-accused had 46 previous convictions, 12 of which were for robbery, 1 possession of firearm with intent, 9 for burglary, 11 for s. 4 theft and 1 for conviction for possession of articles.

15. It is submitted that the judge did not adequately take account of the difference in the criminal records of the appellant and his co-accused, the appellant's record being less serious, and that therefore, the sentence imposed offends the principle of parity.

16. The respondent submits that the difference in sentence imposed is readily and objectively justifiable in light of the fact that the appellant was serving a suspended sentence at the time. It is accepted that the co-accused was on bail when the offence was committed.

Discussion

17. The matters in issue can be addressed succinctly. We are entirely satisfied that committing an offence during the operational period of a suspended sentence is an aggravating factor and so, the judge did not err in this respect. A sentence of five years imprisonment suspended for ten years was imposed for possession of firearms with intent and attempted burglary in 2008.

18. The judge properly identified the fact that the offence was committed on bail as an aggravating factor stating:-

"...[t]he fact that the accused was on bail for similar type offence at the time when he committed this offence, significantly aggravates the offending conduct."

19. However, we believe she fell into error in her reasoning as to why she was imposing a somewhat greater headline sentence on the appellant in that she stated:-

"I'm placing the headline sentence higher than that of the co-accused in view of the fact that Mr O'Callaghan was on bail and a suspended sentence at the time, even though Mr Clarke, his co-accused, had 46 previous convictions..."

20. As both the appellant and the co-accused were in fact on bail, this was not a reason to differentiate between them and so we will quash the sentence and proceed to re sentence *de novo* as of today's date.

Re-Sentence

21. Whilst it is argued with a very light touch that the appellant's role was a somewhat lesser one, in that he did not hold the firearm on the date in question, this is quite properly not pressed.

22. We consider on the aggravating factors identified by the judge that the appropriate headline sentence taking matters in the round in that of 11 years' imprisonment.

23. In taking account of the mitigating factors, to include his progress in custody to date, we will reduce that sentence to one of 9 years' imprisonment.

24. The sentence must of course be a proportionate one and it is necessary to step back and examine the sentence of 9 years in terms of the totality principle. This sentence must be imposed consecutive to the sentence of 8 years' imprisonment given that the offence was committed on bail. We consider it appropriate to adjust the sentence in furtherance of this principle and so we impose a sentence of 7 ½ years' imprisonment.

25. We understand that the appellant is progressing well while incarcerated and is addressing his addiction difficulties; reducing his methadone dosage, he is in the progression unit in Mountjoy Prison and is employed in the laundry.

26. Consequently, we will suspend the final year of the sentence on the same terms as in the court below, to aid his rehabilitation.