THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[48/19]

Neutral Citation Number: [2021] IECA 221

The President

McCarthy J

Donnelly J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOROF PUBLIC PROSECUTIONS

RESPONDENT

AND

CONOR METCALFE

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 29th day of July 2021 by Birmingham P.

1. On 19th December 2018, the appellant was convicted before the Special Criminal Court of the offence of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939 (as amended). Subsequently, on 18th February 2019, he was sentenced to a term of four and a half years imprisonment with the sentence to date from 10th December 2018. He subsequently appealed against both conviction and sentence. This Court has already dismissed the appeal against conviction, delivering a judgment dated 18th February 2021, and this judgment now deals with the sentence appeal.

2. In dismissing the appeal against conviction, the background to this matter was set out in considerable detail and we do not propose to repeat that exercise at this stage. However, in

a situation where the approach of the trial court to sentencing is now the subject of criticism, and in circumstances where the trial court delivered a very detailed ruling in relation to sentence, we think it helpful at the start of this judgment to refer to what the Special Criminal Court had to say in imposing sentence. Taking that approach will, we believe, provide context for the arguments advanced in the course of this appeal.

The Sentence

3. The Special Criminal Court referred to the fact that in its ruling, delivered on 19th December 2018 convicting the appellant following a contested trial, it had set out in detail the facts that had, in the view of the Court, been established by the evidence. The Court explained that it was their intention to apply the two-staged analysis – the first stage involving assessing the gravity of the offence, and then the second stage would involve taking account of any mitigating factors. The Court stated that the inherent gravity of the offence was addressed by the specific statutory provision prescribed in relation to the offence, the maximum penalty applicable being one of eight years imprisonment. The Court explained that they had carried out the first stage of the necessary analysis, that is to say the assessment of gravity, by reference to the facts as found in their judgment. The Court observed that the statutory belief evidence did not, in itself, provide any clues as to the gravity of the offence of membership committed. The Court commented that just as with legitimate organisations, a statement that somebody is a member on a particular date is not informative in itself as to the nature and extent of that membership. The example was drawn of a sports club which would have members who were never present and members who were on the premises at every spare moment. A body called upon to assess the level of membership of any organisation, be it lawful or otherwise, has to look beyond the basic facts of membership to the surrounding evidence and circumstances in order to assess whether an individual is highly committed and

active, semi-detached, or at the other end of the scale, a member in name only. The Court observed that where membership of an organisation is in issue in a criminal case, that if there is slight or no evidence of such surrounding facts or circumstances, the accused is, in the ordinary course, entitled to the most favourable possible view as to their level of membership.

4. The Court then observed that in the case before it, the second strand of the evidence was of some assistance in assessing the nature and extent of the membership of the accused as of the date of the offence in question. In this case, the accused had stood trial charged with membership of an unlawful organisation within the State on 24th November 2015. The Court clarified that the strand to which it was referring was the independent evidence in support of and in corroboration of the statutory belief or opinion evidence which, in the case, was provided by way of adverse inferences drawn by the Court from the accused's failure to answer material questions put to him at interview. The Special Criminal Court pointed out that as set out in the verdict, the prosecution had proved a range of conduct and associations on the part of the accused that, in the view of the Court, imparted a very significant level of materiality to the questions put pertaining to such matters. The Court explicitly stated that the facts proved by the prosecution for the purposes of establishing the materiality of questions put to the accused during interviews had been of particular assistance to the Court in determining the nature and extent of the IRA membership held by the accused on 24th November 2015.

5. The Court then reviewed the factual matters that it regarded as relevant to the assessment in paragraphs A to F.

6. We do not think it is necessary to review in detail the evidence which was adduced at trial with a view to establishing the materiality of questions. Suffice to say that the evidence fell into two categories, the first relating to evidence establishing the involvement of the accused in moving a stolen Renault van under the supervision and direction of a convicted

member of the IRA and the subsequent use of that van in the context of the unlawful possession of firearms by two other individuals. There was also evidence of the accused associating with known and convicted members of the IRA and the fact that a document bearing the fingerprints of the accused was found in the residence of a convicted member of the IRA in the course of a search on 25th March 2015. The handwriting on the document was similar to the handwriting in journals found bearing the name of the accused and the subject matter of the document was the apparent movements of vehicles used to transport wholesale cigarettes and information relating to the ownership and location of a post office.

7. The Court was of the view that the facts which underpinned the questions that were subsequently put to the accused, and not answered by him, were also material to the assessment of the gravity of the offence for which he had been convicted. The Court felt that in general terms, as with any criminal offence, the offence of membership of an unlawful organisation can be divided into offences at the lower end, mid-range and upper end of the scale. If one has regard to such a range, that would indicate that lower end offences should attract a sentence of up to 32 months, mid-range offences between 32 and 64 months and upper end offences from 64 months to eight years.

8. The Court opined that the sweep of the facts outlined unequivocally suggested that the membership with which the Court was concerned was persistent and active as of 25th November 2015. None of the individual facts suggested that the accused was a high level member or a directing mind of the organisation, but the instances of his various activities and associations in the context of membership were consistent, repeated, voluntary and intentional. Accordingly, they were of the view that the evidence in the case disclosed an offence towards the top of the mid-range for such offences, and that, accordingly, they had identified a headline sentence of five years imprisonment as appropriate.

9. The Court then turned its attention to mitigating factors. They observed that the weightiest mitigating factors that can arise would emanate from cooperation with an investigation, a plea of guilty, an expression of remorse or a firm purpose of amendment. However, none of those features were present in the case before the Court to the extent that the Court had been obliged to enter a not guilty plea on behalf of the accused. The Court said that counsel on behalf of the accused relied upon a limited number of matters in mitigation relating to family, employment qualifications, a positive period in custody and genuine personal and social references. Previous convictions that were recorded were minor and not of any great relevance to the serious offences under consideration. The Court felt that the modest nature of the mitigation available in the case would be reflected in a straight discount of 10% of the headline sentence, giving rise to a sentence of four years and six months imprisonment.

The Appeal

10. In contending that the sentence imposed was unduly severe, the appellant submits that the trial court erred in its assessment of gravity when it placed the offence at the top of the mid-range. The appellant says that the offence was at most at the low end of the mid-range, if not in the low end. It is said that the trial court erred in attaching significance to evidence adduced to establish the materiality of questions when the prosecution specifically and for tactical and/or strategic reasons made clear that they were not contending that this evidence supported or corroborated the opinion/belief evidence of the Chief Superintendent.

11. Furthermore, the appellant takes issue with the observations by the sentencing court that his involvement was "consistent, repeated, voluntary and intentional". There is particular criticism of the use of the word 'voluntary' which, it is said, adds nothing to the case. In that regard, this Court would observe that from time to time, the Special Criminal Court, or on

appeal, this Court, finds itself dealing with cases where it was suggested that the involvement was not truly voluntary, but rather as a result of a degree of coercion or moral pressure, perhaps arising from the involvement in an unlawful organisation of a relative or some other sinister figure in an effective position of authority. We think it likely that the Court was doing no more than making the point that the evidence here did not suggest that there was anything other than free, voluntary and conscious participation.

12. We agree with the trial Court that just as there may be different levels of activity in lawful organisations, so too may there be different levels of activity in unlawful organisations. The analogy drawn by the trial court of the member of the sports club is a helpful one. At trial, there was evidence related to associations, related to a particular document and related to a stolen vehicle. While at trial the evidence was adduced for the purpose of establishing the materiality of questions, we see nothing objectionable in the Court, at the sentencing stage, having regard to the evidence. The materiality of the questions at trial was established by proving the factual matters that underlay the questions beyond a reasonable doubt. It was not a mere prosecution tactic to submit that the facts did not corroborate the Chief Superintendent's opinion. What corroborated his opinion was the failure to answer material questions based upon those facts. This approach ensured that there could be no suggestion that the facts themselves were being in one sense relied upon twice, *i.e.* to form the Chief Superintendent's opinion and also to corroborate. In the context of the sentence hearing, it seems to us that the factual background to the questions that was established showed that the appellant's membership was active and involved and went beyond what, to use the sporting club analogy favoured by the Special Criminal Court, could be regarded as social membership or pavilion membership. In our view, it provided strong support for the suggestion that the membership that the Court was dealing with was an active membership and that this was not a situation of somebody who was a mere paper member.

We do not see that the Court's approach to the assessment of gravity was an impermissible one.

13. Standing back to look at the sentence imposed, it does not seem to us to have been out of line with sentences imposed in other cases. The Court would add one or two observations. At the sentencing hearing, the Court was told that the appellant had 13 previous convictions, the most recent of which was in December 2011. Six of those convictions related to public order offences – one was for criminal damage, one for s. 123 of the Road Traffic Act 1961 (as amended), one for possession of knives, one for drunk driving, one for driving with no license and one for driving with no insurance. All had been dealt with in the District Court. When the evidence was given, the presiding judge interjected to say, "nothing particularly relevant there, so". In the course of the sentencing remarks, the Court referred to the fact that the accused had previous criminal convictions, but added that they were minor in nature and not of any great relevance to the serious offence under consideration in this case. We feel that the approach taken by the sentencing court was a generous one. We accept that the previous convictions are not at all of the order of relevance that they would be if they related to previous convictions for membership, or convictions for activity associated with membership such as firearms or explosives. Nonetheless, recording 13 previous convictions, even if the most recent was December 2011, is not a matter of no consequence and does give rise to some loss of mitigation.

14. Overall, we have not been persuaded that the trial court fell into error, either in its approach to the assessment of gravity or in its identification of a headline or pre-mitigation sentence and then the application of mitigation.

15. Rather, it seems to us that the sentence imposed clearly fell within the available range and we therefore dismiss this appeal.