THE COURT OF APPEAL

[52/22]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GERARD DUFFY

APPELLANT

JUDGMENT (*Ex tempore*) of the Court delivered on the 11th day of November 2022 by Birmingham P.

1. This is an appeal against severity of sentence. The sentence sought to be appealed is one of eight years and nine months imprisonment with the final 12 months suspended, that was imposed by the Special Criminal Court on 4th March 2022. The sentence was imposed in respect of the offence of participating in certain activities contrary to s. 73 of the Criminal Justice Act 2006, as substituted by s. 10 of the Criminal Justice (Amendment) Act 2009.

2. The particulars of the offence were set out in these terms:

> "Gerard Duffy, on the 14th day of August 2019 at Main Street, Virginia in the County of Cavan you did commit a serious offence, in that you did attempt to commit an offence contrary to section 4 Criminal Justice (Theft and Fraud Offences) Act of 2001 contrary to common law, to wit the attempted theft of an ATM and its contents at Riverfront bar and restaurant for the benefit of, at the direction of, or in association with, a criminal organisation."

The sentence imposed was in relation to this, count 20, and there was a further count on the indictment, count 21, which it was agreed was to be taken into consideration. That count was an offence of participating in certain activities contrary to s. 72 of the Criminal Justice Act 2006, substituted by s. 6 of the Criminal Justice (Amendment) Act 2009, and the particulars of offence were set out as follows:

> "Gerard Duffy, on the 14th of August, 2019 at the shed at Tullypole, Moynalty in the County of Meath, participated or contributed to the possession of cash intending to facilitate the commission by a criminal organisation or any of its members of a serious offence, with knowledge of the existence of the organisation referred to."

3. While the focus of attention at the sentence hearing was on the events in Virginia on 14th August 2019, the Court was told that there had been a series of ATM robberies at various locations in Monaghan and Cavan between 16th December 2018 and the Virginia incident, and that the total amount of monies stolen came to approximately €790,000. The Special Criminal Court was informed it was the view of the Gardaí that it was the same criminal organisation that was involved in the various ATM incidents. It seems that the evidence in relation to the other incidents was adduced in order to provide the Court with information about the nature of the activities of the criminal organisation to which there was reference in the charges before the Court. Today, and in the written submissions, the appellant says that it may be that very unwittingly the Court may have been influenced by hearing the evidence of these incidents and may have fallen into the error of proceeding on the basis that there was some involvement by the appellant with those incidents when it is stressed that he pleaded guilty on the basis of the two counts which have been quoted. We can say at this stage that there is no reason to believe that the sentencing Court was led into error by hearing about the earlier ATM incidents, the evidence was admitted for a particular reason, and we do not believe that the Special Criminal Court was misled as to the nature of the plea, and the basis on which it was required to sentence.

Background

4. So far as the last incident, the Virginia incident, is concerned, this merits further description. A grey-coloured Toyota land cruiser with false registration plates pulled a flat twin axle trailer into Virginia to a building site, a site for a new fire station, at Bailieboro Road outside the town. The site was secured by a fence and chain. On the site was a case four-wheel, 14-tonne digger.

5. The suspects in the land cruiser – the incident was subject to Garda surveillance – accessed the site using bolt cutters. The case digger was stolen and was then driven in convoy, it being driven behind the land cruiser, towards Main Street. At Main Street, the land cruiser did a U-turn and returned to the location which was close to the Riverfront Bar and Restaurant where an ATM was located. There, the case digger approached the ATM, and the arm of the digger was extended towards the ATM. At that point, the Garda Emergency Response Unit (ERU) intervened. The land cruiser and ERU vehicle, a Range Rover, collided. This resulted in the trailer becoming detached from the land cruiser. Two suspects were seen fleeing from the land cruiser and the third suspect was seen fleeing from the digger. The appellant was identified by a National Surveillance Unit officer as being this particular individual. The three suspects ran on down the lane and were pursued by Gardaí. They climbed a wall with the Gardaí in pursuit. The appellant was arrested and brought to Carrickmacross Garda station where he made certain admissions. The other two suspects were not apprehended at that stage, though in the course of follow-up searches, another of the suspects, Mr. Ciaran Duffy, was apprehended the following afternoon. It is to be noted that the three individuals who appeared before the Special Criminal Court, and there entered pleas of guilty, were brothers.

Personal Circumstances of the Appellant

6. In terms of the appellant's background and personal circumstances, he was born in October 1990 and there were eight previous convictions recorded in respect of four incidents, all dealt with at District Court level, resulting in convictions being recorded under Public Order, Criminal Damage, and Road Traffic legislation. In terms of serious convictions, it is fair to say that the appellant did not have any serious convictions prior to this matter coming before the Court. The Court heard, and this was true also of the co-accused, that the appellant had a significant work history in the construction industry – indeed, he had a good work history, including of relevance achieving a Digger Pass. At one point in time, the appellant had worked in construction in Australia.

The Sentence Imposed

7. In the course of its sentencing remarks, the Special Criminal Court referred to the decision of this Court in *DPP v. Aylmer* [2020] IECA 106. In the course of the pleas in mitigation in the Special Criminal Court, the point was made on behalf of the individuals before the Court that, while this was offending of a significant and serious kind and the criminal organisation involved in it was a serious one, it was not of the first rank of seriousness, such as that concerning an organisation involved in murders and international drug trafficking. In relation to the offence of possession of cash intending to facilitate the commission of the serious offences concerned, the Special Criminal Court, in the course of its sentencing remarks, referred to the fact that it was clear that this appellant had close contact with the Tullypole yard and shed, a location which was central to the operation of the criminal organisation in question.

8. The approach of the Special Criminal Court to sentencing was to assess gravity, placing it in the top tier, but at a low point within that tier. They then identified a pre-mitigation or headline sentence of 11 years. They did this in circumstances where the maximum sentence available by statute was one of 15 years. A discount of 20% was then applied in respect of the plea, giving rise to a sentence of eight years and nine months, and then the sentence was further ameliorated by suspending the final 12 months.

Discussion and Decision

9. An issue raised by the appellant is that he received the same sentence as his brother and co-accused, Ciaran, but that unlike Ciaran, he had not participated in further criminal activity post-apprehension in Virginia. He said that imposing identical sentences for himself and his brother was inappropriate. Unlike his brother Ciaran, this appellant had no further links to Tullypole post-apprehension. For her part, the Director says that while it may be that his brother, Ciaran, was fortunate not to receive a separate sentence by reason of his subsequent conduct or to have his sentence lengthened, this did not mean that the sentence imposed on the appellant was inappropriate.

10. For our part, we believe the focus of the attention should be on the sentence imposed on this appellant and whether his sentence is appropriate or excessive. Suggesting that his brother might have been dealt with more severely does not avail the appellant. While the post-Virginia offending of his brother might have resulted in a somewhat heightened sentence, we do not think it was inevitable that this would be the case.

11. In the course of today's application, counsel for the appellant has focused on two issues: firstly, he says that the headline sentence of 11 years was too high as the criminal organisation involved here, whilst not an insignificant one, was not in the same league as an organisation involved in drug trafficking on a global scale or that associated with murders. Counsel asked, rhetorically, what would the sentence have been if it was a tier one organisation (tier one being a phrase used by this Court, not by counsel)? The second issue, Counsel submits, is that the Special Criminal Court erred in selecting the same headline sentence for the appellant and his brother, because the brother had pleaded guilty to a third offence, which involved attending on two occasions at the Tullypole yard post-the incident in Virginia. The fact that the two brothers ended up with the same headline sentence, notwithstanding that the brother had entered an additional plea, in matters involving another incident which significantly post-dated Virginia, meant that the appellant's sentence was too severe *vis-à-vis* his brother, and therefore the appellant's sentence was overly severe and inappropriate. It is submitted that there was a further error, in that the discount therefrom was inadequate. The discount of 20 per cent could not be considered as generous as it was the minimum discount that could be applied. Finally, counsel for the appellant argued that the suspension of 12 months did not adequately address the fact that the appellant was, at least in terms of serious offences, a first-time offender, and therefore, the suspension of only 12 months was not adequate. Rather, a suspension of a greater amount would have been adequate to differentiate between him and his brother.

12. In this Court's view, this was offending of quite exceptional seriousness. The Special Criminal Court saw this offending as falling at the low end of the top tier. We do not believe the Special Criminal Court can be found at fault in that regard. The discount of 20% for a plea, which was not an early one and was one which was offered in circumstances where the appellant had been caught red-handed at the scene, was not an inappropriate one. The suspension of one year must be seen in relation to fact that this was not a situation where there was evidence that the offence was linked to addiction or anything of that nature, and that steps were being taken towards rehabilitation, and that that was a process which the Court would want to encourage, by significant part-suspension.

13. This Court has often said that it is not sufficient for it to intervene that it would have been the situation that, had this Court or individual members of it been called on to sentence at first instance, that they might have imposed a different sentence. Rather, for the Court to intervene, something more is required, something in the nature of an error of principle must be established. What is required, before intervention, is that the sentence imposed fell outside the available range. In this case, it has to be accepted that the sentence imposed was a significant one, but it would also have to be accepted that the offending was always going to have to be met by a significant sentence. It is indeed the case that the sentence would certainly not be regarded as lenient and that some would regard it as falling at the severe end of the available spectrum. However, we have not been persuaded that it fell outside the available range. It seems to us the sentence imposed by the Special Criminal Court was one available to the Court.

14. In those circumstances, we have not been persuaded that there was any error in principle, and therefore we are obliged to dismiss the appeal.