THE COURT OF APPEAL

[197/22]

Neutral Citation No: [2023] IECA 182

The President

McCarthy J.

Ni Raifeartaigh J.

BETWEEN

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

RESPONDENT

AND

JONATHAN DOWDALL

APPELLANT

JUDGMENT of the Court delivered on the 14th day of July 2023 by Birmingham P.

Introduction

1. On 17th October 2022, the appellant was sentenced by the Special Criminal Court, on foot of a plea of guilty, to a term of four years imprisonment in respect of an offence contrary to s. 72 of the Criminal Justice Act 2006, as substituted by s. 6 of the Criminal Justice (Amendment) Act 2009, for the offence of participating in or contributing to activities which would facilitate the commission of a serious offence by a criminal organisation. He has now appealed against severity of sentence.

Background

2. The background to the sentence hearing, and now to this appeal against severity of sentence, is well known and does not require to be rehearsed in any great detail. It is sufficient at this stage to recall that the case has as its origin the murder of Mr. David Byrne

on the occasion of a boxing weigh-in at the Regency Hotel in Whitehall, Dublin, on 5th February 2016. At one stage, the appellant was charged with the offence of murder, but following an approach by him to the authorities, a new charge was laid to which he entered a plea of guilty. A *nolle prosequi* was entered in respect of the charge of murder on 28th September 2022.

3. The sentence hearing took place at the Special Criminal Court on 3rd October 2022, on which occasion the Special Criminal Court heard an outline of the evidence from Detective Sergeant Patrick O'Toole. This outline of the evidence in the case referred to the fact that, as part of the investigation, Gardaí had focused on persons who had been at the hotel or were connected to the hotel on 4th and 5th February 2016. In particular, that exercise focused on room 2104. That room was booked and reserved over the phone. In the first instance, a credit card was used to secure the room. At that stage, a mobile phone contact number was provided. At an early stage in the investigation, that number was called by Gardaí, and it was answered by Mr. Patrick Dowdall, the father of the present appellant. In the aftermath of the reservation of the room, CCTV footage showed Patrick Dowdall engaging with the hotel receptionist, taking possession of a key card and making his way to the room. Patrick Dowdall was driven to the hotel by the appellant. After check-in and receipt of the key cards, the Dowdalls drove to another location where they met another person, who is understood to be a member of the criminal organisation behind this attack and murder, and key cards were handed to him by the appellant. Shortly afterwards, an individual who became of interest during the course of the investigation, the late Mr. Kevin Murray, arrived at the hotel and made his way straight to the hotel bedroom. He did not engage with reception, so he clearly had a key card.

4. On 7th March 2016, the appellant travelled north from Dublin city centre in his land cruiser where he met with another individual who was centrally involved in the investigation;

this was the same person to whom the bedroom key cards had been given. Together, they drove to Northern Ireland. The vehicle driven by the appellant was the subject of audio surveillance, an authorisation having issued pursuant to the Criminal Justice (Surveillance) Act 2009.

Personal Circumstances of the Appellant

5. With regard to the appellant's background and personal circumstances, he was born in May 1978. He is a married man, the father of four children aged between 11 and 25 years at the time of the sentence hearing. An electrician by trade, in 2007 he had started his own business, which was very successful, providing employment, including apprenticeships, to many people from the north inner city area of Dublin. The appellant is from the north inner city and his family had been close friends and neighbours of the Hutch family for many years; members of this family were believed to be linked to the Regency attack, the incident forming part of the so-called Hutch/Kinahan feud. Of significance is the fact that on 1st June 2017, at the Special Criminal Court, he received a sentence of 12 years imprisonment in respect of an offence of false imprisonment, with a concurrent sentence of four years in respect of an offence to kill or cause serious harm. The 12-year sentence imposed by the Special Criminal Court was reduced on appeal to a sentence of ten years, with two years suspended. The offence which gave rise to that prosecution occurred on 15th January 2015.

The Sentence Hearing

6. In the course of the sentence hearing, counsel on behalf of the appellant submitted that if the traditional approach of dividing offences into low tier, mid-tier and upper tier was taken, this was an offence which would fall into the low tier. Considerable emphasis was placed on the implications for the appellant and his family of his decision to give evidence on

behalf of the prosecution in trials arising from the murder. It was said that his life was "effectively over", as well as the lives of his family, and that he would have to start over. He would have to live anonymously in exile, probably permanent exile, he would spend his life looking over his shoulder, and every conversation he had with a stranger, he would have to remind himself to be very discreet. It was submitted that this was a case where it would be legitimate for the Court to consider imposing a suspended sentence. It was accepted that the nature of the offence to which he pleaded was such that it would render it inappropriate to consider a suspended sentence unless there were exceptional circumstances and peculiar features in the case. However, it was submitted that there were exceptional circumstances and there were peculiar features, which made a non-custodial disposal realistic and indeed appropriate.

7. When passing sentence on 17th October 2022, in the course of sentencing remarks, the Special Criminal Court referred to the case of *DPP v. Martin Aylmer* [2020] IECA 106, which offered a degree of guidance to sentencing courts as to how to approach cases of this nature. The Court indicated that it did not agree with the submissions that had been made which would have placed the offence within the lowest tier of offending – in the tier where sentences would be between non-custodial and five years before mitigation. The Court said it was satisfied that the appellant knew he was assisting a serious criminal organisation. He had received and followed instructions to obtain a hotel key card, with the assistance of his father, and then he had delivered that hotel key card to another member of the criminal organisation. The assistance resulted in a hotel room being available to a leading member of the team that carried out the subsequent murder. The Court noted that that hotel room gave the individual a base in the hotel to carry out criminal activities and an apparent legitimate reason for their presence there prior to the murder. The Court referred to the fact that the appellant had continued to associate with the same person to whom he had delivered the key card,

travelling with him to and from Northern Ireland, at a time when their conversations on the journey were recorded pursuant to an electronic surveillance authorisation. The Court said it had not been given any details of the discussions, but it did know that a firearms seizure relating to the murder took place two days later. The appellant is critical of this observation and says it raises the question of whether the appellant was being sentenced in respect of matters other than those with which he was charged and other than those to which he had pleaded guilty.

8. The Court commented, "taking the most charitable view possible of the evidence, we assess the headline sentence in Mr. [Jonathan] Dowdall's case as being the same as that identified in *Aylmer*, that being one of eight years' imprisonment." Thereafter, the Court made reference to mitigating and personal factors. The Court noted the appellant was not a person of previous good character as of the date of the commission of the offence – this being a reference to the false imprisonment matter – but that there was evidence of positive activities on his part prior to becoming involved in serious crime. It was noted that he had faced up to his period in custody in a proper and serious manner, and in relation to the matter before the Court, he had pleaded guilty to the current charge at an early stage. The Court referred to various medical reports and other reports put before it. The Court indicated that, in the ordinary course of events, the plea of guilty and the other personal circumstances would see a reduction of 25%, giving rise to a sentence of six years. However, what was described as the "extraordinary additional factor" was the decision by the appellant to make a statement and to give evidence against other individuals implicating them in serious crime. The Court was of the view, however, given the gravity and the consequences of the crime, that even this additional mitigation did not bring the case below the custody threshold. As such, the Court settled on a sentence of four years imprisonment, representing a total discount of 50% from the headline.

The Appeal

9. Contending that the sentence was unduly severe and that this Court should intervene, a number of issues are raised, including, but not limited to, the fact that the headline sentence of eight years was too high. In this regard, it is said the appellant's role in the offence was limited, confined to driving his father to the hotel to collect the key cards and then handing over the key cards to a member of the criminal organisation. The evidence was that the appellant was not a member of the criminal organisation, and he did not know the purpose for which the room was being used. It is pointed out that there was evidence of a relationship between the appellant's family and the family centrally linked to the criminal organisation which was unrelated to criminal activity as both families had grown up in the same community. It is pointed out that there was a trail left, which was always likely to lead back to the appellant and his father, and there was a view within the Gardaí that the appellant had, to some extent, been used by the criminal organisation. It is contended that the sentencing Court fell into error in attaching significance to what occurred on 7th March 2016 during the drive north and the conversations that occurred in the car. It is contended that the focus on the journey and the recorded conversations led to impermissible speculation. It is argued that the comparison with *Aylmer* was inappropriate, in that the conduct and assistance in issue here was not at the same level as in *Aylmer,* where the accused was involved in purchasing a multitude of unregistered phones, was linked to a location where there was an abundance of firearms and cleaning products, believed he was furthering drug trafficking offences, and was financially benefiting from his role. It is said there was a further error on the part of the sentencing Court, in that it regarded the previous convictions of the appellant as an aggravating factor and the most that could be said was that his previous convictions resulted in a loss in mitigation.

10. A further point made is that, in imposing a sentence of four years to be served on the appellant and a sentence of two years on his father, there was a departure from the principle of parity. The sentencing Court had referred to Patrick Dowdall as "an assistant to the assistant". It is submitted that this sense of the sentencing Court, when dealing with Patrick Dowdall, that it was dealing with the assistant to the assistant, was without justification. Rather, it is said that the involvement of the two Dowdalls was in essence the same and should have resulted in the same sentences, both sentences being placed at the lower level that applied to Patrick Dowdall. It is said the Court's approach to mitigation also saw errors. Even taken alone, it is said, the guilty plea warranted a greater discount than 25%. It is said that this was a case that should have been dealt with on the basis that the appellant was in the same position as someone coming before the court on a signed plea. Apart from the plea, and before consideration of the offer to give evidence against those involved in the crime, there were the other factors present which required consideration, including the appellant's work record, his history of community involvement, and the fact that he had a number of significant medical difficulties. Moreover, and it is said that considerable reliance is placed on this aspect, the appellant stresses the difficulties that would arise for him and his family arising from his decision to give evidence, which was not sufficiently addressed by the mitigation of 25%.

Application to Adduce New Evidence

11. Before addressing the substantive issue in the case – whether the sentence imposed by the Special Criminal Court was unduly severe, and, as such, whether intervention is required by this Court – it is necessary to refer to the fact that the appellant has brought a motion before this Court seeking leave to adduce new evidence at the hearing of his appeal. It is accepted that, at the sentence hearing in the Special Criminal Court, counsel on behalf of the

appellant referred to the appellant's decision to make a statement to Gardaí and to commit to giving evidence at a forthcoming trial, and had contended that this would have serious consequences for the appellant and his family, and that the impact on the appellant's family life would be extensive. However, it is said that, at the time of the sentence hearing, the negative consequences to the appellant and his family which would arise from the appellant's decision to assist the prosecution had not fully manifested, but that, since the sentence hearing, matters had crystallised further. The appellant sought to introduce into evidence a letter written by his wife and also sought to call her to give evidence in relation to the matters referred to in the letter. The long-established general practice of the Court has been to lean against consideration of issues that have arisen since trial.

12. In the course of argument, the appellant referred to the case of *DPP v. Colbert* [2016] IESC 69. However, it must be said that that was a very different case. What was in issue there was that the appellant, when he came for sentence in the sentencing Court on charges of sexual assault, was a person who had previously been convicted of rape, a directly relevant serious conviction. However, by the time the matter came to the Court of Criminal Appeal, the rape conviction had been quashed and he was a person without relevant previous convictions. It was in those circumstances that the Supreme Court concluded that the Court of Criminal Appeal should have had regard to the changed record. However, a reading of the judgments in that case does not provide any support for a suggestion that the admission of new evidence should be anything other than exceptional. O'Donnell J. (as he then was) commented that:

> "…there is a general rule against considering matters which have arisen since trial, subject however to an exception that the court should do so where it is required to do so by the demands of justice in the case…
>
> […]

It is only if something arises which falsifies the underlying assumptions in a fundamental way, or where exclusion would be an affront to common sense or a sense of justice that it would be appropriate to consider considering matters which have occurred since trial."

13. In this case, when imposing sentence, the Special Criminal Court was fully aware of the fact that the now appellant had provided a statement to Gardaí and was indicating a willingness to give evidence. That the decision he had arrived at would have major implications for him and for his family was central to the plea in mitigation made on his behalf. In our view, there is nothing in the proposed new evidence that would undermine what occurred in the Special Criminal Court. It is in those circumstances, and for those reasons, that we declined to admit the proposed new evidence and refused the reliefs sought in the motion.

Discussion

Headline Sentence

14. In considering where the headline or pre-mitigation sentence should be set, the Court had some guidance from the Oireachtas and also from an earlier decision of this Court (*Aylmer*). The legislature had addressed the seriousness of an offence contrary to s. 72 of the Criminal Justice Act 2006 with the amendment of that section by the introduction of s. 6 of the Criminal Justice (Amendment) Act 2009, which increased the maximum penalty from five to 15 years imprisonment; this was a significant increase, which saw the maximum sentence trebled. In *Aylmer*, factors which were identified as relevant were the nature of the assistance, as well as the nature of the organisation assisted; the decision points out that a broad range of "gangs" were covered by the relevant section, ranging from a local group of car thieves at one end of the spectrum, to international drugs importers and distributors at

another end. Also identified as relevant were the consequences of the act of assistance, which, this Court pointed out, might include the commission of a crime which the appellant did not specifically foresee. There was also reference to consideration of general deterrence.

15. In this case, the Special Criminal Court was told by Detective Sergeant O'Toole, who gave evidence at the sentence hearing, that his colleague, Detective Superintendent Gallagher, had first-hand knowledge of what he has described as a violent and murderous feud (the aforementioned Hutch/Kinahan feud). It was said that Detective Superintendent Gallagher had first-hand knowledge of the existence of these criminal organisations and their involvement in serious criminality for many years, to include murder, money laundering, firearms, and related activities. Further, he had particular knowledge of the existence, activities, and structure of the Hutch criminal organisation.

16. It seems clear that the organisation assisted is far removed from a group of local juveniles involved in the unauthorised taking of MPVs. The Court was dealing with an organisation, to use language that has featured in other cases, that was a "tier one" criminal organisation; see, in that regard, *DPP v. Duffy* [2022] IECA 307. The assistance provided was, by any standards, very significant. Its effect was to provide the gang, intent on carrying out a murder, with a base in the hotel. The Special Criminal Court, we think, properly had regard to the fact that the appellant continued to assist, even in the aftermath of the murder, by driving the individual within the criminal organisation to whom he had given the key cards to and from Northern Ireland as late as 7th March 2016. The appellant has focused on the fact that the Special Criminal Court when reviewing the evidence in the case referred to the fact that they knew a firearms seizure relating to the murder took place two days after the car journey, which was the subject of electronic surveillance. We accept that the reference to the firearms seizure was somewhat surprising as it does not arise from the evidence.

However, it is not a reference which would of itself invalidate the sentencing process in the Special Criminal Court and call for the intervention of this Court.

17. The Special Criminal Court felt it was hard to see how the headline culpability of the appellant was radically different than that of the respondent in *Aylmer*, and went on to observe that, even accepting the submission that the appellant did not envisage or intend to be involved in a crime of murder, his position was in fact no different to what was accepted by the prosecution as having been the case in relation to Mr. Martin Aylmer.

18. Understandably, counsel on behalf of the appellant sought to minimise the extent of the assistance offered and the significance of the assistance. We believe the offending here was very serious indeed. The appellant has sought to put the assistance offered on this occasion in the context of the fact that assistance had been provided on previous occasions to members of the Hutch family in a non-criminal context, in the nature of paying for services on their behalf, including the provision of holidays with a credit card on behalf of individuals who had chosen not to have their own credit card. However, that is to ignore the fact that the appellant entered a plea of guilty to the charge proffered. For our part, we are of the view that the identification of a headline or pre-mitigation sentence of eight years was well within the range available to the Special Criminal Court. Had the Court identified a somewhat higher pre-mitigation sentence, such as one that placed the offending on the margin between the top of the midscale and the lower end of the top scale, which would lead to an identification of a headline sentence of the order of ten years, it is unlikely still that this Court would have been minded to intervene.

19. The Special Criminal Court is criticised for treating the appellant's prior criminal record, which includes convictions for false imprisonment and threatening to kill or cause serious harm, as an aggravating factor when it is said that the offences could, at most, have seen a loss of mitigation. The submissions on behalf of the appellant do not sit easily with the

exercise engaged in by the Special Criminal Court when it compared the appellant's offending with that of Mr. Aylmer, and concluded:

> "[i]n our view, there is no credible basis for distinguishing the headline sentence in the *Aylmer* case to produce a radically reduced headline sentence on the facts of this case. That is without considering the distinguishing factor that [the appellant] had, within the previous year, committed serious crimes of violence, apparently unrelated to any compromising association with the Hutch family".

It is clear that the Special Criminal Court thought there was no reason to distinguish between the *Aylmer* case and the present one in terms of the headline sentence even before the appellant's previous conviction was taken into account. We agree with that view.

Parity

20. The appellant has pointed to the divergence that exists between the sentences imposed on him and on his co-accused and father, Patrick Dowdall, who received a sentence of two years. The principle of parity relates to a recognition that, all things being equal, co-offenders should, in general, receive comparable sentences. In this case, the Special Criminal Court concluded that all things were not equal, and that the role of Patrick Dowdall was a lesser role. The appellant disagrees with the assessment of the Special Criminal Court in that regard and says that both should have been placed at the same level, *i.e.*, at the lower level where Patrick Dowdall's offending was placed.

21. It seems to us there was a clear basis for differentiating between the roles played by the two Dowdalls and therefore differentiating when it came to the imposition of sentence. In the case of the appellant, he had significant involvement post-murder, driving the person to whom he had given the key cards to Northern Ireland and back, conversing with him during the course of the journeys, which conversations were recorded. It is also of significance that, in relation to the prior offending, which saw father and son involved, both the Special

Criminal Court at first instance and this Court on appeal differentiated between the two Dowdalls to a marked extent.

22. We have no doubt that the differentiation in sentence was one which was open to the Special Criminal Court. If we concluded that it was a case where the same sentences ought to have been imposed on both Dowdalls, the question would have arisen for consideration whether the sentence imposed on the appellant was an appropriate sentence and whether the error, if any, was one that had inured to the benefit of Patrick Dowdall.

Credit for a Plea

23. The appellant has argued that the credit allowed for a plea in this case of 25% was inadequate and that the case should have been dealt with as if the appellant was someone who had come before the court on foot of a signed plea of guilty. We are bound to say we see these arguments as somewhat strained. On occasion, this Court has spoken about the particular value of a signed plea of guilty. It means that a plea is entered at the earliest possible opportunity. Normally, it will mean that the need for any post-charge further investigation is obviated and issues such as the necessity to deal with pre-trial disclosure do not arise. In dealing with the mitigating and personal factors that were present, the Special Criminal Court referred to the fact that the appellant had pleaded guilty to the current charge at an early stage. However, at another stage in the course of sentencing remarks, the Special Criminal Court commented:

> "It must also be said, however, that there is a discordant note for us in all of this. It remains a matter of public record that the accused mounted and pursued all the way to the Supreme Court a fundamental challenge to the jurisdiction of this Court to hear this case, as well as an attempt to mount a s. 4E [of the Criminal Procedure Act 1967, as amended] application to have the case dismissed."

The appellant is critical of these observations which he sees as unwarranted. It is pointed out that the challenge to the Court's jurisdiction was at a time when the appellant was facing a murder charge. Likewise, it was pointed out that the attempt to raise an issue by way of a s. 4E application, which was also in the context of the murder charge, proved not to be an option, only because of the legal anomaly that arose from the fact that he was a person who had been charged before the Special Criminal Court, rather than sent forward to that Court for trial and, as such, s. 4E had no application.

24. For our part, we understand that the appellant availed of the legal options available to him and he is not to be criticised for doing so. On the other hand, we do not believe the legal strategies employed by him would mean that he was a person who should receive greater credit than would normally be allowed for a plea. Overall, we are satisfied that the Special Criminal Court had proper regard to the fact that a plea of guilty was entered and to the circumstances in which that occurred.

Failure to Suspend any Part of the Sentence

25. In circumstances where sentences for the false imprisonment and related offences had been part-suspended, we can see why a Court would hesitate in also suspending in part any sentence imposed in respect of this offence. There is also the fact that the hearing in the Special Criminal Court proceeded on the basis that, consequent on the decision he had taken to cooperate with the authorities, the appellant would be leaving the jurisdiction on the completion of his sentence. In that regard, considerations such as encouraging rehabilitation, which would often be a feature when a court is considering part-suspension, did not really arise.

Decision

26. In the course of written submissions, the respondent commented that the imposition of such a significantly reduced sentence may in all the circumstances be considered generous. We would not demur from that observation. Indeed, in our view, the sentenced imposed, when viewed in the round, has to be seen as lenient – indeed, very lenient. We are in no doubt that the sentence imposed was one that fell within the available range. If we had any doubts about the appropriateness of this sentence, it would be as to whether a more severe sentence ought to have been imposed. However, we will content ourselves by saying we are entirely satisfied that the sentence cannot be regarded as unduly severe.

27. We therefore dismiss the appeal.