



THE COURT OF APPEAL

[23/18]

[28/19]

**The President
Kennedy J.
Donnelly J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BRIAN O’SULLIVAN

APPELLANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARCUS O’ROURKE

APPELLANT

**JUDGMENT (Ex tempore) of the Court delivered on the 25th day of October 2019 by
Birmingham P**

1. This is an appeal against severity of sentence. The appeal arises out of a sentence hearing that took place on 5th January 2018. On that occasion, each of the appellants received an effective sentence of 12 years imprisonment with two suspended. In both cases, the sentence was structured on the basis of three years imprisonment in respect of a drugs matter and a consecutive sentence of nine years in respect of robbery with concurrent sentences, the final two years of the aggregate sentence being suspended. So far as the drugs aspect is concerned, the sentencing Court was dealing with two separate, distinct and unrelated drugs offences, one committed by each appellant. So far as the robbery, firearms and endangerment matters are concerned, that was a single incident in which both appellants participated.
2. So far as Mr. O’Sullivan is concerned, the drugs matter related to possession of a quantity of Xanax on 16th March 2015. That sentence, in his case, has now been served and is not the subject of appeal, though counsel on his behalf says that the sentence imposed was a significant one, a high one, a harsh one, and he says that that is

relevant when one comes to look at the overall or aggregate sentence that was imposed.

3. In the case of Mr. O'Rourke, the drugs matter involved heroin. On that occasion, Gardaí stopped a vehicle, there were a number of occupants, Mr. O'Rourke was a backseat passenger, he was seen to put white plastic packages into his mouth, those packages and then other packages that had been concealed in his underwear were retrieved and analysed and they contained some 50.33 grams of heroin with a value of just over €7,000. Mr. O'Rourke made admissions while in custody.
4. Both men secured bail and both men were admitted to bail, but while on bail, offended. The fact that the offence that is now going to be described occurred while on bail, by statute, has to be regarded as an aggravating factor and it is a factor that potentially distinguishes the case from some others on which reliance has been placed by counsel on their behalf.
5. So far as the second matter in time is concerned, this related to an offence that occurred on 3rd August 2016. It was a robbery at Waterville Post Office. On that day, the owner of the post office, a middle aged lady, was expecting a cash delivery. At around the time that the security van driver arrived, a vehicle entered the village. It was driven a number of laps of the village and then two men entered the post office, one carrying what appeared to be a firearm, the other a crowbar. The owner activated a panic alarm, a gun was pointed in her direction, one of the men broke glass in order to gain access to the area beyond the counter and they made off with some €4,000 or €5,000. Also present at the time, were some tourists, a Dutch family, and they would have found this an extremely frightening incident. The car was driven onto the Ring of Kerry Road, which is, as is widely known, a narrow and busy road. Gardaí came upon the vehicle that had been used in the robbery, but by that stage, the appellants had transferred to another vehicle. The fact that two vehicles had been acquired for the purpose of this robbery is indicative of the degree of planning and preparation that had gone into it.
6. The attention of the Gardaí was then focused on a Mazda vehicle as the vehicle in which the men were believed to be at that point. At one stage, the Mazda managed to get out of sight of Gardaí, and then when Gardaí came upon the Mazda, the two appellants, who had concealed themselves in the vehicle so that the Gardaí had at first thought it was empty, then reversed the Mazda into the Garda car. Later, the two appellants were found in heavy undergrowth. In the case of Mr. O'Sullivan, he pleaded during the course of the trial.
7. The appellants say the judge made a number of errors. They say that there was an error in failing to identify a headline sentence, but they say that the sentence was too severe in all the circumstances and they say that it is possible to identify other sentences involving offences of comparable seriousness where the sentences were less.

8. In the Court's view, we have to ask ourselves, on what basis should we or could we intervene? We have consistently said that before we would intervene, that something in the nature of an error in principle has to be identified, the mere fact that if sentencing ourselves at first instance as a Court, or individual members of the Court, might have been persuaded to impose a different sentence, does not provide any basis for intervention. It is only if the sentence falls outside the available range.
9. In the Court's view, the aggravating factors present in relation to what might be described as the 'Kerry incident' were such that the sentence imposed clearly falls within the available range. The production of a firearm in the course of a well-planned robbery, the production of a firearm to a middle aged lady, the driving of the vehicle at high speed on the narrow and busy roads and the actions of crashing the vehicle into a Garda car, endangering the occupants of the Garda car, means that the offence has to be seen as very much on the upper end of the scale.
10. In those circumstances, the Court is in no doubt that the sentence was one that was within the available range. In that regard, it has to be borne in mind that the judge was sentencing individuals with significant prior convictions. In the case of Mr. O'Rourke, he had 43 previous convictions. It is true that the bulk of those were under the Road Traffic Acts and 11 were under the Misuse of Drugs Act, and the point is fairly made on his behalf that there is nothing of comparable gravity there.
11. In the case of Mr. O'Sullivan, again, there is a significant prior record. In all, he has 52 previous convictions, including a number of s. 3 Misuse of Drugs Act offences, obstruction offences, three offences of sale and supply of drug. These were not insignificant records.
12. In summary, then, the Court has not been persuaded that the sentence imposed was excessively severe. In the Court's view, the sentence, rather, fell within the available range. In those circumstances, the Court dismisses the appeal.