THE COURT OF APPEAL

[260/19]

The President
McCarthy J
Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MS (A MINOR)

RESPONDENT

JUDGMENT of the Court delivered on the 29th day of July 2020 by Birmingham P

1. On 2nd July 2020, this Court delivered its judgment on the application by the DPP seeking to review the sentence that was imposed in this case on grounds of undue leniency. For the reasons set out therein, we concluded that the sentence was indeed unduly lenient. We took the view that the sentence imposed, which, it will be recalled, was one of 11 years' imprisonment, but with provision for a review after the respondent had spent some five years in custody, failed to reflect the gravity of the offending that was in issue.

2. By definition, any offence of attempted murder is a really serious offence, involving, as it must, an intention to kill, an intention which is often not proved in cases of murder.

   However, even in terms of attempted murder, there are many factors present which meant that this offence had to be regarded as being very much at the upper-end of the spectrum. There was the element of planning and premeditation; acquiring and equipping himself with what was intended to be the murder weapon; luring the victim to the place where it was intended that she would meet her death; the violence of the attack, and the very significant consequences this has had for the victim who was fortunate, indeed, to survive.

3. The Central Criminal Court judge's approach to sentencing, which, as we have commented earlier, was an exceptionally careful, conscientious and considered one, was to first identify a headline or pre-mitigation sentence. There is, in fact, some ambiguity in his sentencing remarks as to whether he was identifying a headline or pre-mitigation sentence of life imprisonment and was making the point that a sentence of life imprisonment would normally see the person sentenced serving in the range of 16 to 19 years, or whether he was, in the first instance, identifying a headline or pre-mitigation sentencing range of 16 years to 19 years. The Director, for her part, has not taken any

issue with the identification of the headline or pre-mitigation sentence, and likewise, we, for our part, do not see any error on the part of the Central Criminal Court judge. We think a headline or pre-mitigation sentence could certainly have been life imprisonment and if the headline was to be seen as a determinate sentence expressed in terms of a number of years, a sentence of 17 and a half years or a sentence of that order, would have been appropriate.

4. It is accepted by the DPP that there were significant factors present by way of mitigation. We agree. There was, firstly, the youth of the offender, 15 years and two months at the time of the offence; the absence of any previous convictions and the history of significant mental health difficulties. It was also necessary to have regard to the manner in which he met the case, making admissions, and following those up with an early plea of guilty. It was inevitable that the combined effect of the significant factors present by way of mitigation would see a very significant reduction from the headline or pre-mitigation sentence. The Director says that those factors were appropriately, indeed, she says, generously, reflected in the decision to reduce the sentence from, say 17 and a half years, being the midpoint of the range of 16 to 19 years referred to, to 11 years.

5. We, for our part, agree that a reduction of this order was appropriate and did not involve any error. In the Central Criminal Court, the judge then took the further step, which both sides were agreed was open to him, to list the matter for review. It is clear that the judge was resorting to the review mechanism in a situation where he had been told that his preferred option of a lengthy sentence, part-suspended, was not open to him.

6. In contending that it was not appropriate for the judge to go beyond the reduction of the sentence to 11 years, the Director, slightly unusually, but very understandably in the circumstances of the case, has made the point that allowing for normal remission for good behaviour, a sentence imposed of 11 years' imprisonment would be expected to see the sentenced person serving eight years and three months when regard is had to normal remission. Counsel on behalf of the Director was very firm in making the point that any reduction beyond that would give rise to a sentence that was unduly lenient.

7. Had the judge decided to impose a sentence of 11 years' imprisonment simpliciter, and had that sentence been the subject an appeal against severity, it is very unlikely that this Court would have been minded to intervene. However, it does not necessarily follow from that this Court should therefore impose that sentence at this stage.

8. We see merit in the review mechanism. The existence of a review date means that there is a target date for the young respondent to work towards. On that review date, there will be a number of options open to the judge conducting the review. One possibility is that the review might not result in the release of the respondent. Another possibility is that the judge might decide to suspend the balance of the sentence then unserved, either from that point, or from some date in the future. The option would also be available to the judge to provide that the balance of the sentence would be suspended for a period in excess of the sentence remaining to be served, so, by way of example, if there was to be a review at a time when two years of the sentence was unserved, the judge might decide

to suspend the balance of the sentence, either from that day, or, perhaps, from a date six months later, and to stipulate that the sentence would be suspended for a period of, say four or five years, on condition that he would specify including that the respondent be of good behaviour during any remaining period custody and for the specified period post-release.

9. In the usual way, having concluded that the sentence was unduly lenient, we are required to resentence as of today's date. Up to date information has been put before us. The up to date information comprises a supplemental report of Dr. Church and a report from Oberstown. The report from Oberstown is broadly positive and it appears that the respondent has done well there. He has, of course, been in custody since immediately after the offence was committed. That he has done well there is a positive factor. However, it is the case that Dr. Church has not changed his opinion. Indeed, the further information that he has been provided with strengthens his previous opinions on diagnosis and risk. He remains of the view that the respondent's presentation is consistent with a mental state at risk for development of a psychotic mental illness. Dr. Church makes the point that the respondent remains at HIGH risk of serious self-harm, or completed suicide, around the time of sentencing appeal, and in due course, at the point of transfer to another establishment at the age of 18 years. Dr. Church makes clear that he also continues to hold the opinion that the respondent currently can only be considered to present a HIGH risk of harm to others, with the potential for serious, life-changing or potentially fatal injuries to others. In Dr. Church's view, the most likely victims of serious violence are those whom the respondent perceives to have maltreated or denigrated him, or those whom he judges for other reasons to be legitimate and deserving targets of violence or punishment. The opportunity to prepare and carry out violent acts, including acts as to weapons and to the victim, increased the immediacy of the risk of more serious harm to others – they are factors which, to some extent, can be managed within his current custodial environment.

10. Having considered the matter, it seems to us that a review offers the best prospects of a manged, supervised and guided reintroduction to society. Clearly, this is a difficult case and there are no easy solutions. No outcome is entirely straightforward, but it seems to us that making provision for a review is the least worst option.

11. We have already concluded that a review after five years in custody was unduly lenient. We have, in effect, concluded that the review was scheduled to take place at too early a stage. Having regard to the very significant mitigating factors to which we have made reference, we do not believe that increasing the prison sentence above and beyond the 11 years specified by the judge in the Central Criminal Court would be appropriate. If, therefore, there is to be a review, it must come at a point where it is potentially of some value to the respondent. In other words, it must come at a point in advance of what would be the normally scheduled release date. Having given the matter anxious consideration, we have concluded that there should be provision for a review of the sentence of 11 years imprisonment on 1st January 2025 i.e. the review should comment

on that date. Like the judge in the Central Criminal Court, we think it is realistic to envisage that the review process would take approximately three months.

12. In deciding to fix that review date in January 2025, we are conscious and have had regard to the fact that for the respondent, the fact that the Director has succeeded in her application must be a source of deep disappointment to him and we are conscious that he may not find it easy to cope with the situation. This is a case where the disappointment factor, we which often make reference to in dealing with undue leniency reviews, is likely to be particularly acute and we have taken account of that in coming to the decision that we have.