



THE COURT OF APPEAL

[235/19]

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

FRANK RYAN

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 28th day of July 2020 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. The appellant appeared before the Circuit Criminal Court, Clonmel on November 22nd 2017 to be tried before a jury on eight counts on an indictment as follows: a count of burglary, two counts of robbery, one count of attempted robbery, unlawful possession of a controlled drug, possession of a knife in a public place, and unlawfully producing a knife to intimidate another person. After a legal argument in absence of the jury, the appellant entered a plea of guilty to all eight counts:-
 - i) Burglary contrary to Section 12(1)(a) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 on the 13th day of November, 2016 in Tipperary, when the appellant entered a part of a building known as the Store Room of the Black Sheep Bar as a trespasser and did commit theft contrary to Section 4 of the Criminal Justice (Theft & Fraud Offences) Act, 2001.
 - ii) Robbery of Maureen O'Halloran contrary to Section 14 of the Criminal Justice (Theft & Fraud Offences) Act, 2001 on the 1st day of December, 2016 at Gerry's Newsagents, Bank Place, Tipperary Town, Tipperary of €40 cash.
 - iii) Attempted robbery of Erika O'Brien on the 1st day of December, 2016 at Ladbroses, Main Street, Tipperary.
- 17300647 related to Count 4 for an offence committed on the 3rd day of December, 2016:-

- iv) Robbery of Agnes Hogan of €70 in cash at Patty's flower shop, 4 Davis St, Tipperary contrary to Section 14 of the Criminal Justice (Theft & Fraud Offences) Act, 2001 in which on December 3rd 2016
- v) Possession of a controlled drug, contrary to Section 3 and 27 of the Misuse of Drugs Act, as amended, in which the appellant on December 3rd 2016 at Tipperary Garda Station, Tipperary Town, had in his possession a controlled drug, that being Cannabis.
- vi) An offence contrary to Section 9(1) and (7) of the Firearms and Offensive Weapons Act, 1990 on December 3rd 2016 at Cluain Arann, Avondale Crescent, Tipperary by possession a "small knife".
- vii) A similar offence to that at Count 6 of possession of a "large knife" contrary to Section 9(1) and (7) of the Firearms and Offensive Weapons Act, 1990 in which the Defendant on the 3rd day of December, 2016 at Cluain Arann, Avondale Crescent, Tipperary a public place, did have in his possession a large knife which had a blade or which was sharply pointed.
- viii) An offence contrary to Section 11 of the Firearms and Offensive Weapons Act, 1990 in which the appellant did on the 3rd day of December, 2016 at Patty's Flower Shop, 4 Davis Street, Tipperary Town, while committing an offence, to wit, robbery contrary to Section 14 of the Criminal Justice (Theft & Fraud Offences) Act, 2001 in the course of a dispute produce an article capable of inflicting serious injury

The appellant was subsequently sentenced on December 1st 2017 on the following counts:-

- i) three years imprisonment for a count of robbery;
- ii) one year imprisonment for the count of burglary, to run concurrently with Count 1;
- iii) two years imprisonment for the count of attempted robbery, to run consecutively with counts 1 and 2;
- iv) two years imprisonment for the second count of robbery to run consecutively to Count 3

Counts 5,6,7,8 were taken into consideration.

This amounted to a total sentence of seven years imprisonment the final year of which was suspended for a period of two years on certain terms.

2. When these sentences were imposed on the 1st of December 2017 the appellant was serving two consecutive sentences of nine months in total imposed on the 10th of October 2017 in respect of assault offences committed by him while he was in prison on the 3rd of January 2017. The appellant had been remanded in custody on the 4th of December 2016

in respect of the present offences. Having regard to the nature of the assault offences committed in prison while on remand on the present offences - the learned trial judge, had he known the circumstances of them, could have made the sentences under appeal consecutive to them. This did not arise inasmuch as he was not so informed. The appellant was remanded in custody on those assault charges on July 3rd 2017. The period in custody on remand in respect of the present offences only was between December 4th 2016 and July 3rd 2017.

3. This appeal was ultimately pursued on the sole basis that the trial judge did not make the present sentences concurrent with those which, it was conceived, he was then serving, *viz*, those imposed on 10 October 2017 - that he did not backdate them at least in part. It appears that the basis upon which the appellant was in custody was not put before the trial judge - the sole reference to it was by counsel for the accused when, during the course of his submissions the judge on the issue of sentence, he told him that the appellant was "currently serving a sentence in Cork. And as I understand it, judge, with remission his release date on that sentence is currently set as the 1/5/2018". It is an oversimplification to say, as has been advanced on this appeal, that the failure of the judge to backdate the sentence was an error of principle because of the supposed failure of the prosecution to place before him the full picture as to periods in custody or sentences as elaborated above. Certainly, the prosecution should have had relevant information. It seems to us that there was responsibility on counsel for the accused also. The fact that of an overlap between the sentence imposed on December 1st 2017 and that being served at that time and imposed on October 10th 2017 meant that the judge was perfectly entitled to refuse to backdate the sentence on the information before him; he could of course had made them consecutive.
4. However, we think that in the ordinary course, and it is not of course always the case that such must be done, a period of remand in custody solely in respect of the offence for which sentence is being imposed will be taken into account. We will vary the sentence of the Circuit Court accordingly and direct that the appellant be given full credit for any period spent in custody solely on these offences. We understand those dates to be from the 4th of December 2016 to the 3rd of July 2017.