



THE COURT OF APPEAL

[2021] IECA 70

[73/19]

**McCarthy J.
Kennedy J.
Donnelly J.**

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

RESPONDENT

AND

JOHN ROCHE

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 5th day of March 2021 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. The appellant and his co-accused, Mr Brock, were each charged with a single count of possession of an explosive substance contrary to section 15(4) of the Offences Against the State (Amendment) Act, 1998. The offence carries a maximum sentence of fourteen years imprisonment. Both accused were found guilty by the Special Criminal Court on the 5th of April, 2019 after a four day trial. The appellant was sentenced on the 12th of April, 2019 to seven years imprisonment. The co-accused, Mr Brock, received a sentence of eight and a half years imprisonment, with the final eighteen months suspended on the undertaking that he desist from any further paramilitary association upon his release.
2. The explosives in question were 57 kilograms of ammonium nitrate fuel oil, or ANFO, and 38 2.5 kilogram bars of the industrial explosive Kemegel. The appellant and his vehicle were being monitored by members of An Garda Síochána on the 13th of April, 2016 from about 4 pm. Shortly before 7 pm, Mr Roche was observed in the area of Rathcoole, and Mr Brock was the front seat passenger in the car at that stage. At 6.59 pm the two men were observed at the entrance to Behan's Quarry on the N7 in Mr Roche's car, and at 7.09 pm Mr Roche was observed to drive his Skoda Fabia car from the direction of the quarry southbound on the N7. At 7.30 pm, the car was stopped by members of the Emergency Response Unit in the vicinity of the junction of the Nangor Road, Longmile Road, and the Naas Road. Each of the accused complied with directions given to them at that time by members of the Emergency Response Unit. The explosives were found in the boot of Mr Roche's car. In addition, detonators were found underneath the front passenger seat. It is not contested that the offences committed by each of the accused are offences committed in furtherance of the activities of the unlawful organisation, the Irish Republican Army, IRA, or Óglaigh na hÉireann.

3. The appellant's date of birth is the 16th of November 1963. He had no previous convictions; he was a person of good character and had never come under Garda attention before nor was it anticipated he would do so in the future. He is a married man with children, and he resides in Dublin south inner city. He is a barber/ hairdresser by trade and he has his own business in that field. He is known for his community and voluntary work.
4. In sentencing the appellant, Hunt J., speaking for the Court, made the following remarks:-

"We will deal first with Mr Roche. There are two principal mitigating factors in his case. The first is that although he did not plead guilty, Mr Roche did not contest the prosecution evidence, and no submissions were made on his behalf during the trial. This considerably shortened the time and prosecution and police resources necessary to complete the trial, and Sergeant Boyce correctly acknowledged the value of the plea in this regard. We cannot attribute the same value to a no-contest situation as to an early and unequivocal plea of guilty, but we also recognise that it is a mitigating factor of some weight in a particular category of cases that come before this Court, of which this case is an example. Secondly, Mr Roche is now a man in his mid-50s, who has no previous convictions, and will therefore have to serve a substantial sentence of imprisonment for a first offence in a context where we accept that service of that sentence will be made more difficult by reason of his significant health difficulties. The absence of previous convictions is supplemented in his case by positive testimonials as to family and previous employment matters, as well as positive contributions to the local community. These matters were accepted by Sergeant Boyce under cross-examination by Mr Hartnett. Given the particular experience and knowledge of Sergeant Boyce in relation to such matters, we naturally place particular reliance on his evidence in relation to these issues. In particular, his acceptance that Mr Roche was not on the garda radar, either before or after this incident, is a matter of significance for us.

In the circumstances, we assess the discount applicable, by reason of the combination of matters identified above, is 30%. We will reduce the headline sentence by three years in the circumstances. Given the absence of previous convictions and Sergeant Boyce's assessment that Mr Roche is unlikely to come to further attention, we will apply the discount in a non-conditional manner, and therefore impose a sentence of seven years' imprisonment on Count No. 4 on the indictment, to be backdated as appropriate."

Grounds of appeal

5. The appellant submits the following grounds of appeal:-
 - i) The Court erred in law in allowing the appellant's co-accused an opportunity to offer the Court an undertaking to desist from involvement in paramilitary activity on the express basis that such an undertaking would reduce the sentence to be imposed upon that co-accused, whilst not allowing the appellant a similar opportunity;

- ii) The Court erred in law in failing to allow the appellant appropriate discount in sentence for previous good character and the absence of prior convictions.
6. We think that all aspects can be dealt with together, as we think that the real issue here is the issue of proportionality, which, in truth amounts to the issue of whether the sentence is excessive.
7. In this regard, Counsel stresses the extent of the difference in sentence between his client and the co-accused. The co-accused had a previous conviction for possession of firearms and ammunition recorded in the Special Criminal Court on 14th of March, 2008. It was confirmed during the course of the sentencing hearing that the previous offence also related to Mr Brock's involvement in the furtherance of the activities of the IRA. The Court dealt with Mr. Brock as follows -

"There is an element of recidivism in Mr Brock's case which is not in Mr Roche's case, and this must be reflected in the structure of the sentence. We will unconditionally reduce Mr Brock's sentence to eight-and-a-half years. If he wishes to avail of a further discount, of a conditional nature, of 18 months, so as to end up with the same net sentence as Mr Roche, because of the previous offending in his case we require some form of bond or undertaking involving him being of good behaviour, and desisting from paramilitary associations from a period of three years following his release. That has been our practice in other cases involving persons with serious criminal convictions before the Special Criminal Court, and we see no reason to depart from it in this case. In the case of a second or subsequent conviction, there must be some form of insurance or incentive in relation to the danger of reoffending which is inherent in an offender who returns to this Court on such subsequent occasions".

8. The co-accused duly entered such a bond. In recognition of this disparity, Counsel for the appellant addressed the trial court as follows:-

"MR HARTNETT: Well, just in relation to the opportunity that is being presented to

MR JUSTICE HUNT: We're not asking him to do anything, because he has no previous convictions.

MR HARTNETT: Yes.

MR JUSTICE HUNT: We're simply giving him seven years.

MR HARTNETT: Yes. May it please the Court.

MR JUSTICE HUNT: We're giving Mr Brock a chance to contemplate whether he wants to take up the part suspension in his case."

9. It was submitted that the appellant herein was an even more suitable candidate for a partly-suspended sentence than the co-accused, due to his personal circumstances, the

fact that he had no previous convictions, and was of previous good character. Further, as a result of the Court's failure to consider the appellant suitable for part-suspension, the effective sentence imposed was the same for both. The appellant submits that the resulting sentence offends the principle of proportionality in circumstances where the appellant had significantly stronger mitigation before the court in contrast to which his co-accused had been found guilty of for possession of firearms offences in the context of paramilitary activity on a previous occasion.

10. The respondent submits that in light of the limited mitigation available to the appellant, a 'straight reduction' from the 'headline' sentence of ten years' imprisonment by a factor of 30% to an actual sentence of seven years' imprisonment adequately reflected the mitigating factors in his case.
11. It seems to us that the approach taken by the trial court to sentencing in this case was correct. We think that the headline sentence of ten years was correct and a reduction on the headline sentence of ten years to seven years was appropriate in mitigation. This represented a reduction due to the factors identified by Mr Justice Hunt, which we need not repeat here. The Court identified the relevant factors and it is plain from the judgment that it gave due weight to them.
12. In this instance, the reason the sentence of the co-accused was suspended in part was to ensure that his commitment to rehabilitation, and in particular his undertaking to dissociate himself from IRA activities, was fulfilled or achieved. Sentencing involves looking at each offender individually. There was no rational basis for suspending any part of this appellant's sentence. There is no rule of law which requires co-accused to be treated in the same or even in a similar manner. Here, there was an unambiguous basis for the distinction. Given the seriousness of the offence, we think that the sentence was proportionate. The suspensory period of the co-accused was a real sentence of imprisonment.
13. We accordingly dismiss this appeal.