



THE COURT OF APPEAL

Record Number: 195CJA/23

**The President.
Kennedy J.
Burns J.**

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

JUSTIN DOODY

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of February 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency.
2. On the 13th June 2023, the respondent was sentenced to 2 years' imprisonment in respect of one count of arson contrary to s. 2 of the Criminal Damage Act, 1991, with the final six months suspended on conditions.

Background

3. At approximately 5:45am on the 4th August 2019, An Garda Síochána attended a fire at a laundrette in Courtown. On arrival, the Fire Brigade were in attendance and had managed to extinguish the fire. There was extensive smoke damage to the premises and the machines were effectively decommissioned as a result of the fire. Gardaí estimated the damage at approximately €18,249. The laundrette ceased business after the fire. The premises was rented at the time. The pub located in the same complex had accommodation for staff above the pub.
4. The owner of the building told gardaí he finished up work at the pub and at approximately 5:45am, he and a colleague discovered the fire and alerted the emergency services.
5. CCTV footage before the court below showed three separate angles: two cameras from an apartment complex and another from a chipper. At 5:27am, two men are visible loitering near a parked car, gardaí gave evidence that the respondent's face is visible in this section of the footage as he turns towards the camera. At 5:29am, the blaze from the laundrette is visible and both men can be seen leaving the area on foot. Gardaí were in a position to view the CCTV footage and identify the respondent.

6. The respondent was arrested, detained. He made no-comment in interview. The prosecuting garda gave evidence that there was “*bad blood*” between the respondent and the tenant of the laundrette.

7. The respondent was arraigned on the 25th April 2023, and pleaded not guilty to the single count of arson. A jury was sworn in and some evidence was heard. The following day the respondent was re-arraigned and entered a plea of guilty.

Personal Circumstances

8. The respondent’s wife of 30 years died in or around 2017. He has three children from that marriage ranging from ages 12-31. He has 8 previous convictions for theft, 2 for drug matters, 1 for assault, 22 for road traffic matters and 2 for burglary.

9. At the time of sentence for this matter, the respondent was serving a sentence in respect of a s.15A drugs offence. That sentence was imposed on the 26th January 2023, with a release date on the 25th April 2024.

Sentencing Remarks

10. The judge considered the amount of the damage of approximately €18,249.00 and the loss to the tenant and the owner of the building. He considered that there was an element of premeditation and the fact that there was accommodation above the pub adjacent to the damaged property. He considered the issue of general deterrence and the evidence of bad blood between the respondent and the tenant of the property. Having assessed the gravity of the offence, he nominated a notional sentence of 3 years’ imprisonment.

11. The judge had regard to the respondent’s family circumstances, in particular, that he has a twelve-year-old son who is being cared for by his eldest son who is trying to juggle between studying for a master’s degree and care for his younger brother. He accepted that the respondent had displayed some remorse and held some degree of insight, that he had behaved in prison, he had not received any P19s, that he had a positive Prison Governor’s Report and had written a letter of apology. Accordingly, the judge reduced the sentence to two years’ imprisonment and suspended the last six months of the sentence on conditions including that the respondent refrain from any contact with either the owner or tenant.

Grounds of Appeal

12. The Director contends that the sentence imposed represents a departure from the appropriate sentence on the following grounds:-

i) The learned sentencing judge placed the headline sentence too low given the gravity of the offence

ii) The learned sentencing judge failed to place sufficient weight upon aggravating factors such as the accused’s previous convictions, and the damage done.

iii) The learned sentencing judge erred in imposing a sentence to run concurrently with a sentence imposed on 26th January for an offence contrary to s. 15A resulting in a postponement of his anticipated release date by approximately six months.

iv) The learned sentencing judge erred in imposing a sentence which was simply too low in all the circumstances.”

Submissions of the Director

13. The Director relies on *People (DPP) v Goodchild* [2022] IECA 232 and the range of penalties identified therein:

"the majority of offences where the range is as for this offence, sentence may be imposed on the basis of ranges of 1–5 years, 5–10 years and 10–15 years."

14. *Goodchild* involved the arson of a residential dwelling which was occupied at the time of the offence, the sentencing court imposed a sentence of seven and a half years' imprisonment with the final eighteen months suspended. An appeal against severity of sentence was dismissed by this Court.

15. *People (DPP) v Bourke* [2020] IECA 371 is cited in which case this Court dismissed a severity appeal of a sentence of 11 years with the final three years suspended imposed on a charge of arson. This Court held that the sentence could be characterised as lenient if not unduly so, having regard to the element of premeditation in that the appellant held a grudge against the victim for many years and purchased petrol in advance of the incident.

16. Further reliance is placed on the following remarks of Prof. O'Malley in his text, *Sentencing Law and Practice*, 3rd ed:-

"A survey of English appeal court and Irish trial court decisions reveals a fair degree of consensus on the factors that will tend to aggravate an arson offence. At the upper end of the spectrum of gravity are those cases where the offender set fire to a residence (whether his or her own or somebody else's) as a deliberate act of revenge, knowing that the residence was occupied, that the occupants were likely to be asleep at the time and that the fire might spread to neighbouring residences

[...]

An arson attack on a non-residential premises may also have serious consequences, leading to people who worked there losing their jobs, or causing other serious disruption where the premises provided some important or essential service to the community."

17. In relation to concurrent sentencing, the Director cites *People (DPP) v Curtis* [2022] IECA 84 in which case, a sentence of five and a half years' imprisonment was imposed on the respondent in respect of an offence contrary to s. 15A of the Misuse of Drugs Act, 1977 and a concurrent sentence was imposed in respect of a money laundering offence on the same day. This Court held that s. 15A and money laundering were each offences of real seriousness in their own right and the judge might have considered the question of consecutive sentences. The sentence imposed was quashed and in its place, this Court imposed a sentence of ten years' imprisonment.

18. It is submitted that by referring to the headline as being one of three years, the sentencing judge placed this offence into the middle part of the lower range. While it is accepted that this was a business premises and would not have been expected to be occupied, it is noted that the adjacent building was occupied and that the damage to the premises was considerable and resulted in the business being inoperable and the tenant being unable to return to business. In light of the foregoing, it is submitted that the sentencing judge erred in placing this offence in the low range.

19. It is submitted that the sentence ought not to have been imposed concurrent with the s. 15A sentence; The effect of the sentence for arson commencing on the date of sentence was to postpone the respondent's release date by approximately six months.

Submissions of the Respondent

20. The respondent contends that the sentence properly reflected the offence and lists the following in support of that contention:-

- (i) the fire was such that the owner and colleagues were in a position to attempt to extinguish it and was not out of control;
- (ii) the CCTV footage showed that the incident was brief;
- (iii) the laundrette was not in the immediate vicinity of any dwellings;
- (iv) it was accepted by the prosecuting Garda that there would have been no expectation of anybody being present in either the laundrette or the attached public house given the hour of the morning at which this incident occurred (albeit there were in fact an unquantified number of persons working in an adjoining premises);
- (v) insurance monies were paid out to the owner in respect of this matter which covered two-thirds of the damage caused;
- (vi) it was accepted that this was not a sophisticated venture on behalf of the respondent.

21. It is submitted that the evidence on the date of sentence was that the landlord "*just can't get a tenant at the moment*" and as such, any suggestion or submission that the premises was rendered inoperable by the fire is not accepted. It is said that in the course of delivering sentence, the judge considered the possibility of the respondent putting life at risk despite there being no evidence in this regard.

22. In relation to the concurrent element, the respondent points out that no issue was made of same at the sentencing hearing. Reliance is placed on the following remarks of Charleton J in *People (DPP) v FE* [2021] 1 IR 217 at 243:-

"The duty of the court is more than as between the parties and involves finding the correct sentence as a matter of justice. Thus, while it is not a rule of law, it is a rule of good practice to mention if the view of the prosecution is that some conviction fits within the principle of a possible consecutive sentence."

23. It is submitted that *Curtis* is of no relevance to the present case as it dealt with two offences which occurred as part of the same tranche of offending behaviour whereas in the present case, the Director complains that the sentence was not made consecutive to a sentence imposed on a different date where there was no connection between the two matters.

24. In connection with the above, it is submitted that the offending involved in the present case occurred before the s. 15A matter and therefore it would have been crushing for the court to impose a consecutive sentence where he had not yet committed the drugs offending at the time of committing the arson offence.

25. It is further submitted that *Goodchild* is of no relevance in that the aggravating factors present in that case are not present here. In particular, it is noted that *Goodchild* involved the direct arson of a residential dwelling and a much greater financial loss. Para. 10 is cited:-

"The judge identified the aggravating factors as being; the degree of planning and premeditation involved in the commission of the offence, the knowledge that people were present in the house at the time of the offending and the timing of the offence at a time

when people would normally be expected to be asleep, the impact of the offence on the injured party, the failure to recompense and The Probation Report placing the appellant at a high risk of reoffending.”

26. The respondent cites a recent decision of this Court, *People (DPP) v Shannon* [2023] IECA 325. In that case, the respondent was asked by a third party to damage some cars and the respondent volunteered arson as the method. He set fire to a number of vehicles and a business premises over the course of two days. The damage to the business premises totalled €229,600. He received compensation for the offending and in the aftermath of the offending he expressed satisfaction with what he had done. This Court imposed a total sentence of ten years’ imprisonment.

27. The respondent distinguishes the present case from *Shannon* in that the “before” and “after” behaviour is absent, the commission of offences for financial reward is absent, there was no evidence of premeditation, there was no evidence of any emotional impact on any person, the respondent does not have any other convictions for criminal damage and there was not a “total destruction” of the laundrette.

28. In response to the Director’s submission that the result of the sentence imposed was to lengthen the respondent’s period in custody by only six months, it is said that this disregards the imposition of the suspended portion of the sentence. Reliance in this regard is placed on *People (DPP) v DW* [2020] IECA 145 in relation to the effectiveness of a suspended sentence.

29. It is open, it is submitted, for this Court to find the sentence imposed lenient but not unduly so, which approach this Court has taken before and did indeed take in *People (DPP) v Farrell* [2019] IECA 134. It is said that in light of the mitigation before the court and the consideration of rehabilitation, the sentence imposed was not unduly lenient and the standard as set out by McKechnie J in *People (DPP) v Stronge* [2011] IECCA 79 has not been met.

Discussion

30. The principles for determining undue leniency applications are well established in the case law, commencing with the decision in *People (DPP) v Byrne* [1995] 1 ILRM 279. In *Stronge*, McKechnie J. distilled the applicable principles, and the following is of particular relevance:-

“(ii) to establish undue leniency, it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former”

31. The onus is on the Director to establish that this sentence was unduly lenient and to do so she must show that the divergence between the sentence actually imposed and that which ought to have been imposed amounts to an error of principle. It is only if this point is reached that this Court may intervene.

32. In our view, the judge erred in his nomination of the headline sentence, as a consequence, the ultimate sentence imposed was simply too low for such a serious offence. The fact that the sentence for this matter was made concurrent with the sentence imposed on the s. 15A matter compounds the problem.

33. While the nomination of the headline sentence alone would justify this Court's intervention, when that is taken in conjunction with the concurrency element, the sentence is rendered unduly lenient and one outside the scope of the discretion of the sentencing judge.

34. While counsel for the Director submitted that the carceral element of this sentence extended his sentence beyond that of the sentence for the s. 15A offence by approximately 6 months, in fact, it transpires that his release date is the 22nd June 2024, presumably when one takes account of remission.

35. There were significant aggravating factors to this offending, and while it is argued that the premises was a business premises, one cannot ignore the fact that the building adjacent to it accommodated staff. While the respondent contends there was no evidence of putting life at risk, the prosecuting garda gave evidence that there was such accommodation above the pub.

36. A somewhat loose suggestion was put forward that there was some bad blood between the respondent and the tenant, which was not fully explored in evidence, and it must be said that this is surprising as motive is undoubtedly an important factor in assessing the gravity of the offence of arson. However, there were additional aggravating factors, including the amount of the damage to the property and the fact that the tenant, in essence, lost the business as the machines were destroyed. Finally, the judge properly considered there to be an element of premeditation; a fire does not start itself.

37. As we consider the sentence unduly lenient, we will quash the sentence imposed and proceed to re-sentence *de novo* on a consideration of the evidence adduced at the sentence hearing and the additional material we have received.

Re-Sentence

38. In our view, arson is a serious offence, this is reflected by the Oireachtas setting a tariff of a maximum of life imprisonment. The policy behind such is obvious and the principle of general deterrence is an important factor in assessing the gravity of the offending conduct. In the present case, taking account of the aggravating factors, we consider the appropriate headline sentence to be one of 5 years' imprisonment.

39. We accept that there are mitigating factors; the respondent pleaded guilty, albeit at a late stage, however, the evidence was that the plea was considered valuable. We have received updated reports; an education report and a Prison Governor's Report. The respondent was transferred to Shelton Abbey on the 17th July 2023 and has had periods of temporary release. We have also received a handwritten letter of apology, which speaks to some insight, shame and remorse. We take account of his personal circumstances and that he is now in a new relationship and has a young child with his new partner. We must also have regard to the fact that the respondent is a man with previous convictions which leads to a progressive loss in mitigation.

Decision

40. Had this Court been sentencing the respondent in the first instance, we would have been minded to impose a sentence of 3 ½ years imprisonment. We would not have been disposed to date that sentence from June 2023 in light of the sentence imposed for the s.15A offence which was imposed on the 26th January 2023 and which is due to expire on the 25th April 2024. However, given the new material and the prospect of rehabilitation, we will impose a sentence of 3 years' imprisonment to date from today's date.