



## THE COURT OF APPEAL

Kelly J.  
Peart J.  
Mahon J.

12/13

**The People at the Suit of the Director of Public Prosecutions  
V  
M.J. Walsh**

**Appellant**

**Judgment of the Court (ex tempore) delivered on the 10th day of November, 2014, by Kelly J.**

1. This is an appeal against severity of sentence imposed by His Honour Judge Teehan sitting at the Circuit Court in Clonmel in December 2012. On that occasion the accused pleaded guilty to two counts on a two count indictment, both charges being preferred under s. 3 of the Non Fatal Offences against the Person Act. The two incidents which gave rise to the charges occurred on two separate occasions divided in time by a number of months. The first took place in early July 2011, and on that occasion, a Mr. Butler was the injured party. The second assault occurred in the early days of November 2011, and on that occasion, a Mr. O'Dwyer was the injured party.

2. There was a certain similarity in the way in which these offences were committed. In each instance the injured party was confronted by two individuals, one of whom was the accused. In each instance the injured party was brought to the ground as a result of the intervention of the accused. The injuries sustained by the injured parties were fully described before the judge whose sentences are being impugned. In the case of Mr. Butler, he set out in his statement what occurred. Having been brought to the ground, he was kicked in excess of four times, he said, to quote him exactly he said:

"I felt several kicks more than four times at least from him on my head, I knew he was kicking me, because I could see his legs. I remember putting my hands up to cover my face, I don't know if the other fellow assaulted me, because the next thing I passed out on the ground."

3. The person he is referring to there as the person whom he knew to be kicking him was the accused. Mr. Butler did pass out. He became unconscious and was taken to Clonmel Hospital. The following day was referred to Cork University Hospital because it was suspected that he had a fractured jaw. Fortunately that was not so, but he had all of the other soft tissue injuries and the *sequelae* which were set out in evidence before the judge.

4. The physical evidence was one thing and the physical injuries which were sustained are dealt with in the short summary that was put before the judge. He also suffered some psychological *sequelae* and he describes them in the statement in the following terms:

"I now fear for my own safety all the time and I am very nervous going around the town and I am very wary of my surroundings and the people in them. I feel very uncomfortable on my own. I no longer socialise and I am not comfortable outside of family events. I don't leave the house unless necessary which causes difficulties at home and with my family."

5. He also had some €300 in out of pocket expenses and no compensation was ever offered in that regard.

6. Insofar as the second assault is concerned, the victim on this occasion was a Mr. O'Dwyer and the physical injuries sustained by him were much more serious. He again was brought to the ground and kicking and punching to his head took place. He managed to resurrect himself from the ground and was attempting to get away when he fell and fractured his ankle. He says that the accused then stamped on his left ankle above the ankle and that he heard it snap. "He did this to try and stop me from running, as he stamped on my ankle I heard it pop and I looked down and saw the bone had pierced the skin on the right hand side of my ankle". That was his account.

7. It is correct to say that that account of stamping on the ankle was not accepted by the accused, but whilst he did give evidence in the court below in relation to the proffering of an apology, he did not touch upon his denial of the assertion made by Mr. O'Dwyer the injured party.

8. The consequences for Mr. O'Dwyer were indeed serious. Mr. O'Dwyer was a rather talented young man as is clear from the evidence. First of all he had succeeded in obtaining a Master's Degree in Economics and Finance and at the time of this assault, he had no fewer than four job interviews lined up. Three were with stock broking companies in Dublin and one with Allied Irish Banks. Those interviews had to be foregone. Ultimately he did secure employment, but those interviews were obviously of importance to him, given the qualification that he had just achieved. His talents were not limited to the academic halls. He was also quite a sportsman and it was in a sense a cruel irony that on the very night after this assault was perpetrated upon him, he received a telephone call telling him that he was being made an offer to become a member of the senior panel of the Tipperary hurling team. Of course, because he had to have surgery involving the putting of plates and screws into position in his ankle, that sporting opportunity was lost to him. These assaults caused very serious consequences for the victims.

9. The first criticism that is made of the judge is that he designated these offences as coming within the upper end of the range of offences that is contemplated under section 3. It is said that the judge ought to have regard to these as being in the medium range, rather than at the upper end. This Court disagrees with that criticism of the trial judge.

10. It is correct to say that weapons in the form of knives or bottles or crowbars or coshes were not used, but the foot can be an equally damaging weapon when applied to the head of a person who is jostled to the ground and where continuous kicking goes on, in the case of Mr. Butler, on the admission of the accused himself over a period of time of up to ten minutes. This Court does not believe that any legitimate criticism can be made of the judge in coming to the conclusion that, having regard to the nature of these offences, the amount of violence that was utilised and the unprovoked nature of the assaults that they could be regarded as other than offences at the upper end of the range. So far as there is criticism made of the judge in that regard, it is in the view of this Court unfounded.

11. The second criticism which is made is that it is contended that the trial judge failed to take into account all of the mitigating factors which had been put in evidence before him. It is important to remember that in this case the sentence was imposed immediately after all of the evidence had been heard by the trial judge. This Court is satisfied that in imposing sentence in those

circumstances, it is not an obligation of a trial judge to refer to each and every mitigating and aggravating circumstance and tick it off as though it were a check list.

12. Support for that proposition can be found from the observations made by Geoghegan J. in *DPP v McKevitt* [2008] IESC 51, where he says, it has never been the law that a trial court must trawl through every credibility point raised against a key witness and explain why it has rejected it in its judgment. That approach can be replicated on the topic of imposition of sentence. It is not necessary for the judge to go through, as I say, every item and tick it off like it were a check list.

13. In the course of the written submissions, specific points were set forth in numerical order and it was said that these various points with their respective numbers had not been referred to by the trial judge. In fact, when one looks at the transcript, it is clear that certainly insofar as a number of them are concerned, the trial judge had indeed referred to them. But overall having regard to the fact that the trial judge had just moments beforehand heard all of the evidence and then referred to quite a number of the mitigating factors, the fact that he did not mention some specifically, does not in the view of this Court amount to an error in principle on his part and consequently the criticism which is levelled against him in that regard is rejected.

14. The third point which is made, concerns the decision of the trial judge to make the sentences consecutive to each other. In the case of the assault on Mr. Butler, he imposed a term of three and half years. In the case of the assault on Mr. O'Dwyer he imposed a term of four years imprisonment and then he directed that they be served consecutively. It is to be noted that during the course of the sentencing, the trial judge did not give any indication that it was his intention to impose consecutive sentences. This Court is of the view that it would be desirable that if a judge is contemplating a consecutive sentence, that he ought to give notice of that fact so as to enable representations to be made to him by reference to what is described as the "totality" principle.

15. I will come to what that amounts to in a moment. Before doing so, I should point out that counsel indicated that he was not making a specific complaint of the fact that he was denied an opportunity to make representations to the court. He accepted that had he wished to do so, he could have done so, albeit that the trial judge had indicated what his view was on the matter.

16. Both sides accept and are correct in so doing that there is a discretionary entitlement on the part of a sentencing judge to impose sentences on a consecutive basis. That much is clear from the judgment of the Court of Criminal Appeal pronounced by Keane J. as he then was in *People v. T.B.* [1996] 3 I.R. of 294. This is what he said:-

"The essential issue arising on the appeal is as to whether the trial judge erred in principle in imposing consecutive sentences. The jurisdiction of the courts to impose concurrent or consecutive sentences where a person has been convicted of more than one offence at the trial is, in general, a non statutory one, although it has been regulated by statute in particular contexts. While we were not referred to any authorities, it seems clear that the general principle is that concurrent sentences should be imposed for offences arising out of one incident or transaction, although there are exceptional cases where the sentencing tribunal may depart from the usual practice.

In England the courts have also applied what has come to be called "the totality principle" which is summarised as follows by one learned commentator:

'The courts have evolved a principle which Thomas has called the totality principle, which requires a court to consider the total sentence in relation to the totality of the offending and in relation to sentence levels for other crimes.'

It would be thus inappropriate, for example, to impose a series of prison sentences in respect of a number of motoring offences to run consecutively which would have the consequence of subjecting the offender to a disproportionately severe sentence and one that might be more than the court would impose for manslaughter or rape. In such a case it has been suggested that the sentencing tribunal should step back, so to speak, and consider the totality of the sentences and whether any reduction is called for in the circumstances."

Keane J. went on to say:

"In the present case it is perfectly clear that the offences in respect of which the accused pleaded guilty did not arise out of the same incident or transaction, but, on the contrary were committed at intervals over a lengthy period of years. It was, accordingly, a case in which it was clearly within the discretion of the trial judge to impose consecutive sentences if he thought that appropriate."

17. In the present case, it is the view of this Court that no error in principle was made by the trial judge in deciding to impose consecutive sentences here. They were two quite separate assaults, two quite separate injured parties and the assaults took place within a number of months, one of the other. There was a certain similar *modus operandi*, but, apart from that, these two serious matters required to be dealt with as they were dealt with by the trial judge by a consecutive rather than a concurrent sentence. The interests of justice would not have been served by a concurrent sentence being imposed.

18. The court is also satisfied that the judge was mindful of the totality principle, because he then, having imposed the sentences on a consecutive basis, (which would have given rise to imprisonment for seven and a half years), reduced the effective sentence by imposing a suspension of the last eighteen months, thus giving rise to an effective sentence of six years.

19. He did that as he said himself at the conclusion of the transcript so as to deal with the mitigating factors "I will suspend in view of the mitigating factors the last eighteen months of that sentence on Mr. Walsh entering into a bond to keep the peace". He took into account in the overall sentence that he was imposing all the mitigating factors which had been opened and developed in the evidence and the submissions before him, thus giving rise to an effective sentence of six years imprisonment. This, having regard to the serious nature of these assaults, was a sentence which this Court does not regard as being in any way in error and consequently the result of the appeal is that it is dismissed. That is the order which the court makes.