THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

Record No. 167/16

DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

V

MARK SWEENEY

RESPONDENTS

Judgment of the Court (ex tempore) delivered 21st February 2017 by Mr. Justice Edwards

Introduction
1. The appellant pleaded guilty to an offence of robbery before Roscommon Circuit Criminal Court on the 9th of March 2016. He was sentenced by His Honour Judge Keenan Johnson on 2nd of June 2016 to eight years' imprisonment, with the final two years and six months suspended. The appellant appeals against the severity of this sentence.

The Circumstances of the Offence
2. On the evening of the 24th of August 2015, the victim, Mr Gaynor, who was 90 at the time of the incident, was walking through the Demesne Town Park in Castlerea, Co Roscommon, when he was approached by the appellant, who demanded money. Mr Gaynor offered him some change. In what appears to have been an unplanned attack, the appellant grabbed Mr Gaynor's umbrella from him, threatened him with it and pushed him into some nettles. He struck the victim several times in the upper body with the umbrella. Mr Gaynor then gave the appellant approximately €450 in cash, or about two months' worth of his pension. The appellant, who was under the influence of drugs and alcohol, used the money to buy vodka for himself and two others. The facts were established from the victim's evidence and from CCTV footage of the incident. The appellant did not contest the charges and immediately admitted wrongdoing when questioned by Gardaí.

The Impact on the Victim
3. The sentencing court received evidence concerning the physical and psychological harm Mr Gaynor had suffered as a result of the incident in the form of a victim impact statement that was read into the record, and a doctor's report. The pushing had resulted in a fracture to his second lumbar vertebrae. Prior to the incident the victim had had no history of back pain but since then has had continual lower back pain. His walk is slow and painful and he has trouble getting in and out of beds and chairs. He experienced regular sleep disturbance over an extended period. Despite having volunteered with the Park Committee over many years, Mr Gaynor now does not enter the park unaccompanied and he said he *is "very disappointed that [he] cannot use the park freely".* In his statement, the victim told the Court that at the time of the incident he was very afraid the appellant would knock him unconscious, or that the incident would provoke the reoccurrence of a stroke which he had had previously.

The Appellant's Personal Circumstances
4. The appellant is a paranoid schizophrenic and a substance abuser. On the evening in question, the appellant was heavily intoxicated, having consumed a large amount of alcohol and cocaine and having abused his prescription drugs. Evidence was given in court that the appellant had *"gone off the rails"* when his mother, to whom he was close, had recently died. He is from a family of 19 children and has a young daughter who lives with his brother as both he and the child's mother are unable to care for her. He left school at the age of nine because of bullying, and is illiterate. He has no work history, owing to his lack of skills and time spent in prison. He has eight previous convictions, one of which relates to a manslaughter in circumstances where he hit a friend over the head with a bottle while intoxicated. After the incident the inhabitants of Castlerea held a demonstration in expression of their anger at what had happened to Mr Gaynor and it was accepted by the Court that as a result of this, it is unlikely that Mr Sweeney could plausibly return to live in the town. He had no recollection of the incident, but when showed CCTV footage at the Garda station four days later he admitted his guilt completely and showed remorse.

5. It should be noted that the appellant and his counsel were keen to emphasise that neither Mr Sweeney's mental illness, nor his alcohol and drug abuse nor the pain caused by the death of his mother were being relied upon as in any way excusing his behaviour. A psychiatric report handed into Court also made clear that his risk of reoffending was linked to his alcohol and drug abuse, but not to his mental illness.

The Sentence

6. In sentencing Mr Sweeney, the sentencing judge in that case had regard to a number of principles as enunciated by this Court and its predecessor, the Court of Criminal Appeal, as well as other considerations:

> *"The principles to be considered are (a) that the sentence must be proportionate to the crime; (b) I must take into accounted any aggravating factors, mitigating factors and the circumstances of the accused; (c) I must consider whether the accused has shown remorse and displayed appreciation for his wrongdoing; (d) I must look at the accused's record and the likelihood of him reoffending; and (e) I must consider the effect of the consequences of the offence on the victim, Mr Gaynor; and I must also consider the accused's cooperation with the gardaí throughout the investigation of the offence. I'm required, under section 5 of the Criminal Justice Act 1993, to take into account the victim impact report which has been submitted to the Court. I must also consider the probation report that has been prepared for this sentencing together with the psychiatric report on the accused which has been prepared by Dr Gulati."*

7. The sentencing judge went on to identify the aggravating factors of the case as being: the aggression and level of physical violence; the fact that the victim was a vulnerable individual who may never fully recover; the nature and frequency of the appellant's previous convictions together with his high risk of reoffending; and finally, a failure to make restitution, which was taken to indicate a lack of appreciation of the gravity of the offence.

8. The sentencing judge went on to identify a number of mitigating factors, namely: the appellant's early plea of guilt, which saved the victim the stress and trauma of attending Court – although the judge noted that the video evidence was so compelling that the appellant had no option but to plead guilty; the appellant's family background, work and educational background; the appellant's mental condition and the fact that he had previously responded well to supervision by the probation service, even if this had had little long term effect; the fact he is no longer able to return to Castlerea on account of local hostility; and finally, the fact that he did not attempt to use his mother's death, his substance abuse or mental illness as an excuse for the incident, which the judge held displayed an acknowledgement of the wrong committed. The sentencing judge also accepted that the accused was remorseful and that no element of premeditation was involved.

9. In balancing the competing concerns of the case, the sentencing judge held that the sentence would have to entail *"a substantial penal element "* but would also have to *"contain some light at the end of the tunnel".* He noted that the Oireachtas had legislated for a maximum sentence of up to life imprisonment. He assessed the seriousness of the offence, which he had characterised as harrowing for the victim and callous, as meriting a headline sentence of 10 years' imprisonment. Having considered mitigating factors, this was reduced to eight years' imprisonment. In addition to that reduction, the sentencing judge then went on to suspend upon certain conditions the final two years and six months of the eight year sentence he had determined upon *"to enable the accused to rehabilitate himself"*. In effect, therefore, the net sentence to be actually served was one of five years and six months imprisonment.

Grounds of Appeal

10. The appellant appeals on two grounds.

> 1. The trial judge erred in imposing a sentence of 8 years imprisonment, in that the trial court measured the level of severity of the offence at an excessively high level on the scale of seriousness for the offence of robbery.
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> 2. The trial judge recognised mitigating circumstances, but erred in sentencing by giving insufficient effect to them, in particular the mitigating factors of the appellant's early guilty plea and genuine remorse.

The Appellant's Arguments

11. The appellant submits that the learned sentencing judge classified the offence as falling at the higher end of the scale for the particular offence, when it should have fallen at the upper end of the mid range of seriousness. While the sentencing Court correctly identified the relevant aggravating and mitigating factors, it erred in locating the offence a point that was too far along the scale of seriousness in the direction of the maximum sentence and gave insufficient weight to certain mitigating factors.

12. The appellant relies on a number of cases to suggest that a headline sentence of 10 years was too high. In *DPP v Michael Byrne* [2015] IECA 235 the appellant received consecutive sentences of two and three years' imprisonment for two offences of robbery, one of which was against a 13 year old boy involving the robbery €1,700 worth of goods. The robbery caused the boy a panic attack immediately after. The second offence was committed while on bail for the first offence and involved the robbery of €50,000 in cash from a transit van. The offence also involved a stolen car and a violent assault. In that case, the appellant was from a family of ten children whose parents had separated. He had attained a junior certificate and had some work history as a gardener. The second offence was committed while the appellant was under the influence of illicit drugs, and he was granted bail to attend addiction treatment. He broke the terms of this bail by only attending for four days. The trial Court imposed sentences of five years' imprisonment, taking into account his history of 63 previous convictions.

13. In *DPP v Bridget Connors* [2016] IECA 68, the appellant appealed a three year sentence for robbery of a female shopkeeper with a syringe. The appellant was a 41 year old heroin addict, with one adult child. In that case, this Court agreed with the Trial Court's decision not to suspend any part of the sentence on account of her total failure to engage with the Probation Service.

14. In *DPP v Gerard Grey* [2014] IECA 9 a sentence of five years' imprisonment was upheld for an offence of attempted robbery on a financial institution involving a gun. The Court considered a psychiatric report and the fact the appellant was addressing his addiction as mitigating factors.

15. While the appellant submits that in the present case the sentencing judge correctly suspended two and half years of the sentence, he erred in not giving sufficient allowance for the mitigating factors by applying a reduction of two years.

The Respondent's Arguments

16. The respondent argues that no error in principle can be identified. Firstly, the targeting of a vulnerable victim who was 90 years old is a significant aggravating factor. *O'Malley* in 'Sentencing Law and Practice' (3rd Ed) when dealing with the targeting of a vulnerable victim, specifically cites the example of the robbery of an elderly person involving violence, and states that this is widely accepted as an aggravating factor. The respondent submits that the targeting of an elderly victim, the unnecessary escalation and

gratuitous use of violence amount to significant aggravating factors.

17. Further, the respondent submits that the sentencing judge is required under s. 5 of the Criminal Justice Act 1993 to take into account the impact on the victim. The respondent refers to the significant mental and physical impacts the victim suffered, as well as his immediate feelings of fear at the time of the incident.

18. In relation to the appellant's previous convictions and risk of reoffending, the respondent submits that these are relevant factors to be considered, irrespective of whether they amount to an aggravating factor or merely a loss of mitigation.

19. The respondent argues that the sentencing judge placed the offence at the correct point on the scale of seriousness. In direct rebuttal of the appellant's contention that the sentencing judge put it at the higher end of the scale, the appellant states that nowhere did the sentencing judge classify the offence as being at the higher end. The appellant relies on Professor O'Malley, who states that sentences ranging from three to 10 years' imprisonment represent the middle of the range of seriousness. If Professor O'Malley is correct, they submit, the sentencing judge placed the offence at the higher end of the mid range.

20. The respondent goes on to distinguish the present case from the three authorities relied upon by the appellant. In *Byrne*, the respondent submits, although the 13 year-old victim was vulnerable, he was not as vulnerable as Mr Gaynor. Further, there was no serious physical harm and no long term victim impact. The sentence was also not backdated to account for time served, unlike in the present case. In *Connors* and *Grey*, the victims were not vulnerable, no actual violence occurred and there was no evidence of victim impact.

21. The respondent highlights the judgment of this Court in *DPP v Jonathan Duffy* [2016] IECA 331 which, the respondent submits, illustrates this Court's approach. In that case, Bermingham J held as follows:

> *"This Court has said on many occasions that the fact that there might be another way of dealing with matters does not justify intervention by this court. Indeed even in the situation where the individual members of the court might be minded to adopt a different approach, if such was the case, would not of itself justify an intervention. Rather the court can intervene only when an error in principle is identified and where the approach taken falls outside the permissible range. In this case the offence in question was a very serious one as committed by an offender with a very significant directly relevant prior record. In the circumstances the court is unable to identify any error in principle must dismiss the appeal."*

22. At the oral hearing of the appeal the Court was also referred to *The People (Director of Public Prosecutions) v Obaseki* [2016] IECA 379 which involved a robbery in which a young victim sustained significant injuries, including a compound fracture to his leg, and in which the court determined upon a headline sentence of seven years as being the appropriate starting point.

23. In response to the appellant's contention that the trial judge gave him insufficient benefit for mitigating factors, the respondent submits that it is clear from the judgment that the sentencing judge specifically took cognizance of the guilty plea and other mitigating factors (which it was submitted were limited), in reducing the sentence from 10 to eight years. The two and half year suspension to aid rehabilitation must also be considered. This, the respondent contends, amounts to a reasonable and proportionate ultimate sentence that was within the sentencing judge's legitimate range of discretion. It was submitted that there is no error in principle, especially considering the appellant's previous convictions.

Analysis and Decision

24. We agree with counsel for the respondent that the sentencing judgment in this case reveals no error of principle. The sentencing judge's approach to sentencing was impeccable, in that he properly assessed the seriousness of case both with respect to moral culpability and harm done, and having done so located the offence at an appropriate place on the range of available penalties so as to determine upon a headline sentence before taking account of mitigating factors.

25. Complaint was made in the appellant's written submissions, although this was not pressed at the oral hearing, that a headline sentence of ten years was too severe for this offence. We cannot agree. While it might be said that a headline sentence of ten years was perhaps at the upper end of the appropriate range, it was within the sentencing judge's legitimate margin of discretion to locate it where he did. There were a great many aggravating circumstances in this case. The victim was elderly and vulnerable, money was demanded of him with menaces, then significant actual violence was used, the victim's own umbrella was taken from him and used as a weapon, significant harm was done to the victim, a significant sum of money was stolen, and all this was done in circumstances where the appellant was in a state of self induced intoxication and in circumstances where he had two previous convictions for robbery and other convictions for crimes of violence including manslaughter and assaults. The case clearly justified fixing a headline sentence towards the upper end of the mid range on the scale of available penalties, which is what the judge did.

26. The main complaint relied upon at the oral hearing was that the sentencing judge gave insufficient credit for mitigation. There was very little, apart from the early plea, which could have provided mitigation. While the appellant was subsequently co-operative this was against a background of a very strong case, including the fact that the assault was recorded on CCTV. Much is made of the appellant's remorse, and it was and is accepted as being genuine. That remorse was reflected in his early plea and it is true to say that some court time and resources were spared by the plea, and that the victim did not have to give evidence at a trial. It was emphasised that he was very concerned not to subject the victim to further stress and trauma, and his attitude in that regard is to be commended.

27. Nevertheless, even taking into account the plea, the admissions made for what they were worth, his remorse and his personal circumstances including his substance abuse problems, it is very difficult to see how all of this could have entitled him to very much more than the 20% afforded to him by the sentencing judge. In saying this we would concede that if the sentencing judge had stopped there and left it at 20% such a discount would not have been regarded as generous, although it would not necessarily have fallen outside of the appropriate range.

28. However, even if a 20% discount for mitigation was on the low side, and we are far from convinced that it was, it was more than compensated for by the very generous further effective discount that the judge went on to apply in terms of suspending an additional two and a half years with a view to incentivising rehabilitation. The combined effect of the 20% discount for pure mitigation and the further 25% to incentivise rehabilitation resulted in a net overall discount of 45%. By any standards this was generous in the circumstances of the case and fully took into account the personal circumstances of the appellant.

29. We therefore find no error of principle on the mitigation side of the sentencing equation either, and we are fully convinced that the ultimate sentence imposed of eight years with two and a half years suspended was an appropriate and proportionate sentence. We are no disposed to interfere with it, and dismiss the appeal.