



THE COURT OF APPEAL

[92/2017]

**The President  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**MICHAEL KIRBY**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 3rd day of December 2018 by Ms. Justice Kennedy**

**The Appeal**

1. This is an appeal against the sentence imposed on the appellant in Limerick Circuit Criminal Court on the 6th of April 2017 following a plea of guilty. The appellant was sentenced to eight years' imprisonment in respect of the offence of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997.

**The Background**

2. The facts are somewhat convoluted and we now refer to the salient features. On the 14th September 2015 the appellant drove to the home of the victim, Mr Cosgrave, who was then 18 years of age. The men were known to each other. The appellant demanded €150 for an alleged drug debt and urged Mr Cosgrave to get into the car in order to clear the victim's name. The victim noticed a claw hammer in the car and it seems at this point that the appellant handed Mr Cosgrave what Mr Cosgrave described as an eight of cocaine and told him to put it up his sleeve.

3. The appellant drove to an address and on arrival, he took the cocaine from the victim, locked the victim in the car and entered the house alone. He then returned to the vehicle and gave the cocaine back to the victim. He then drove to a second address where a third man joined them in the car. The three men drove to a soccer club in Limerick but left shortly thereafter due to the presence of CCTV cameras.

4. They parked nearby and walked to an area not covered by CCTV. Once there, the victim was asked to divide up the cocaine and as he began doing so the appellant began hitting him on the leg with a claw hammer. He demanded the return of a half bar of cocaine.

5. He then tried to hit the victim on the head but was unsuccessful. Mr Cosgrave was lying on the ground at this point and he saw the appellant go towards the soccer club whilst the third man remained but did not intervene. The appellant said he was going to get a gun and he returned with a handgun. At this point Mr. Cosgrave begged and cried for his life and the appellant pointed the gun at him. The victim covered his head and heard two clicks and knew that the appellant had pulled the trigger. Throughout the appellant demanded his half bar of cocaine and said to Mr Cosgrave that he was lucky he had no bullets or he would be dead, that he was going to take him down the bog.

6. The victim was then forced to ring another youth to get a replacement supply of cocaine. The two men then escorted the victim to a house where he was further questioned about the cocaine. The second youth arrived and the appellant produced a knife and told them to leave the house.

7. Mr. Cosgrave, when he returned home, informed his mother of his ordeal and he attended a doctor who noted that he had tenderness over his thigh and a diagnosis of resolving hematoma of the muscle was made. He said he was anxious and he was afraid to leave home. In summary, he sustained an injury to his thigh caused by a blunt instrument and resulting in bruising and bleeding in the musculature of his thigh and the medical opinion was that Mr Cosgrave should make a full recovery from his physical injuries but that he may exhibit ongoing symptoms of anxiety and flashbacks. Mr Cosgrave on the sentence date did not have continuing sequelae of a physical nature. CCTV footage supported the victim's account of the journey prior to the arrival at the soccer club. The weapon was not located.

8. Three accused were sent forward for trial, and on the date of trial the appellant pleaded guilty, which was considered by the judge to be an early plea in the particular circumstances.

9. The appellant had convictions for burglary, for offences under the Road Traffic Act and convictions under the Misuse of Drugs Acts. The convictions most relevant to the instant offence include convictions for possession of knives, a conviction in July 2005 for robbery and other charges including that of false imprisonment for which he received two years' imprisonment. The facts of that incident included a male being stopped by three males, a knife produced, items demanded and the tip of the knife stuck into the victim's thigh. On the 30th January 2009, a sentence of eight years' imprisonment was imposed on the appellant for the offence of assault causing harm. In that instance, a physically frail young man was assaulted and was found in an unconscious state necessitating he be placed on a life support machine and requiring surgery for serious head injuries.

**Personal Circumstances**

10. The appellant was thirty three years of age when sentenced. He wrote a letter of apology which was furnished to the court in which he confirmed his intention to rehabilitate himself. Whilst incarcerated, he attended counselling services provided by the Merchant's Quay project.

**Sentence**

11. In his detailed sentencing remarks, the judge emphasised the serious nature of the victim's ordeal involving the use of a claw hammer and the production of a handgun which, even unloaded, resulted in a terrifying experience for the victim. The Court also referred to the appellant's previous convictions, the pre-meditated nature of the crime and the deliberate efforts to evade CCTV.

12. To use the language of the sentencing judge, he placed the appropriate tariff within the range of seven to ten years. In terms of mitigation, the Court emphasised the early plea and that the plea was of material value, permitting the avoidance of a trial and any further victimisation of the victim. The court also pointed to the expression of remorse and the efforts taken by the appellant to rehabilitate himself.

**Grounds of Appeal**

13. The appellant puts forward the following grounds of appeal:-

(a) firstly, that the trial judge erred in failing to identify the actual headline sentence and erred in his assessment of the notional sentence; and

(b) secondly, that the trial judge attached insufficient weight to the mitigating factors.

14. In the latter respect it is submitted on behalf of the appellant in the course of these submissions which were furnished to the court, that the judge failed to give due weight to the timing of the plea which was sufficiently early to prevent the victim from giving evidence which was especially valuable in circumstances where the victim was described as a vulnerable youth. It is also submitted that the material assistance of the plea was not given due weight by the sentencing judge and that the judge failed to have due regard to the appellant's expressions of remorse, which involved a personal letter apologising to the Court and the victim. The judge, it is also submitted, failed to have an adequate understanding of the appellant's efforts of rehabilitation.

**Findings of the Court**

15. Before this Court will intervene, an error in principle must be identified.

16. So far as the offence that the Circuit Court was dealing with and which is now the subject of this appeal this was, by any standards, a most serious and sinister offence. It involved the assault on the victim with a hammer which, whilst not causing long lasting physical injury, was nonetheless a sustained and painful attack, the production of a gun and, in particular, the 'clicking of the trigger' designed to terrify the victim, the assertion by the appellant that the victim was lucky he had no bullets or he would be dead and the production of the knife. All were designed and, indeed, had the effect of terrifying a vulnerable young man.

17. The sentencing judge properly identified the aggravating factors and rightly took into account the appellant's relevant previous convictions which were opened to him. Mr Kirby's previous conviction for robbery and the offence of false imprisonment, which was taken into consideration, for assault causing serious harm and for possession of knives are all relevant previous convictions.

18. The complaint is made that the judge failed to identify a pre-mitigation figure. In fact, he stated that the matter was very serious and that the appropriate tariff was within the range of seven to ten years.

19. The judge then proceeded to impose a sentence of eight years imprisonment, having taken into account the mitigating factors which he had identified, the strongest of which was undoubtedly the appellant's plea of guilty, which was accepted as being an early plea and was also accepted as being of material assistance.

20. Whilst it would have been preferable had the specific pre-litigation figure being identified by the trial judge, this court has not been persuaded that the sentence imposed fell outside the appropriate range for what was a very serious offence. The judge took into consideration all mitigating factors and imposed a sentence of eight years' imprisonment, thereby giving to the appellant, in the mind of this Court, every possible benefit.

21. Looking at the offence committed, as it was, by someone with relevant previous convictions, and indeed this offence was committed within months of his release from custody, this Court cannot identify any error.

22. Overall, this Court is in no doubt that the sentence decided upon by the sentencing judge was one which was available to him and, in fact, fell very firmly within the available range.

23. Consequently, the appeal is dismissed.