



THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Appeal No. 112/15

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Samantha Corbett

Appellant

Judgment of the Court (ex tempore) delivered on the 21st day of July 2015 by Mr. Justice Edwards

1. In this case the appellant pleaded guilty on 23rd February 2015 to a single count of assault causing harm contrary to s. 3 of the Non Fatal Offences against the Person Act 1997 and she was sentenced before Cork Circuit Criminal Court. She received a sentence of three years imprisonment with the final one year of the said sentence suspended conditionally. The appellant now appeals against the severity of her sentence.

2. The circumstances of the crime were as follows. On Saturday 26th July 2014 the appellant was a patient awaiting treatment at The Mercy University Hospital Emergency Department. She was been dealt with by two staff nurses one of whom was a lady called Eithne O'Flynn, and while Ms. O'Flynn was assisting her colleague in attending to the appellant she was punched in the right side of the face by the appellant resulting in her falling underneath a trolley onto the ground. The entire incident was captured on close circuit television and in any event a complaint was made and a witness accounts were given, both by Ms. O'Flynn and others who observed the incident.

3. The gardaí attended at the hospital and viewed the close circuit television and took relevant statements and in due course the appellant attended the Bridewell garda station for the purpose of been interviewed in relation to the assault that had occurred. That interview took place on 1st October 2014. The appellant claimed to have no recollection of the circumstances in which the assault had taken place. It was common case that she was highly intoxicated at the time. However, she readily identified herself in the CCTV footage that was shown to her. She said that *"I am denying what happened, but I can't remember what happened, but if that's what I done then I am disgusted with myself"*. It is accepted by all concerned, and was accepted indeed by the trial judge, that from a very early stage Ms. Corbett both expressed, and demonstrated by her conduct, remorse for her involvement in assaulting Ms. O'Flynn.

4. The assault on Ms. O'Flynn had severe effects on the lady in question. She provided a victim impact statement to the court which is relatively brief and which the court will read out. She says:-

"My name is Eithne O'Flynn. I am a married mother of three children ranging in age from the age of seven to seventeen. I am a staff nurse and this has been my profession for the last twenty two years. I spent the last eleven years approximately in the emergency department of the Mercy University Hospital. This assault has changed my daily living greatly since I suffered a serious neck injury which required a neurosurgical opinion and to this day I remain in this consultant's care. I am also under the care of a pain specialist consultant. I suffer with pain on a daily basis requiring me to take medication. There are many days that I cannot carry out my activities as a mother such as collecting my children from school or cooking the family dinner. I rely on parents and friends and some days I have to rest – return to bed. Secondly, to the pain in my neck which radiates down my left arm, this brings its own guilt on my part in crying out to other people by having to ask them to help out. It has also handed pressure on my husband who works long hours in his own job. My children on occasion have said to me out of pure frustration that they hate what this neck injury has done to me and that I am not fun anymore. This assault has also effected by sleep party greatly. Firstly, due to the pain I sometimes suffer at night and second, wondering what did I do to deserve this when I was only carrying out my job. I have always, always wanted to work in Emergency Medicine and have loved my time there and I also always been a front line hands on nurse and now I have been told by my consultants that I cannot return to contact ward nursing firstly due to my neck injury and the fear that I would further injure by neck by patient lifting and secondly because of the fear I have developed since been assaulted by this woman in an area I enjoyed working in and I was also very proficient in. I do not know how long more this injury will effect me for and I am so cross at how it has affected by life."

5. The sentencing court heard evidence concerning the personal circumstances of Samantha Corbett from the investigating guard, who was Garda Brian Murphy. Garda Murphy told the court that the appellant had ten previous convictions, three of which were for offences contrary to the Non Fatal Offences against the Person Act 1997, albeit that three of those offences were charged under s. 2 of Act, namely the lowest form of assault chargeable under that legislation. Her most recent previous conviction was one on the 4th November 2014 at Mallow District Court for an offence which occurred on 8th August 2013 and for that the appellant had received a six months suspended sentence. It was confirmed to the court that the appellant had never before been before the Circuit Criminal Court before.

6. The garda did not have much other information concerning the personal circumstances of the appellant save for stating that she had been living for some time in the Mallow area and had recently been availing of a women's refuge in Cork city.

7. There was a probation report before the court which put some further flesh on the bones of that fairly limited account and the sentencing judge alluded to the probation report in his sentencing remarks. However, the appellant herself gave evidence before the circuit court and provided much contextual detail which was of assistance in terms of the mitigating factors in the case.

8. She told the court, firstly, that she wished to apologise to the injured party.

9. She told the court that she had a long standing alcohol problem arising out of the fact that she had been in an abusive relationship with an ex partner for some time, that she had become pregnant but that prior to her child being born she had decided to address her

alcohol problem, had gone to Tabor Lodge and had completed a Tabor Lodge alcohol addiction programme two weeks before her child, Jasmine, was born in February 2014. Unfortunately, the problems arising from the abusive relationship with her ex partner continued and her daughter, Jasmine, was taken into care not long after she was born. There was a nine month interim care order due to expire in June 2015 in the context of the sentencing hearing taking place on 22nd April 2015.

10. The appellant told the court that her long term focus and goal was to get her daughter back. It was put to her that it would be necessary for her to address her alcohol issues and that she had been offered admission to Cuan Mhuire on three previous occasions in the recent past but had not taken up any of those appointments. She offered an explanation for that saying that on the first occasion she was the victim of an assault which prevented her from doing so. On the second occasion she was in Cork University Hospital for a cat scan on her head. On the third occasion she wanted to see her daughter before doing anything and that is why she did not take up the third appointment.

11. Counsel on behalf of the appellant applied to the judge to adjourn the matter to allow the appellant to take up a fourth appointment in Cuan Mhuire so that she could commence a twelve week alcohol residential course to deal with her alcohol abuse. The judge considered that request but determined that he was not in a position to accede to it. In deciding not to do so he referred specifically to the probation report which he noted confirmed that she was at high risk of re-offending and he noted that in the conclusion to that report it was stated that it was a matter of concern that the appellant was not on the bed list for Cork Simon Community. Moreover, the probation officer had stated at the time of writing "I cannot advise as to where she is sleeping at night". He noted that the probation officer had concluded that it was not possible to make a positive recommendation at that time. He commented that the probation service, being an agency of the court, had sought to induct her into a treatment centre but that she had not been compliant and accordingly the court was not persuaded that that was a course that should be proceeded with at that point.

12. The judge stated that:

"Mr Boland is quite correct that the Court must have regard to the prospect of rehabilitation, but not necessarily in the prescriptive manner that he is indicating to the Court. The Court can approach that from a number of different angles, and I do not believe that is the way the Court should proceed at present. Accordingly, I'm going to deal with the matter now by way of final disposal."

13. The court then proceeded to sentence the appellant and in doing so made the following remarks. The judge stated that:-

"When considering the issue of sentence he had to have regard to the offence itself and the circumstances of the offender to achieve a balanced view on the matter and the court also had to have regard to the prospect of rehabilitation. The Court must have regard also to the social desirability of having frontline health workers protected, and that feeds into the issue of deterrence, and also the Court must look into the issue of what is a deserving sentence, all under the principle of proportionality. "

14. He further stated:

"Now, the defendant has pleaded to an assault causing harm to a nurse Eithne O'Flynn at the Mercy Hospital on the date in question, namely the 26th of July last year, at the Accident and Emergency Department. The Court is informed that the maximum sentence under that is ... five years' imprisonment."

The court then noted that it was not fettered by any requirement to impose a minimum sentence and continued :

"Now, having listened to the replies giving by the garda witness when outlining the matter and what was said in cross examination and also to the questions I might have put myself, and having listened keenly to the statement read out by Nurse Eithne O'Flynn the court must first of all scale its offence in the level of seriousness. The consequences for Nurse O'Flynn here are pretty severe. The medical report from the head doctor, Chris Luke, shows that she has an injury to her spine and he offered the view that she was very lucky she did not sever her spine having regard to the manner in which her neck was positioned when she was caused to go under the trolley. Moreover the effect in the daily living of Nurse O'Flynn is such as to cause the court to conclude that this belongs to the higher end of the scale for an offence of this nature."

15. The sentencing judge noted that there was an aggravating factor in that a plea had been offered to the District Court in Kilmallock on 3rd April 2014 whereby that Court was persuaded not to deal with the matter before it and to give the appellant a chance. Despite the appellant having been given that chance she committed the offence for which she was now being sentenced. He noted that the probation report indicated that in fact chance after chance had been extended to the appellant. He added:

"That is not to say - and the Court would be slow to ever make such a comment - that there is no hope here; that is not the case. However, the Court must look at the abuse of that probation period when she commits this fairly horrific offence on Nurse O'Flynn; these are clearly aggravating factors."

16. The judge then went on to list the mitigating factors, and they were significant in the case. He noted that she had co-operated with the gardaí, that she pleaded guilty at an early stage, that she had saved Nurse O'Flynn the trauma of having to give evidence and had saved the court from having to conduct a lengthy trial. He said that:

"...having regard to those factors and to the manner in which I have calibrated the seriousness of the offence, I'm also obliged to have regard to her personal circumstances; she is a person of 29 years of age and has a difficult background; there's no doubt about that. That is set out in the probation report and there are childhood factors which are quite clearly difficult for the accused. She has a child in care which is truly a searing issue for a parent, and she has hopes that she can be reunited with her child. She has an addiction issue of a severe nature by all accounts. Attempts to break the cycle of misuse of alcohol have, in the past, not borne fruit and she has, as I understand it, an opportunity to enter Cuan Mhuire at present, as Mr Boland has indicated to the Court. She has 10 previous convictions, three of which are for section 2 assaults, that's assault without harm, and these were prosecuted not in this Court previously. She is, as I understand it, now under a suspended sentence but this offence was committed not during the currency of that suspended sentence, so it's not reckonable under section 99."

17. The court then considered the issue of rehabilitation. He stated:-

"I must look towards the prospect of rehabilitation but I must also look at the requirement that the Court recognise that those who are on the frontline, whether in healthcare, education, fire services or criminal justice, that they are entitled to expect that if there are offences committed against them as personnel, that the Court will take these matters seriously and mark the sentence and mark these matters accordingly by reference to the sentencing. Otherwise, the Court might send out a message that these matters that this type of behaviour is all right or it's passable. I am aware that Ms Corbett committed these offences while in a semi-intoxicated state; I am aware that she expresses remorse. I look at the manner in which she expresses this in the probation report and she makes reference to the victim having "a mark on her face". The mark on the face will pass; it is the neck injury is the one that is of concern and that has effectively severely curtailed her family life and her medical career where she was content and working well.

In all the circumstances, the case has to be disposed of by way of a custodial sentence, and the appropriate sentence in this case is three years; imprisonment. The Court further, having regard to the prospect of rehabilitation, will suspend the latter 12 months of that sentence, provided she enters a bond to keep the peace of be of good behaviour for a period of four years, the period being exceeded by one year for the purpose to aid her rehabilitation and to ensure compliance. That she come under the Probation Service supervision immediately upon release and abide by all directions given to her. That is the sentence."

18. So that was the sentence that was imposed and the reasons for it as stated by the sentencing judge. The grounds on which that sentence is appealed are essentially four. The primary and first complaint made is that the sentencing judge rated the case at too high a position on the scale of seriousness.

19. The second ground of appeal is that the sentencing judge attached insufficient weight to the mitigating circumstances in the case.

20. The third main complaint in the grounds of appeal was that the judge had attached too much importance to the sentencing objective of general deterrence.

21. Finally, the fourth complaint is that there was insufficient consideration of rehabilitation, and that the sentencing judge had erred not adjourning the sentencing hearing to allow the appellant to take up the bed in Cuan Mhuire that had been available to her at the time.

22. Dealing with the first point, namely that the case was rated too highly on the scale of seriousness, the maximum potential penalty for the offence was one of five years imprisonment. Somewhat unsatisfactorily the sentencing judge did not state where on the scale of seriousness he placed the offence before application of the mitigating factors in the case. He merely said that the appropriate sentence in the case was one of three years imprisonment. Unquestionably there were significant mitigating factors in the case. However, it is unclear from the judgment precisely what discount was in fact afforded on account of mitigating factors. That having been said, it is hard to see how there could have been less than two years allowance for mitigation having regard to the available mitigating circumstances. As was pointed out there had been an early plea of guilty, there was genuine remorse, there was a background of significant adversity in the appellant's personal life and she had a young child who was in care. The appellant also had significant substance abuse, and in particular alcohol dependence problems.

23. It seems reasonable to infer that the judge, who had earlier stated that the case "belongs at the higher end of the scale for an offence of this nature", had as a matter of likelihood started at or near at the top end of the range, i.e., five years, and had allowed a significant discount in mitigation ending up at three years.

24. However, counsel on behalf of the appellant has made the point that this was by no means the worst manifestation of a s. 3 assault that could have been perpetrated, notwithstanding that it was perpetrated on a front line healthcare worker. He has also made the further points that no weapon was used, that it was a single blow assault and that there had been no pre-meditation. These points are all valid and well made.

25. In the circumstances the court considers that this case was placed at too high a position on the scale of seriousness, and to that extent the trial judge was in error. This Court considers that properly judged the case would have attracted a headline sentence of four years on the scale of seriousness before application of mitigating factors.

26. The court has already indicated that the mitigation available was considerable and that it would have justified a discount of two years in respect of mitigation. So on that basis the headline sentence of four years would have become two years. That is in fact where the sentencing judge ended up because having determined on a sentence of three years after application of mitigation he then went on to suspend the last twelve months of that with a view to incentivising rehabilitation, with the result that the appellant was required to serve a net two year sentence.

27. The court does not quarrel with the sentencing judge's desire to incentivise rehabilitation by the suspension of a portion of the sentence figure arrived at after due allowance was made for mitigation. However, as the point at which the sentencing judge had started was located too far along on the scale, it meant that even if everything else had been appropriately adjudged the sentencing judge's final figure which was still going to be too high on account of that initial error. Accordingly the final sentence of two years cannot stand in those circumstances.

28. The court will therefore uphold the first ground of appeal, quash the sentence imposed in the court below, and in due course proceed to re-sentence the appellant appropriately along the lines indicated above.

29. However, before doing so it is necessary to briefly proceed through the other grounds of appeal.

30. The court does not accept that insufficient weight was given to the mitigating circumstances. It is sufficient to say that the trial judge listed in some detail the relevant mitigating factors including the appellant's co-operation and early plea of guilty, her homelessness, her remorse, the fact that the appellant had a child in care and that that child would be impacted, and also considered very specifically the question of rehabilitation.

31. With regard to the complaint made with respect to general deterrence, this court finds itself in disagreement with the submission made by counsel on behalf of the appellant. Deterrence, both general and specific, is a legitimate sentencing objective. It is a matter of significant importance for the courts to support the important role being played by front line professionals in the caring professions, to quote the trial judge "whether in healthcare, education, the fire service or in criminal justice." The victim in this case was a staff nurse on duty in an emergency department who was merely attempting to do her job and to assist the appellant who had presented

in an intoxicated state for treatment. She was seriously assaulted in an unprovoked and vicious way and such an offence has to be marked with a sentence that will act as a deterrent, not just to the appellant herself but to others. It was entirely legitimate in this court's view for the sentencing judge to allude to the need to send a message in regard to the unacceptability of such assaults and the court is not therefore disposed to uphold the complaint that this was a case in which the trial judge attached too much weight to the objective of general deterrence. The court simply does not agree with that contention.

32. Finally, with respect to the claim based on an alleged failure to have adequate regard to the sentencing objective of rehabilitation, the sentencing judge was satisfied that this was not an appropriate case in which to allow the appellant to immediately take up the bed that was available to her in Cuan Mhuire. This Court considers that that was a decision entirely within the range of the sentencing judge's discretion and one that was legitimately open to him on the evidence. Accordingly, it is one with which this Court takes no issue. Moreover, the Court has already noted that the sentencing judge in fact sought to incentivise the appellant's rehabilitation by suspending the final twelve months of the sentence figure arrived at after due allowance was made for mitigation.

Re-sentencing

33. The court will proceed at this point to re-sentence Ms. Corbett. The court has invited the parties to put before it any materials that either or both of them might wish to place before it to update it in terms of what has happened on either side since the matter was before the Circuit Court on 22nd April last. Neither side has elected to do so which is, perhaps, unsurprising given the relatively short time that has elapsed since the Circuit Court hearing.

34. The court has already indicated that it is of the view that, when properly assessed on the scale of seriousness, this case would attract a sentence of four years imprisonment before taking into account mitigating circumstances.

35. The court has already stated also that it accepts that there is considerable mitigation available in this case and it is therefore prepared to discount that four year sentence by a period of two years to take account of mitigation leaving a net sentence of two years imprisonment.

36. However, the court will also follow the lead of the Circuit Court judge by seeking to incentivise rehabilitation by the suspension of a further portion of the balance and it is prepared to suspend some nine months of the remaining two years leaving a net sentence to be served of fifteen months. The suspension will be on conditions. It will be subject to the appellant entering into a bond to keep the peace and be of good behaviour in the sum of €100. It will also be a specific condition of the suspension that the appellant during the remainder of her time in custody continues to engage with the addiction counselling services with which she is presently engaging, and that she follows all of their directions and recommendations in regard to their programme. Further, following her release, it is a condition that she engages with the probation and welfare service and follows all of their directions. The period of suspension shall be for the unserved balance of the sentence of fifteen months imposed on her today, and for a further two years following her release.