THE COURT OF APPEAL

Record No. 47/2018

Mahon J.
Edwards J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

CHRISTOPHER MORGAN

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 8th day of June 2018 by Mr. Justice Mahon

1. The appellant was convicted at Dublin Circuit Criminal Court on the 25th January 2018 of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001. He now appeals the sentence of two years imprisonment imposed on the 16th February 2018.

2. On the 29th September 2016 the appellant assaulted Declan Foran at Sackville Place in Dublin. On that occasion Mr. Foran and his brother were homeless and were sleeping on the street. They were approached by a female who asked if she could sleep between them. When she received no response she became abusive, left and later returned with two men, one of whom was the appellant. The assault involved blows to the injured party's face and kicking between his legs. The female also participated in the assault as did the man accompanying the appellant. Mr. Foran's pockets were rifled and a newly purchased mobile phone stolen, and which he described as his only life line. Mr. Foran was taken to hospital but left before receiving any treatment for his wounds which included a laceration above his right eye and swelling to the right side of his face. The appellant was later arrested. Mr. Foran's stolen mobile phone was found on him, as were blood stains which were forensically linked to the injured party. The female accomplice is currently awaiting trial on similar charges to those preferred against the appellant. The male accomplice has pleaded guilty to a similar charge to that facing the appellant in addition to a charge pursuant to the Firearms and Offensive Weapons Act 1990 because he possessed, in the course of the assault, the top of a glass bottle which he used to intimidate his victim.

3. The following grounds of appeal are relied upon by the appellant:-

> (i) the learned trial judge in imposing a custodial sentence on the appellant erred in principle in failure to take into account adequately or at all the appellant's efforts to rehabilitate himself. The appellant had not come to the attention of the gardaí since the offence of the 29th September 2016 and had been of no fixed abode at the time of the offence but had since secured accommodation;
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> (ii) the learned sentencing judge imposed a sentence that was excessive and erred in principle in the imposition of same. He furthermore failed in the first instance to have any or any adequate or sufficient regard to where on the scale of penalties the offence which the appellant committed lay prior to sentencing;
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> (iii) the learned sentencing judge erred in principle in failing to attach a sufficient weight to the testimony of the reports in court and effectively stopped the appellant from continuing with his addiction and training programmes. This is contrary to the recommendations of all of the reports handed into court and in particular to the evidence given by one James Murphy of the Spellman Centre.

4. The appellant has one hundred and one previous convictions. These include one threat to kill, eight s.2 assaults, four s. 3 assaults, forty nine public order offences, four incidents of violent behaviour at a garda station, three of robbery, four of burglary, four for theft, six for criminal damage and two under the Firearms and Offensive Weapons Act. He has served a number of prison sentences including one for eighteen months, one of three years and one of six months.

5. In the course of his sentencing judgment, the learned sentencing judge described the assault on the injured party as *"pretty savage"*. He noted the fact that the appellant made admissions and pleaded guilty, that he had co-operated with the gardaí and that he was remorseful for what had occurred. He also noted that the appellant had made efforts to reform his life and to remain free of drugs. He went on to say:-

> *"…But obviously, the courts should try to reform individuals, but courts must also punish individuals. This was a fairly merciless attack on this man, who was doing nothing but sleeping and I'm afraid Mr Morgan cannot escape a custodial sentence, despite the mitigation and the submissions made on his behalf. It seems to me Mr Morgan should try to reform himself when he leaves prison, not before he comes before the court in relation to pleas. And therefore, the appropriate sentence, I think, in all the circumstances for this robbery, it's a very serious robbery involving serious violence, is a term of imprisonment of two years…"*

6. It is evident from the learned sentencing judge's comments that he did apply his mind to the issue of rehabilitation but having done so decided against suspending any portion of a sentence to facilitate same. Rather he suggested that the appellant should start that process of rehabilitation while in custody. Undoubtedly, the learned sentencing judge took the view that the many occasions in the past when the courts had provided the appellant with the opportunity to rehabilitate had not borne fruit. It is remarkable that so many of the appellant's previous conviction related to offences involving violence or the threat of violence. In relation to the contention that the learned sentencing judge failed to identify the offence on the scale of gravity prior to sentencing, while it is

indeed the case that this was an accurate observation, it does not necessary follow that the sentence imposed was excessive or inappropriate in any way. This court has frequently advised that it is best practice to first identify on the scale of gravity where a particular offence lies, then identify an appropriate headline sentence and finally, if appropriate, discount that sentence in respect of relevant mitigating factors. That position was emphasised in the judgment of this court in *DPP v. Dinneen* [2017] IECA 70 and in *DPP v. Connick* [2017] IECA 268 and in *DPP v. Riordan* [2017] IECA 145, to mention but a few. In *Dinneen* this court stated:-

> *"In arriving at the sentence of three years, the learned sentencing judge did not, contrary to best practice, identify a headline sentence based on the gravity of the offence. Consequently, the court is unable to identify, in particular, any discount afforded by the learned sentencing judge in respect of mitigating factors, including the plea of guilty and the appellant's personal circumstances. However, while that criticism is well made, it does not necessarily follow that a sentence imposed in this way should be quashed. What is important is the final sentence as imposed and whether that indicates an obvious error of principle..."*

7. Similar sentiments were expressed in Riordan wherein, in the court's judgment delivered by Edwards J., the following was stated:-

> *"Counsel for the appellant has sought to argue that the sentencing judge's assessment of the gravity of the offence was too high. We are faced with the difficulty, in this as in so many cases, that the sentencing judge does not indicate where exactly she was prepared to locate the offence on the spectrum of available penalties before discounting for mitigation. We do know where she ended up, namely at five years, following which she suspended a further year to incentivise rehabilitation. While the sentencing judge clearly departed from best practice in not nominating a headline sentence this does not form the basis of any ground of appeal."*

8. The focus of the appeal is the contended failure of the learned sentencing judge to adequately engage with the issue or rehabilitation particularly in the light of identifiable positive indications that the appellant had at long last and after a period of offending stretching over fifteen years started to actively rehabilitate and that the various reports provided to the court undoubtedly established that.

9. The various reports certainly make impressive reading and point strongly to the appellant having turned over a new leaf and of someone making very real efforts to reform.

10. It is worthwhile quoting some extracts from the reports. In the Probation Report dated 21st January 2018 the following appears:-

> *"Reports and communications from the various services with which Mr. Morgan engages indicate that he has fully engaged and co-operated and has made significant progress over the past year.*
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> *Mr. Morgan presents as someone who would benefit from probation supervision where he could be supported in continuing to address the risk factors as outlined in this report and sustain the progress made over the past year."*

11. The Senior Clinical Psychologist, Dr Mark Fitzpatrick, stated in his report of the 6th November 2017:-

> *"Mr. Morgan said he is currently attending the Spellman Centre five days a week and reported that he has benefitting from talking about his past experiences and learning how to manage his feelings of anxiety and reactions to stress more adaptly instead of resorting to substance abuse. Mr. Morgan also reported that he is attending Alcoholics Anonymous and Narcotics Anonymous support groups every Tuesday in Gardiner Street as part of his after care programme, and attending an Adult Education Centre on Cork Street every Wednesday where he is working towards attaining his Junior Certificate. These developments, in my opinion, represent extremely positive progress and I would strongly recommend that Mr Morgan continues to engage with the Spellman Centre and associated rehabilitation/educational services, and be assisted and guided by Probation Services on an ongoing basis with the aim of supporting him to permanently overcome his addiction problems and transition to independent living. It should be noted that he is still in the early stages of recovery and is, as such, vulnerable to relapse, and therefore, assisting him in this manner to maintain abstinence and focus on his holistic recovery will significantly reduce the risks of recidivism. I wish him well in this endeavour and would encourage him to persevere."*

12. In a short report from the Fr. Peter McVerry Trust dated the 26th July 2017 - some six months prior to seeing Ms. Aileen O'Neill, acting teamleader , very positively said:

> *"Christopher engages very well with the service and provides weekly urinalysis and breathalysers. All urinalysis has been negative to date. Christopher attends the house meeting on a weekly basis. Christopher also pays rent on a weekly basis.*
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> *Christopher also engages in RDRD Day Programme in Ringsend. The feedback from this programme has been very positive and highlights how much Christopher is engaging in his recovery."*

13. Finally, in a letter dated 25th January 2018 a strong plea is made by the Spellman Centre in the following terms:-

> *"Christopher has shown excellent commitment on the project by linking in with him as his key worker and engaging well in all group setting. He is a huge asset to the group and his always there to support and encourage his peers. Christopher has been addressing the many difficulties in his life and has been working hard on himself to make positive changes to his lifestyle. Continuing to work in the Spellman Centre will give Christopher the opportunity to work on his self development and continue to stay drug and alcohol free.*
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> *I as Christopher's primary key worker it would not be in his interests or the interest of his young family to be incarcerated as this would have a major impact on his education and ongoing recovery."*

14. The seriousness of the offence was without question. Its viciousness was quite remarkable. It was entirely unprovoked and indeed unnecessary and pointless for the purposes of facilitating the theft of a phone. The victim was vulnerable, had done nothing to attract the appellant's attention, he was hopelessly outnumbered and rendered utterly defenceless.

15. The dilemma facing the sentencing judge was the fact that this vicious and unprovoked assault had been committed by a person who had an appalling record and a large number of very relevant past convictions. Clearly, he saw little prospect for further rehabilitation occurring outside prison and saw no reason to structure a sentence accordingly.

16. However, and perhaps to a greater extent than would be the more usual experience of this court, there did exist and were made available to the sentencing court very strong and positive statements from different persons and institutions particularly experienced in dealing with and assessing offenders and more particularly repeat offenders. The overwhelming sense emerging from these sources is of a young man previously consumed with criminal and irresponsible behaviour having turned, or at least engaging in the process to a significant degree of turning, away from a criminal past and having commenced in a very real way, rehabilitation. The public interest in encouraging this reform is so obvious that it barely needs mention. Importantly in this case there exists substantial proof that the appellant has (and has done so by the sentencing date) successfully dealt with his previous serious addiction problems and was, and is, drug free. That fact alone marks out this case as, sadly, somewhat rare.

17. The court is satisfied that the learned sentencing erred in failing to structure the sentence to facilitate and encourage this rehabilitation. His decision to impose a custodial sentence was, however, correct because of the very serious nature of the crime.

18. The court will therefore allow the appeal. It will impose a sentence very much designed to provide the appellant with the strongest possible incentive to continue his admirable efforts to date to rehabilitate and leave his criminal past forever behind him, while at the same time, reflecting the very serious nature of the crime.

19. That sentence will be five years imprisonment with the final four years suspended for a period of three years post release on the appellant entering into a bond in the sum of €100 to keep the peace and be of good behaviour and comply with the requirement of the Probation Service during the said three years. Said sentence to commence with effect from the 25th January 2018.