



THE COURT OF APPEAL

Record No: 8/2018

Edwards J.

McCarthy J.

Kennedy J

THE DIRECTOR OF PUBLIC PROSECUTIONS

- AND -

WAYNE O'DWYER

RESPONDENT

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 4th March 2019 by Mr. Justice Edwards

Introduction

1. This is an appeal against the severity of a sentence of seven years' imprisonment with the final three years thereof suspended, imposed on the appellant by Clonmel Circuit Criminal Court on the 15th of December 2017 in respect of his plea of guilty to a count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

2. The appellant makes two complaints on this appeal. It is firstly complained that the sentencing judge failed to follow this court's recommended best practice with respect to sentencing methodology, and, in particular, failed to adopt a semi-structured reasoning approach. It is suggested that no headline sentence was identified, and that how the sentencing judge ended up at the sentence ultimately imposed is not apparent.

3. Secondly, the appellant complains that the sentencing judge in effect imposed an exemplary sentence on the appellant because he was from Carrick-on-Suir, in circumstances where the sentencing judge perceived crimes of violence and threatened violence as being endemic in Carrick-on-Suir.

Background to the matter

4. The charge giving rise to the sentence arose out of an incident that occurred on the 31st of March 2016 at a shop called Eurogiant on Main Street, Carrick-on-Suir. A Ms Debbie Brockson was working there as a shop assistant on that date. At 3.15pm the appellant entered the premises wearing a grey hoodie which was pulled up over his head, and a hat pulled down towards his eyes, in an effort to conceal his identity. He walked towards Ms Brockson and ordered her to "Open the fucking till".

5. Displaying considerable courage, she initially refused to do so. The appellant then repeated "Open the fucking till" and added "I've a gun in my pocket. If you don't open the till I will shoot you." He then became even more aggressive and threatened that he would slit Ms Brockson's throat. Despite this she maintained her composure and, displaying extraordinary presence of mind in the circumstances, managed to get to and press a panic button. As a result of her pressing the panic button other staff immediately came on to the shop floor with a view to assisting her. In the meantime, the appellant, who was at that stage behind the counter, physically grabbed the till but lost his grip on it and it fell to the floor. He then picked it up and came out from behind the counter. The other staff members who had arrived attempted to prevent him from leaving the premises but were unsuccessful in doing so. He left the premises and went to a nearby house where he was subsequently arrested by Gardaí. The till, which had contained €250, was recovered, as was the cash.

6. After being taken to Clonmel Garda Station the appellant was interviewed, and he was co-operative during interview.

7. Ms Brockson, who had apparently been reluctant to do so initially, made a short victim impact statement, in which she described being terrified at the time, thinking that the appellant was going to seriously injure her and wondering if she would ever see her children again. She described breaking down when she went home after the incident, and stated that she is nervous ever since of anybody coming into the shop wearing a hoodie. She doesn't like going anywhere on her own since the incident.

The appellant's personal circumstances

8. The appellant was born on the 10th of January 1989. He is a block layer by training but was unemployed at the date of his sentencing.

9. The sentencing court heard that the appellant had 21 previous convictions, the majority of which were for public order offences but one of which was for attempted robbery and another of which was for theft.

10. He had received a suspended sentence of 10 months' imprisonment at Carrick-on-Suir District Court on the 18th of October 2012 for the attempted robbery, and had been fined €300 on the 3rd of January 2009 by New Ross District Court for the theft offence.

11. The court heard that the appellant has long standing addictions to drugs, including heroin, amphetamines, cocaine and alcohol. The vast majority of his convictions are alcohol related.

12. The appellant had previously been making efforts to deal with his addictions but due to the breakdown of a six-year personal relationship he had relapsed. It was during the period of that relapse that he committed this offence.

13. The court heard that the appellant had in recent times become a father and was now motivated to re-engage with rehabilitative services in order to be able to participate in his son's upbringing. The Court had before it two Probation Reports which were generally positive in terms of his commitment and the genuineness of his willingness to re-engage. Unfortunately, however, he is nevertheless assessed at being at high risk of re-offending until various risk factors identified in the report are addressed.

The sentencing Judge's Remarks

14. In sentencing the appellant, the sentencing judge stated:

"JUDGE: Well, robbery is one of the most serious offences in the entire of the criminal law. It carries a maximum sentence of life imprisonment and that's for very good reason. Most victims of crime have the sort of effects that Miss Brockson has suffered since this incident, which occurred much more than a year and a half ago now. It would be surprising for a person in Miss Brockson's position not to suffer significant psychological consequences after undergoing an ordeal like this. Mr O'Dwyer is a tall, well-built young man. He uttered threats to slit Miss Brockson's throat, to shoot her, and these are significantly aggravating factors in this offence of robbery. This offence was committed by somebody with a history of aggressive behaviour. I notice a large number of offences under section 6 of the Public Order Act and somebody who had committed a number of serious offences in the past, including an attempted robbery, including obstruction of a peace officer on more than one occasion, and including a conviction under section 112 of the Road Traffic Act 1961. Mr O'Dwyer is somebody who has been given chances by the courts in the past. Notwithstanding that, he has not turned his life around and turned to a law abiding course. He has all of these previous convictions and he has been assessed as being at high risk of reoffending by the Probation Service.

This case, it seems to me, comes in the top end of the middle range of such offences. Perhaps I'm being unduly merciful to Mr O'Dwyer in saying that that is so, that it is not on a higher plane, but the top end of the middle range for the offence of robbery is a very serious place to be indeed. I have to have regard in sentencing to retribution, obviously, to rehabilitation where there's evidence of that, but also to deterrence. The number of crimes, serious crimes, that come before this Court from Carrick-on-Suir seems to me to have grown in recent years. I'm the principal sentencing judge for indictable crime in this county and this is something that I have noted. And in particular there have been crimes of violence and threatened violence, such as occurred here, and many of them in public places. Now, in mitigation, there's the very important factor that Mr O'Dwyer has pleaded guilty and pleaded guilty at an early stage. That has undoubtedly saved the time -- saved considerable time and expense, insofar as the State is concerned, insofar as the courts are concerned, but more importantly than that, it is highly likely that this news that there was a plea of guilty entered, and an early plea of guilty entered, must have been a comfort to Miss Brockson, the injured party.

Mr O'Dwyer, when arrested, was fully co-operative with the gardaí and made appropriate admissions. Now, he was, of course, effectively caught red-handed but, nonetheless, the plea and that co-operation weigh heavily in his favour when it comes to sentence. Mr O'Dwyer is somebody who has been addicted to a number of substances, including heroin and alcohol. But, even as recently as June of this year when he was attending Dr O'Donoghue, the psychiatrist and psychotherapist, he was taking -- he was still drinking alcohol and taking some drugs and spending money on that. I note that there has been -- no money whatever has been put by, by way of compensation, for Miss Brockson, notwithstanding the fact that Mr O'Dwyer felt he could spend money on alcohol and some drugs while he was awaiting trial here. He will not be punished for that but it would have been -- had he been in a position to put by compensation for Miss Brockson -- and it seems that he does have spare money to spend -- then it would have redounded to his benefit.

He has a partner, he has a young child now and it seems that he has, for the first time in a long time, a relatively stable home life. That is a positive factor with regard to rehabilitation. He has also taken steps to rehabilitate, and I'm told that his physical appearance is very much better than it was a number of months ago.

He is somebody with some work history in the construction trade and the prospect of further work in the new year. I take account of that. He is somebody who has had a chaotic life, starting to drink and starting to take drugs in his early or middle teenage years, and things have not been easy for him, I fully appreciate. Having said that, a great many people have difficult childhoods and adolescence and do not resort to criminality. Mr O'Dwyer has 21 convictions for other offences. Some of them can be largely disregarded; many others cannot.

In all the circumstances, the appropriate sentence here is a sentence of seven years. Having regard to the mitigating factors and, in particular, the plea of guilty and the attempts at rehabilitation undertaken, I will suspend the last three years of that sentence, on Mr O'Dwyer entering into a bond to keep the peace and be of good behaviour during that time; to engage for the first two years following his release with the Probation Service, who will no doubt have requirements of him with regard to attending addiction services, and he must comply with any and every request made of him by the Probation Service. I note the undertaking which he has given and that is, along with the other factors I've mentioned, a particularly important mitigating factor in the case. It is disappointing that it and the apology have not been given until today. They would have carried considerably more weight had they been given long before today, and in particular I'm talking about the apology. But, in all the circumstances, I will suspend, as I say, the last three years of that seven-year sentence. It will be a further term of the suspension of the last three years of the sentence that Mr O'Dwyer will not ingest either alcohol or illicit drugs for that period. He should be bound over in his own bond of €100, suspended for a period of two years."

Discussion and Decision.

15. We find no substance in the complaint concerning the judge's sentencing methodology. It is clear to us that gravity was properly assessed and that the sentencing judge did in fact nominate a headline sentence, namely one of seven years. Given the seriousness of the offending conduct, to be assessed by reference to the appellant's culpability and the harm done to the injured party, Ms. Brockson, the headline sentence could not be said to have been inappropriate. The maximum available was, after all, life imprisonment. However, even taking an effective maximum of fifteen years for non-truly egregious robbery offences, and we have spoken about an effective maximum of that order in other cases (see in particular *People (Director of Public Prosecutions) v Leon Byrne* [2018] IECA 120), the circumstances of this offence easily justified its placement at seven years on the scale. The judge specifically went on to suspend three years of that, stating that he was doing so "having regard to mitigating factors and, in particular, the plea of guilty and the attempts at rehabilitation". We therefore find no merit in the point concerning the sentencing judge's methodology and we are not prepared to uphold the complaint in respect of it.

16. As regards the second point, the suggestion is that the sentence imposed on the appellant was imposed for deterrent purposes and that it was intended to be exemplary. The case made is that the sentencing judge, in his determination to make an example of the appellant, went far too far and imposed a manifestly disproportionate sentence. We do not agree with the characterisation of the sentence imposed as being disproportionate and consider that while the sentence imposed might, arguably, have been at the severe end of the sentencing judge's legitimate range of discretion, it was nevertheless within that range.

17. A sentencing judge has to have regard to the recognised objectives of sentencing in the selection of the penalty that he imposes. These are, respectively, retribution, deterrence (both general and specific) and rehabilitation. It is a matter for the sentencing judge as to which of these requires to be prioritised in the circumstances of the case. In this case, because of a perceived problem in Carrick-on-Suir, he focussed on the need for general and specific deterrence. He was entitled to do so, so long as he stayed within his legitimate range of discretion in terms of what was distributively and ordinaly proportionate in the circumstances of the case. He would not have been entitled to impose a disproportionate sentence for deterrent purposes, but we are satisfied that he did not, in fact, do that. A judge has a range from within which he or she may legitimately select a sentence. The sentence selected may be towards the severe end of that range, or the lenient end of that range, or somewhere in the middle. Providing the sentence is within the range it is unassailable. It is only if a disproportionate sentence is imposed that an appellate court would be justified in interfering. We are satisfied that the sentence imposed in this matter was not disproportionate, and so we also dismiss this ground of complaint.

18. Accordingly, the appeal is dismissed.