



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

V

Paul Halpin

29/16

Respondent

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 19th day of December 2016 by Mr. Justice Edwards

Introduction

1. In this case the appellant appeals against the severity of a sentence of three years imprisonment, with the final six months thereof suspended upon conditions, imposed on him by Dundalk Circuit Criminal Court on the 27th of January 2016 following his plea of guilty to a single count of assault causing harm contrary to s.3 of the Non Fatal Offences Against the Person Act 1997.
2. The accused was jointly indicted with the said offence with a co-accused, a Mr Gerard Soraghan, who also pleaded guilty, and who also on the 27th of January 2016 received a sentence of three years imprisonment in respect of it, but with the final six months thereof suspended upon conditions.

The Circumstances of the Case

3. On the 2nd of May, 2014 the complainant, Mr. George Martin, arrived home after 2 in the morning to find the appellant and the co-accused standing with a woman outside his residence at 48, College Heights, Dundalk. The complainant did not know the two men, but permitted them to enter the premises, where a party was taking place.
4. After the complainant went to bed, he heard guests, including the appellant and his co-accused, being asked to leave the house. When the complainant came down the stairs, he found that the two men had just exited the house. While he was standing in the hallway, one of the two men kicked the front door in. The complainant walked outside and attempted to calm the men down. He told the men that they should go home and that the guards would arrive.
5. After the two men went around the corner, the complainant went to return into the house. As the complainant did so, he was jumped on by one or two males from behind. The co-accused jumped on the complainant and punched him in the face. Then the appellant also punched the complainant in the face once. A witness gave testimony that the appellant and co-accused laughed after the assault as the complainant lay on the ground.
6. After the assault, the complainant was brought into the house and the An Garda Síochána were called. When the Gardaí arrived, they interviewed the complainant and witnesses. They also requested an ambulance, which took the complainant to Our Lady of Lourdes Hospital, Drogheda. He was subsequently referred to St. James Hospital. The sentencing judge described the complainant's injuries as follows:

"The injuries that he suffered were extremely serious. There was bruising of his lower left eyelid; he had a swollen nose; there was the lower right canine and lateral incisor were fractured, that there was damage to these teeth or tooth; and then there was a fracture of the mandible, involving the right parasymphysis and left condyle which required open reduction and internal fixation of the mandible and manipulation of his facial and nasal bones. The detail has been outlined; he had to undergo reduction and internal fixation with the placement of a wire and plate in his jaw. He suffered an extremely serious injury and also my understanding is that he had to have intermaxillary fixation for the close reduction of the right condyle."

The Impact on the Victim

7. The complainant prepared a victim impact statement that was read to the court. In it the complainant described how the assault adversely affected his academic performance, his social habits, and his physical fitness. He was a final year student at Dundalk Institute of Technology, studying a civil engineering honours degree. The results of his exams were affected due to loss of study time, recovery, and the shock and trauma of the incident. The injuries sustained from the assault caused him a 30 percent loss in one course and a 15 percent reduction in his average results. The assault also impeded his social and physical activities. He shared that he had stopped socialising in Dundalk after the assault because he did not feel safe there. Although he plays soccer, gaelic football and does a lot of running, he was unable to play competitive sports for three months after the incident occurred. He reported that during his recovery, he had to blend his food and eat it through a straw, and both his energy level and sleep routine were affected due to low energy during the day and being unable to exercise.

The Appellant's Personal Circumstances

8. At the time of sentencing, the appellant was a young man aged 24 and he had been educated to Junior Cert level. His mother raised him and his three siblings after his parents separated when he was quite young. His counsel stated that he "started getting into trouble locally" when he was about 15 years old due to alcohol and drug abuse, escalating from cannabis to heavier drugs including heroin. His mother asked him to move out of home when he was 18. He was homeless for the next four years and continued to abuse drugs and alcohol. During this period he had full time employment with Tesco, but he stopped working in July 2012, when he was convicted of an offence of handling stolen property and was sentenced to a six month term of imprisonment. He was unable to secure employment upon release, and his pattern of drug use continued through to the time of his offending in this matter in May 2014.
9. The appellant had 14 previous convictions, relating to theft and other crimes against property, drugs, public order, and failing to comply with the direction of a member of An Garda Síochána. Unlike his co-accused, he did not have any convictions for violent

offences, and he did not come to the attention of the Gardaí between the instant offence in May 2014 and his sentencing in January 2016.

10. The appellant's counsel stated that since the instant offence the appellant has reconciled with his family, and they have supported his rehabilitation efforts. The appellant has been clean and drug free since October 2014. The sentencing court had the benefit of a letter from Victory Outreach/Freedom Centre certifying that he had completed a 12 month rehabilitation course, and there were three urinalysis reports confirming his sobriety. A Probation Report prepared for an earlier district court hearing was also provided to the sentencing judge.

11. The sentencing judge remarked that the appellant had entered a guilty plea, and *"he fully cooperated with the investigation and he made admissions in respect of his involvement."* The court also acknowledged that the appellant had expressed genuine remorse and wished to pay compensation if he recovered in a pending personal injuries action.

The Sentencing Judge's Remarks

12. In the course of sentencing the appellant the sentencing judge, having rehearsed the evidence, went on to state:

"In respect of count No. 2, Paul Halpin, the maximum custodial prison sentence is five years. Then I must decide where does this count lie in respect of the maximum sentence, I am satisfied it's in the higher range in respect of the maximum sentence. Then I must have regard to Mr Paul Halpin's personal circumstances. He is now aged 24 years, he completed his Junior Cert. There is a history of work. He worked fulltime in Tesco for a period. He's currently unemployed. He likewise had a history of drug addiction and alcohol abuse, I would say, but also his drug addiction included heroin addiction. In mitigation there was a plea of guilty. He fully cooperated with the investigation. He made admissions in respect of his involvement in the assault. He has expressed remorse. He underwent a drug treatment programme which has been extremely successful. It's confirmed that he is currently drug clean, which is very positive, meaning that he has taken very positive drug rehabilitation steps and he has not come to the attention of the guards since the date of this offence.

And the aggravating factors in the case is that this is a serious offence. The manner of the assault by Paul Halpin on George Martin, it was a vicious, violent, savage attack and assault by Paul Halpin on George Martin. It was a completely unprovoked attack on George Martin. He was attacked suddenly and without warning when George Martin was in a helpless, hopeless and defenceless situation. He punched George Martin in the face. The injuries suffered by George Martin. The effect of the injuries and ongoing effects of the assault on George Martin and the previous convictions. They are substantial aggravating factors in his case.

. . .

Mr Halpin is not a position to offer any sum of money by way of tender or tender a sum of money by way of apology or contrition or remorse but it appears that he has High Court proceedings but I am not concerned with that but certainly in respect of mitigation -- having regard to the sum of money by Mr Soraghan, likewise I believe in respect of mitigation there are more -- he has more positive mitigating factors in that when he was arrested, detained and interviewed he fully cooperated with the investigation and he made admissions in respect of his involvement. Mr Soraghan, as he's perfectly entitled to, exercised his right to silence, and that is not an aggravating factor whatsoever, but of course when a person fully cooperates with an investigation and makes admissions that is simply an additional mitigating factor. I stress the fact that they rely on the right to silence is not and cannot, as a matter of law, be an aggravating factor but I am just differentiating the cooperation, the degree of cooperation and the degree of admissions by Mr Halpin in respect of his involvement in the investigation or cooperation of the offence.

. . .

In respect of . . . Mr Paul Halpin, count No. 2, I must have regard to the seriousness of the offence and to the substantial aggravating factors and balance them against the mitigating and the personal circumstances. I will have regard to the mitigating and the personal circumstances, although there are substantial aggravating factors in the case but having said that, I will have regard to the mitigating and the personal circumstances. And in respect of count No. 1, I am imposing a three years custodial prison sentence. Likewise I am suspending the last six months for the reason which I have already outlined, having regard to the greater cooperation and the admissions that he made, which I am satisfied does allow for such a discount in the circumstances, and that I would suspend the last six months of the three years on the following terms: That he enters into a bond before this Court to be of good behaviour for a period of one year from the date of his release from custody."

The Grounds of Appeal

13. There were originally nine grounds of appeal advanced in the Notice of Appeal filed in this matter. However, in the appellant's written submissions these were distilled down into five points. Moreover, at the oral hearing before us today counsel for the appellant, with admirable economy, was content to put the matter before us on the basis that he was relying on just two substantive complaints:

a. The sentencing judge failed to attach sufficient weight to the appellant's progress to date towards his rehabilitation and failed to incentivise continuation of efforts in that regard;

b. The sentencing judge did not adequately differentiate between the two co-accused, in circumstances where unlike the situation of his co-accused the appellant (i) had not committed the offence while on bail, (ii) had been cooperative, (iii) had no relevant previous convictions, and (iv) had taken active steps towards rehabilitation and had not come to adverse notice since. Conversely the co-accused had offended while on bail, had been uncooperative, had relevant previous convictions and had not stayed out of trouble. While a higher headline sentence had been selected in the case of the co-accused, both had received the same effective custodial sentence to be actually served. Both had entered early pleas of guilty and apart from the offending on bail aspect of the matter which aggravated culpability in the co-accused's case they were otherwise equally culpable. However, as regards mitigation, admittedly the co-accused had been in a position to pay some actual compensation, and had done so, but the appellant had indicated a willingness to do so, and did so in circumstances where he had a realistic prospect of raising funds in the context of a pending personal injuries claim if given more time. Even in circumstances where the judge was unwilling to give him further time, the failure to adequately

differentiate between the two defendants was, it was submitted, an error of principle.

The Appellant's Submissions

14. In his written submissions, the appellant submits that the principle of proportionality has a long tradition as the dominant principle in sentencing and addresses the task of striking a balance between the specific offence and the personal circumstances of the person who committed that offence. The appellant relies upon the Court of Criminal Appeal decision of *The People (Director of Public Prosecutions) v McCormack* [2000] 4 IR 356 wherein Barron J notes at 359:

"Each case must depend upon its own special circumstance. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it had been committed by that accused."

The appellant further relies on *The People (Director of Public Prosecutions) v M* [1994] 3 IR 306 as referred to above, which provides that the Court

"should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and appropriate reduction made."

15. The appellant submits that the sentencing judge erred in principle by imposing a disproportionate sentence in regard to (1) the nature of the offence, (2) the appellant's personal circumstances, and (3) the sentence imposed on his co-accused. First, the appellant submits that the sentencing judge incorrectly placed the count in the higher range in respect of the maximum sentence because the evidence showed that the appellant only struck the complainant once. The appellant further submits that the sentencing judge incorrectly included the subject matter of the prosecution on the scale of severity of the particular offence and failed to adequately consider imposing a non-custodial sanction. Subsequently, the appellant submits that the sentencing judge did not give sufficient regard to the appellant's remorse and drug rehabilitation as mitigating factors. Finally, he submits that the sentencing judge erred in principle by imposing the same sentence on the appellant and his co-accused who had prior convictions for violent offences, did not cooperate, and committed the instant assault while on bail in relation to a section 3 assault.

The D.P.P's Submissions

18. Counsel for the respondent very fairly conceded that the sentencing judge's ostensible failure to treat the co-accused's offending while on bail as an aggravating factor was problematic for him. However, he submitted that in the overall the ultimate sentence imposed on the appellant proportionate and appropriate to the circumstances of the case.

Decision

19. The decision we have arrived at is that we are disposed to uphold this appeal principally on the grounds that the sentencing judge did not adequately differentiate between this appellant and his co-accused whose circumstances were very significantly different.

20. We consider that if we were not to intervene, the appellant might harbour, with some justification, a sense of grievance. We are satisfied that the failure to adequately differentiate was in the circumstances of this case an error of principle.

21. In particular a marked differentiation was required in circumstances where the sentencing judge had been required by statute to treat the co-accused's offending while on bail as aggravating the offence in his case. Moreover there were far greater mitigating circumstances in the appellant's case. Unlike the co-accused he had been cooperative and had made admissions. While both had fourteen previous convictions none of this appellant's previous convictions were for crimes of violence. Conversely the co-accused had two previous convictions for crimes of violence. In addition, the appellant had taken substantial steps towards addressing his drugs and alcohol issues and had stayed out of trouble and this was not true in the co-accused's case. We therefore have found an error of principle and we will proceed to a re-sentencing.

22. It is proposed to impose the same headline sentence as previously imposed, namely, a sentence of 36 months imprisonment. However the sentencing judge in the Circuit Court had suspended six months of that for a period of one year. Subject to the sum of €2,500 being paid by way of compensation to the injured party in this case one or before the 7th of February 2017, will we suspend fifteen months instead of the six months originally suspended of the appellant's sentence. If he wishes to avail of the greater suspension, the money must be paid on or before the date in question i.e., the 7th of February, 2017. It will again be for a period of one year, subject to him entering into his own bond in the sum of €200 to keep the peace and be of good behaviour, which is what was imposed in the court below.