THE COURT OF APPEAL

CRIMINAL

Finlay Geoghegan J.
Peart J.
Mahon J.

Appeal No. 170/12

PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

-and-

SHANE MILLEA

Appellant

JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan on the 6th May, 2016

1. On 1st December 2014 the Court heard an appeal against the severity of a sentence of 10 years imprisonment (with two years suspended) which was imposed on the defendant following his plea of guilty to an offence of manslaughter arising out of events which occurred on 2nd December, 2010. On that day the Court allowed the appeal and said it would later give its reasons. The Court had intended remanding the appellant in custody and putting back the sentencing for a short while to give its reasons prior to re-sentencing. However later in the day the Court was asked to re-sentence immediately to facilitate an application by the appellant to the prison authorities for administrative compassionate release in relation to his mother's illness.

2. The Court then, also on 1st December 2014, sentenced the appellant to eight years, from the date upon which he went into custody (2nd December, 2010) and by reason of mitigating factors suspended the last three years of the sentence.

3. This judgment sets out the reasons for which the Court allowed the appeal and for the sentence imposed on 1 December 2014.

4. The appellant was originally charged with murder, but on 12th March, 2012, pleaded not guilty to murder, but guilty to manslaughter, and that plea was accepted by the Director of Public Prosecutions. The matter was put back for sentencing. Submissions were heard on 30th April, 2012. Sentence was imposed on 8th May, 2012.

5. The offence was committed on 2nd December, 2010. The appellant and the victim, Paul Harris, were cousins and good friends. The circumstances in which this offence occurred, briefly, are that on 2nd December, 2010, both men had been in the deceased's house and had consumed a good deal of alcohol during the day. The incident which gave rise to the offence occurred in the evening time at about 6.40 p.m. They were the only people in the house at that time.

6. Some video footage taken with a camcorder in the house during that day showed the two men drinking and at times dancing, and also showed Mr Harris holding a knife and coming towards the appellant, and though it is not suggested that there was any malice intended, it appears that the deceased stabbed the appellant in the buttocks with a knife that the appellant had given him as a gift on the previous day.

7. The evidence given at the sentencing hearing included a description of what was seen on the camcorder footage, and from the account of that evidence it certainly appears that both parties had consumed drink, there was loud music playing, there was dancing around and general horseplay.

8. When he was interviewed by Gardaí the appellant stated that at some point in the evening the deceased had become aggressive and had picked up an axe and threatened him with it. He stated that the deceased had told him to get out of the house or he would chop him up. He went on to say that he had stepped backwards from the deceased and had picked up a knife from the coffee table in the room which was the knife that he had brought to the house the previous day and had given to the deceased as a gift. He said that he had immediately left the house but had tried to keep his eyes on the deceased at all times as he was afraid that he would be attacked. According to his statement he left the house and stood in the front garden facing the house and attempted to telephone a taxi but apparently misdialled the number. He then telephoned his mother asking her to help them. He said that he then saw the deceased coming towards him with the axe over his head and that he swung the axe at him and hit him on his right arm; that he lifted the axe up again and swung it and at that point the appellant stabbed the deceased in order to protect himself until the attack ceased. The deceased fell down and according to the appellant, he then dropped the knife and telephoned an ambulance, and attempted to resuscitate the deceased for approximately 30 minutes. The axe in question was found at the scene when gardaí arrived, and the Court has been shown a photograph of same. According to the evidence it was some 3 feet in length.

9. Some of the evidence given at the sentencing hearing was in relation to the contents of the 999 call which the appellant made in the aftermath of this attack. The contents of that call describe the appellant indicating that he had been attacked by the deceased with an axe and that he had had to defend himself with a knife. When the gardaí arrived on the scene shortly after that call had been made, they found the appellant performing CPR on the deceased, he being given instruction in that regard by members of the fire brigade service by telephone. The evidence was that according to the audio transcript of that telephone call, the appellant was extremely upset at the time and concerned for the welfare of his cousin. He apparently carried out the CPR procedure for 15 – 20 minutes. When the gardaí arrived the appellant told them that he could not believe that he had just killed his cousin and that they had been best friends. At that stage he informed the gardaí that the deceased had come at him with an axe and hit him on the arm with the handle of the axe and that he had attacked the deceased in self defence. The appellant had sustained a soft tissue injury to his left arm when he was struck with the axe handle.

10. The injuries to the deceased comprised a large number of stab wounds. He was bleeding profusely. He had a severe laceration down the left side of his torso and some of his organs were protruding. There were also a number of deep lacerations around his chest. He was pronounced dead at the scene. When the body was examined by Professor Cassidy she noted that there were six stab

wounds to the front of the deceased's body, as well as internal injuries to his liver and small intestine. In addition there was a stab wound to the left thigh and the femoral artery had been severed. In addition there were knife wounds to his arms. She opined that it was the injury to the thigh, the severing of the femoral artery specifically, which had caused the copious bleeding and that his death was due to blood loss from this leg wound.

11. At the sentencing hearing, there was also evidence that the appellant had some previous convictions, most of which related to road traffic offences, but he had two previous convictions involving the possession of knives, one being that on 29th April, 2007 he was in possession of a knife, for which a fine of €50 was imposed. It is unclear from the evidence whether the knife in question was of the flick knife variety or whether it was, as suggested by Counsel for the appellant, a penknife. There was also an earlier conviction for a similar offence on 4th October, 2004 when the Probation Act was applied.

12. There was also evidence that the appellant and the deceased each had problems with drug addiction. Evidence was produced in the form of a letter from Bawnogue Youth and Family Support Group which confirmed that the appellant had accessed that service from September, 2008 until September, 2010, had attended all his appointments, had arrived on time and had shown a desire to live a drug-free life. The letter spoke well of the appellant, describing him as having engaged with the service and having conducted himself in a responsible and friendly manner throughout, and that he was highly thought of by all the staff at the centre. Sadly however, despite his attempts to rehabilitate, he had failed to permanently rehabilitate himself in relation to his drug use.

13. At the conclusion of the evidence given at the sentence hearing, the trial judge inquired of counsel for the DPP as to the DPP's submissions in relation to penalty. In answer, counsel informed the trial judge that the DPP's view on sentence was that:-

> "In relation to the assessment of sentence prior to the application of mitigating features, the director considers that the sentence should be at the upper level of the middle range and that after the application of mitigating factors, she considers that the appropriate sentence would be within the mid-part of the middle range of sentence".

14. At the sentencing hearing, counsel for the appellant drew attention to a number of matters which it was submitted were mitigating factors to be taken into account by the sentencing judge when considering what would be the appropriate sentence. Those matters are as follows:

> • The fact that the fatal injuries were inflicted while the appellant was trying to defend himself from an imminent attack;
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> • his relative youth, being only 25 at the time that the offence was committed;
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> • his own difficult personal circumstances, including a serious drug addiction and the steps that he had taken to deal with same;
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> • his lack of serious previous convictions;
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> • his conduct at the scene subsequent to the fatal incident, specifically in contacting the emergency services and in attempting to resuscitate his cousin;
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> • the remorse which he expressed both at the time of the incident and subsequently, including in a letter addressed to the trial judge which was read out by the trial judge in court on 8 May 2012 in which he described his profound regret for what had happened and his regret for the suffering which he had caused to the immediate family of the deceased.

15. In his sentencing remarks, the learned trial judge referred to the appellant's background of addiction to drink and drugs and stated that having regard to previous case law, this feature not only afforded the appellant no defence but also afforded no mitigation in relation to his responsibility to society. He went on to describe the case as a tragic one, stating:

> "the accused in self-defence killed his relative and best friend". He went on to say that "the friendship seems to have been rooted in a deep interest in knives, each having previous convictions for possession of knives, including flick knives. An extraordinary feature of the case is that on the day before his death the deceased was given a present by the accused of the flick knife which killed him".

The learned trial judge then stated as follows:

> "I take account of the following: one, the inherently grave nature of the crime; two, the effect on the family of the victim; three, the fact that the blows struck against the accused were with the wooden handle of the axe; four, the multiplicity of the blows struck in response to that; five, the general level of manslaughter sentences as identified in the judgement of Mr Justice Hardiman in the Kelly case. Taking account of these factors, I sentence the accused to 10 years' imprisonment to date from 2 December 2010.
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> The only factor in favour of the accused is his plea of guilty. To take account of this, I suspend the final two years of the sentence on the accused entering into a bond, set in the sum of €1000, that he will never possess an offensive knife in perpetuity, the bond to be entered into before the prison governor. The only figure which will be specified in the warrant leaving this court with the accused will be one of 10 years' imprisonment, and any other description of the sentences is a misdescription."

16. The Court noted that having imposed sentence, the learned trial judge made an order for the forfeiture and destruction of the knife and the axe which had been used in the events earlier described, but went on to say that in the event that there was any appeal by the appellant, he wanted those items to be produced to the appellant court. The Court brought that matter to the attention of counsel for the DPP at the hearing. The items were not in court when this appeal was heard, but photographs of each item were given to the Court, and the Court considered that in such circumstances it was not necessary that the appeal be adjourned so that the items themselves could be produced. It is however unfortunate that the trial judges specific request in this regard was overlooked.

Legal submissions:
17. In his submissions on behalf of the appellant on this appeal, Paul Burns SC acknowledged that the amount of force used by the appellant by way of self defence was excessive, but nevertheless emphasised the self-defence nature of the circumstances in which the injuries were inflicted and the fact that it is the use of excessive force which constituted the offence whereas the number of stab wounds was treated as an aggravating factor. In that regard, he has emphasised also the fact that the knife used by the appellant

was not brought to the house by him on the date of this incident, but had been given as a gift to the deceased on the previous day, and further that it had been taken up by the appellant only as a means of self-defence after he was threatened by the deceased. He has submitted that the courts have considered that such an element of self defence is a factor that ought to be taken into account when sentencing, in contrast to an offence arising from provocation, and in this regard he has referred to *DPP v. Dillon,* (Unreported, Court of Criminal Appeal, 17th of December, 2003) (McCracken J.). That was a case where the defendant was convicted by a jury after a full trial and it appears that two defences were mounted namely provocation and self defence. The court noted that it was not possible to know whether the conviction for manslaughter was arrived at on the basis of provocation or whether it was on the basis of self defence, but McCracken J. stated in this regard:

> "We do not know on which basis the jury decided. They clearly decided there was some form of excessive force used because they found him guilty of manslaughter. However, we must in those circumstances assume that they found effectively on the basis most favourable to the accused and it appears the accused gave evidence during the trial. He put forward his account of what happened which included his evidence that the initial injury was caused by the deceased's girlfriend swinging him around to some degree and pushing him onto the knife. He admits clearly that he then had several other stabs because of the deceased attitude to his mother. However, on the basis of taking what has to be the best in favour of the accused the sentence does appear to be seriously excessive."

18. It is submitted to this court that there has been an error in principle by failing to take account of the context of self defence when this offence was committed, leading the judge to place this offence at to high a level on the spectrum of manslaughter cases.

19. It has also been submitted that no account was taken by the trial judge of the mitigating factor derived from the fact that in the immediate aftermath of the injury caused to the deceased, the appellant provided immediate assistance and called for help. It is submitted that there was an error in principle by not taking account of this important feature in the case, which serves to distinguish it from the case of someone who attempts to flee the scene or to conceal his involvement in what has happened. In this regard, Mr Burns referred to the evidence in the transcript of the telephone conversation with the emergency services who talked the appellant through the CPR procedure which the appellant engaged with for a period of between 15 and 20 minutes. It is submitted that it was an error of principal not to take this into account as a mitigating factor justifying a reduction from the sentence found to be the proportionate sentence for the offence.

20. It was further submitted by Mr Burns that the sentencing judge erred in principle by taking no account of the remorse shown by the appellant both in the immediate aftermath of the offence, and afterwards, including in the letter which was addressed to the judge and which was read out in court by the judge on 8th May, 2012.

21. It is further submitted by Mr Burns that the trial judge failed to take account of the cooperation of the appellant in the immediate aftermath of the incident when he was interviewed and made a statement in which no attempt was made to distance himself from what had happened or disguise the facts.

22. Given that the sentencing judge expressly stated in his sentencing remarks that the only mitigating factor in the case was the plea of guilty, it is submitted on the appellant's behalf that the failure to take into account the other mitigating factors to which reference, has been made and which were contained in the submissions made to the trial judge at the sentencing hearing, amounts to an error in principle leading to a sentence which was excessive and disproportionate in the circumstances.

23. In aid of his submission that the sentence of 10 years with two years suspended is excessive in all circumstances, Mr Burns referred to the judgement of Murray C.J., as he then was, in *DPP v. Princs*, (Unreported, CCA, 31st July 2007) which is submitted to be an offence of a more aggravated nature at a higher level on the scale of manslaughter offences, involving the use of a knife which was deliberately taken up in order to attack the victim while the latter was seated in an armchair. It appears also that in Princs, the defendant had left the flat where the killing had occurred, and was later arrested when stopped by Gardaí. Following an appeal by the DPP against the leniency of the sentence imposed, the Court of Criminal Appeal increased the sentence to one of ten years, with three years suspended.

24. Shane Murphy SC for the DPP submitted that there was no error in principle in the sentence imposed given the degree of violence used by the appellant as evidenced by the injuries to the deceased which were noted by Professor Cassidy when she examined the body. He noted that among the matters which the sentencing judge took into account in arriving at the sentence imposed was "*the multiplicity of the blows struck in response to [the blows against the defendant with the handle of the axe]".* Mr Murphy has submitted that the trial judge appropriately placed this offence at the higher end of the mid range of manslaughter offences in arriving at a sentence of 10 years. He has submitted that this is a correct starting point from which then to consider mitigating factors and take those into account appropriately. In this regard, Mr Murphy drew attention to the evidence that the deceased had six defensive wounds to his arms when his body was examined during the post-mortem, in contrast to the fact that the appellant himself suffered only a soft tissue injury to his left arm during the incident. He submits that the sentencing judge was entitled to assess the amount of force involved in the context of the evidence as a whole and bear in mind the severity of the assault itself. He has submitted also that the trial judge was entitled to consider the multiple use of the knife as an aggravating factor, and one which indicated that the offence concerned was "grave".

25. He submits that in taking account of the plea of guilty, the trial judge can also be seen to have taken account of the appellant's acknowledgement of his responsibility and his remorse. In relation to remorse, Mr Murphy has submitted that there is no real difference between remorse expressed in the immediate aftermath of the offence and a plea of guilty given at a later stage.

26. Mr Murphy has submitted that the sentence of 10 years imprisonment, with two years suspended on certain conditions is appropriate and proportionate, and that while the sentencing judge does not expressly give credit for other mitigating factors, it is submitted nonetheless that the sentence which has been imposed is proportionate to those other relevant factors, which must also include the effect of the crime on the victims of the offence, in this case the family of the late Mr Harris. He submits that the sentence is not out of line with other sentences which have been imposed for manslaughter offences as recorded in the judgement of Hardiman J. in *DPP v. Kelly* [2005] 2 I.R. 321, to which indeed the sentencing judge himself referred to during his sentencing remarks. He submitted that the offence in this case is correctly placed in the upper end of the mid-range of sentencing – that mid-range being one attracting sentences between 6 years and 12 years – and that when all the facts and circumstances of this case are taken into account a sentence of 10 years with 2 years suspended is an appropriate and proportionate sentence.

Conclusion:

27. This Court was satisfied that the plea of guilty by the appellant to the offence of manslaughter which was accepted by the DPP is not as stated by the sentencing judge "*the only factor in favour of the accused".* In particular, the fact that the appellant remained at the scene, sought help from the emergency services, and rendered assistance to the victim by performing CPR on the victim, being

guided in that regard by advice being given to him over the phone by the Fire Brigade Service, is a significant mitigating feature of the case which ought properly to have been considered as being in his favour and taken into account by way of mitigation. There is nothing in the sentencing remarks to indicate that this feature was taken into account in any way.

28. The Court further considers that the remorse shown by the appellant both in the immediate aftermath of the incident and at later stages to be genuine remorse. It is of such a character that it is worthy of being considered a mitigating factor distinct from the plea of guilty to be taken account of in the sentence imposed. Again, there is nothing in the sentencing remarks that would indicate that it was taken into account. In this Court's view that amounts to an error in principle.

29. In so far as the sentencing judge placed this offence at the upper end of the mid-range of manslaughter offences, on the above facts this Court considered that he erred in principle. This Court considered that it is correctly at the mid-range of such offences, bearing in mind the circumstances in which the knife came to be used and the element of self-defence which attended the circumstances of the offence and that excessive force is intrinsic to the offence of manslaughter.

30. The Court therefore allowed the appeal, and sets aside the sentence imposed. Having later heard submissions on the same day as to the appropriate sentence to be imposed considered that the appropriate sentence was one of eight years from the 2nd December, 2010 being the date on which the appellant went into custody with the final three years suspended in order to properly and proportionately take account of the mitigating factors referred to above which were present at the date of the original sentencing, and further to reflect the fact that in accordance with the submissions made the appellant while in prison had made genuine efforts to rehabilitate himself and address his drug addiction.