



THE COURT OF APPEAL

**Sheehan J.
Mahon J.
Edwards J.
246/15**

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Glen Kiely

Appellant

JUDGMENT of the Court (Ex tempore) delivered on the 19th day of July 2016 by

Mr. Justice Sheehan

1. This is an appeal against sentence.

2. The appellant pleaded guilty to violent disorder contrary to s. 15 of the Criminal Justice Public Order Act 1994, in respect of an incident that occurred on the 27th November, 2013, near Balbutcher Lane, Ballymun. He received a sentence of three and a half years imprisonment with the final twelve months suspended on the usual terms.

3. The facts are that a young man who later refused to make a complaint to the gardaí was attacked by a group of three men, one of whom was the appellant. The appellant was believed to be wearing a knuckleduster and carrying a hurley which was thrown at the injured party. The injured party received a severe beating.

4. The appellant is 28 years old and living with his partner and four children at an address in Ballymun. He has 47 previous convictions, including five for offences contrary to s. 3 of the Misuse of Drugs Act, as amended, two for offences contrary to s. 15 of the Misuse of Drugs Act, three for obstruction under the Misuse of Drugs Act. He has two convictions for endangerment, one for dangerous driving, one for drunken driving, two for unauthorised taking, two for driving without insurance and the rest of his convictions relate to Road Traffic Act matters.

5. At the sentence hearing on the 18th May, 2015, the court was told that his last conviction had occurred on the 4th September, 2014, when he had received a community service order of 120 hours in respect of an offence contrary to s. 15 of the Misuse of Drugs Act.

6. There was evidence before the sentencing court that the appellant had made huge efforts to overcome his serious drug addiction problem. The appellant had written letters of apology about his behaviour on the night in question, had secured a work placement at the Dogs Trust and had completed a drug detoxification programme. Oral evidence was given on his behalf by Anne O'Connell, Team Leader with the Ballymun Youth Action Project. A number of other references were handed into court, including letters from the Peter McVerry Trust, a letter from Jennifer Hughes of the Ballymun Job Centre and a letter of apology from the appellant himself.

7. Counsel for the appellant submits that the learned sentencing judge failed to have any adequate regard to the social, domestic and other circumstances of the appellant by the date of sentence and in particular failed to have adequate regard to the mitigating factors especially the huge progress which the appellant had made in dealing with his drug addiction. Counsel for the appellant submitted that in all the circumstances of the case the sentence was excessive particularly in light of the exceptional mitigation.

8. The appellant relied on a number of judgments namely *People (DPP) v. McCormack* [2000] 4 I.R. 356, *People (DPP) v. Jennings* CCA, 143/98, (Unreported, 15th February, 1999), *People (DPP) v. Billy O'Driscoll* and *People (DPP) v. Nicholas O'Driscoll* CCA, 4th July, 2008, Appeal No. 51/07 and Appeal 57/07 [2008] IECCA 97, *People (AG) v. Michael O'Driscoll* CCA Nos. 45 and 46 1971 3rd March, 1971, Frewan Vol. 1 351.

9. In the *People (DPP) v. Jennings*, the court stated the following:-

"This young man has had a troubled background and he has not taken his hope in the past. But there comes a time in everyone's life, and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this, his last chance perhaps, he will hopefully take it and rehabilitate himself, get employment and become a useful member of the community."

10. In that case the court went on to reduce the sentence that was then being served.

11. Counsel for the Director of Public Prosecutions on the other hand while acknowledging the rehabilitative efforts of the appellant nevertheless maintains that in this case, there is no error of principle in the judge's approach to sentence. Counsel further concludes that the rehabilitative efforts as evidenced by the appellant were adequately factored into the sentence that was imposed.

12. Counsel for the Director submits that the sentencing judge had due regard to all of the mitigating factors including the appellant's efforts to control his addiction, the remorse he had shown and his personal circumstances. Counsel went on to refer to the following remarks of the sentencing judge:-

"The mitigating factors are his plea, the efforts he made to rehabilitate himself and the remorse he has shown. The court is taking into account and well into account the testimony of Ms. Anne O'Connell and the probation and welfare service reports and the letter from the Dogs Trust, as well as letters from the Fr. Peter McVerry Trust and the court in marking the seriousness of the offences has also taken into account the personal circumstances of Glen Kiely and will impose a prison sentence of three and a half years imprisonment with one year suspended."

13. Counsel for the respondent relied on *People (DPP) v. Loving* [2006] 3 I.R. 355, *People (Director of Public Prosecutions) v. Keane* [2008] 3 I.R. 177, *DPP v P.H.* [2007] IEHC 335, *People (DPP) v. O'Halloran* CCA *ex tempore* judgment of Denham J. delivered on the 21st October, 2002, *People (AG) v. Earles* [1969] I.R. 414.

14. The question that arises for our consideration in this case is whether we should now interfere with the sentence that was imposed on the 19th October, 2015. A person in the appellant's position is particularly vulnerable. At the time that the sentence was imposed he appears to have made significant progress and it may well have been in the interests of society and in the interests of crime reduction had he been given a further opportunity to prove that he was a person who could be trusted to continue with what was for him significant rehabilitative effort.

15. On the other hand it was open to the sentencing judge to impose a sentence of imprisonment notwithstanding the efforts made by the appellant and this she did. We accordingly do not find an error in the sentencing judge's approach under this particular heading.

16. The difficulty however that we have with this case is that we are unable to identify the trial judge's starting point. The sentencing judge did not identify a headline sentence and we find ourselves in the position of having to speculate as to what that was and what allowance the judge made for mitigation.

17. This Court's view on the preferred approach to sentencing has been set out in an *ex tempore* judgment of this Court in *DPP v Flynn* delivered by Edwards J. [2015]. Accordingly we find an error in the trial judge's approach and we also hold that insufficient credit was allowed for what both parties agree is significant mitigation. In proceeding to resentence the appellant we have had the benefit of documentary evidence that the appellant is engaging with the psychology service in Mountjoy Prison and we have also had the benefit of seeing certificates confirming that he has completed courses in food safety and personal development. There is also a letter confirming that he has employment available on release from prison and we have been told by Counsel that the appellant is now in a position where he wants to assume a proper and responsible role as partner and father to his children.

18. The documentation that we have been presented with tends to confirm that the appellant continues to make progress. In view of the seriousness of the offending behaviour we cannot accede to Mr. Rea's request that the balance of the appellant's sentence be suspended. However in view of all the efforts that he has made, we will increase the suspended part of the sentence by one year. This means and the appellant will know this, that he must be of good behaviour for a period of two years following his release from prison. If he is not of such good behaviour he will return to prison for a further two years in respect of this offence for which he has already served a period of time in prison. Accordingly the court will set aside the original sentence in this case and substitute it in its place a sentence of three and a half years imprisonment with the final two years suspended. We will impose the same terms that the Circuit Court judge imposed when suspending one year of the sentence, namely that for the period of two years following release the appellant keep the peace and be of good behaviour and be subject to the supervision of the Probation Service for that period of time.