



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

Appeal No. 238CJA/14. Appeal No. 239CJA/14,

Appeal No. 240CJA/14. Appeal No. 241CJA/14.

In the matter Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

- and -

Daniel Phelan, David Leonard, David Skeffington and Nico Barrett

Respondents

Judgment of the Court (ex tempore) delivered on the 25th day of June 2015 by Mr. Justice John Edwards

1. This is a case in which the Director of Public Prosecutions seeks a review of the sentences imposed on these four respondents by the sentencing judge in this case invoking the jurisdiction under s. 2 of the Criminal Justice Act 1993. That provision provides that if it appears to the Director of Public Prosecutions that a sentence imposed by a court on conviction of a person on indictment was unduly lenient, she may apply to the Court of Appeal to review the sentence.

2. On the 25th June 2013 the respondents each pleaded guilty to a single count of assault causing harm contrary to Section 3 of the Non Fatal Offences Act 1997, and for which the maximum penalty is five years.

3. The circumstances of the offending conduct were as follows. On the 3rd of July 2012, Mr. Gary Kenneally and Ms. Ciara Sheehan who were in a relationship were socialising in Charlestown, County Mayo. Both parties were serving members of An Garda Síochána. After leaving "KD's", a late bar, they were subjected to verbal abuse from Mr. Barrett, who was known to Mr. Kenneally. Mr. Kenneally attempted to diffuse the situation by shaking hands with Mr. Barrett. He told Mr. Barrett that he was with his girlfriend and did not want any trouble. The injured parties then crossed to the opposite side of the road. Mr. Barrett, together with the other three respondents continued to shout abuse and then followed the injured parties. Mr. Barrett was shouting, "That bitch is a guard as well. She is only a dirty pig's tramp." Another said, "Two fucking Garda pigs." The four respondents then followed the injured parties to The Square in Charlestown. At this location Mr. Leonard knocked Ms. Sheehan to the ground. As Mr. Kenneally bent down to help her, Mr. Phelan kicked him in the face. He too was knocked to the ground and was kicked by several attackers. All the kicks were aimed at Mr. Kenneally's face and head and he was knocked unconscious.

4. All four respondents were identified from CCTV footage. Mr. Barrett and Mr. Leonard were arrested on the 6th June 2012 at their respective homes. Mr. Phelan and Mr. Skeffington presented at Tubercurry Garda Station on the 6th of June 2012 and were arrested.

5. Having heard evidence concerning the circumstances of the crime, including victim impact statements, and the circumstances of the respondents, on 14th October, 2014, the sentencing Judge indicated that it was his intention to sentence the respondents to a suspended sentence with a community service order. Matters were adjourned to enable the Probation and Welfare Service to assess the respondents' suitability for community service.

6. On 31st October, 2014 the sentencing Judge imposed the following sentences in respect of the respondents:-

(a) Daniel Phelan – a sentence of three years suspended on conditions that he keep the peace and be of good behaviour for a period of two years and further that he should complete 120 hours of community service within one year.

(b) David Leonard – a sentence of three years suspended on conditions that he keep the peace and be of good behaviour for a period of two years and further that he should complete 120 hours of community service within one year

(c) David Skeffington - a sentence of three years suspended on conditions that he keep the peace and be of good behaviour for a period of three years and further that he should complete 240 hours of community service within one year.

(d) Nico Barrett - a sentence of three years suspended on conditions that he keep the peace and be of good behaviour for a period of three years and further that he should complete 240 hours of community service within one year.

Each accused, respectively, then entered into a bond and acknowledged himself bound in the sum of €100 to comply with the specified conditions.

7. The applicant contends that these sentences were unduly lenient, and seeks to have them reviewed and set aside on that basis.

8. The standard which must be met by the applicant for such a review is a high one. The courts have held that before an appeal court would be justified in interfering with a sentence on the grounds of undue leniency it has to be satisfied that the sentence imposed represented a substantial departure from what would be regarded as the appropriate sentence.

9. In the case of *The People (Director of Public Prosecutions) v. McCormack*, [2000] 4 I.R 356 Barron J, giving the judgment on behalf of the Court of Criminal Appeal, said (at 359) that:

"In the view of the court undue lenience connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. 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 has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

10. In the present case the sentencing judge approached the matter correctly to the extent that he determined in the first instance where the case lay on the scale of seriousness, taking into account the aggravating circumstances of the case, and decided that the sentence appropriate for the crime was one of four years in circumstances where the maximum potential sentence that might have been imposed was one of five years.

11. No one has sought to suggest that the sentencing judge was in error in fixing the seriousness of the case as meriting a sentence of four years imprisonment in each case before taking into account any mitigating circumstances, and this court agrees that that was the appropriate place at which to start.

12. The sentencing judge was then required to sentence not just for the crime but for the crime as committed by the offenders in question, because there is a constitutional requirement that a sentence should be proportionate to the gravity of the offending conduct on the one hand and to the circumstances of the individual offender on the other hand.

13. There were very substantial mitigating circumstances in the case of each of the respondents. They had all pleaded guilty. In Mr Phelan's case he had no previous convictions. While the other three had some convictions none were for crimes of violence. In addition, all four were remorseful, and Mr Barrett and Mr Skeffington had had to cope with particular adversities in their lives.

14. There is no doubt but that the respondents were entitled to generous mitigation. However, this court considers that notwithstanding that they were entitled to generous mitigation, the seriousness of this case was such that a custodial sentence could not have been avoided. To the extent that the trial judge imposed sentences that involved wholly suspended custodial sentences on condition that a certain level of community service would be carried out, this Court considers that such sentences were in fact unduly lenient.

15. The Court considers that the sentences imposed represented a substantial departure from what would be regarded as the norm for serious assaults on members of An Garda Síochaná. Notwithstanding that the members in question were off duty, the assaults occurred in circumstances in which, the sentencing judge was satisfied, and this court is equally satisfied, all parties were aware that the persons against whom the attack was being directed were members of An Garda Síochaná.

16. It is appropriate that an assaults on Gardaí, albeit off duty, should be particularly deprecated on behalf of society and that they should be regarded as serious crimes and be punished accordingly.

17. The Court has already indicated its view that four years imprisonment was appropriate before any discount was applied to take account of mitigating circumstances. The mitigating circumstances were correctly identified by the sentencing judge and no issue is taken with that. The respondents were certainly entitled to a substantial discount on account of those mitigating circumstances but this Court is satisfied that the sentencing judge erred in principle in attaching too much weight to the mitigating circumstances and imposing wholly non custodial sentences.

18. In those circumstances, the court must proceed to a re-sentencing of the respondents to impose what the court considers is the appropriate sentence in each case, and in order to do that, and in accordance with established *jurisprudence* the court has invited the parties on a contingent basis to put before it any additional material that they might wish to have taken into account by the court. In general what is put before the court in such circumstances is material updating the position with respect to either good conduct or bad conduct, as the case might be, in respect of each of the respondents in question. In response to this certain further information was placed before the Court to which I will allude in due course.

19. As already stated the court does not quarrel with the headline sentence of four years imprisonment which the sentencing judge determined on as being the starting point, and all parties accept that the mitigating circumstances were correctly identified by the original sentencing judge. The court takes account of all of those mitigation circumstances. Principal amongst these, of course, are the pleas of guilty. The Court also takes into account, in the case of Mr. Phelan, the fact that he had a completely unblemished record, and in the cases of Mr. Leonard, Mr. Barrett and Mr. Skeffington, respectively, the fact that, although they each had some previous convictions, none of them were for crimes of violence so that, in effect, they had no relevant previous convictions. Those, as I say, were the main mitigating factors, and they each then have other individual circumstances which the original sentencing judge identified and took into account, and which this Court will also take into account.

20. Some time has passed at this stage since the initial sentence hearing and, indeed, since the finalisation of the sentencing by the trial judge. We have now been provided with evidence as to how people have got on in the meantime.

21. In the case of Mr. Leonard, he has not come to the attention of the gardaí since.

22. In the case of Mr. Phelan, he has not acquired any subsequent conviction.

23. In the case of Mr. Barrett, he has, regrettably, acquired a conviction but it is in circumstances where he has a substance and alcohol abuse problem. However, he has had a very considerable period of time in which to attempt to address those issues and while we are told that he intends to undertake a residential treatment programme when he is in a position to do so, and the court very strongly hopes that he will take that up in due course, it remains the case that Mr. Barrett has unfortunately been in trouble, albeit not in the most serious way, since the matter was before the Circuit Court. The court also notes in his case that there are certain other adversities that he is required to cope with. His father is unwell. He has a young son who he is in a care relationship with, of course. The court also takes into account the submission that he has always engaged well with the probation and welfare services and has been co-operative in regard to their assessments of him, and their requirement with respect of him.

24. In the case of Mr. Skeffington, he has also been in trouble since the Circuit Court, on two occasions as detailed by Sgt. Corcoran. Again, he has certain personal adversities. In particular there was reference to a tragedy in the family and the court takes that into account.

25. Affording generous mitigation to each respondent, the four year sentence which has been identified as being the appropriate sentence for the crime before mitigation is taken into account, can, in the view of this court, be immediately reduced by fifty per

cent on the basis of the mitigating circumstances they share in common. The four years will therefore come down to two years in each case. The question then arises as to whether all or any of them should receive any further discount on account of additional individual circumstances.

26. The court has determined that it ought to deal with the respondents in the following way, and I will deal with them in the order in which they appear on the indictment and in the title to the proceedings.

27. In the case of Mr. Phelan, because he has remained out of trouble since the Circuit Court and has not come to adverse notice, and so as to incentivise his continued rehabilitation, the court will further mitigate the proposed two year sentence by an additional year and so will impose a sentence of twelve months imprisonment.

28. The court will do likewise in the case of Mr. Leonard. The two years will also come down to one year in his case.

29. In the case of Mr. Barrett, whom the court regards as being the instigator of what occurred, and therefore somewhat more culpable than the others, but who has also been in trouble again, and not as quick as one might have hoped he might have been in terms of addressing his underlying substance and alcohol abuse problems, which problems seem to have a factor in what occurred on the night in question, the court is going to impose a sentence of fourteen months. Accordingly the two years previously mentioned will come down by ten months in his case, leaving a net sentence of fourteen months imprisonment. The ten months further reduction is in acknowledgment of his particular personal adversities and so as to incentivise him to now address, albeit belatedly, his alcohol and substance abuse problem.

30. Finally, in Mr. Skeffington's case, and principally to incentivise his continued rehabilitation, the court will mitigate the proposed sentence of two years by a further twelve months also in his case, leaving a net twelve months sentence to be served.