



THE COURT OF APPEAL

**Mahon J.
Edwards J.
Hedigan J.**

59CJA/16

In The Matter of An Application Pursuant to Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

Appellant

V

Patrick Casey

Respondent

JUDGMENT of the Court delivered on the 27th day of February 2017 by Mr. Justice Hedigan

Introduction

1. This is an appeal brought by the Director of Public Prosecutions on the basis that the sentence imposed upon the respondent in respect of a charge of robbery by the learned trial judge was unduly lenient. The respondent was sentenced, having contested the charge, on the 12th February, 2016, in respect of the offence, to three years which was suspended in full for a period of six years subject to certain conditions. This sentence was consecutive to a sentence of three years and six months imposed for an earlier robbery.

2. The indictment contained five counts. The respondent was convicted by a jury on counts one and two. These, respectively, were the robbery of €15 cash and burglary of an inhabited caravan. The respondent had earlier pleaded guilty to counts four and five. These were possession of a knife at the time of the robbery and criminal damage in a Garda station. This application is not directed at the burglary or criminal damage sentencing. It focuses on the robbery conviction alone.

The Circumstances of the Offences

3. At 8pm on the 21st March, 2015, one Edward Quinlivan, who was 16 years old, was walking with two friends when he was approached by the respondent. The respondent said he had a knife and demanded money. Mr. Quinlivan having been put in fear handed him €15. The respondent advised one of the two companions not to call the Gardai. The Gardai were in fact informed and located him. On being searched he was found in possession of €15, a Stanley knife with a retractable blade and a ladies ring which was stolen from the inhabited caravan.

4. The respondent was questioned on the 21st and 22nd March, 2015. He denied having contact with the injured party or his companions. He stated the knife was for cutting lino. Later he said that he was unaware of it, that the jacket was borrowed and the knife must have been in the pocket.

5. At the time that the offences were committed the respondent was on bail in respect of two earlier offences. The first of these was the above robbery in which the handbag was stolen from a woman who was six months pregnant. She suffered a minor cut to her finger. This was a random and opportunistic offence. It was committed while he was on bail for yet another second offence. This was a charge of possession of a weapon. It arose from an incident where the Gardai intercepted a vehicle containing the respondent and eight other armed men. They were described by the judge as "a lynch mob". The respondent was in possession of a pick axe handle. This was an orchestrated incident but the respondent was not one of the principal offenders. The respondent pleaded guilty at an early stage to both these offences.

The Respondent's Personal Circumstances

6. The respondent has a number of previous convictions which relate to offences relatively minor in nature compared to those mentioned above. The respondent's mother died in a road traffic accident and his father died in violent circumstances. He was an orphan at the age of 17 months. He did not have the support of caring parents during his formative years. He has also suffered further recent tragic bereavements. He has addiction issues which he is attempting to address.

7. In a letter sent on the 27th May, 2015, there is a general expression of apology, although this could not be said to extend to the contested charge. It also included statements about his intention to address his addictions and refers to the recent death of his brother.

Sentence

8. The learned trial judge dealt with all the offences before him as follows;

In relation to count one of Bill No. 72/2015 with which we are concerned herein, he found the aggravating factors were that the offence was opportunistic, menacing and intimidating. It was committed while the accused was on bail for two other charges including one of robbery. No remorse was expressed. In mitigation the judge found that there was no actual violence, there was an early plea albeit to only two of the charges and the accused had a difficult and tragic family background. He sentenced the accused on count one, the robbery, to three years consecutive to concurrent sentences of three years and six months imposed in respect of the other offences of robbery and possession of a weapon. The judge suspended the sentence in full for a period of six years from the date of the sentence. In respect of count two, that was taken into consideration. No order was made in respect of count three. In respect of count four a sentence of twelve months was imposed concurrent with the sentence in respect of count one and suspended on the same terms. Count five was taken into consideration. The accused having been in custody since the 28th April, 2015, the sentence was backdated to that date.

Appellant's Submissions

9. It was the appellant's submission that the sentence imposed failed to reflect a significant aggravating factor, namely, the

commission of an offence involving violence or the threat of violence when on bail in respect of similar offences. The respondent did not have the benefit in mitigation of a guilty plea. He had been convicted by a jury following a trial.

10. The appellant refers to s. 11 of the Criminal Justice Act 1984 as amended by s. 10 of the Bail Act 1997 and as substituted in part by the Criminal Justice Act 2007 and submitted that in most cases where an offence is committed while an offender is on bail two consequences automatically follow:

- i. It is mandatory to make any sentences imposed consecutive to the sentence for the offence in respect of which he was on bail.
- ii. Offending while on bail must be treated as a separate aggravating factor unless there are exceptional circumstances justifying departing therefrom.

11. It was submitted that this Court and its predecessor have repeatedly emphasised the importance of observing those statutory provisions. The Court was referred to *The People (Director of Public Prosecutions) v. Doran* [2008] IECCA 78 at p. 3 which noted the requirement for consecutive sentences for offences committed while on bail and that s. 10 of the Bail Act 1997 states that it is an aggravating factor. Further where the offences are very similar one could expect an increasing scale of imprisonment. The overall time to be spent in prison should be looked at having regard to the offences involved.

12. The appellant noted that the methodology for applying the provisions of s. 11 of the 1984 Act have been set out in *The People (Director of Public Prosecutions) v. Yusuf* [2008] I.R. 204 and *The People (Director of Public Prosecutions) v. Healy* [2016] IECA 3.

13. The appellant referred to *The People (Director of Public Prosecutions) v. O'Leary* [2015] IECA 128 where it was noted that robberies accompanied by a weapon or the threat of violence invariably result in custodial sentences. With strong mitigation this might be part custodial part suspended. Every case is different and regard should be had to the crime and the criminal.

14. The appellant noted the following aggravating factors:

- i. The victim was 16 years old.
- ii. While the victim did not see the knife in the respondent's possession the respondent threatened him with the weapon.
- iii. An attempt was made to dissuade him from calling the Gardai.
- iv. It was an offence committed while on bail for a similar random, opportunistic robbery of a vulnerable victim.

15. It was submitted that the sentencing judge failed to reflect these factors in identifying the appropriate headline starting point. Significant mitigation was not available to the sentencing judge and he correctly stated that there was no evidence of remorse.

16. It was submitted that only in exceptional circumstances should a sentence which must be consecutive due to being committed while on bail be suspended in its entirety. The suspended sentence constituted a substantial departure from the appropriate punishment.

Respondent's Submissions

17. The respondent submitted that the sentencing judge in light of the respondent's "very, very difficult family circumstances" imposed a sentence of three years and six months on the first robbery and a consecutive three year sentence on the second fully suspended for six years.

18. The respondent referred to *The People (Director of Public Prosecutions) v. Clohessy* [2016] IECA 356 at para. 13 and submitted that the sentencing principles are particularly apposite for the respondent. The Court in that case noted that the suspended sentence "is nevertheless a punishment in that it remains capable of activation" and such applications often arise. The sentence would "hang over the respondent" and that he remained "under the watchful eye of the justice system for up to six years, and in a manner which will incentivise rehabilitation".

19. The respondent also referred to *The (Director of Public Prosecutions) v. Ellis* [2016] IECA 358 where this Court at para. 20 approved and quoted O'Malley, *Sentencing Law and Practice*, 2nd Edition, (Dublin, 2006) para. 6.51 on the last chance principle. The author noted that there is some authority for the approach of giving offenders with a criminal record, and perhaps a lengthy one, a last chance if there are indications that they intend to relinquish the criminal way of life.

20. The sentencing judge having already imposed a lengthy custodial sentence for the first robbery carefully constructed the consecutive sentence to take account of the respondent's personal circumstances. He was afforded a real prospect of rehabilitation upon completion of the first sentence with the probability of having the suspended sentence activated if he did not take the opportunity.

21. The lack of an expression of remorse was accepted but it was submitted that to have offered remorse having contested the robbery and burglary charges would have been an empty gesture. The respondent expressed general remorse in his letter of the 27th May, 2015, which the sentencing judge considered.

22. There were substantial points of mitigation which supported the suspended consecutive sentence and it was not a substantial departure from what would be regarded as an appropriate sentence. It was within the sentencing judge's discretion and margin of appreciation.

Decision

23. This appeal is focussed upon the sentence imposed in respect of count one of Bill No. 72/2015 which was one of three years consecutive to concurrent sentences of three years and six months and twelve months in respect of Bills No. 1/2015 and 3/2015 respectively. The learned trial judge suspended this sentence in full for a period of six years from the sentence date subject to certain conditions.

24. The accused committed the instant offence at a time when he was on bail for the offences referred to in Bills No. 1/2015 and 3/2015. This offence was the robbery of €15 from a youth who was accompanied by two other youths. The accused told his victim that he had a knife and demanded money. In sentencing him the learned trial judge considered the offence to be opportunistic,

menacing and intimidatory. He noted no remorse was expressed albeit it was said on behalf of the accused that this would have been rather futile in the context of his having contested the robbery charge involved here. Although the knife was not produced during the robbery, it was a clear and present threat to a victim who was of a nervous disposition.

25. This Court considers that it is of first importance that full account be taken of the clear legislative policy expressed in s. 11 of the Criminal Justice Act 1984 (as amended by s. 10 of the Bail Act 1997) and substituted in part by the Criminal Justice Act 2007. This provides as follows:-

"(1) Any sentence of imprisonment passed on a person for an offence—

(a) committed while on bail, whether committed before or after the commencement of s. 22 of the Criminal Justice Act 2007, or

(b) committed after such commencement while the person is unlawfully at large after the issue of a warrant for his or her arrest for non-compliance with a condition of the recognisance concerned,

shall be consecutive on any sentence passed on him or her for a previous offence or, if he or she is sentenced in respect of two or more previous offences, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment in respect of those consecutive sentences shall not exceed 2 years.

(2) Subsection (1) shall not apply where any such sentence is one of imprisonment for life or is a sentence of detention under section 103 of the Children Act, 1908.

(3) Subsection (1) shall apply notwithstanding anything contained in section 5 of the Criminal Justice Act, 1951.

(4) Where a court:-

(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail,

and

(b) is required by subsection (1) to impose two or more consecutive sentences,

then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."

26. Thus the legislative policy is that where an offence is committed while the offender is on bail, two consequences should follow automatically:-

1. It is mandatory to make any sentence imposed for such an offence consecutive to any sentence imposed for any offence in respect of which the offender had been released on bail.

2. Offending while on bail must be treated as a separate aggravating factor by the sentencing judge.

27. Wholly exceptional mitigating factors may be considered in respect of determining the extent, if any, of a suspensory provision in relation to a consecutive sentence such as herein. In this case the mitigating circumstances identified by the learned judge were that no actual violence was used, that there was a plea to possession of the knife and to the criminal damage charge and that the accused had a very tragic family background. Although the absence of violence was a factor fairly considered, it raises little by way of an exceptional nature. The same applies to the pleas such as they were. The accused's tragic family background is very sad to read but perhaps even more sadly cannot be described as wholly exceptional in the context of a repetitive offender with serious addiction problems. This Court considers that exceptional means exceptional. Where found present, the particular exceptional circumstances should be clearly identified and set out by the sentencing judge.

28. In addition, where offenders use violence or the threat of violence involving the use of a weapon, this Court has stated that the practice is that a custodial sentence should invariably follow. Where there exists strong mitigating factors, the practice is that a partly custodial, partly suspended sentence should be imposed. See *The People (Director of Public Prosecutions) v. O'Leary* [2015] IECA 128.

29. Taking all these factors into account it seems to the Court that insufficiently exceptional circumstances exist in this case to justify the suspension of the whole of the sentence imposed of three years. On this basis the Court has decided that an error of principle was made by the learned trial judge. We will therefore proceed to resentence the respondent. We have considered additional material which was submitted on his behalf by his counsel at this hearing on a contingency basis. This material outlines even further recent tragic events in the life of the accused. Taking these into account, we will impose the same sentence of three years in respect of count one in Bill No. 72/2015 which sentence will be consecutive to the sentences imposed in respect of convictions under Bills No. 3/2015 and 1/2015 but will suspend the last two years for a period of six years on the same terms. The suspension period should date from 12th February, 2016.