



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Hedigan J.**

CCA 300/16

The People (at the suit of the Director of Public Prosecutions)

Appellant

V

Peadar Macken

Respondent

JUDGMENT of the Court delivered on the 5th day of March 2018 by

Mr. Justice Hedigan

Background

1. This is an appeal by the Director of Public Prosecutions on the basis of the undue leniency of the sentence. The respondent was charged with two offences; assault causing harm to Martin Whelan contrary to s. 3 of the Non-Fatal Offences against the Person Act 1997 and production of an article contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. Both offences took place on 28th May 2008. The trial of the respondent before a jury took place on 10th, 11th and 12th November 2015. The accused was convicted on both counts on the indictment and on 25th February 2016 the Circuit Court heard evidence in respect of the sentence and adjourned the matter to 1st November 2016. On 1st November 2016 the Circuit Court imposed a sentence of 180 hours community service in lieu of four years imprisonment on count 1 and 60 hours community service in lieu of two years imprisonment on count 2. This amounted to a total of 240 hours community service to be completed within 12 months in lieu of the sentence. It is to be noted that the offence contrary to s. 3 of the Non-Fatal Offences against the Person Act 1997 carries a maximum penalty of five years imprisonment and/or a fine. The offence contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 also carries a maximum penalty of five years imprisonment and/or a fine.

Grounds of appeal

2. The grounds of appeal submitted are:

- (i) the sentence did not adequately reflect the nature of the charges, the consequences of the acts of the accused and their effect on the victim;
- (ii) the learned trial judge erred in principle in failing to give sufficient weight to the evidence of the prosecution as to the circumstances and surrounding the commission of the offence admitted and in particular:
 - (a.) the failure of the learned trial judge to identify the aggravating factors in the matter,
 - (b.) the failure of the learned trial judge to identify a headline sentence in the matter before applying aggravating and mitigating factors in arriving at a sentence and in that regard failed to follow established sentencing process which would lead to a more appropriate sentence and to one that would be more readily reviewable,
 - (c.) the failure to impose a custodial sentence in the matter,
 - (d.) attaching too much weight to any mitigating factors that may have existed.

The sentence hearing

3. The relevant matters which were outlined to the Court during the sentence hearing on 25th February 2016 and 1st November 2016 included the following:

- (i) the offences occurred on 28th May 2008,
- (ii) the injured party and the accused had known each other for over 20 years,
- (iii) the injured party agreed to allow the accused to stay with him in Carraroe, Co. Galway, as the accused had no place to stay and had no money to pay for a hostel,
- (iv) they drank whiskey and Guinness that evening and apparently earlier that day,
- (v) at about 10 pm Mr Whelan stated to Mr Macken that he was going to bed but he asked Mr Macken not to smoke in bed as he was afraid he might set the bed alight,
- (vi) Mr Macken became very annoyed with this and jumped up and hit Mr Whelan in the side of the head with a bottle. Mr Whelan fell to the floor, the accused knelt on top of him, broke the bottle and stabbed him in the neck,
- (vii) Mr Whelan made his way out of the house and contacted the emergency services,
- (viii) there was a lot of blood at the scene. The injured party received a wound to the facial area which requires sutures,
- (ix) Mr Whelan was very traumatised by what happened. He has had no contact with the accused since the incident,
- (x) the accused's date of birth is 21st April 1953,

(xi) the accused had 12 previous convictions, all of which were summary in nature (public order offences and criminal damage),

(xii) at the time of the sentencing no victim impact statement was available as the injured party had unrelated major surgery and was unlikely to leave hospital until the month following the sentencing hearing.

4. The plea in mitigation offered in court on behalf of the respondent included the following:

(i) all previous convictions were summary offences,

(ii) the accused had a partner of five years standing,

(iii) the accused had been sober for six and a half years,

(iv) the accused had stayed out of the Rosmuc area and had not come to the attention of the Gardaí during the last eight years,

(v) the accused had a history of alcohol abuse,

(vi) the accused had signed on weekly at Galway Garda Station for the past eight years,

(vii) the accused was homeless at the time of the offence,

(viii) he has managed to rehabilitate himself in terms of sobriety,

(ix) a lot of alcohol was consumed on that night; the accused has memory loss in relation to the incident,

(x) there was an offer of compensation and €5,000 was in fact paid,

(xi) there was a probation report before the Court,

(xii) the accused suffers with epilepsy. He had a head injury the night before this offence,

(xiii) the accused was at the time of sentencing a 62 year-old man who had turned his life around and undertook rehabilitation prior to engaging with the Probation Service.

The personal circumstances of the respondent

5. Mr Macken is now a man of almost 65 years having a date of birth of 21st April 1953. He has nine previous criminal convictions from 1972 to 2010. Among these are:

(i) In 1983 the Metropolitan District Court received a six month sentence for malicious damage.

(ii) In 1997 Kilmainham District Court, s. 2 criminal damage, bound to the peace for two years.

(iii) In 2010 he had two s. 4 public orders and received fines, two s. 6 public orders and received two three-month suspended sentences to run consecutive. In respect of a charge of entering a building with intent to commit an offence, he received one month suspended and consecutive to the others.

The 2010 convictions occurred after the offences herein. The respondent has a long history of alcohol abuse. He was not cooperative with the investigation at the time of this offence, he did not admit to the assault and he was found guilty by a jury. In this case Mr Macken was before the Court for the first time on an offence of this nature. He had no previous convictions for assault. He is unclear when he stopped drinking but thinks that it may have been around the time of the 2010 convictions. He then started attending AA meetings regularly. He told the Probation Service 2016 that he does not now attend AA meetings as he said he had no urge to drink alcohol. However, through his counsel he told this Court that he did in fact attend AA sessions. He started a relationship five years ago which appears to be a positive development and one of the reasons why he has not returned to drinking. With the help of the city council he was helped to secure accommodation and he apparently likes where he is living. In his recovery he returned to building curraachs for the community which is a trade that he learnt as a young man and which he still loves today.

The victim impact statement

6. The following victim impact statement was made by Martin Whelan of Bealadangan, Co. Galway, on 19th October 2016. It was not available to the learned sentencing judge but was made available to this Court today. It is as follows:

"I Martin Whelan, now aged 66 years, my date of birth is 6/11/1949, live on my own at Bealadangan, Co. Galway. Since I was badly assaulted in May 2008 I am left with a permanent scar to the right side of my face and another permanent scar under my jaw. I received eight stitches to my face and 17 stitches to my jaw. I now only shave every second day. I have to sit at the kitchen table with a mirror and ordinary razor in case I cut myself. I cannot shave in the bathroom because I need to be sitting and have a steady hand for fear I cut myself. During the first few years after being assaulted I found it very difficult to relax and sleep at night. I couldn't stop thinking about the way I was assaulted by a fella that was supposed to be my friend. That same fella cut my face and throat with a broken bottle. That scenario played on my mind for a long time during my recovery. This statement has been read over to me and it is correct."

Submissions of the appellant

7. Ms Caroline Cummings on behalf of the appellant submitted that the primary error of the learned sentencing judge was a failure to give appropriate weight to the aggravating factors. She identified these as being that the offence was committed in the victim's own home, it was unprovoked, it was by a friend, it was an abuse of hospitality, a weapon was used and the victim was hit and stabbed. She notes that a plea of guilty was not available as mitigation. She submitted that there were also some minor errors on the part of the learned sentencing judge. She identified these as being that there were in fact actual previous convictions and that there was a medium not a minor risk of reoffending. Ms Cummings referred the Court to three cases where community service was given in lieu of

imprisonment in the context of serious assaults but noted that in each case a guilty plea had been offered.

Submissions of the respondent

8. Mr Ó Dúnláing on behalf of the respondent informed the Court that the community service directed had not in fact been completed. This however was through no fault of the respondent. The Probation Service had not been in a position to organise any appropriate service for him. The respondent however was doing voluntary work. He submitted that although the sentence was a lenient one, it was not unduly so. He submitted that the learned sentencing judge did identify where the offence fell. He found it to be mid-range. He found the headline sentence to be one of four years where five years was the maximum. The learned sentencing judge had in fact dealt with the aggravating factors. He had already considered those in fixing the headline. In mitigation Mr Ó Dúnláing noted that the respondent accepted the verdict albeit that he had contested certain things at trial. He had been dealing with his alcohol problems and at sentencing had not been drinking for over seven years. He had paid €5,000 in compensation to Mr Whelan.

Decision of the court

9. The Court has already today outlined the jurisprudence establishing the legal principles applicable to an undue leniency appeal. I will not repeat the relevant principles again here. The offence in this case was one of egregious and apparently unprovoked violence. Mr Macken is fortunate he did not end up facing a far graver charge. His victim unsurprisingly has carried the scars both physical and psychological of this moment of madness to this very day. Crimes of such violence with a broken bottle must, in all but the most exceptional of cases, attract a custodial sentence. In this case the learned sentencing judge did identify a headline of four years. In the light of the maximum sentence available being one of five years on count 1 and count 2 he clearly considered the offence merited something close to the top of the range although he described this as at the top of the mid-range. This Court agrees with the headline sentence found by the learned trial judge in relation to this offence. However when he proceeded to impose in lieu of prison community service of respectively 180 hours and 60 hours in place of the sentence, we find the learned sentencing judge fell into error. The facts of the case were unusual but did not give rise to any exceptional quality that might justify a sentence that did not contain at least some custodial element. We will therefore proceed to quash the sentence imposed and will proceed to resentence the respondent in respect of these two offences. In doing so, we take account of the aggravating factors and the mitigating factors outlined above. We will impose the same sentence of imprisonment that the learned sentencing judge found was merited in respect of counts 1 and 2 i.e. four years and two years to be served concurrently. In the light of the lengthy period that has ensued and the exemplary behaviour of the respondent in the years since the commission of this offence, we will suspend the whole of this sentence for four years on conditions that he enters into a bond of €100 and that he continues to comply with all requirements of the Probation Service including the voluntary work in which he has engaged to