THE COURT OF APPEAL

Record No. 49/2016

Birmingham J.
Mahon J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

PAUL L'ESTRANGE

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 26th day of May 2017 by Mr. Justice Mahon

1. The appellant pleaded guilty in respect of two offences, namely assault causing harm contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997, and the possession of an offensive weapon contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. On the 12th February 2016, the appellant was sentenced at the Circuit Criminal Court in Dublin to seven years imprisonment in relation to the assault offence. The second offence was taken into consideration. The appellant has appelled against his sentence.

2. The victim of the assault was Mr. James McGurk. He and the appellant were co-tenants in a house at 379C, North Circular Road, Dublin 7. On the night of the 15th January 2015 the appellant cut Mr. McGurk's neck with a knife in what appears to have been an unprovoked and inexplicable assault. Immediately before doing so he taunted Mr. McGurk with references to him making his will and suggested to him that the night would end badly for him. Following the assault, Mr. McGurk sought assistance from neighbours who succeeded in disarming the appellant, albeit it with difficulty, and in the face of resistance from him.

3. The appellant was thirty nine years old on the date of the offence. He expressed regret for the offence and blamed its occurrence on alcohol and an alcohol addiction problem with which he was grappling at that time. He had no significant previous convictions. Although he was on social welfare at the time of the assault, he had previously a reasonably good employment history, and the court is told that he has good prospects for employment when released from prison. His parents, with whom he now resides were, and remain, very supportive of him.

4. The injury to the victim consisted of a slash wound to the throat which has left a scar of between six and eight inches in length. The victim impact statement indicates that Mr. McGurk has been badly psychologically affected by the assault. He suffers from post traumatic stress disorder, and has become fearful, distant and reclusive. His physical injuries have however recovered with the exception of the scarring.

5. The appellant contends that the learned sentencing judge fell into error in a number of respects. In the appellant's written submissions, the following is stated:-

> *"..the judge gave no indication as to the sentencing range within which he deemed it appropriate to operate, and / or where within that range the judge viewed the appropriate starting point and / or what, if any, mitigating factors were expressly considered by him and / or to what extent, if any, the ultimate sentence was discounted to reflect these factors."*

6. In his judgment, the learned sentencing judge described the offence as being *"a very serious assault"* and suggested *"that the level of culpability is high"*. The learned sentencing judge appears to have rated the offence at the higher level of the gravity scale before imposing the seven year sentence, a sentence which he described as *substantial.* He expressly referred in his sentencing judgment to the relevant mitigating factors, and he also said he deemed the appellant's two previous drink related offences to be very minor factors in relation to sentencing.

7. The learned sentencing judge unfortunately did not indicate a headline sentence or the extent of the discount afforded in respect of the mitigating factors. Given the existence of such mitigating factors and their acknowledgement by the learned sentencing judge, it might be assumed that the actual heading sentence, prior to any reduction for such factors, was probably in the region of nine or ten years.

8. The learned sentencing judge was criticised for his suggestion, in the absence of any evidence to support it, that the appellant intended to murder Mr. McGurk. He is also criticised on behalf of the appellant for, it is contended, failing to adequately address the question of rehabilitation in the imposition of what was described as a *straight* seven year sentence.

9. Particular reliance is placed on the words of Denham J. (as she then was) *in DPP v M.* [1994] 3 I.R. 306, at p. 316:-

> *"Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence… However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the applicant must be taken into consideration by the court."*

10. Reliance is also placed upon parts of the judgment of the Court of Criminal Appeal in *DPP v. Fitzgibbon* [2014] 2 ILRM 116, including:-

> *"A sentencing judge should set out clearly the factors which had been taken into account in arriving at an appropriate sentence and specify the approach adopted in coming to a conclusion as to the appropriate sentence having regard to all of those factors."*

11. The court's attention was also drawn to the broad sentencing scale suggested in *Fitzgibbon*, a case concerned with what was described as a *truly horrific assault* involving twenty six punches to the head, sixty five stamps on the head and two stamps to the chest. That "scale" suggests that before any mitigating factors are taken into account a sentence of between two and four years was appropriate for offences in the lower end of the range, sentences of between four and seven and a half years were appropriate for those in the middle range, and sentences of between seven and a half and twelve and a half years were appropriate for offences of the most serious type. Sentences of twelve and a half years and upwards, including life imprisonment, were only appropriate in wholly exceptional cases.

12. The court has been referred to a number of so called comparator cases. Of course, while useful, such cases vary greatly in terms of the circumstances in which the individual offences concerned were committed, and it is important to consider them with that limitation in mind. What is clear, is that sentences significantly vary as between assault cases as might be expected in order to reflect their different circumstances. In general terms, offences involving serious personal violence attracts significant custodial terms of imprisonment, and especially so where such assaults occur without provocation, as was the case here, and in cases which involve the use of knives. The prevalence of such cases is an unfortunate and worrying feature of recent years and requires a tough response from the court.

13. As already indicated the court has approached this appeal on the basis of its assumption that the headline sentence, prior to discounting for the mitigating factor, is in the region of nine or ten years. It is the actual sentence, as ultimately imposed, which has to be the focus of this court's deliberation. The mere fact that a sentence is not structured in the preferred manner, namely by identifying a headline sentence before applying a specific discount for the relevant mitigating factors, and thus arriving at a net term, cannot be a basis in itself for it been quashed and a re-sentencing exercise undertaken.

14. What is remarkable about this case, leaving aside the inexplicably reason for the assault in the first place, is the fact that a life threatening, or even worse, a fatal wound was not inflicted. The element of pre-mediation and the manner in which the appellant addressed his victim before attacking him only served to emphasise Mr. McGurk's good fortune that the outcome was not far more serious. The views expressed by the learned sentencing judge as to the serious nature of this offence, and which had been the subject of criticism by counsel for the appellant, were appropriate merely reflect this fact. A net custodial sentence of seven years was within the sentence discretion available to the learned sentencing judge. In terms of its gravity it probably fell into the third sentencing category suggested in *Fitzgibbon*. No error of principle has been established to the satisfaction of this court, and the appeal must there be dismissed.