



THE COURT OF APPEAL

Kelly J.
Peart J.
Mahon J.

111/13

The People at the Suit of the Director of Public Prosecutions
V
Gerard Grey

Appellant

Judgment of the Court (ex tempore) delivered on the 10th day of November, 2014, by Kelly J.

1. This is an appeal against the severity of a sentence imposed by His Honour Judge O'Shea at the Circuit Criminal Court at Wicklow in April 2013. The accused, Gerard Grey, on that occasion pleaded guilty to one count of attempted robbery, the circumstances of which were outlined in evidence before the trial judge.

2. What occurred was that on the 19th July, 2010, the accused together with Christopher Heffernan went to the EBS Greystones premises and entered them. The accused, with a gun in his hand, vaulted over the counter and held it to the cashier Ms. Lorraine O'Reilly's head and shouted at her "give me the money". When the alarm was sounded he made off and drove away and ultimately was apprehended after a car chase.

3. The applicant has a lengthy criminal record. He has 31 previous convictions, three of them were for robbery and in respect of them he received sentences of either three or four years each.

4. The court is mindful of the remarks made by Hardiman J. presiding in the Court of Criminal Appeal in the case of *DPP v Geasly* a decision of the 10th June, 2013, which were made in the context of an appeal in a case where a firearm was possessed by the appellant. The judge said on that occasion as follows:

"The court will not repeat what is said other than to say very briefly that the unlawful possession of a lethal weapon is a crime which has blighted out society and plainly requires a very condign sentence."

5. In this case, the accused was sentenced to five years imprisonment. His counsel accepts that in the ordinary way, that could not be regarded as an excessive sentence and certainly it could not be described as a sentence which is any way wrong in principle. But he makes two complaints about the imposition of that sentence on the accused. He says first of all, that in fixing on that tariff, the judge failed to take into account all of the mitigating factors which had been outlined in evidence before him. The court has had the advantage of the transcript of what went on before Judge O'Shea on the 18th April, 2013. It is clear that immediately prior to the imposition of sentence, all of this relevant material was opened to him. It is also clear from a perusal of the transcript that he took all that into account, admittedly in a shorthand fashion. For example, insofar as the psychiatric report is concerned, he expressly referred to the fact that he was not going to go through it in public so as to avoid embarrassing the accused. That, I do not think, can be regarded as a basis for criticising the judge for not taking that matter into account. He clearly did.

6. He also heard, just before he imposed sentence, evidence which he referred to during the course of the sentencing. For example, the apology to Ms. O'Reilly, the attendance which the accused had had with an organisation called Hope, the evidence of Mr. Dowling a senior project worker and the "hands on peer education" which were referred to. He also referred to the accused's involvement in football training and how he had been dealing with his heroin addiction. He took those matters into account clearly having them in mind. He weighed them up and contrasted them with the aggravating factors which he also identified; the frightening, intimidating, aggressive manner in which the offence was carried out, the use of the gun, the demand for the money and so on.

7. This Court is satisfied that no legitimate criticism can be made of Judge O'Shea in the way in which he conducted the sentencing hearing. Nor can any legitimate criticism be made by reference to an allegation that he did not take everything into account. The view of court is that he did.

8. Consequently, insofar as that criticism is concerned, it is not, in the view of this Court, well founded.

9. The second criticism which is made pertains to the alleged disparity between the treatment given to this accused and his co-accused Mr Heffernan. It is said that that treatment was so different and not based upon rationality that it ought to be condemned as an error in principle.

10. The first thing to note is the decision of Mr. Justice Walsh in *The People (Attorney General) v. Poyning* [1972] I.R. at p. 402, where he said at p. 408:-

"When two prisoners have been jointly indicted and convicted and one of them receives a light sentence or none at all, it does not follow that a severe sentence on the other must be unjust. If in any particular case one of such joint accused has received too short a sentence that is not per se a ground on which this Court would necessarily interfere with the longer sentence passed on the other. Of course, in any particular case the Court must examine the disparity in sentences where, if all other things were equal, the sentences should be the same; it must examine whether the differentiation in treatment is justified. The Court, in considering the principles which should inform a judge's mind when imposing sentence and having regard to the differences in the characters and antecedents of the convicted persons, will seek to discover whether the discrimination was based on those differences."

11. The citation from that case is clearly apposite here. The trial judge was careful to differentiate the position between the accused and Mr. Heffernan. First of all, insofar as the offence itself was concerned, it is clear that the more active party in the commission of the offence was the accused. He was the man who brandished the gun. He was the man who vaulted over the counter. He was the one who shouted at the cashier, which must have been a horrifying experience for her and indeed it was. He was the one who then drove away. Mr. Heffernan, by contrast, took a more minor part in the whole affair, although of course, was clearly involved in it. That is the first distinction. Secondly, insofar as the criminal record of the two individuals is concerned, the criminal record of the accused here is clearly more serious. In his case, he has 31 previous convictions including three of robbery. His co-accused had 23 previous convictions with two for robbery. These are points which were made by the judge in coming to the conclusion that he ought to deal with them differently. He imposed a sentence of four years on Mr. Heffernan and a sentence of five years on the accused.

12. In the view of the court, having regard to the observations in *Poyning's* case, this is clearly a case where the differentiation in treatment was justified. In looking at the principles which informed the judge's mind when imposing the sentence and having regard to the differences in character and the antecedents of the convicted persons, the differentiation was clearly based on those differences and accordingly, criticism made of the trial judge, in the view of this Court, is not justified under this heading either.

13. Consequently, no error in principle having been identified by reference to the various criticisms which have been levelled against the trial judge, this appeal fails and the order of the court is that the appeal is dismissed.