



## THE COURT OF APPEAL

Edwards J.  
McCarthy J  
Kennedy J

Record No: 54/2019

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- V -

VASILE MARIN

APPELLANT

**JUDGMENT of the Court (ex tempore) delivered on the 30th May 2019 by Mr. Justice Edwards**

### Introduction

1. On the 27th of February 2019 the appellant was sentenced to three years' imprisonment with the final 18 months suspended for 18 months, conditional on, inter alia, 12 months of probation supervision.

2. He now appeals against the severity of that sentence.

### Background Facts

3. At trial, Garda Cian Daly gave evidence to the effect that on the 10th of September 2016, the injured party, Mrs Elizabeth O'Toole was shopping at a Eurospar grocery store in Bayside. After paying with cash, she estimated that she had around €300 remaining in her purse.

4. Mrs O'Toole placed the groceries and her purse in a personal shopping trolley, then left the shop and proceeded in the direction of her home which was just a short distance away. As she approached the back of her house, a male came up from behind her. He placed one arm around her, primarily to distract her, he says, but it undoubtedly had the effect of also restraining her, and while she was so distracted and restrained he reached into her shopping trolley with his other hand and removed her purse from it, before then making his escape.

5. Following the incident, Mrs O'Toole, who was very shaken by what had occurred, reported what had happened to the Gardaí and was able to provide a description of the man. After examining CCTV footage, Gardaí identified the appellant and arrested him on foot of a Section 48 warrant.

6. During the resulting interview, the appellant was very forthcoming. When asked what he remembered about the day in question, he replied: *"I went to the shop. I went to pay. When I went to the counter the woman was in first, she was buying stuff, she leaves, I left the shop as well. When I got out, I saw the woman walking away, I then followed her and took her wallet. I didn't hit her or use bad language, I just took the purse."*

7. When asked how much money he took, the appellant answered that it was €190. When he was asked if he put his hands on her, he replied: *"No, I'm sorry for what I did. I was a bit drunk, I wasn't really aware of what I was doing."* When it was put to him that the weight of his actions stemmed not from the sum of money but rather the psychological trauma caused by his following and robbing the victim, the appellant replied: *"I'm really sorry, it's the first time it happened, it will never happen again"*.

8. When asked about his reasons, the appellant answered *"I owed some money to somebody that I played roulette with"*.

9. When presented with the CCTV footage, the appellant identified himself.

### Impact on Victim

10. Immediately following the incident, Mrs O'Toole was in a state of shock to the extent whereby she was unable to open her door, having to ring the doorbell to enable someone else to let her in. Mrs O'Toole is 81 years of age and had recently undergone heart surgery during which a pacemaker had been implanted.

11. She described an awful shock as a result of the experience, and is still at pains to discuss it. The fact that the occurrence took place so close to her home caused her much anxiety. She reported involuntary shaking for several days and continued mental trauma when thinking about what happened. Mrs O'Toole became quite reclusive as a result of the appellant's actions, and could not bring herself to leave the house for over six months following the robbery. However, she reports that she eventually resolved that she was not going to let this incident wreck her life, and eventually started going out again.

12. Nevertheless, the incident caused lasting effects. The complainant remains extremely nervous and anxious, and has relinquished her financial tasks to her son as she will no longer wishes to handle or deal with cash. Moreover, she still does not go grocery shopping, availing of the services of her home help to do it for her.

### Appellant's Personal Circumstances

13. The appellant was from Romania and came to Ireland with his family in 2002. He is one of ten children and resides with his mother and several siblings. His educational attainments are limited as he was suspended from school shortly after completing his Junior

Certificate exams due to non-attendance. He cites his failure to complete his education as being part of the reason for his poor English skills.

14. He was 22 years old when he committed the offence. At that point in time, he was already in a relationship with his partner; she was then pregnant with their second child.

15. He enjoys the support of his family, his partner, his Church pastor, and several friends who offered positive testimonials. The appellant has never had employment apart from brief casual work as a gardener. He has a hearing difficulty and is in receipt of disability benefit on that account and on foot of a diagnosis of depression. His daily routine involved helping his mother, including activities such as chaperoning his brothers to and from school.

16. The appellant cites desperation as the motivation for his actions – he had accrued a gambling debt of €700. He says that he had made attempts at paying off part of it but was receiving threats to repay the amount in full. He claims that he has since ceased gambling.

17. The appellant has only a limited criminal record, involving two previous convictions for s.4 theft, both of which were dealt with non-custodially in the District Court. The prosecuting garda confirmed that he had not come to their attention for any reasons since the offence.

### **Sentencing Judge's Remarks**

18. The sentencing judge stated as follows:

*"All right, the position is, Mr Marin has pleaded guilty to count 1 on the indictment, and the details of the incident were given in evidence on the 22nd of November of this year. The court heard how the injured party, Mrs Betty O'Toole, an 81-year old lady, was making her way home from the Eurospar in Bayside, making her way home with her purse containing €300 in her trolley. She was targeted by the accused, followed, and he reached into her trolley and took the purse from her. I received a victim impact report from Mrs O'Toole, and it is clear that the events in question had a very serious impact on her. She was extremely frightened, she stayed at home and was afraid to go out for some considerable time after, until she reached a point where she made a very conscious decision not to let the incident destroy her life and she started to go out again, but she continues to think about the incident and it is very much on her consciousness, and it had a very upsetting effect on Mrs O'Toole's family in addition.*

*The accused comes before the court at the age of 24. He is one of a large family. He has no history of employment with the exception of some casual gardening, he has – he is in receipt of disability benefit for depression, which has been diagnosed and which is referred to in the probation report. He has submitted a large number of letters and testimonials from family members and persons with whom he is acquainted, which speak well of his character and his personality generally, and he comes before the Court with a very limited criminal history namely two District Court convictions for theft.*

*Now, in terms of the headline sentence in this case, the clear aggravating factors are the fact that the victim in this case was a vulnerable 81-year old woman, and the fact that she was specifically targeted and followed by the accused for the purposes of carrying out the robbery, a further aggravating factor is the effect that the incident had, and the effect that an incident like this will inevitably have, on somebody of that age, which was very significant, although thankfully, not of an entirely enduring nature. In terms of the actual offence itself, minimal force was used in terms of taking the bag, and as a consequence, I am placing the offence on the higher end of the low range for a robbery offence.*

*I'm going to give Mr Marin credit for his plea of guilty, for the co-operation and admissions that he made following his arrest. I will also give him credit for the fact that he has expressed remorse for his actions and is apologetic for the effect that they have had on his victim. I also take into account the fact that the offence was motivated by a gambling debt that he had accumulated, I also take into account the lack of force which was used in appropriating the bag, or the lack of excessive force. I also take into account the testimonials that have been submitted on his behalf and the fact that he has a mental health diagnosis, for which he is on disability benefit, and I also take into account the recommendations of the probation report and the aspects of his risk factors which require to be addressed.*

*Generally speaking, somebody with as limited a record as Mr Marin has would not expect to receive a custodial sentence for an offence of this nature. However, elderly people have to be protected from being targeted by opportunistic persons, regardless of whether they have debts or financial pressures, and in the circumstances, having applied a headline sentence of three years to the offence, and having given Mr Marin credit for the mitigating factors which have identified, I am imposing a ... [interjection] ... headline sentence of three years and [will] suspend the final 18 months for a period of 18 months on the accused entering into a bond to keep the peace and be of good behaviour for a period of 18 months, and furthermore, to undergo a period of 12 months' probation supervision, during which time he is to attend all appointments offered to him by his probation officer, he is to follow all directions of his probation officer in relation to his mental health and impulsive behaviour, and he is to engage with his probation officer for the purposes of a referral to an employment and training service to address his employment or vocational needs. And he is to inform the probation service of any change in his contact details. Now, it doesn't affect the bottom line in terms of the sentence, but clearly, there is a requirement for rehabilitation, which requires to be incorporated. And so, it's three years with the final 18 months suspended and subject to 12 months' probation supervision."*

### **Grounds of Appeal**

19. The appellant puts forward the following grounds of appeal:

(i). The sentence imposed was excessive in all the circumstances of the case.

(ii). The sentencing judge erred in attaching disproportionate weight to the age of the injured party and in sentencing the appellant to an immediate custodial sentence primarily on the basis that elderly people are required to be protected from opportunistic crime, the overall effect of this was akin to the application of a policy that offences against elderly persons necessitated an immediate custodial sentence irrespective of the gravity of the offence or the personal circumstances of the accused.

(iii). The sentencing judge erred in failing to attach any or any sufficient weight to the appellant's mitigating circumstances and the documentation submitted on his behalf

(iv). The sentencing judge erred in failing to take into consideration the particular hardship which an immediate custodial sentence would entail for the appellant given the fact of his being a non-national with very limited English, hearing difficulties and whose depression is of such a level as to warrant the payment of disability benefit.

(v). The learned sentencing judge erred in failing to give the applicant sufficient credit for his good character, represented by his low level of previous convictions and not having come to Garda attention since the index offence.

(vi). The sentencing judge erred in placing the offence too high on the scale of gravity having regard to the low level of force used by the appellant and the relatively low value of property involved.

(vii). The sentencing judge failed to attach any or any sufficient weight to the appellant's early plea of guilty and his expressions of remorse for his behaviour.

(viii). The sentencing judge failed to attach any or any sufficient weight to the Probation and Welfare Report and in particular the recommendations in that report.

(ix). The learned sentencing judge erred in failing to give any or any sufficient consideration to the imposition of a fully suspended sentence.

### Submissions

20. We acknowledge that both sides have filed helpful written submissions for which the Court is grateful, and the appellant has produced a book of relevant authorities, and refers liberally to those authorities in his submissions. He relies in particular on *The People (Director of Public Prosecutions v WC)* [1994] 1 ILRM 321 as authority for the proposition that it is a constitutional requirement that a sentence must be proportionate both to the gravity of the offending conduct and to the personal circumstances of the offender, and must strike a balance between those factors, which we accept is the law. He also relies on the statement of Denham J in *The People (Director of Public Prosecutions v M)* [1994] 3 IR 306 to the effect that in considering the principles of sentencing it is important to remember that one is dealing with an action between the State and the individual accused and not between the accused and the victim. We were further referred to MacMenamin J's judgment in *Pudliszewski v District Judge John Coughlan and the Director of Public Prosecutions* [2006] IEHC 304, which was a judicial review case in which the sentence of a District Judge was quashed on the basis that the District Judge had wrongfully adopted a fixed policy position in his approach to sentencing, reflected in his statement that "the golden rule is that receivers go to jail". It was suggested that in the present case the sentencing judge also adopted a fixed policy position on the basis that she found that it was necessary to imprison the appellant notwithstanding that a person with his characteristics would not normally be imprisoned for an offence such as the present one. Finally, we were referred to our own decision in *The People (Director of Public Prosecutions) v Doolan* [2014] IECA 22 as a supposedly relevant comparator.

### Discussion and Decision

21. We reject without hesitation the suggestion that the sentencing judge over assessed the gravity of this case. Robbery carries a range of penalties running from non-custodial disposal up to life imprisonment. However, as we have previously pointed out, sentences in excess of fifteen years are rare and most cases are dealt with on the basis that there is an effective low range running from non-custodial disposal up to five years, a mid-range from five years to ten years, and a high range from ten years to fifteen years, with sentences in excess of fifteen years and up to and including life imprisonment being reserved for the most egregious cases. The circumstances of this case clearly placed it within the low range but as the sentencing judge rightly identified there were a number of aggravating circumstances. In particular, this case involved the targeting of a vulnerable victim. Moreover, the accused had relevant previous convictions. His culpability was significant, and although no actual violence was used by him on the victim very significant psychological harm was done to her. Gravity is measured with reference to culpability and harm done. The sentencing judge located the gravity of the offence as being at the high end of the low range and we agree with that characterisation. She nominated the headline sentence of three years and we find no error of principle in her having done so.

22. We would add in that regard our view that the fact that an elderly and vulnerable victim was targeted, in the way in which it was done in this case, was a factor which necessitated the prioritisation amongst the objectives of sentencing of deterrence, both general and specific. There was an obvious need for a meaningful headline sentence for reasons of general deterrence, and as the probation report had assessed the appellant as being at moderate risk of reoffending, there was also a need for specific deterrence. We consider that the headline sentence of three years that was nominated was entirely appropriate in those circumstances. While it might have been at the severe end of the judge's legitimate range of discretion, she was entitled to nominate such a headline sentence and indeed was justified in doing so for deterrence purposes. It is, of course, true that a judge cannot for deterrence purposes impose an exemplary sentence fixed at a level which is disproportionate. However, we are entirely satisfied that the headline sentence of three years nominated as the sentencing judge's starting point was completely appropriate to the gravity of the offending conduct in this case.

23. The second major complaint is that the sentencing judge attached too much significance to the age and vulnerability of the victim, and lost sight of the fact that this was a prosecution between the State and the accused and not between the victim and the accused. We profoundly disagree with this. The sentencing judge was most careful and conscientious in the construction of her judgment. While she placed emphasis on the fact that the victim was elderly and vulnerable, and had suffered significant harm in the incident, she was right to do so and she did not place undue emphasis on those factors. Indeed, if she had failed to allude to them as she did, she would have been in error because they were highly relevant circumstances in terms of the assessment of gravity.

24. The third complaint is that the sentencing judge fettered her discretion, in effect, in expressing the view that "*generally speaking, someone with as limited a record as Mr Marin has would not expect to receive a custodial sentence for an offence of this nature*", and then going on to impose a custodial sentence nonetheless. The case is made that the sentencing judge felt that as a matter of fixed policy she was obliged to impose some element of custody in circumstances where the victim had been elderly and vulnerable. We reject this complaint without hesitation. All the judge was saying was that in the absence of the aggravating circumstance which exists in this case, namely the targeting of a vulnerable individual, the accused might have avoided custody. However, that aggravating factor elevated the gravity of the offence to the point where custody was required. She was absolutely right in so concluding and we see no evidence of an error of principle. There was no question of her approaching the sentencing from a fixed policy position.

25. The appellant further complains that the sentencing judge failed to adequately reflect the mitigating circumstances in the case. We are satisfied that she correctly identified all of the mitigating and relevant personal circumstances and took them into account, including the appellant's plea of guilty; his cooperation; his expression of remorse; the fact that he is an immigrant with low educational attainment, no employment history and comes from a generally poor background; that he speaks little English; that he has a hearing problem, suffers from depression and is on disability; that he is in a relationship and has a number of children, and the fact that the probation service has assessed him as being at moderate risk of reoffending.

26. While the sentencing judge does not indicate the weight that she afforded to the individual factors, and she was not obliged to do so, she synthesised all of these factors and determined upon an overall discount of 50% from the headline sentence to be given effect to by the suspension of the final eighteen months of the three-year sentence that she had set as the headline sentence. We have considered the mitigating circumstances in this case and we do not consider that cumulatively they would have entitled the appellant to a discount of more than 50%. Accordingly, we find no error of principle in the manner in which she addressed the mitigating circumstances in the case.

27. Finally, we should say with respect to the case of Doolan put forward as a comparator that we do not regard it as being helpful. A single case put forward as a direct comparator is of little or no use particularly in circumstances where the circumstances of the case offered as a comparator were significantly different. In Mr Doolan's case the court was concerned with a person who was a first-time offender with no previous convictions, much less relevant previous convictions, and who had been cooperative to the extent that his prosecution would not have been possible at all but for that cooperation. The circumstances of the present case were very different.

28. In conclusion, we have not found any error of principle in how the sentencing judge dealt with this matter and in the circumstances we must dismiss the appeal.