



THE COURT OF APPEAL

289CJA/15 & 290CJA/15

**Birmingham J.
Mahon J.
Edwards J.**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

EDDIE MURPHY AND JAMIE O'BRIEN

APPELLANTS

JUDGMENT of Mr. Justice Birmingham delivered on the 6th day of March 2017

1. The matter before the court sees the Director of Public Prosecutions seeking a review on grounds of undue leniency of sentences imposed in the Cork Circuit Criminal Court on 20th November 2015. The sentences sought to be reviewed are, in the case of Eddie Murphy, a sentence of six years imprisonment imposed in respect of an offence of intentionally or recklessly causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, and a sentence of two and a half years imprisonment, with the final 18 months suspended in respect of an offence of attempted robbery which was to be served consecutive to the sentence on the s. 4 offence and a sentence of six years imprisonment with the final 12 months suspended imposed in the case of James O'Brien in respect of the same s. 4 offence.

2. The background facts are that a serious incident occurred on 28th April 2015 at Exchange Business Park which gave rise to the charges under s. 4 of the Non-Fatal Offences Against the Person Act. The incident saw the injured party, Mr. Mark Lahive, suffering very serious injuries. The injured party was a van driver who is in the food business and on the afternoon of that day, had been engaged in stocking his van in preparation for the following day's run. He noticed the two respondents hanging around beside the van and was suspicious of their intentions. He picked up a bar, an iron or metal bar, which he makes use of in the course of his work and waved at them to depart. They did not do so, but instead turned on Mr. Lahive and confronted him. He was knocked to the ground and the two men then took the bar from him and took it in turns to severely beat him with it. In addition to the beating with the iron bar, Mr. Lahive was kicked and punched. In addition, an observer of the incident who attempted to intervene was threatened with violence. The assault lasted some four minutes, which for the injured party must have been a lifetime.

3. Mr. Lahive suffered very severe injuries which were life-changing and will be permanent. A CT scan showed a large comminuted depressed skull fracture. There was also a fracture of the right forearm, a fracture of the left middle finger and right fingers and a fracture of the right shin. Brain bruising has given rise to a weakness in both limbs. Mr. Lahive was hospitalised for a prolonged period of time including spending some months at the National Rehabilitation Centre. He is unable to work or drive. The victim is a married man and the father of four young children and the incident has had a devastating effect on his relationship with his family and in particular his ability to care for and to interact with his children.

4. In relation to the attempted robbery matter, the situation is that on 22nd December 2014, the injured party was sitting in his car in the car park of a Church on the Western Road in Cork waiting to collect his son as he had arranged to do. The door of the car on the driver's side was pulled open and the injured party found himself confronted by two males, one of them Eddie Murphy. The men demanded money from them and then demanded his car. The injured party had the seatbelt on, but the two would-be robbers tried to pull him from the car. He was taken from the car and pushed against the car and they tried to push him to the ground. However, the injured party succeeded in slipping out the jacket that he was wearing and by this method made his escape.

5. So far as the background and circumstances of the two respondents are concerned, Mr. Murphy was 26 years of age at the time of the offence and had 65 previous convictions recorded. While the majority of these were for public order offences, ten were for theft, one for burglary and six for s. 112 of the Road Traffic Act. He had three Circuit Court convictions but this was clearly by some distance the most serious offence that he had ever been involved in.

6. So far as the position of James O'Brien is concerned, where the sentence imposed was one of six years imprisonment with one year suspended, he was 20 years of age at the time of the sentence hearing. He had 42 previous convictions which included four for assault, two for assault causing harm and three for robbery. His most serious previous conviction had been dealt with in the Cork Circuit Court on 28th April 2014. It appears that he had been released from prison about a week before committing this offence.

7. The Director contends that in relation to the s. 4 matter, the judge did not have sufficient regard to the sustained and vicious nature of the assaults perpetrated by two men with an iron bar, that the assaults resulted in devastating and lifelong injuries and that they were fuelled by intoxication and were completely unprovoked. The assaults, the Director points out, have had a profound effect on the victim and they were assaults that were committed by two men with significant previous records.

8. So far as the attempted robbery is concerned, the Director says that insufficient regard was had to the fact that this was an offence committed by two men acting together; that it was committed at night in the car park of a Church; that it involved dragging the victim from his car and that the matter had a significant impact on the victim.

The Sentence Hearing

9. In the course of the sentence hearing, victim impact reports in respect of Mr. Lahive and his wife, Rebecca, were put before the court. These make harrowing reading. Mr. Lahive's report dealt not only with his very significant physical injuries, but the impact it has had on his quality of life. Again, the victim impact report from Mrs. Lahive confirmed how the incident had impacted on her and on her children. There was also a report from the victim of the car park incident who confirmed that he was terrified at the time and was shocked and in an anxious state for the next few days after the attack, but that almost a year later, he did not have any ill-effects and he expressed his relief that the defendants had admitted their guilt and spared him having to re-live the attack on him in court.

10. The appellants have not taken issue with the gravity of the offence while pointing out that there were factors not present which would have served to aggravate the situation still further had they been. In that regard, it was pointed out that this was not a premeditated offence and it was not a case where the weapon was brought to the offence by the assailant. The main emphasis, though, was on the background and personal circumstances of the appellants.

11. In the course of the plea on behalf Mr. Murphy, a letter which he had written expressing sincere apologies for his actions was read to the court. The letter comments that he had not previously done anything like this and that at the time of this incident he was under the influence of alcohol, ecstasy and prescription drugs. The letter commented that he wished he could take back everything that had been done on that terrible day, but that what he could do is change his life around while in prison and that he was seeking to do that. The letter stated that he was attending all the addiction services available to him, was studying for his Leaving Cert and attending various other courses. Counsel's plea focussed on the relevance of the addiction issues and difficulties in his personal life such as the fact that his father was very ill at that time. Counsel took up the theme that he was doing well in prison and was attempting to turn his life around.

12. The plea in mitigation on behalf of Mr. O'Brien drew attention to his young age; the fact that he was only 19 at the time of the offence; that the background to offending was to be found in addiction difficulties involving drink and drugs. The court was told that he had experienced real tragedies in his family including the fact that two sisters had died during his teenage years of Cystic Fibrosis. The fact that he had been cooperative with the investigation and had entered a very early plea was emphasised.

The Judge's Approach to Sentencing

13. The judge enquired of Counsel whether any of them wished to assist the court by reference to the general principles enunciated in the cases of *Fitzgibbon*, *Ryan* and *Z* or by reference to any other sentencing data that might be available in order to assist the court in arriving at an appropriate sentence. Prosecution Counsel indicated that having taken instructions from the Director, he wished to state that the Director's view was that the case fell within the category of the most serious type in *Fitzgibbon*, that is to say those where the sentence indicated was one between 7 and a half and 12 and a half years rather than the exceptional range between 12 and a half years and, in wholly exceptional cases, life imprisonment. Defence Counsel referred to the case of *DPP v. Cullen*, a decision of this Court. The court then proceeded to pass sentence. The judge began his sentencing remarks by indicating that the court was obliged to have regard to a number of sentencing issues in identifying the appropriate sentence, including details of the offence itself and the circumstances of the offender. The court was required to have regard to the effect of the crime upon the victim and his family. The court also had to have regard to the need to put in place a deterrent effect, both on the particular offender and on others who might be minded to commit similar offences. Also relevant was the decision of *The People v. O'Driscoll*, having regard to the prospects of rehabilitation. All of those matters had to be tempered by the principles of proportionality

14. Having summarised the facts of the s. 4 assault, the judge indicated that within the context of this being a serious offence, which indeed it was, he said, that he deemed it to reside at the higher end of the scale. He referred to *Fitzgibbon* and the scale set out there. He observed that there were clearly aggravating factors in the case in that two men together turned on Mr. Lahive who was on the ground and left him almost for dead. Therefore, on preliminary examination and having regard to the scaling that he had applied and before taking into account mitigating and other circumstances, he felt that the offence would ordinarily attract a sentence of nine years imprisonment without regard for the mitigating factors in the case. In the case of Mr. O'Brien, he said that when he had finally sobered up, he cooperated with the gardaí and entered an early plea, though that plea had to be seen in the context of the weight of evidence against him. The offence was committed by Mr. O'Brien at a time when he was 19 years of age. He was dependent on drugs and this led him into a downward spiral of criminality. At the time of committing the offence, he was heavily intoxicated. He had, though, expressed remorse and the judge was willing to accept that he was now a person who had come to realise the enormity of the offence committed. The judge then imposed the sentence that is now the subject of review, that is one of six years imprisonment with the final year suspended and also made provision for a period of three year post-release supervision to aid rehabilitation. The judge then turned to the situation of Mr. Murphy, referring specifically to the factors that were present in his favour.

15. When the judge came to deal with the car park offence, he indicated that this would ordinarily attract a sentence of five years imprisonment, but that having regard to the principle of the totality of the sentence, that he felt the appropriate sentence was one of two and a half years imprisonment. While initially there was some doubt as to whether the period to be suspended was one year or one and a half years, the judge clarified this by saying that the aggregate sentence was eight and a half years with the final one and a half year suspended.

The Arguments on this Application

16. The Director says that the error here was in taking nine years as the starting point and that a higher starting point should have been selected. Counsel for Mr. Murphy says that this was undoubtedly a lenient sentence but not an unduly lenient one. He says that an effective sentence of seven years imprisonment for someone whose previous highest sentence was one of six months is very substantial indeed, and that while perhaps lenient, it cannot be regarded as such a departure from the norm as to justify intervention by this Court. Counsel for Mr. O'Brien says that the starting point of nine years was not particularly lenient. She does accept that the mitigation that was then applied was generous, but she says not exceptionally so and that the sentence ultimately arrived at was not such a departure from the norm as would justify intervention.

Discussion

17. In this case, the sentencing judge approached his task with particular care. He was obviously conscious of much of the recent jurisprudence in the area of sentencing and was anxious to apply it. The *Fitzgibbon* case was obviously very much to the forefront of his mind. It may be that the identification in *Fitzgibbon* of a range of 7 and a half to 12 and a half years imprisonment for the most serious cases falling short of the exceptional category is in fact too wide to provide the degree of assistance that was hoped. In this case, both culpability and harm were high. This was an assault by two men acting in concert using an iron bar, taking it in turn to beat their victim and to persist with the beating at a time when he was unable to offer resistance. The result of the assault has been catastrophic. A higher starting point would certainly have been justified. Having chosen 9 years as a starting point, the judge applied very generous mitigation indeed. The s. 4 assault was reduced by a full third in the case of Mr. Murphy and in the case of Mr. O'Brien there was still further mitigation in that the final year of his 6-year sentence was suspended.

18. The approach taken by the sentencing judge to the car park incident was an appropriate one. In the court's view, he was correct to conclude that an additional sentence was required, but equally correct to conclude that it was necessary to have regard to the principles of totality.

19. In the view of the court, the focus at this stage has to be on the overall sentences ultimately arrived at. A net 7 years in the case of Mr. Murphy and 6 years with one suspended, so a net five years in the case of Mr. O'Brien. In considering the adequacy of these sentences, the court is fully conscious of the jurisprudence in this area which is now well known and not in dispute and accepts

that only a substantial departure would permit intervention. The court is satisfied that there has indeed been a substantial departure and that the extent of the departure means that the sentences imposed fall outside the margin of appreciation available to the sentencing judge.

20. The court is therefore required to re-sentence. It does so as of today's date and in doing so it takes into account that increasing the sentences at this stage when the respondents are well into their sentence will be a source of deep disappointment for them and will make serving the sentences more burdensome than would otherwise have been the case. In the court's view, the appropriate sentence in the case of Mr. O'Brien would not have been less than 7 years. However, because the court is intervening at this stage, the court will confine the sentence that it is imposing to one of 6 and a half years. Accordingly, in the case of Mr. O'Brien, the sentence of 6 years imprisonment with one suspended will be set aside and in substitution there will be a sentence of 6 and a half years imprisonment to date from the day he went into custody.

21. In the case of Mr. Murphy, in the view of the court, the aggregate sentence for the two offences to be served could not have been less than 9 years. However, for the reasons stated, the court will at this stage impose a sentence of 8 and a half years in aggregate. The court will leave unchanged the sentence in respect of the car park offence and will impose a sentence of 7 and a half years imprisonment in respect of the s. 4 assault. As previously, the sentences will be served consecutively, resulting in a net sentence of 8 and a half years.