



**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 128

**Appeal No. 328CJA/12**

**Birmingham, J.  
Sheehan J.  
Mahon J.**

**The People at the Suit of the Director of Public Prosecutions**

**Applicant**

**And**

**Joseph O'Leary**

**Respondent**

**Judgment of the Court delivered by Mr. Justice Alan Mahon on the 16th day of June 2015**

1. This is an application for a review of a sentence imposed on the respondent on 13th November 2012 at Wexford Circuit Criminal court pursuant to s. 2 of the Criminal Justice Act 1993.
2. The sentences subject to review are as follows:-
  - (i) A term of six months imprisonment in respect of one count of assault contrary to Section 2 of the Non Fatal Offences against the Person Act 1997. This sentence was suspended in its entirety for a period of three years, on conditions.
  - (ii) A term of ten years imprisonment in respect of one count of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This sentence was suspended in its entirety for a period of three years, on conditions.
  - (iii) A term of ten years imprisonment in respect of one count of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This sentence was suspended in its entirety for a period of three years, on conditions.
  - (iv) A term of ten years imprisonment in respect of one count of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This sentence was suspended in its entirety for a term of three years subject to conditions.
3. The focus of the Director's application is the fact that the said sentences were suspended in their entirety, and that an immediate custodial sentence was not imposed, having regard to, in particular, the seriousness of the offences, their number and the respondent's previous convictions.
4. The offences in question were committed by the respondent in the period May to July 2011. Briefly stated the details of each offence are as follows:-
  - (i) On 5th May 2011 Miss Christine Keane, a sixty five year old lady, was confronted by the respondent as she was getting into her car at Bride Street, Wexford. The respondent was brandishing an axe when he confronted Miss Keane. He stole her purse containing approximately €300 in cash and some bank cards. This incident gave rise to two of the offences in respect of which the respondent was convicted, namely Section 2 of the Non Fatal Offences against the Person Act 1997 and Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The respondent pleaded guilty to both charges.
  - (ii) On 1st June 2011 the respondent committed a robbery on Miss Betty O'Donovan, an employee in a bookmaker's premises in Wexford. The respondent wore a balaclava and was holding a hatchet when he demanded money from Miss O'Donovan. The amount stolen on this occasion was €1,570. This incident gave rise to a charge of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The respondent pleaded guilty to this charge.
  - (iii) On 20th July 2011 Miss Gaye Cussins was subjected to a robbery by the respondent. Miss Cussins was an employee of Boyles Sports Bookmakers in Wexford. The respondent entered the premises, waved a hatchet at Miss Cussins and demanded money. He stole approximately €1,570.00 and then left the premises. Other customers and staff were present in the course of this incident. The respondent was charged with one count of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He pleaded guilty to the charge.
5. The respondent was born on 16th August 1978. He was thirty two years of age at the time he committed the offences. He has a history of depression and a gambling addiction. He joined Gamblers Anonymous and attended mental health services between 2005 and 2009. He undertook a FAS course in 2007 and obtained six City and Guilds certificates which lead to an eleven month work experience placement with an architectural firm in Wexford in 2010/2011. At the time of the commission of these offences, the respondent was training as a lab technician with Waters Technology in Wexford. That employer was sufficiently impressed with the respondent to keep his job open for him despite their knowledge that he had committed these offences. He had two relevant previous convictions, dating back to 2004, for attempted robbery and robbery, respectively. He received a two year suspended sentence in respect of each of these, the last being imposed on 6th February 2007.
6. At the sentencing hearing, a number of character witnesses gave evidence. Two individuals who were members of Gamblers Anonymous waved their anonymity to give evidence in support of the respondent. Psychiatric evidence was heard in relation to the respondent's mental health difficulties over the years. Mr. Brian Glanville, a consultant criminal psychologist, also gave evidence. A detailed probation report was also made available to the court. That report was positive and indicated a low risk of re-offending on

condition the respondent continued to take his mediation. The respondent's psychiatrist, Dr. O'Donoghue, indicated his concern that the respondent would not function well in prison. Victim impact reports were provided to the court on behalf of the victims in these incidents. All referred to the enormous affects on their lives as a direct result of their confrontation with the respondent. Clearly in each of the cases, it could be said that their lives have been partially destroyed as a result of their experiences.

7. The learned sentencing judge took a number of mitigating factors into account, describing them as; *a large number of mitigating circumstances*. In this respect, he referred to the medical reports, the probation report, the low risk of re-offending, and what he described as the respondent's genuine remorse. He was also clearly impressed by (as described by him), the *outstanding* support for the respondent from the Aiseiri addiction and gambling treatment centre in Roxboro, Wexford. The respondent was an in patient in that institution between 26th August 2011 and 23rd September 2011. The respondent is currently studying for a four year BSC Honours Degree in Software Development in Carlow Institute of Education. He begins his last year in that course in September this year.

8. In his sentencing judgment, the learned sentencing judge stated the following:-

*"I have to balance everything. I not only have to consider the deterrent factor that features in all criminal trials; I have to consider rehabilitation. As I have said, I am impressed with his efforts to rehabilitate but I have to concern myself with the public as well. He comes here, perhaps maybe uniquely, because of the medical background as set out by Dr. O'Donoghue.*

*I have considered this case long and hard. It is most tempting to impose a custodial sentence in this case, and it is not to say that Mr. O'Leary is not deserving of a custodial sentence in this case. Unfortunately, there is no in between. There is no place that judges can put addicts - and gambling addicts - as distinct from other criminals but that is what he is. He is a man with a criminal record and he has pleaded guilty to three very serious criminal crimes. I will take on board the plea that has been made on his behalf. It seems that during the period when he was on a suspended sentence he applied himself and did what he should have done, took his medication and did not involve himself in more crime. I am conscious of the fact that there are three broken women now as a result of what he has done, and people like those three women look to the court for protection.*

*I do believe that he is a special case".*

9. The learned sentencing judge went on to impose lengthy prison sentences, but suspended the entire of these on condition that "he continues and undertakes to continue his treatment in Aiseiri, that he liaises with the Probation Service, that he engages with the Probation Service in an effort in some form of restorative justice to try and explain his situation to the injured parties, if they are so willing to receive contact with him at some stage, either through correspondence or meeting him in a supervised situation.

10. Undoubtedly these offences are particularly serious. The fact that on each occasion the respondent confronted middle aged women with an axe marks out the offences as particularly reprehensible, albeit it in circumstances where no physical injuries were inflicted. The victims have understandably been left severely traumatised as a result of their experience.

11. Individuals who engage in criminal conduct which involve the use of a weapon, and more particularly those who engage in robbery accompanied by the use of weapon and the threat of violence, invariably receive custodial sentences. In such cases, the more usual practice, where there are strong mitigating factors, such as, as in this case, a plea of guilty is for a court to impose a prison sentence, partly custodial and partly suspended.

12. Of course every case is different. A court, in sentencing an individual, must have regard to the particular crime as well as the particular criminal. In *State (Standbridge) v. Mahon* [1979] I.R. 214 at p. 219, Gannon J. stated:-

*"The first consideration in determining sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others, but also by affording a compelling inducement and an opportunity to the offending to reform. The punishment should be appropriate not only to the offence committed, but also to the particular offender."*

In *DPP v. McCormack* [2000] 4 I.R. 356 (CCA), Barron J. stated (at p. 359) that:-

*"Each case must depend on its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by the accused."*

13. In this case it is very clear that the learned sentencing judge, while, on the one hand, recognising the seriousness of the crimes in question and the enormous impact they have had on the victims, on the other hand considered very carefully the respondent's medical and personal history. He was clearly impressed by the extent of his remorse and his efforts at rehabilitation, not least the fact that he was currently entering into the final stages of a four year BSC degree course. Undoubtedly, his approach to sentencing the respondent was careful and considered. Nevertheless it is this court's view that, having regard in particular to the very serious nature of the crimes in question and the effect they have had on the victims, the sentence was lenient to the extent that the terms of imprisonment (and which were quite appropriate in the circumstances) were suspended in their entirety. A more appropriate overall sentence would require that the respondent spend some time in prison, followed by a lengthy suspended period to account for the various mitigating and other factors in the case. The issue for this court is however; was this lenient sentence unduly lenient? It is the view of this court that the sentence as imposed by the learned sentencing judge, and more particularly, his decision to suspend the entire of that sentence, was unduly lenient, and the Director therefore succeeds in this application.

14. It is necessary now for this court to impose its own sentence on the respondent. The respondent is nearly thirty seven years of age. He has served two and a half years of the three year period of suspension, and has remained out of trouble during this period. To his great credit he has embarked on a difficult course of education, and will shortly be entering into his final year of a four year BSC degree course. There is reason to believe, therefore, that the respondent has very significantly rehabilitated himself and has honoured the chance provided to him by the learned sentencing judge nearly three years ago. It is the view of this court, in all the circumstances, that the imposition of a custodial sentence at this remove which would require him to spend a period of time in prison would be counter productive, and would serve no useful purpose. Indeed, there is reason to be concerned that such a step would undo much of the good which has clearly taken place over the past three years or so in terms of the respondent's rehabilitation. It is therefore the decision of this court that the appropriate sentences will be the terms of imprisonment as imposed by the learned sentencing judge, but on the basis that the said prison terms will be suspended for a period of ten years on the same conditions as

were imposed by the learned sentencing judge.