



THE COURT OF APPEAL

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

Appeal No.: 186/2015

Between

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Paul Coady

Appellant

Judgment (ex tempore) delivered on 18th day of April 2016 by Mr. Justice Mahon

1. The appellant was convicted of one count of assault contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 on 25th November 2014, having pleaded guilty, at the Circuit Criminal Court sitting at Clonmel in Co. Tipperary. The appellant was sentenced on 29th April 2015 to a term of imprisonment of five years (to date from 29th April 2015) with the final one year suspended for a period of three years. This is an appeal against sentence.

2. On 11th June 2012 the victim of the assault and a friend were socialising in a licensed premises in Carrick On Suir, when an incident occurred involving the victim and the appellant's parents. Later in the evening, while the victim and his friend were walking home, a taxi pulled up, and out of the taxi alighted the appellant and his brother (and co-accused), who ran towards them. The appellant punched the victim to his head and as a result he fell backwards onto the ground. The appellant then kicked him in the head. While the victim was on the ground he was unconscious. As he attempted to struggle to his feet, a co-accused hit the victim with a bottle smashing it on impact. The co-accused pushed the broken bottle into the victim's face while the appellant continued to kick the victim "like a football". The assault was apparently initiated by the appellant.

3. The injuries sustained by the victim were extensive. They included severe swelling to his face, bruising around the ear, lacerations in the central frontal area of the forehead requiring suturing, lacerations to the left cheek requiring suturing. By any account, the assault was quite vicious and the victim was fortunate not to have sustained even more serious and long term injury. He has been left with scarring on his left cheek and forehead.

4. The victim also suffered psychological trauma as a result of the incident. In his victim impact statement he has described how he has become a prisoner in his own home, fearful to venture out. He has suffered from depression, loneliness and frustration as a result of his experience. He has also stated that the lack of remorse shown to him by the appellant is a matter of concern for him. He has expressed an anxiety to sell his home and move away. The incident has clearly had a devastating effect on the victim.

Previous convictions

5. The appellant has thirty four previous convictions, including two s. 3 assaults, one s. 15 Misuse of Drugs Act offence, one criminal damage offence and a large number of public order offences.

The grounds of appeal

6. The following grounds are relied on by the appellant:-

(i) The learned sentencing judge wrongly used the sentencing of the appellant to make a statement about his perception of an increase in assaults in the town where this assault occurred;

(ii) the learned sentencing judge failed to accurately place the particular offences committed by the particular appellant the appropriate position along the spectrum of gravity for such offences;

(iii) the learned sentence judge imposed a sentence that was perverse having regard to the respective levels of involvement as between the appellant and his co-accused;

(iv) the learned sentencing judge gave undue weight to the aggravating factors in the case and consequently imposed a sentence that was disproportionate, overly harsh and wrong in principle.

(v) the learned sentencing judge was wrong to impose the maximum sentence available under the law in circumstances where the appellant had entered an early plea of guilty and in light of the other mitigating factors;

(vi) the learned sentencing judge failed to give an unconditional reduction in sentence for the mitigating factors;

(vii) the learned sentencing judge gave insufficient weight to the mitigating factors in the case when taken individually and in their totality, and consequently gave too modest a reduction in the overall scheme of the sentence.

(viii) the learned sentencing judge failed to have any or any adequate regard for the personal circumstances of the appellant.

The co-accused's sentence

7. The co-accused (a brother of the appellant) received a sentence of five years, but with 50% of the term suspended, compared with the appellant's 20% of his five year term suspended. The co-accused was two years younger and while he had less previous convictions than the appellant, one of these concerned violent disorder and another assault causing harm. The co-accused had visited the victim in his home after the assault and had apologised for the incident, and in so doing indicated greater remorse than was shown by the appellant.

The sentencing judgment

8. In the course of his judgment, the learned sentencing judge remarked on the increased level of crime involving personal violence noticed by him in the town of Carrick On Suir in the course of his work as a judge. The following are extracts from his sentencing judgment:-

"... This at least is the fourth significant instance of bad section 3 assaults in a public area of Carrick on Suir that I can recall, and one of those involved two separate victims on two separate occasions. In addition to that, there has been before the court a charge of affray involving several men who fought openly near a busy supermarket in broad daylight on one occasion, and another where the gardai, a number of gardai were threatened with a axe by a very violent individual. ... It is unfortunately the case that the level of violent crime in Carrick On Suir has increased significantly, and as the main sentencing judge for this County, I cannot disregard that fact.

...It is something which it seems to me the court should take into account to some extent because deterrents is one of the factors which a judge has to have regard to in sentencing and I am in probably a better position than many judges might be who come here, who come here for individual sessions. Now, with regard to the crime I am dealing with here, I have to say that if all of those s. 3 cases from Carrick on Suir and indeed elsewhere in the circuit that have come before me, for the savagery of the attack, this is the worst, and I cannot ignore that fact. There was a graphic account referred to in the evidence of Sgt. Barrett, which was a description by Mr. Foley, the unfortunate man who accompanied Mr. Hall, the injured party on the night, when he referred to Mr. Hall's face being opened up, and very obviously the attack on Mr. Hall was one of unbounded savagery, and the court cannot disregard that fact.

... Now, it is certainly the case that Paul Coady's previous convictions are considerably worse than those of his brother, but those of Alan Coady are significant also in relation to this crime. Both men, it seems, have had a capacity to abuse alcohol in the past. Whether they are victims of alcoholism is not clear to me, but both certainly have had a tendency on numerous occasions to binge drink, and this is a crime which was committed while both men had a lot of drink taken. So I have to regard that as an aggravating factor. And then there is the factor that Paul Coady has been placed at a high risk of re-offending by the Probation Service, by Mr. O'Brien. Mr. Alan Coady has been placed at a moderate risk.

... This is a case which is at the very highest end, and for that reason, is one of those rare cases where a plea of guilty is entered where a maximum sentence is warranted.

... In each case I am imposing a sentence of five years imprisonment. In the case of Paul Coady, I am suspending the last year of that sentence for a period of three years from his release and I say that advisedly in relation to somebody who has such a history of violence. In the case of Alan Coady, I will suspend the last two and a half years of that sentence ..."

9. The submission in relation to the imposition of the maximum five year headline sentence is that it was unduly harsh having regard to the mitigating factors, and especially the plea of guilty. It is contended that the circumstances of the assault are not such as should fairly or reasonably categorise the offence as one which should attract the maximum sentence of five years in circumstances where there had been a plea of guilty, as contemplated by s. 29 of the Criminal Justice Act 1999. Section 29 is the statutory sanction for the imposition of a maximum sentence notwithstanding a plea of guilty, such as, as suggested to the court, occurred in *DPP v. Z* [2014] IECCA 13, where a life sentence was imposed for rape notwithstanding a plea of guilty.

10. The sentence imposed on the appellant, while nominally the maximum sentence was, in practical terms, a four year custodial term. It does not, in reality, amount to the imposition of the maximum sentence in the context of s. 29 of the 1999 Act, as the sentence imposed incorporated within it an effective 20% discount in recognition of the mitigating factors (including the guilty plea). It is therefore misleading to seek to explain the sentence in the context of s. 29 of the 1999 Act.

11. It was also submitted that the imposition of a five year sentence for a s. 3 assault was excessive simply because some s. 4 assault offences will appropriately attract sentences of considerably less than five years. However, such a comparison on that basis alone is simply unsustainable and unrealistic. Put simply, an upper end, (in terms of gravity) s. 3 assault will, on occasion, be significantly more serious than a lower end (in terms of gravity) s. 4 assault. Additionally, there will be a host of other factors which will properly, on occasion, result in a s. 3 assault attracting a stiffer sentence than a s. 4 assault.

12. Insofar as the differentiation between the sentences of the appellant and his brother is concerned, the court does not consider as unreasonable the decision of the learned sentencing judge to suspend 20% of the custodial term in the case of the appellant, and 50% of the custodial term in the case of his brother, the co-accused. Significant differences between the two, in terms of the sentencing process, were identified by the learned sentencing judge, including the co-accused's lesser number of convictions, the co-accused's visit and apology to the victim of the assault and the more positive probation report on the co-accused. While, arguably, particularly having regard to the co-accused's use of a bottle in the assault, his sentence might be said to have been lenient, that fact cannot of itself undermine the sentence imposed on the appellant.

13. The circumstances of the assault were such as strongly indicate that the two brothers acted in effect as part of a joint enterprise, the co-accused using a bottle and the appellant using his fists and his boot. Both continued to very viciously assault the victim while he lay defenceless and probably unconscious on the ground. No effort was made by either to restrain the other. On this basis, the decision to impose the same headline maximum sentence was reasonable. The only issue is, was the decision to differentiate the two in terms of the suspended elements in the sentences such amount to an unfairness against the appellant, and therefore an error of principle? The court is of the view, for the reasons already indicated, that there was no such error of principle.

14. In relation to the facts of the case, it is absolutely clear that the assault, and the involvement of both brothers, was very serious and quite merciless in terms of its viciousness. The incident was understandably and correctly viewed by the learned sentencing judge as being "*at the very highest end*" in terms of its gravity.

15. The imposition of a five year sentence with the final twelve months suspended for this assault, given the lengthy list of previous convictions, including convictions for violent assaults, was not unreasonable and was within the range appropriate for this type of offence and within the discretion of the sentencing judge.

16. The appeal is therefore dismissed.