



THE COURT OF APPEAL

Record Number: 265/2023

Bill Number: DUDP 637/2021

Birmingham P.

Ní Raifeartaigh J.

MacGrath J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC

PROSECUTIONS

RESPONDENT

-AND-

DEAN MARTIN

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 27th day of June 2024 by Ms.

Justice Ní Raifeartaigh

Issue

1. This is an appeal against severity of sentence. The appellant pleaded guilty to one count of attempted robbery and sentenced to 3 years imprisonment with the final 12 months suspended. The main point urged on the Court is the sentencing judge failed sufficiently to take into account that he had previously received a sentence for 4 years with 12 months suspended in respect of a similar offence committed extremely close in time to the instant offence, and had served the custodial element of that prior sentence and was engaging in rehabilitation at the time of the later sentence. It is said that the “relatedness” of the two offences should have led to a greater reduction in the later sentence in order to respect the totality principle.

Evidence at the sentencing hearing

2. The sentence hearing took place on 2nd November 2023 in the Dublin Circuit Criminal Court before Judge Orla Crowe. As a result of a call from a takeaway restaurant in Finglas on the 24th March 2020, members of An Garda Síochána attended the premises where the owner of the business, which was a family business, reported that an attempted robbery had taken place at approximately 11pm. He said that a male had entered the takeaway, jumped on the counter brandishing a broken bottle, and demanded money from the till, putting him in fear. In a statement given to Gardaí later, the owner described how the takeaway had been empty but for himself and a female colleague when the male came in. He gave a detailed description of what the man looked like and what he had been wearing. He described being terrified and his female colleague also described herself as being shocked and scared. The owner said he took up a hurl which he had behind the counter and the male left the premises once the hurl was produced. Nothing was taken during the attempted robbery. There was

CCTV footage of the premises from which the appellant was identified as the male who came into the takeaway. Certain items which matched the owner's description of what the male was wearing were found in a laneway close to the takeaway and DNA profiles which matched the appellant's were found on a number of these items.

3. When the appellant was interviewed in respect of the offence, nothing of evidential value was forthcoming. He sought and obtained a trial date in respect of the offence but indicated he would plead guilty the week before the trial was due to and entered a plea of guilty on the 4th July 2023.

4. Another similar-type robbery was reported as having taken place in Ballymun within 35 minutes of the incident. and the appellant had been sentenced to four years imprisonment with the final year suspended in respect of that offence by the time of the sentence hearing in the instant case. Moreover, he had served the custodial element of that offence and had been released from prison some 7 months earlier and was engaging in rehabilitative efforts.

5. The appellant had 80 previous convictions, 5 of which were dealt with in the Circuit Court and 75 of which were dealt with in the District Court. He had one for assault; one for robbery; 44 for theft; eight for public order; four for unauthorised taking of pedal cycles; one for handling stolen property; four for criminal damage; one for production of an article in the course of a dispute; five for burglary; seven for failing to appear; two under the Misuse of Drugs Act; and two for possession of knives.

6. A number of documents were put before the sentencing court; a probation welfare report, a psychological report, a Safe Pass expiring in June 2027, and certificates in respect of three courses completed in respect of construction and related skills.

7. The personal circumstances of the appellant were set out in the reports and in the plea in mitigation. The appellant was 29 years old at the time of the sentencing hearing and 26 years old at the time of the offence. He had a difficult upbringing the details of which are not necessary to set out here. He began using drugs in his teenage years, became addicted to benzodiazepines and developed a difficulty with cocaine. This led to his offending in order to fund his addiction.

8. Counsel for the appellant submitted that the appellant had engaged very well with Probation Services and demonstrated good insight into the effect of his crime on the victims. The appellant instructed his counsel to convey his apology to the victims and to the Court. At the time of the sentencing hearing, counsel submitted that the appellant was taking positive steps towards a more pro-social life including; attending with the Spellman Centre for addiction, moving from the area he was brought up into the city centre; playing football with a local club; completing courses to improve his chances of employment (in this respect it was also indicated that the appellant had a Safe Pass); living in a 'constructively supportive' environment with his partner and her children (for home he was effectively *in loco parentis*). Counsel for the appellant also noted that the appellant had already served a three year sentence in relation to an incident which occurred about 35 minutes after the offence in the instant case, and that had the appellant taken a different course and dealt with the matter at an earlier stage there was some likelihood that the instant matter would have been 'wrapped up' with the sentence that was imposed.

Sentencing Remarks

9. The judge, during her sentencing remarks, observed that he had pleaded earlier he might have dealt with the case along with the other robbery committed on the same day for which he had served a sentence but did not choose to do so. She noted that there were no

victim impact statements but said that the offence must have had a significant impact on the employees of the takeaway. She noted the appellant's age, his previous convictions, and his personal circumstances as well as the contents of the Probation Report and the indication therein that they considered they could work with him in the future. She identified the following aggravating factors; the appellant's brandishing of the broken bottle and the jumping on a counter at two employees, and the appellant's numerous relevant previous convictions. In mitigation she identified the plea, albeit that it was a late plea; and the efforts he was making to rehabilitate himself.

10. The sentencing judge nominated a headline sentence of 4 years. She reduced this to a sentence of 3 years in light of the mitigating circumstances. She suspended the final 12 months for a period of two years on condition that he keep the peace and be of good behaviour, attend all appointments with his probation officer, continue to engage with addiction support programmes, engage in offence-focused and victim impact work, and inform the Probation Service of any change in contact details and addresses.

The appeal

Submissions of the appellant

11. The central submission made on behalf of the appellant is that the sentencing judge erred in failing to consider the principle of totality in sentencing, particularly in light of the "relatedness" of the instant offence and the robbery committed shortly afterwards, resulting in a sentence that was disproportionate and excessive. He relies on the approach to interrelatedness taken in *The People (DPP) v Redmond* [2022] IECA 44 where it was said that offences may be treated as a continuum of offending where there is, *inter alia*, temporal contiguity and commonality of *modus operandi*. The appellant submits that there should

have been an express discount to take account of the relatedness of the offences and that the failure to do this was an error in principle. The appellant also submits that the sentencing judge, in failing to take account of the relatedness of the two offences, erred in imposing a sentence that was disproportionate in all the circumstances and failed to have sufficient regard to the principles of proportionality and totality. The appellant relies on *The People (DPP) v RMcC* [2008] 2 IR 92 in respect of the principle of proportionality and on *The People (DPP) v Crowley* [2021] IECA 178 in respect of the principle of totality. The appellant also submits that the sentence was a ‘crushing’ one when seen in light of the previous, related, sentence recently served by him and given the progress he was making in his life while in custody and since his release.

12. The appellant submits that the fact that he did not enter an early plea to this offence did not render irrelevant the fact that he had been sentenced already in respect of another offence committed 35 minutes after this one. He submits that, had the two been dealt with by the same sentencing judge at the same time, it is likely that there would have been a reduction in the overall global sentence to take account of the principles of totality and proportionality. He submits that there was an element of impermissible double counting in the manner in which the sentencing judge treated his failure to enter a guilty plea in respect of this offence.

13. He further submits that the sentencing judge erred in failing to have due regard to the rehabilitation of the appellant, and that a fully suspended sentence would not have been inappropriate given the strides towards rehabilitation which were being made by the appellant. With regard to the importance of rehabilitation as a sentencing principle and the appropriateness of suspended sentences, the appellant cites *The People (DPP) v Hall* [2016] IECA 11 and *The People (DPP) v Barnaville* [2018] IECA 351.

Submissions of the Director

14. The Director cites *The People (DPP) v Casey and Casey* [2018] IECA 121 and submits that the factual matrix of the appeal, when viewed in the context of the other offence of robbery that he committed on the same evening and to which he pleaded guilty in 2021, involved a ‘*spree*’ of multiple similar type offences (one of which was at the time of sentencing a recorded previous conviction) which was correctly treated as an aggravating factor by the learned sentencing judge.

15. The Director points out that a plea of guilty was not entered until the morning of the trial date on the 4th of July 2023, over three years from the date of the offence, and over two years from the date upon which criminal proceedings commenced before Dublin Circuit Court. In such circumstances, the injured party, civilian witnesses and An Garda Síochána had prepared for a fully contested trial and no admission of guilt or expression of remorse was indicated either formally or informally until a few days prior to the trial date. In those circumstances, the later plea of guilty was of reduced value and was properly so treated by the judge.

16. The Director submits that the sentencing judge carefully engaged with the evidence in respect of mitigating factors and rehabilitation. She submits that the judge gave appropriate weight to the mitigating factors and reduced the sentence from four to three years, and that the judge incentivised rehabilitation by suspending the last 12 months. The Director submits that this reduction and suspension may be considered generous in circumstances where the probation report placed the appellant at a high risk of reoffending.

Discussion and Conclusion

17. It is clear that the essence of the appeal is that the sentencing judge erred in failing to have sufficient regard to the proximity of the offence in time to another offence to which he had pleaded guilty and been sentenced in 2021, and effectively laid the fault at the appellant's door for not pleading guilty at an earlier point in time. In effect, counsel invites the Court to take the view that the sentence should have been fully suspended by reason of the fact that he had already served the custodial element of the first sentence and was engaging in strong efforts at rehabilitation by the time he came to be sentenced for this offence.

18. It seems to the Court that what is overlooked in the appellant's argument is that the judge who sentenced the appellant in 2021 was not aware that the appellant had also committed another similar offence within a 35-minute period. Had that judge been so aware, he or she would undoubtedly have factored that into the sentence and the fact that there were two and not merely one offences within the same time period would undoubtedly have affected the overall sentence. The judge who sentenced the appellant in 2023, in contrast, was acutely aware of the fact of there having been an earlier sentence in respect another offence on the same night. She had all the information about his rehabilitative efforts before her and it cannot be said that she failed to take it into account. The Court is of the view that she was within her range of discretion in dealing with the matter as she did, and that the appellant did not have an entitlement, as it were, to a fully suspended sentence (or a sentence with a greater element of suspension) by reason of the "relatedness" of the two offences. If one considers the overall effect of both sentences, for a person with as many previous convictions as the appellant to receive such a sentence for two robberies on the same night

was not excessive or disproportionate, notwithstanding his attempts at rehabilitation. The overall effect was that he would serve no more than 5 years in custody.