



**THE COURT OF APPEAL**

**Record Number: 189/2018**

**Birmingham P.  
McGovern J.  
McCarthy J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**KENNETH MCINERNEY**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 1st April 2019 by Mr. Justice McCarthy**

- 1.** This is an appeal against the severity of the sentence of three and a half years' imprisonment imposed on a count of violent disorder, the appellant having entered into a signed plea of guilty in the District Court which he affirmed in the Circuit Court after his return for trial.
- 2.** The offence in question took place on June 25th 2017 in Cork City Centre. A group of people had gathered outside a bar whilst another group which included the appellant passed by. An argument broke out after some of the passers- by sought cigarettes from the former group.
- 3.** The fight settled down after a barman intervened but then began again, resulting in a number of brawls which broke out on the street. The appellant had been at the side lines at the beginning but became involved when the fight restarted. He concealed a glass bottle under his top and he attempted to strike another man over the head with it. He made an attempt to kick another male during the course of the fight before he retrieved a pint glass from a table and threw it at the opposing group. He lifted a chair over his head and threw it at another man on the street. The whole incident was captured on CCTV.
- 4.** The appellant had nineteen previous convictions dating from 2011 including two for robbery and one for s.3 assault, for which he received an eighteen-month sentence with five months suspended. The other offences include one for arson, one for theft, three for criminal damage, two under s.3 of the Misuse of Drugs Acts and six in respect of public order matters.
- 5.** The appellant was subject to a four month suspended sentence on a charge of criminal damage at the time of the present offence. He was 22 years of age at the time of sentencing. He had been in State care as a child and was living rough and in emergency accommodation in the city. He has a history of alcohol and substance abuse. In mitigation the chaotic nature of his personal circumstances was brought to the courts attention.
- 6.** He entered the plea of guilty at the first available opportunity. He indicated his remorse and his wish to deal with his substance issues. The appellant was sentenced along with a co-accused, Mr. Hassett, who was also involved in the incident apparently from the beginning. It is being sought on this basis to draw a distinction between the extent of the moral culpability of the appellant and that of Mr. Hassett.
- 7.** We think that since the extent of the appellant's violence was more significant than that of Mr. Hassett, in particular that he used a glass, the shorter duration of his involvement counts for little. A third co-accused was sentenced to a term of one-years' imprisonment but we do not have sufficient detail about him to comment on it one way or the other.
- 8.** We reiterate, however, that if arguments as to supposed disparity of treatment are to be advanced, it is essential that arrangements are made to ensure that all relevant transcripts are before the court.
- 9.** The appellant submits that the trial judge erred in principle in: -
  - (1) Failing to have any or any adequate regard to the mitigating factors associated with the appellant.
  - (2) Failing to have any due regard to the appellant's plea of guilty.
  - (3) Failing to have any regard to the principle of parity.
  - (4) Failing to first canvass with counsel an authority upon which the sentencing judge cited and appear to rely on in imposing sentence.

**10.** The fourth ground is based upon the proposition that the sentencing judge had regard to a comparator, namely, *the Director of Public Prosecutions v. Sweeney* without telling counsel in advance that he proposed to do so. We cannot see that any possible criticism could be levelled against the judge for adopting this course. An experienced judge is entitled to draw upon case law to guide him and does not necessarily have to apprise counsel in advance of the fact, or obviously that he will have regard to established principles. We therefore reject this ground of appeal.

**11.** We think that the first and second grounds can be dealt with together. The appellant submits that imposing a sentence, the sentencing judge made no reference to the appellant's young age only making reference to his "difficult personal circumstances". It is submitted that the judge erred in principle in failing to have any or any adequate regard to his difficulties with alcohol and the developmental difficulties associated with the combination of the two.

**12.** The judge did reference the appellant's plea of guilty but it is submitted, failed to note the fact that the plea was signed in the District Court and subsequently affirmed. Equally the judge appeared to minimise, it is said, the effect of the plea of guilty, noting that the appellant was caught red handed on CCTV and thereafter, making no reference to the manner in which he approached the proceedings. The plea of guilty, it is submitted, merited significantly greater credit and particularly in circumstances where this was entered at the first available opportunity.

**13.** The respondent submits that having identified a headline sentence in respect of the gravity of the offence at five years' imprisonment, the judge discounted the sentence to reflect the mitigating factors applicable and imposed, properly, a sentence of three and a half years. Further in relation to the plea of guilty it is submitted that the judge acted correctly and in accordance with the jurisprudence of the Superior Courts.

**14.** In noting that the appellant was caught "red handed" and that such circumstances the extent of reduction which a guilty plea entered in other circumstances might attract. The appellant submits that the judge failed to have regard to the factor of the relative culpability of the appellant and his co-accused.

**15.** It seems to us that the Circuit Judge was perfectly entitled to take the view he did, that there was a lesser degree of culpability attached to the behaviour of Mr. Hassett. We do not have sufficient information, as we have said, to comment upon the case of the third co-accused.

**16.** There is no general rule to the effect that the offenders must be treated in the same way or similarly in respect of given offences. Each offender must be dealt with individually and thus, even if, say, an unduly lenient sentence was imposed on one offender, one could not thereby justify a similar error in the case of another.

**17.** It seems to us that this is one of those cases where the Circuit Judge on the face of the transcript, took all relevant matters into account when sentencing the accused. There may of course may be cases where notwithstanding the fact that the judge, as here, did so, an error of principle nonetheless arises by virtue of the severity of the sentence. Whether or not the severity of a sentence constitutes an error of principle must be a matter for a judgment on a case by case basis.

**18.** The court must be careful however, not to substitute its own view of what might or might not have been an appropriate sentence at first instance, and must have due regard to the wide margin of discretion vested in the trial judge. However, in the present case we think that an error in principle arose by virtue of the severity alone of the sentence.

**19.** We think that the headline sentence of five years' imprisonment was excessive. We think that the mitigating factors were not given sufficient weight. This is especially so because the plea of guilty was signed in the District Court and affirmed when the appellant was returned. Such signed pleas of guilty are of particular weight.

**20.** We do not think that the sentences imposed by the co-accused were unduly lenient on the information available to us but the treatment of the appellant was more severe.

**21.** We think that the mitigating factors properly gave rise to a reduction in the penalty to approximately three and half years' imprisonment but we think that it would have been appropriate in the circumstances to suspend the last year thereof and we shall accordingly allow the appeal and substitute a sentence of three and half years' imprisonment, the last year whereof we shall suspend. We will do so on the terms that the appellant enter a bond to keep the peace and be of good behaviour for a period of twelve months subsequent to his release.