



## THE COURT OF APPEAL

Sheehan J.  
Mahon J.  
Edwards J.

Appeal No.: 281/2015

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

Liam McCann

Appellant

### Judgment of the Court delivered on the 19th day of July 2016 by Mr. Justice Mahon

1. The appellant was sentenced on 13th November 2015 at Wexford Circuit Criminal Court to concurrent sentences of eighteen months, eighteen months and three years (with the final six months suspended), respectively, in relation to three counts, to which he pleaded guilty, namely:-

- Damaging property contrary to the provisions of s. 2(1) of the Criminal Damage Act 1991.
- Unlawful use of a mechanically propelled vehicle contrary to the provisions of s. 112 of the Road Traffic Act 1961, as amended by s. 65 of the Road Traffic Act 1968 and by s. 18 of the Road Traffic Act 2006.
- False imprisonment contrary to s. 15 of the Non Fatal Offences against the Person Act 1997.

2. The appellant has appealed against these sentences.

### Background facts

3. On 11th August 2014 at approximately 4p.m. the appellant forcibly entered the home of Mrs. Kathleen Brown in Co. Wexford. At the time, Mrs. Brown was caring for her three young children, aged one, five and seven.

4. Having attempted unsuccessfully to enter the house by throwing himself against a living room window, the appellant threw a rock through a front sitting room window where Mrs. Brown and her three children were watching television. He then climbed in through the broken window and confronted Mrs. Brown and her children. He bundled the two oldest children, aged seven and five, into a cupboard in the kitchen, and closed its door on them. He proceeded to take two knives from the kitchen, holding one to his throat and the other in front of him waving it around. He was in a highly agitated state, and demanded that Mrs. Brown ring the gardaí. He was shouting that there were people after him. He then demanded that Mrs. Brown take the children into her bedroom, and to lock the door. Mrs. Brown suggested, in an effort to placate the appellant, that he would take her car. Some minutes later the appellant returned to the bedroom, knocked on the door, and when it was opened, he was seen to be holding a knife against his own neck. He then returned into the hall of the house, whereupon Mrs. Brown and his children ran from the house to a neighbour's house.

5. The appellant then stole Mrs. Brown's car but crashed it into a wall at the house. A neighbour attempted to detain the appellant but he escaped and ran through adjoining fields. On the main Bunclogh to Enniscorthy road he attempted to stop passing motorists. When a number of vehicles stopped he attempted to gain entry by banging heavily on their windows, but he did not succeed in doing so. He then waded across the River Slaney, and was found on the embankment of the river by Gda. Paul Quirke. He was taken to Gorey garda station but was deemed unfit for interview for a number of hours. When later interviewed by the gardaí he made full admissions as to what had occurred.

6. The incident was a terrifying ordeal for Mrs. Brown and her children. Mrs. Brown believed that she would be attacked and raped, and that her children would be harmed. She provided a very comprehensive victim impact statement.

### The grounds of appeal

(i) The learned sentencing judge erred in law and in fact in imposing a custodial sentence having regard to all of the circumstances of the case and the weight of the evidence;

(ii) the learned sentencing judge erred in law and in fact by placing disproportionate weight on the public interest in the deterrents of the commission of crime and failing to take any or any adequate account of the public interest in the rehabilitation of offenders;

(iii) the learned sentencing judge erred in law and in fact in confusing and / or conflating the issue of *mens rea* for the relevant offences with the issue of actual culpability and in particular attached undue weight to the unintended consequences of the *actus reus* of the relevant offences;

(iv) the learned sentencing judge failed to take sufficient account of the mitigating factors in his decision to suspend only the last six months of the three year sentence for false imprisonment

### The sentencing judgment

7. In his lengthy sentencing judgment, the learned sentencing judge stated, *inter alia*:-

*"As is well known a judge has many things to do in constructing and imposing a sentence. It's no harm to remind ourselves that most common law jurisdictions have developed general principles which, although they may not point to the quantum of punishment merited by any one offence, indicates facts which should point towards leniency or severity, and they include the principles that the maximum sentence should be reserved for the most serious variation of the*

*offence; that a guilty plea, which has been entered here, should ordinarily be rewarded with a discount; that offences arising from the one single incident should attract a concurrent, as opposed to a consecutive sentence; and that the absence of a previous criminal record, which is the case here, should be treated as a mitigating factor. These are all factors which I am obliged to take into account, and I do take them into account. And I have to balance and weight the aggravating factors with the mitigating factors and of course I have to take into account the common good and the public interest."*

8. He also commented as follows:-

*"Mr. Cody asked me to treat this as an unique case, and there are many features about it which are unique, but in a society which seems to have free access to drugs, and despite the fact that people seem to be unemployed are able to indulge in binge drinking not over one day but over three days copious amounts of alcohol, it is regrettable but unfortunately occasional that people run amok and go out of control. But there are consequences when that happens"*

and

*"..I accept that Mr. McCann didn't intend to hurt or interfere with anybody, that was not in his mind, but unfortunately he terrorised Mrs. Brown and indeed her husband and the two young children who were of age and the baby who was twelve months"*

9. The learned sentencing judge felt that in the circumstances he had no choice but to impose a custodial sentence. He stated that he recognised the great efforts that the appellant had made to rehabilitate himself, that it was his first offence, and that he had no previous criminal convictions.

### **The victim impact statement**

10. A comprehensive victim impact statement was prepared by Mrs. Brown. It is useful to refer to the following extracts from that statement.

*"On 11th August 2014 on a Monday afternoon, I experienced the most horrific ordeal. You are meant to feel safe and secure in your own home, well I don't anymore. That was taken away from me that afternoon. I feel terrified on my own in the house. I will never forget the noise of smashing glass and the kids screaming... The images of him trying to put the kids into a press and putting a knife to his neck will never leave me. The not knowing what he was going to do or what he wanted. We were so vulnerable. The things racing through my mind. Was he going to hurt the kids? How would I protect him? What if he hurts me, how would I keep them safe? What if he killed us or raped me? I didn't know how I was going to protect the kids and myself.. Emotionally, I am a broken person. No one can see the scars on the inside or understand what I went through that day, and I have to live with it for the rest of my life.. You never imagine anything like this could happen in your home or neighbourhood, you would see something like this on TV or in a movie. I wouldn't wish what I went through that day on anybody. As I said in this statement earlier, everyone, including me, is meant to feel safe and secure in their own home. This was robbed from me that day and I have to live with that horrifying day til the day I die."*

### **Discussion and conclusion**

11. Undoubtedly, this was a most serious offence. It involved the forcible entry into a family home and the terrorising of a mother and her three young children. It involved the use of a knife, albeit in circumstances where it was not pointed in a threatening fashion at any of the victims. Nevertheless they were in fear of their lives and were in a situation that for a relatively lengthy period they were extremely concerned for their safety. In particular, Mrs. Brown was terrified of what might happen to her young children, and she was also fearful of being raped.

12. While it is now accepted, in hindsight, that the appellant did not intend to physically harm Mrs. Brown or any of her children, and did not do so, the fact that Mrs. Brown believed that she and / or her children would be harmed is perfectly understandable in the circumstances. Mrs. Brown's detailed victim impact statement is testimony of the nightmare experience suffered by her and her young children and the extent to which the traumatic events of that occasion continue to affect her, and undermine her confidence in the safety of her own home.

13. Arriving at a sentence which is just and proportionate is never an easy task. It is invariably even more difficult in circumstances where, on the one hand, the offence is grave, and the affect on the victims is very serious and long term, while on the other hand, there are strong mitigating factors including, particularly, a plea of guilty coupled with a lack of previous convictions. It is generally the practice of the courts to, wherever possible, and whenever appropriate, avoid the imposition of an immediate custodial sentence for first time offenders, particularly where the offence is seen as very much out of character and unlikely to be repeated. All these factors are present in this case, to a greater or lesser extent.

14. Of particular relevance in this case is the fact that the appellant had no previous convictions and appeared to be acting on the date in question in a highly agitated and disturbed state but with no intention of physically harming anyone. These are all factors in his favour. In a comprehensive psychological report prepared by Dr. Kevin Lambe for the court below it was stated that the appellant was fit to plead in that he was aware of the nature and quality of his acts at the time of the alleged offences, and when the matter came into court for sentencing, and that he met the diagnostic criteria for depression at the time of the alleged offences. That report also suggested that the appellant was *"of low violence risk into the future, so long as he remains drug free"*. The abuse of alcohol and drugs over a prolonged period immediately prior to the offence were significant precipitating factors in its occurrence.

15. In an *ex tempore* judgment of this court on 20th April 2015, in the case of *DPP v. N.C.*, the following is stated:-

*"...It is well-established that a sentencing Court must direct its attention to the crime that was committed and the person who committed it. It is not the crime committed as a general concept or as being of a particular class, but the actual offence that the person before the Court committed. This is the primary determinant of sentence. What is the gravity of the crime that the guilty person committed? Relevant to this first question is what kind of crime was committed, what the particular circumstances were, how badly were other people affected, was lasting harm done, was there an antisocial element and any other matters that define severity of this class of offending. There may be features of the crime that make it more serious or less serious within the category of crime. For example, a sexual abuse crime committed by a person in a position of authority or trust is more heinous for that reason. That does not mean that if the crime was committed by a person who was not exploiting the advantage of his position, there will be mitigation to*

*that extent. The crime is still serious and is not mitigated by the absence of aggravation. Another aggravating feature is the extent of the impact on the victim. Impact reports from victims are intended to remind the Court of the consequences of the crime and in many cases they may be long-lasting and profound, such as often is reported in cases of sexual abuse. Indeed, it may be that the damage to the victim far outlasts any sentence imposed on the perpetrator."*

16. In this case, the court has been made fully aware of the extent of the impact on the victim, particularly Mrs. Brown. While it might be hoped that the affect of the crime on her very young children might disappear with the passage the time, it is clear from Mrs. Brown's victim impact report that the affects on her are *long lasting and profound*.

17. We are satisfied that, when sentenced in the court below, the fact that the appellant did not intend to harm Mrs Brown and the children was in fact taken into account. It is the view of the court that the effective sentence of three years with the final six months suspended was both measured and appropriate and sufficiently reflects, on the one hand, the seriousness of the crime and the long lasting effect on Mrs. Brown and her children, while at the same time recognising and taking account of the undoubtedly strong mitigating factors apparent, including those bearing on culpability. Indeed, if the appellant had callously intended the harm that he caused a very much higher sentence would have been warranted. However, the offences were still serious and fully merited the sentences imposed even after taking into account all relevant mitigating factors. We are also of the view that the suspension of the last six months of the three year sentence imposed for the false imprisonment offence was a sufficient measure to incentivise rehabilitation.

18. We find no errors of principle in the sentencing judge's approach and therefore dismiss the appeal.