



THE COURT OF APPEAL

Finlay Geoghegan J
Irvine J.
Hogan J.

131 CJA/14

BETWEEN/

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993
THE PEOPLE (at the suit of the DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

v.
JOSEPH CARBERRY

RESPONDENT

JUDGMENT of the Court (ex tempore) delivered on the 17th day of November 2014 by Mr. Justice Hogan

1. This is an appeal by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, against the leniency of two sentences which were imposed by His Honour Judge McCartan, on May 14th 2014. The accused pleaded guilty to two offences contrary to s. 3 of the Non Fatal Offences against the Person Act, 1997 ("the 1997 Act"). In approaching this question the Court follows the well known statement of principle contained in one of the earliest s. 2 leniency appeals, mainly that of *The People v. McCormack* [2000] 4 I.R. 356, 359 where Barron J., delivering the judgment of the former Court of Criminal Appeal, said that:

"In the view of the court, undue leniency connotes a clear divergence by the court of trial -from the norm and would, say perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend on its own 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 of the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties will depend on these two factors. It is only when the penalties below the range as determined on this basis that the question of undue leniency may be considered."

2. This is the approach which commends itself to this Court. So far as these offences were concerned it is striking that they were each committed within the space of a few minutes of each other on September 5th 2010. Mr. Carberry received two sentences of imprisonment in respect of these offences under s. 3 of the 1997 Act. Both sentences ran concurrently and both were suspended in their entirety. Before considering the question of undue leniency it is necessary first to narrate briefly the background to the two offences.

3. The background to the first offence was that Mr. Carberry saw a Ms. Karen Manley who had just purchased some cans of beer at a convenience store in O'Connell Street in Dublin. She saw Mr. Carberry (whom she knew as "Jody") coming to her with what was described as aggressive body language. He approached her and said words to the effect that "you are going to get it". Ms Manley then felt the impact of a knife on her, felt wet on her leg and after screaming she collapsed and was hospitalised. As it happens, the original consent to the release of medical records was lost. This, as we shall see, was also the case in respect of the other offence, so that in neither case is the medical evidence actually available to the Court. It is nonetheless clear from the evidence of the prosecuting Garda, Garda Gaffney, that Ms. Manley lost a significant amount of blood and there was a small puncture wound around her groin area. It is obviously unfortunate that the Court does not have these medical details, but that is nevertheless clear that the victim's injuries were potentially serious.

4. A few minutes later Mr. Carberry approached a Ms. Imelda O'Brien, whom he also knew. There was some screaming and shouting and then Mr. Carberry produced what appeared to be a steak knife. It is accepted that there was an injury to Ms. O'Brien's abdomen and to the left hand and that she required hospitalisation as a result. Unfortunately Ms. O'Brien died before the sentencing hearing, although it must be stressed that there was no suggestion that there was any link between these injuries and her untimely death.

5. The evidence before the Circuit Court was that Mr. Carberry has a bad criminal record of 36 convictions. They include 7 convictions for public order, 12 convictions for theft, 3 convictions for burglary and 3 convictions for possession of a knife. It has to be said in his favour that there are no previous convictions for violence. It would appear that the violence in these cases was essentially casual and random. In one case there appears to have been a dispute in respect of a cigarette and in the other it related to some previous argument.

6. Mr. Carberry is a fifty one year old man with a twenty seven year old daughter. He left school at thirteen and then obtained some casual employment in landscaping and in general labouring. Sadly, his life has been severely damaged by alcohol, cannabis and heroin and he was abusing heroin at the time of these instances. He was residing in basic hostel accommodation and then at one point he was residing with his brother in Coolock and then after been sentenced in May 2014 he is now residing again in a hostel.

7. In terms of mitigating factors there is the fact that Mr. Carberry clearly has had a difficult upbringing. He has had few opportunities in life. He has expressed remorse for these offences. It is of importance that there were early pleas of guilty in both cases and, perhaps, most critically of all, at the time of the sentence he was six months drug and alcohol free. His Honour Judge McCartan gave him one further chance, even though he acknowledged the existence of the offender's past bad record.

8. So far as these two offences are concerned, the court would first observe, although it is not critical in any way to our ultimate decision, that the learned Circuit Court judge erred in not applying one of the two approaches to sentence indicated by the former Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Ryan* [2014] IECCA 11, [2014 2 I.L.R.M. 98. But far more importantly the two year sentences actually imposed does not reflect the inherent gravity of the offences committed by this accused in these circumstances. These were two random and essentially unprovoked attacks on two defenceless victims, both of which required hospitalisation as a result. We are accordingly satisfied that the Director has met the s. 2 test and that these were unduly lenient sentences in respect of these offences committed by this accused in these circumstances.

9. The Court expresses no view at this stage on the suspension of the entire sentence by the trial judge having regard to the mitigating factors, particularly the question of the six months drug and alcohol free status of Mr. Carberry at the time of the sentence in May 2014. The Court will accordingly set aside these sentences in view of their leniency and proceed now to sentence Mr. Carberry. We invite the parties to make appropriate submissions as to sentence. We will also invite the parties to place, where

appropriate, any new material before us

10. The Court, having allowed the Director's appeal pursuant to s.2 of the 1993 Act and then having just heard further submissions from the parties, must now proceed to impose sentence.

11. For the reasons that are set out in the earlier judgment of the Court, we consider that these two offences fall into the upper end of the mid range of s. 3 offences. Applying one of the two approaches suggested by Clarke J. in Ryan, we consider that the appropriate sentence would be one of three years' imprisonment in both cases prior to giving any consideration to issues of mitigation.

12. We turn now to examine the mitigating factors. In this context we must stress that, having allowed the s. 2 appeal, the Court must now sentence Mr. Carberry having regard to the circumstances as they stand as of today's date.

13. We consider that there are exceptional circumstances which are personal to this accused which would justify the Court in suspending the three year sentences in their entirety. Mr. Carberry has, to his credit, succeeded in turning his life around since these two offences were committed in September 2010. In particular, since he was first granted bail by is Honour Judge McCartan in November 2013, he has been consistently drug and alcohol free. The Gardaí have very fairly acknowledged that he has not come to adverse Garda attention.

14. The Court will accordingly suspend on terms the entirety of this three year sentence. This sentence to run concurrently in the case of both offences with effect from the date of the original sentence, namely, 12th May 2014. The terms which the Court imposes are ones which are common in cases of this kind. They obviously include the requirement to keep the peace and to be of good behaviour for the three year period dating from 12th May 2014. But we will also stipulate that Mr. Carberry remain alcohol and drug free during the entirety of this period and that he place himself under the supervision of the Probation and Welfare Service. The Court specifically requires that he will abide by all directions in relation to drug treatment and counselling which are given by the Probation and Welfare Service.

15. These directions will include the requirement that he will provide all samples and urinalysis required by the Probation and Welfare Service, that he will attend all meetings required by Probation and Welfare Service and that he will notify the Probation and Welfare Service of his current address or any change in his contact details including, where appropriate, any contact telephone numbers. For the avoidance of any doubt we will stipulate that the directions in relation to drug treatment counselling will also include any direction in relation to treatment for alcohol addiction. The Court will further require that Mr. Carberry enter a bond in favour of the People of Ireland in the sum of €100 (with no lodgement to be required) with effect from 12th May 2014.