



THE COURT OF APPEAL

Record No. 273/2015

Sheehan J.  
Mahon J.  
Edwards J.

Between/

The Director of Public Prosecutions

Respondent

- and -

Gerard Browne (No. 2)

Appellant

**JUDGMENT of the Court delivered on the 9th February 2017 by Mr. Justice Mahon**

1. The appellant was convicted by jury at Portlaoise Circuit Criminal Court on 6th November 2015, following a three day trial, of one count of assault causing harm contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997. He was sentenced on 6th November 2015 to a term of three years imprisonment, consecutive to the lawful termination of the sentence currently being served by him. This is his appeal against that sentence.

2. The victim of the assault was one Stephen Cooper. Mr. Cooper and the appellant were both prisoners in the Midlands Prison on the 20th May 2014. Mr. Cooper was previously a member of An Garda Síochána, but was serving a sentence for offences contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended), fraud and perverting the course of justice. As a former member of An Garda Síochána, Mr. Cooper was afforded special protection within the prison.

3. On the 20th May 2015, as Mr. Cooper was being escorted to the prison gym, he was assaulted by the appellant and forcefully struck on the head two or three times with a mug concealed inside a sock. He suffered a serious head injury requiring a number of stitches. The incident was captured on CCTV and was witnessed by a prison officer.

4. The appellant admitted that he attacked Mr. Cooper in the manner described. He claimed however that Mr. Cooper had consented to being assaulted, having requested the appellant to attack him for the purposes of facilitating or orchestrating Mr. Cooper's early release from prison on the basis that the prison authorities would consider that his safety inside the prison was at serious risk. He alleged that Mr. Cooper agreed in return to provide him with certain documentation and information, as well as €1,000 in cash.

5. For his part, Mr. Cooper denied that he had consented to being assaulted in the manner described, or at all. He insisted that he had had no agreement with the appellant, as claimed by him.

6. Section 13 of the Criminal Law Act 1976 provides a sentence imposed for an offence committed in the course of serving a prison sentence shall be consecutive to the sentence then serving. Specifically it provides as follows:-

"13(1) Any sentence of penal servitude or imprisonment or of detention in Saint Patrick's Institution passed on a person for an offence committed while he is serving any such sentence shall be consecutive on the sentence that he is serving or, if he is serving or is due to serve more than one sentence, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment or detention in respect of those consecutive sentences shall not exceed two years.

(2) Subsection (1) of this section shall not apply in any case where the sentence being served or to be passed is a sentence of penal servitude for life or imprisonment for life.

7. In the circumstances of this case, s. 13 of the Criminal Law Act 1976 required that the sentence imposed in respect of this offence be consecutive to the sentence then being served by the appellant. That sentence is a lengthy prison sentence with a release date in 2020, and was imposed for offences of robbery, aggravated burglary, escaping from lawful custody and false imprisonment. The appellant has in total thirty nine previous convictions including burglary, false imprisonment, dangerous driving, misuse of drugs, theft, criminal damage and various road traffic offences.

8. The focus of this appeal, and essentially its only ground, is that there was an error of principle on the part of the learned sentencing judge in that he treated as an aggravating factor the commission of this offence while the appellant was serving a prison sentence and in circumstances where s. 13 of the Criminal Law Act 1976 already reflects an existing policy which dictates a protection to the sanctuary and smooth administration of prisons. It is submitted on behalf of the appellant that the learned sentencing judge wrongly enhanced the sentence by calculating it in a manner which amounts to the imposition of a double penalty.

9. The learned sentencing judge, in the course of sentencing the appellant stated the following:-

*"..well, I am conscious of the fact that the sentence is consecutive and I have taken that into account in my assessment of what the appropriate sentence is. Because it has to be borne in mind that this was a crime on top of a crime, basically the accused was in custody and he perpetuated this crime in the prison, which is an attack on the smooth administration of the prison and the courts have to deal with that as an aspect of the sentencing process and take it into account in determining the sentence."*

10. It is contended on behalf of the appellant that in effect, the learned sentencing judge was treating the fact that the offence was committed while already serving a prison sentence as an aggravating fact notwithstanding the fact that the s. 13 requirement that the sentence be consecutive is itself designed to inflict additional punishment on an individual because he commits a crime in the course of serving a sentence. It does so in the sense that a discretion to impose a concurrent sentence not available to the sentencing judge. It is further submitted on behalf of the appellant that the learned sentencing judge erred in assessing the offence

at "mid range" and in arriving at a headline sentence of three years and six months thus indicating that in reality he was treating the offence as in the "upper range".

11. The respondent maintains that the sentence imposed on the appellant, namely three years, was an appropriate sentence, and was not a sentence which reflected any increase on the basis that its commission in prison was treated as an aggravating factor by the learned sentencing judge, notwithstanding any comments he might have made to this effect.

12. The court is satisfied that in circumstances where a prison sentence is being imposed on a prisoner and is required to be served consecutively having regard to the provisions of s. 13 of the Criminal Law Act 1976, the fact that the offence was committed while serving a prison sentence should not be treated as an aggravating factor in the context of arriving at an appropriate sentence for the offence. An approach to sentencing the appellant on this basis would constitute an error of principle. In any event it is unclear from the remarks of the learned sentencing judge if in fact he did approach the sentence on this basis.

13. The court is also satisfied notwithstanding the fact that this particular aspect of the case was not heavily promoted by the appellant, that the totality principle applies in all circumstances where a consecutive sentence is being imposed. In *Sentencing Law and Practice 3rd Edition*, Prof. O'Malley observes that:-

*"When a court imposes a prison term on a person already serving a custodial sentence it should stand back and review the overall sentence to which the offender will be subject to ensure that it fairly reflects the totality of the offending."*

14. In *DPP v. Farrell* [2010] IECCA 68, O'Donnell J. stated:-

*"The imposition of a consecutive sentence carries with it a particular obligation to ensure that what is described somewhat clumsily as the "totality principle" is observed. It is a commonplace of many types of assessments that the consideration of the component parts risk sometimes missing or exaggerating the value of the whole. This observation applies in the context of sentencing because the construction of the sentence involves not just the identification of the harm to victims, but also an assessment of the culpability of the accused.*

*In the field of sentencing, it is certainly the case that there is a principle of totality, which requires that when consecutive sentences are employed, a court must be careful to take account of the overall impact of the sentence, the moral blameworthiness of the accused and the prospect of rehabilitation and therefore recognises that the total sentence in some cases should be less than the sum of the component parts."*

15. The sentence in this case was a net custodial term of three years. It is a significant sentence not least because it is necessarily added to the sentence already being served. It is as already indicated the court's view that, as submitted by the respondent, a sentence which reflects any increase because the commission of the offence occurred within the prison setting is an error because s. 13 of the Act of 1976 already provides for the same aggravating factor.

16. A sentence of three years imprisonment for this very serious offence however cannot be considered unduly harsh having regard to, in particular, the appellant's lengthy list of previous convictions, many of which are particularly relevant. Neither can the sentence be said to offend against the totality principle.

17. It is therefore not evident to the Court that the learned sentencing judge did in fact increase the sentence to reflect the fact that the offence was committed in prison as an aggravating factor. In any event the Court is satisfied that the sentence is an appropriate sentence for the offence in question.

18. The appeal is therefore dismissed.