THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 171/2015

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

SEAN FARRELL

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 2nd day of October 2018 by Mr. Justice Edwards.

1. On the 19th of May 2015, the appellant was convicted by the unanimous verdict of a jury sitting in Dublin Circuit Court of one count of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Persons Act 1997. The appellant was acquitted on one count of assault contrary to s. 3 of the Non-Fatal Offences Against the Persons Act 1997, and one count of criminal damage contrary to s. 2 of the Criminal Damage Act 1991.

2. On the 22nd of June 2015, the appellant was sentenced to eight years' imprisonment, with the sentence ordered to be backdated to the date at which he entered custody. The appellant appealed against both the conviction and sentence to this Court. On the 28th of June 2018, this Court refused the appellant's appeal against his conviction on all grounds. This judgment deals with the appeal against the severity of the sentence imposed at first instance.

Background facts
3. At the sentence hearing, Detective Garda David Jennings gave evidence as to the incidents forming the subject matter of the present case. On the 18th of June 2013, the victim in this case, Mr. Ryan Hickey, left his house shortly before 9pm to meet a friend, Mr. Niall Byrne. Mr Hickey drove to Mr. Byrne's estate, where the two sat in Mr. Hickey's vehicle and began to roll a joint of cannabis with the intention of smoking it. Mr. Hickey, sitting in the driver's seat, had the window rolled down and, after some time, the appellant, Mr. Sean Farrell, approached the vehicle, saying *"boo"* to the appellant in through the rolled-down driver's door window. The appellant asked Mr. Hickey to let him into the back of the vehicle and so, Mr. Hickey got out of the driver's seat of the vehicle, pulled back the hatchback-type driver's seat, and let the appellant into the back of the car. Thus, the appellant was sitting directly behind Mr. Hickey, with Mr. Byrne in the front passenger's seat.

4. The evidence was then that, the appellant said to Mr Hickey, *"I heard you were a mad rat, Eingo"*(Eingo being the nickname of Mr. Hickey, having spent a significant portion of his late teenage years in England). The appellant then proceeded to place one hand around the neck of Mr. Hickey, slicing him four times in the head and neck with a blade that he held in the other hand. The evidence was that Mr. Byrne had pulled the appellant off Mr. Hickey so as to allow him to get free. At this point, Mr. Hickey got free and got out of the vehicle, heading home on foot thereafter. Having left his keys in the ignition of the car, Mr. Hickey jumped the garden wall of his house so as to get into his house. His clothes were covered in blood and immediately his girlfriend called an ambulance. Towels were placed over Mr. Hickey's wounds so as to try and stop the bleeding, and he told his mother what had happened i.e. that *"Fat Farreller"* had stabbed him with a Stanley blade.

5. Subsequent to the ambulance being called by Mr. Hickey's girlfriend, Garda Jennings received a call to attend the scene. Garda Jennings attended Mr. Hickey's house, where he met him in the garden of his house. He was bleeding from his head and face with a towel over his head. The evidence was that, before being taken to Tallaght Hospital, Mr. Hickey had told him that Garda Jennings had been stabbed by the appellant. The Gardaí subsequently obtained a search warrant for the appellant's house, whereby various potentially probative pieces of evidence were obtained, namely; his clothing which was taken for forensic testing – on one of his shoes a small amount of blood was found but no DNA could be extracted from that; there were fibres from a hoodie that the appellant was wearing which matched fibres found in the backseat of Mr. Hickey's vehicle behind the driver seat, and; a finger print taken from the exterior rear driver's side fly window which matched that of the appellant. During the search of his house, the appellant arrived home and was duly arrested, his reply after caution being *"for what?".*

6. The appellant was taken to Tallaght Garda station where he was interviewed on two occasions. Nothing probative emerged during these interviews, with the appellant repeatedly stating *"I'm innocent"*, without further elaborating on this statement.

7. Garda Jennings then returned to Tallaght Hospital where he took a statement from Mr. Hickey before he had undergone surgery. During this written statement, Mr. Hickey named the appellant as his attacker. He also indicated that he had known the appellant for four to five years and also gave a physical description of the appellant which matched up with Garda Jennings' knowledge of what the appellant looked like. This written statement also explicitly stated that there were only three people in the vehicle at the time. 14 hours later, after Mr. Hickey had undergone surgery, he was interviewed again by Garda Jennings. Once again, Mr. Hickey named the appellant as his attacker.

8. Subsequently, Garda Jennings sought to obtain a statement from Mr. Byrne. One week after the incident, Mr. Byrne indicated that he did not wish to make a statement, that he didn't see anything as he was on the phone at the time. He said that Mr. Hickey and the appellant were friends of his and that he didn't want to get involved as he had his own family to look after. On the 5th of August 2013, Mr. Byrne presented himself at Tallaght Garda Station where he gave a videotaped statement of the incident, whereby he

stated that it was not the appellant but a person going by the nickname of *"Whacker"* who had sliced Mr. Hickey. The statement elaborated that the appellant had been in the car on the day in question in the back passenger seat, but that he was not the attacker. The evidence at the sentence hearing was that when Garda Jennings sought further clarification from Mr. Byrne, he became evasive and jumpy, expressed a wish to leave the interview room and refused to answer any further questions. Garda Jennings met Mr. Byrne on a number of further occasions, seeking further information. However, Mr. Byrne declined to provide Garda Jennings with any such information.

9. The appellant was ultimately charged and faced trial on indictment on three counts, as outlined at the outset of this judgment. At the outset of said trial, the appellant made a number of admissions in relation to his arrest and detention. He also admitted to being in the car at the time of the incident but denied stabbing Mr. Hickey. Mr. Hickey gave evidence at trial, whereby he stated that he had made a mistake in his statements – that it was not the appellant who had slashed him, that he was in the car but it was a *"Whacker"* who had perpetrated the assault. During the trial, Mr. Hickey gave evidence that, at the time that the Gardaí arrived on the evening of the incident, he had indicated that he hadn't called the Gardaí and he didn't want the Gardaí involved. The trial judge applied s. 16 of the Criminal Justice Act 2006, whereby the three prior statements made by Mr. Hickey pre-trial were put before the jury. Mr. Byrne, who was called by the defence, stated that it was not the appellant who had slashed the appellant, rather it was a fourth man by the name of *"Whacker"*.

10. The appellant was ultimately convicted on count no. 3 on the indictment, namely the count of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997. He was sentenced in the terms outlined above and this judgment is concerned with his appeal against the severity of the sentence imposed upon him.

Impact on the victim
11. Mr. Hickey declined to put a victim impact statement before the sentencing court. However, the sentencing court was provided with a medical report from Mr. John Kinsella, who took photos of Mr. Hickey whilst in hospital pre-surgery. It reads as follows: *"Mr Ryan Hickey presented to the emergency department at Tallaght hospital on the 18th of June 2013 and he was admitted from there under my care. He stated that he had been slashed in his face and head with a Stanley knife. At presentation he had two very large and deep gaping wounds to his face. One of these wounds was slashed right through his pinna (ear). He had a further deep gaping wound to the scalp at the back of his head. Luckily his facial nerve had not been severed so he was still able to move his facial muscles on that side. Mr Hickey was treated with intravenous fluids and antibiotics. He was then taken to the operating theatre where his wounds were thoroughly cleaned. They were then carefully sutured. Mr Hickey's wounds have healed up well considering how deep and elongated they were at presentation. He will, however, suffer from very obvious extensive facial scarring long term. Luckily there was no major injury to the nerves in the area. In my opinion the injuries sustained by Mr Ryan Hickey were ones which caused serious disfigurement to him."*

12. Photographs of Mr. Hickey were also made exhibits at the sentence hearing, and have also been put before this Court.

Appellant's personal circumstances
13. The appellant was born on the 3rd of August 1987, making him 27 (almost 28) at the time of sentencing. He is the third eldest of six siblings. In the plea in mitigation, defence counsel submitted to the sentencing court that the appellant had good parents when he was growing up, his father being a taxi-man. It appears that the appellant's father suddenly passed away whilst he was in prison on foot of the present offence. The appellant was refused compassionate bail so as to attend his father's funeral.

14. The appellant has a reasonable educational record. Having attended primary school in Drimnagh Castle, he did well in the Junior Certificate, obtaining eight honours (in honours subjects), and one pass. However, he failed the Leaving Certificate. The various testimonials referenced in the court below indicate that the appellant has a good work record, that this incident is out of character for the appellant, and that he is a hard-working and diligent person. These testimonials also indicate that the appellant is a talented sportsman. One reference, from a Mr. Eddie Tyrrell, stated that whilst the appellant played underage rugby for Guinness' he was a very competitive player. Counsel for the appellant's instructions, at the sentence hearing, was that the appellant played at a more senior level at St. Mary's, also playing occasionally with Leinster B's at u-21 level. It seems, however, that his interest in rugby waned after he suffered a broken arm and was unable to play for a significant period as a result.

15. The appellant has three children, the eldest (daughter) of which is with a former partner, to which it was submitted that he has access to four days a week and contributes towards her upbringing. He has two children with his current partner, a three-year-old-son and a two-year-old daughter.

16. The appellant has seven previous convictions, all of which are road traffic related offences. In 2014, he was convicted of driving without insurance, and driving without a licence. In 2012, he was convicted of failing to produce a learner permit; failure to produce a driving licence; driving without a valid NCT, and; giving a false name under the Road Traffic Act. In 2012, he was convicted of driving without insurance. The Probation Act has been applied in respect of the appellant on three separate occasions, once for interference with a vehicle contrary to s. 113 of the Road Traffic Act, and twice in relation to public order offences.

Sentencing Judge's Remarks
17. In passing sentence upon the appellant, the sentencing judgment read out as follows:

> *"I have indicated that I consider this a most serious case. I've indicated that it is a savage case, a cowardly one, and one that is rooted for reasons that's not entirely clear either in the fact that Mr Hickey owed money for the car deal that had gone on which he had avoided paying and had gone to England for and been attacked shortly after his return, or rooted in a wider sense of disregard having regard to what was said immediately prior to the assault, of Mr Hickey being considered a rat. The use of the knife on the head and face of a person, and from the cowardly position from behind, was designed here to do him permanent injury by ending his life or inflicting scars that he would carry a reminder of what had occurred for the rest of his life. I make the observation that it cannot be disputed that Mr Hickey was attacked on the night in the way he's described, that's evident from all the evidence, including the evidence of his injuries, and in the course of this trial the accused man concedes that he was present in the motor car when the injuries were inflicted on Mr Farrell.*
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> *The single issue then as far as this charge was concerned in the trial is whether or not the three statements made by Mr Hickey, together with his oral account of it given to Detective Garda Jennings at the scene at his home immediately after, is reliable evidence upon which the jury could act. Those statements are in evidence because of the very useful purposes and provisions of the criminal law introduced by the Act which allows such evidence to be given. I have previously indicated that I consider it one of the most useful pieces of criminal reform legislation in recent times, if not in my entire career, and it has seen, time and again, justice been done where inevitably, even in Mr Hickey's position and*

case on the night in question, his remarks to Detective Garda Jennings that he didn't want he hadn't called for the gardaí and didn't want them involved, even though that was his immediate reaction on seeing the detective officer, he did tell him what had occurred and he repeated that account in the hospital prior to and immediately after his operative treatment. And, most significantly, again when Mr Byrne had introduced a "Whacker" person into the formula and account what occurred, months and weeks later when he was interviewed at the garda station he repeated the fact or the facts that there were three people in the car Mr Byrne, Mr Hickey and the accused and it was the accused who had attacked him. So that was the central issue, the testing of that evidence, even in the teeth and face of Mr Hickey seeking to resile from his initial accounts, and all of that was played out in front of the jury and unanimously, without any dissent, the jury had the confidence, as they were absolutely entitled to have, in that evidence and to act upon it. There were only three people in the car and the accused, Mr Farrell, was the man who attacked Mr Hickey and inflicted the injuries. That, to my mind, is a perfectly good resolution of the evidence of this case done by a jury drawn fairly from our community, charged with their oath and directed on the evidence to reach that conclusion. And today, in spite and in the face of all of that, that single central issue to be determined and has been determined on the evidence by 12 men and women who are not in any way involved or engaged in this case other than to act on their oath, the accused man says he's still innocent, and has written a letter to the Court to say that he's sorry for Mr Hickey and his family and can't compare his present predicament with what Mr Hickey must be going through and did go through, but wants to say that he didn't do it. I regret that Mr Farrell persists in this lie and as a result of which he can expect little by way of regard by this Court of what he has written in the letter in the first or any place. He hasn't himself given evidence at trial though he did rely upon, as he was entitled to, the lie he told Detective Garda Jennings in interview, that he wasn't the person who did this, and he directed his lawyers to call Mr Byrne in support of that lie.

He has a young family and young responsibilities. I have no doubt that he is a man of some talent having regard to the testimonials that are here, but this nonetheless, as I said, is a very serious offence that requires the full rigor of the law to be imposed. The guidelines are there and I thank Mr Staines for the assistance and representations of the Director, none of which I disagree with. In all of the circumstances the sentence the Court imposes is a sentence of eight years' imprisonment which will date from the date he went into custody on his conviction. I will direct that he be allowed the time he spend on remand prior to getting High Court bail. In view of his position that he is still protesting his innocence, I can't accede to the application by Mr Colgan to suspend in whole or in part the sentence because I cannot be satisfied as to the potential for rehabilitation that Mr Farrell might or might not represent because we simply don't know why this happened; what was the reason for it, what grounded it, was it some grudge, was it simply hard armed criminal enforcement, as it's somewhat described in the media? I don't know. But it leaves me in the position in any event that Mr Farrell must serve a lengthy term of imprisonment and that is the sentence that I measure as appropriate having regard to the seriousness and the nature of the attack upon Mr Hickey."

Grounds of Appeal

18. In seeking to impugn the above sentence, the appellant seeks to rely upon the following 10 grounds of appeal:

i. The sentencing judge failed to suspend any part of the sentence of 8 years' imprisonment having regard to all the circumstances of the case.

ii. The sentencing judge placed too much emphasis on the appellant relying on his right to trial by jury.

iii. The sentencing judge placed too much emphasis on the fact that the appellant still maintained his innocence of the charge.

iv. The sentencing judge gave no or no adequate consideration to any possible rehabilitation of the appellant and how that should be considered in the sentencing process.

v. The sentencing judge erred in fact and in law in inadequately balancing the aggravating factors and the mitigating factors in the case which resulted in an excessive and disproportionate sentence.

vi. The sentencing judge failed to take into account that the appellant had only some minor convictions and had no conviction for assault or a crime involving violence.

vii. The sentencing judge overly relied upon the submissions in relation to sentence put forward by Counsel on behalf of the Director of Public Prosecutions.

viii. The sentencing judge erred in fact and in law in that he failed to attach sufficient weight to the mitigating factors in the case put forward on behalf of the appellant

ix. The sentencing judge erred in fact and in law in that he failed to attach sufficient weight to the family history and personal background of the appellant and to a number of testimonials advanced on his behalf.

x. The sentence lacks clarity in the manner in which it was arrived at and structured.

Discussion

19. Both sides have furnished the Court with helpful written submissions, for which it is grateful. The focus at the oral hearing was very much on the fact that the sentencing judge adopted an unstructured approach to the sentencing in this case. Counsel for the appellant contends that a detailed consideration of the sentencing judge's remarks indicates that the eight-year term of imprisonment that he settled upon was a headline or pre-mitigation sentence that reflected only the gravity of the offence, and that the sentencing judge failed to go on and provide any discount whatsoever for the mitigating circumstances in the case. Counsel for the appellant contends that that was an error of principle.

20. Counsel for the respondent disputes that the eight-year term was a headline or pre-mitigation sentence and contends that it was in fact the final post-mitigation sentence. In that regard, reliance is placed on the fact that the trial judge specifically referenced the appellant's young family, and the fact that he had young responsibilities, and the many positive testimonials that had been provided in respect of him. He also referred, although not expressly by name, to the guideline judgment in *The People (Director of Public*

Prosecutions) v Fitzgibbon [2014] IECCA 12, which had been opened to him by prosecuting counsel, and to the representations made on behalf of the Director of Public Prosecutions concerning the gravity of the offending conduct, before stating that *"In all of the circumstances the sentence the Court imposes is a sentence of eight years' imprisonment …"*. Counsel for the respondent submits that the reference to *"[i]n all of the circumstances"*, following upon as it did the specific referencing of aspects of the appellant's personal circumstances, demonstrates that the eight-year term must be regarded as having taken into account the appellant's personal circumstances. Counsel for the respondent acknowledges that the sentencing judge does not identify what discount he allowed for mitigation but contends, correctly on the jurisprudence of this Court, that that is not necessarily fatal.

21. It is clear that the sentencing judge, who was very experienced at criminal sentencing, approached the exercise of sentencing this appellant on the basis of instinctive synthesis. It was not an error of principle, per se, to have done so. However, this Court as an appellate court engaged in a review of the sentence imposed, in circumstances where the appellant contends on various grounds that it was excessive, one of which is that there was no ostensible discount for mitigation, is faced with the difficulty that the trial judge's reasoning process by means of which he ended up where he did, is largely opaque. If counsel for the appellant is correct in his contention that the trial judge gave no discount for mitigation, then that was clearly an error of principle. However, we consider that to have been inherently unlikely given the considerable experience of the judge concerned. Moreover, the analysis offered by counsel for the respondent commends itself to us as demonstrating that personal circumstances were in fact taken into account. Accordingly, we are prepared to treat the eight-year term as being a post-mitigation figure.

22. However, even if the eight-year term is treated as being a post-mitigation figure, counsel for the appellant contends that it remains a problem that we do not know how much discount was in fact afforded for mitigation, and whether it was enough.

23. In addition, he complains that the sentence imposed was simply too severe.

24. Moreover, he states that the photographs of the injuries, which were taken in the early aftermath of the incident, and which are vivid and even shocking in what they show, were not the principal evidence relied upon in the court below, and that the trial judge was in the best position to view the actual degree of lasting disfigurement caused to the victim as he was in a position to observe the residual scarring on the victim when he came to give evidence, which would have been far less dramatic than the photographs might have suggested would be the case. There is some substance in this point, but we consider that this Court, comprised as it is of a bench of professional judges, is well capable of making due allowances for the concern raised.

25. Dealing first of all with the suggestion that the sentencing judge over assessed the gravity of the offence, we are not persuaded that that is so. The assault as described in evidence was absolutely vicious. We take the point that the photographs now before us may not be a wholly accurate guide to the level of permanent disfigurement suffered, but that having been said, it cannot be gainsaid that they accurately illustrate the savagery and viciousness of the particular offending conduct. Even taking the point above about some degree of recovery possibly having been achieved, the medical evidence from Mr Kinsella was that the victim would be left with *"very obvious extensive facial scarring long term"*.

26. The intrinsic moral culpability of what was done was very high. The appellant had armed himself with a Stanley blade in advance. There was clear pre-meditation. There was not just one cut, but a succession of deep slices into the victim's face and head. The harm done was grave on any view of it. It was clearly an offence that fell into the upper range of seriousness in terms of the indicative ranges of headline sentences set out in the *Fitzgibbon* case. Counsel for the appellant doesn't really quarrel with that, but maintains that even if the case fell to be located in the upper range in the first instance, the application of appropriate mitigation would have brought it down to the mid-range. He did not accept that this appellant would only have been entitled to a very modest discount in terms of mitigation in circumstances where he had fought the case, and was not a person of previous good character. He places some emphasis on the fact that the appellant's previous convictions were not for crimes of violence. He points to the fact that the offence was out of character, that his client was remorseful, that there was positive testimonials submitted on his behalf, and that even though he had fought the case he had been co-operative to a degree in as much as some s.22 admissions were made at the trial which had the effect of shortening the process.

27. In circumstances where it is not clear how much discount was afforded for mitigation, but in which we believe there was nonetheless a discounting, albeit an unspoken one, it is necessary to consider the sentence actually imposed to see if it is within the range of what the sentencing judge might legitimately have imposed, taking account of his margin of discretion.

28. In our view this was clearly an upper range case, and not one that would have just scraped into the upper range. It falls full square in our view in the middle of the upper range and the sentencing judge would have been fully justified in starting at ten years and discounting from that. Moreover, while we accept that the appellant would have been entitled to some discount in mitigation, we believe that the extent of available mitigation in this case was relatively modest. A discount of two years would have been more than adequate, and somewhat less than that would not necessarily be susceptible to criticism. While it is to speculate to suggest that the sentencing judge's starting point might have been ten years, we are clear in our view that whatever the starting point was, and whatever the discount to be applied was, the ultimate sentence actually imposed was clearly within the range of what was legitimately open to the trial judge. We find no error of principle.

29. Finally, we have also given consideration to the remaining grounds of appeal, not mentioned heretofore, and in particular the complaint that no consideration was given to structuring a sentence so as to incentivise rehabilitation. It is clear that the sentencing judge was conscious of the penal objective of rehabilitation but rejected it as being unrealistic in the circumstances of the case, and in particular where the appellant was not prepared to accept the verdict of the jury. We also find no error of principle on this account.

30. The appeal is therefore dismissed.