THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.
172/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

David Emerson

Appellant

Judgment of the Court (ex tempore) delivered on the 3rd March 2016, by Mr. Justice Sheehan

1. This is an appeal against the severity of a sixteen month sentence of imprisonment that was imposed on the appellant at the Dublin Circuit Criminal Court on the 12th July, 2013, following a plea of guilty by him to an offence of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997.

2. Counsel on behalf of the appellant submits that the learned sentencing judge failed to give the appellant sufficient credit for his early plea of guilty and failed to give him sufficient credit for the fact that he had availed of the period between the offence and the date of sentence to engage in significant rehabilitative programmes with the Coolmine Drug Treatment Centre and also with the Fr. Peter McVerry Trust.

3. The appellant also submits that the sentencing judge erred in law and in fact or a mixture of both by imposing a sentence with the exclusive purpose of punishing the appellant in circumstances where:-

> 1. The defendant had rehabilitated since the commission of the offence.
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> 2. The court imposed a sentence of imprisonment by virtue of the fact that the appellant had previous convictions saying to impose a non custodial alternative would require someone with a record of no previous convictions.
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> 3. The learned trial judge erred by holding that the only way the appellant could be punished was by way of a sentence of imprisonment.

4. In order to consider these grounds of appeal it is necessary to consider the facts of the case, the personal circumstances of the appellant and the trial judge's remarks.

5. On the 21st June, 2012, the appellant entered a premises known as Peachfield, Kilshane Cross, Finglas, a property that the injured party was caretaking and living in at the time. He shared this accommodation with some associates. At 1.00 am on the night in question, the caretaker entered the kitchen of the premises and turned on the light. When he did so, he observed the appellant in the kitchen with a hammer in his hand. The appellant ran out of the house and into the front yard where the injured party confronted him and tried to take the hammer off him, but he was unsuccessful in this and the appellant hit him in the head with the hammer. Some of his associates came to his assistance and with their support he succeeded in detaining the appellant until the gardaí arrived. The injured party was obliged to go to hospital where he received three stitches and his wound was treated under local anaesthetic.

6. The garda evidence confirmed that the appellant was under the influence of an intoxicant at the time of his arrest and the Court was told that the appellant had 46 previous convictions. Among these was a conviction in July 2006, for the unlawful seizure of a vehicle in respect of which he had received a sentence of six years imprisonment. The remaining convictions included 12 for theft, 3 for burglary, a number of public order offences as well as convictions for the unauthorised taking of vehicles. The appellant was 28 years old at the time of sentence. He is in a relationship and is the father of two children. The Court was also told that when he was younger he had suffered a significant brain injury in a road traffic accident.

7. The Court was presented with a number of documents in support of the appellant who was at the time of the sentence hearing living in accommodation provided by the Fr. Peter McVerry Trust and undergoing a rehabilitation programme with the Coolmine Therapeutic Community. He was just about to complete the first part of a drug rehabilitation programme at the date of sentencing.

8. The learned sentencing judge, having heard the evidence and summarised the relevant facts, went on to say the following before imposing sentence:-

> "Now Mr. Emerson is a man with the record, a substantial criminal record with a number of offences and a number of very serious offences. He is also a man who it seems has tried to reform himself and to a great degree is probably successful in that endeavour. He seems to have taken the chances that were given to him and he has finally seen the light and it seems that he has taken certain steps and the outcomes are probably positive. I have had the evidence of Mr. Briody as well as the reports handed in from the various persons and they paint a positive picture. Now I have been addressed also by Mr. Bowman in relation to the way he thinks I should approach this matter. He tells me that Mr. Emerson has had his problems including a major car accident that has resulted in an acquired brain injury. He also tells me that he has had his problems and he has had his difficulties in the past and has been a major menace to society, but he has taken his chance and basically Mr. Bowman tells me that there is a strong indication that Mr. Emerson has completely reformed himself. I have also had before me the judgment of the Court of Criminal Appeal in Eccles and obviously that reinforces the rehabilitation aspect of sentencing if you want to put it that way.
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> Now I want to do justice to Mr. Emerson and I also have to do justice to society. I have to sentence him for the crime and I have to sentence him for his personal circumstances or I have to take into account his personal circumstances and

> that goes without saying. But the question I have to in the end decide, do I send this man to prison or not because this is a serious offence and with a serious background of previous convictions. Obviously I have to take into account his plea of guilty. I also have to take into account his cooperation and admissions to some degree and I also have to take into account where he is now. But all these factors I must take into account and they weigh heavily in favour of Mr. Emerson not getting a prison sentence, but an assault such as this is very serious. A person who commits an assault such as this would only receive a suspended sentence if he had everything going for him. If he had a serious prospect of rehabilitation and the absence of a serious record of convictions. If Mr. Emerson had given up immediately when confronted by the three men or the caretaker I would say I would have an avenue open to me to give him a suspended sentence, but he didn't. He hit a man with a hammer. That is a serious thing to do and he must be punished for that and I cannot see a way to give Mr. Emerson a suspended sentence as Mr. Bowman asks me to do. As I say if he had given up I would have some opening left to me to do that, but not in this case. It is a serious assault. And unfortunately for Mr. Emerson despite his great work, despite the great references that I have received must undergo a custodial sentence in this case and I think the minimum custodial sentence I can impose upon him is a term of imprisonment of sixteen months. If there wasn't such strong mitigating factors it would have been substantially longer in the matter, but I think society requires that serious assaults be punished and serious assaults such as this have to be punished in an appropriate fashion and unfortunately I cannot go down the road as advocated by Mr. Bowman, despite his impressive and impassioned plea."

9. In the course of written submissions on behalf of the appellant, counsel submitted that if the concept of rehabilitation was to be acknowledged and given practical expression as it was in *DPP v. Eccles* (Unreported, Court of Criminal Appeal, 8th October, 2003) and subsequently by the Court of Appeal in *DPP v. Aaron Maunsell extempore* judgment of the Court delivered by Birmingham J. on the 10th November, 2014, the learned sentencing judge ought at the very least to have requested the Probation and Welfare Services to prepare a report in relation to the appellant and assess critically and professionally the likelihood of his maintaining a drug and crime free life style in the medium to long term.

10. Counsel further submitted that the learned sentencing judge erred in the imposition of a sentence of sixteen months given that the reality of this is that it would have placed at risk and in jeopardy the very considerable progress which had already been undertaken by the appellant. Counsel for the respondent on the other hand has filed a detailed response to the appellant's grounds of appeal and seeks *inter alia* to distinguish this case from the facts of the case in *DPP v. Maunsell* [2014] IECA 7, that in all the circumstances of the case while it may well be that some errors were made by the learned trial judge the overall effect of the sentence is that it is an appropriate one if anything at the lower end of the scale for offences of this nature. In those circumstances it is open to this Court, notwithstanding that there has been an irregularity in the course of sentencing, if the Court is satisfied that there has been no injustice caused, not to interfere with the sentence.

11. Counsel for the respondent concludes by saying that the learned sentencing judge did not err in law or in fact in the manner alleged or at all and that the sentence imposed should be upheld and this appeal dismissed.

12. It is correct to say that in identifying sixteen months as an appropriate sentence, the sentencing judge did not identify a headline sentence and so it is not possible to infer from his sentencing remarks where on the scale of penalties he located this particular offence. That said, in the normal course of events one could not criticise the sixteen months sentence of imprisonment and indeed the main ground of appeal that remains open for this Court to consider is the question as to whether or not the learned Circuit Court judge expressed a view of general application namely, that a large number of previous convictions for an offence like this precludes the possibility of a non custodial outcome.

13. We have considered the learned trial judge's remarks as set out in the transcript and holds that he was in error when he foreclosed on the possibility of suspending even part of the sentence. It is therefore unnecessary for us to consider the remaining grounds of appeal.

14. We must now proceed to sentence this appellant afresh. We have received further documentation from Coolmine Therapeutic Community which confirms that the appellant has successfully completed the drug rehabilitation programmes which he had already substantially engaged with at the time of his sentence in the Circuit Court. The first thing however that needs to be said is that this offence was one which in normal course merited a prison sentence and in normal course would have merited a sentence in excess of sixteen months. The appellant is fortunate that the prosecuting garda described the injuries of the injured party as relatively minor ones.

15. That said, there can be no doubt that this appellant has turned his life around in such a significant way that he has now become now a law abiding citizen, a responsible partner and a responsible father to his two children. He is also engaging with further education. He occasionally works with his brother who attended the hearing of this appeal. The Court notes that he has regained the support of the rest of his own family which he had lost as a result of his drug addiction and his criminal offending. When a person manages, as this appellant has done to turn his back on significant drug addiction and significant criminal offending, then he himself, his family and society all benefit. There is one final matter. This appeal comes before us in a most unsatisfactory manner. It is close to three years since this appellant was first sentenced. The delay in this case is not his fault. Hopefully now that this Court is almost up to date with the backlog of criminal appeals such delays will not occur in the future. Certainly such delays are unlikely in the immediate future. It would be extremely damaging to the appellant and his family were he now to return to prison. Such a course runs the risk of undoing the progress that he has made and also risks a reengagement by the appellant with people who he has disassociated from. However, even at this remove we must have regard to Alexander Chudzik, the Lithuanian caretaker who was assaulted.

16. The appellant spent a short period of time in prison following his sentence we take this into account. The maximum sentence for this offence is five years imprisonment and we identify a sentence of three years imprisonment as the appropriate starting point for this offence taking into account the aggravating factors. Fortunately for the appellant the level of harm caused was not great. We do not consider his intoxication at the time of the offence to be of any significant benefit to him because he must take responsibility for his own actions. However it does in this case have some bearing on his culpability. His cooperation with the gardaí and early plea of guilty and his genuine remorse oblige us to mitigate a sentence of three years to one of two years imprisonment. In light of the ongoing progress made by the appellant and bearing in mind the judgment of this Court in *DPP v Aaron Maunsell* we will suspend that two year sentence for a period of two years on the usual terms in order to incentivise further the appellant's ongoing rehabilitation.

17. Accordingly we allow the appeal against sentence and substitute in place of the original sixteen month sentence, a sentence of two years imprisonment suspended for a period of two years on the usual terms.