THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

123/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Jonathan Duffy

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 25th day of October 2016 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence.

2. The sentences appealed are those of seven years imprisonment in respect of a robbery offence and also in respect of an unlawful seizure of a vehicle offence and sentences of six years imprisonment in respect of possession of an imitation firearm and an attempted unlawful seizure of another vehicle. All sentences were concurrent and all were backdated to the 1st September 2013. The sentences that are appealed today were imposed on the 26th May, 2014, in the Dublin Circuit Criminal Court.

3. The background facts are that a robbery occurred in Blackrock post office in the Frascatti Shopping Centre on the afternoon of the 16th April, 2013. On that occasion a male entered the premises with what appeared to be a firearm. There was a female customer in a queue at the counter and he placed his arm around her neck and chin. He had what appeared to be a gun in his right hand. The gun was waved around. He demanded money and the individual who was being held was released when money was put on the counter by the post office employee, approximately €3,000 in €20 notes. The appellant stuffed these into a holdall bag and fled. The robber then made an attempt to stops cars on fleeing. The gardaí were alerted by the staff in the post office who pressed a panic button and they made their way at speed to the post office. However, as a result of information from a bystander, attention switched towards a particular Dublin bus. The gardaí went to that bus and there was a commotion taking place behind the bus where there was a woman screaming, in the aftermath of an unlawful seizure of a vehicle.

4. In relation to this aspect of the incident, a female driver was in traffic and she became conscious of a man being chased by security personnel, she may have recognised one of those from the shopping centre. The man being chased came to the passenger door of her car, got in and told her to drive off. She did drive on a little way, but because of traffic made little progress. The man said that he had to get away and threatened to kill her. The appellant attempted to take control of the car and it stalled. The car in question, a Honda Civic, requires a key, but also a push button start, but the miscreant did not realise this and the car remained stationary until it was surrounded by gardaí.

5. Because of the position that Mr. Duffy had taken up, as he struggled to take control of the car over the injured party, gardaí had considerable difficulty in extricating him from the car. The injured party gave evidence by way of a victim impact statement and she commented that the incident was one of the most frightening and traumatic of her life.

6. There had been an earlier attempted unlawful seizure which is the subject of count 4 on the indictment. On that occasion another female driver was confronted as she exited the car park. A man attempted to open the passenger door and told her to get out, but she hit the horn and kept moving with the door open. Interestingly that driver formed the view that gun that was produced was not real.

7. Having been taken from the car, Mr. Duffy was brought to Blackrock garda station where he was interviewed, and where he made full admissions. He said it was a mad idea. He described it as a "batman idea" and explained that he had bought a toy gun for €2 and had decided to commit the robbery because he was spending €50 a day on tablets. He was charged and was remanded in custody.

Background
8. In terms of his background and personal circumstances, the position is that he was born in July 1983. The appellant had 35 previous convictions, 10 of these were for robbery dating back to 2009 and all of the robbery matters had been dealt with in the Circuit Court. This particular robbery occurred eleven days after he was released from custody on temporary release. He was one of a large family and was the only one of that family who had ever been in trouble. He left school age 13, but well before that he had become involved in substance abuse (solvents) from age 7 or thereabouts. According to a report from psychologist Dr. Glanville that was presented to the court, at age five or thereabouts, he and a friend had been subjected to sexual abuse by two boys aged twelve or fourteen. The report from Dr. Glanville indicated that by the time of the sentence hearing, he had spent some fifteen years of his life in custody. Counsel on his behalf this morning comments that his client's best estimate of the situation is that from the time he was thirteen on, for only six months at maximum, was he other than in custody.

9. On the 15th January, 2014, following an application to her, Her Honour Judge Mary Ellen Ring released the appellant on bail to attend the Coolmine Therapeutic Centre. However, he was unable to maintain the regime in Coolmine and he surrendered his bail on the 17th February, 2014. It seems he was unable to cope with what he saw as a rapid decrease in his methadone dosage. He had been on gradually declining doses while in custody, but it appears the final step to be methadone free was a step too far. The point is made by counsel on his behalf and it is a fair one that this was not a case of an appellant throwing a chance that he had been given by a Circuit Court judge back in her face.

10. At this sentence hearing a complicating factor was that there were a number of matters that were brought before the court

pursuant to s. 99. It does appear that the appellant was subject to a suspended sentence at the time this offence was committed, but there was uncertainty about the terms of the bond entered into by the appellant at the time of his temporary release, whether it had become effective by the time of the offences were committed or whether they dated from a later date in July 2014, a date which was described as the remission date. In such event, in a situation of some uncertainty the Circuit Court judge decided not to take action on foot of the s. 99 applications, but she did indicate that she regarded the fact that the offence was committed eleven days after release from custody and while the appellant was on temporary release as a relevant consideration which had to be taken into account. She then proceeded to impose the sentences now appealed.

11. In support of the current appeal it is argued that the judge in May 2014, lost sight of the fact that the desire for reform and rehabilitation on the part of the appellant which had been a feature just some months earlier, was still live. It is said that the factors that had prompted the judge to be willing to give him a chance which was described as the chance of a lifetime in February remained in play.

12. Counsel recognises that it was unrealistic to expect that the case would have been adjourned further on bail, but says that the factors that had been significant in February ought to have seen part of the sentence suspended in order to give light at the end of the tunnel. This Court has said on many occasions that the fact that there might be another way of dealing with matters does not justify an intervention by this Court. Indeed even in a situation where the individual members of the court might have been minded to adopt a different approach, if such was the case, would not of itself justify an intervention. Rather the court can intervene only when an error in principle is identified where the approach taken falls outside the permissible range. In this case the offence in question was a very serious one and was committed by an offender with a very significant and directly relevant prior record. In the circumstances the court is unable to identify any error in principle and must dismiss the appeal.