



THE COURT OF APPEAL

Birmingham J.
Edwards J.
McCarthy J.

Record Nos: CCA 29/16

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

JANIS ZARANS

Appellant

Judgment of the Court (ex tempore) delivered on the 20th day of December 2016, by Mr. Justice Edwards

Introduction

1. This judgment is concerned with an appeal against the severity of four sentences imposed upon him on the 16th of October 2015 by Longford Circuit Criminal Court following pleas of guilty entered by the appellant on the 19th of May 2015. On that date the appellant had pleaded guilty to a count of unlawful seizure of a vehicle for which he received a sentence of ten years imprisonment, with the final year thereof suspended; to a count imposed of false imprisonment, for which he received a sentence of seven years imprisonment; to a count of reckless endangerment, for which he received a sentence of four years imprisonment and to a count of dangerous driving, for which he received a sentence of three months imprisonment.

2. The appellant contends that the said sentences, and each of them, were unduly severe and excessive.

The circumstances of the case

3. The court heard evidence that the appellant was one of two people involved in the abduction of Sabrina Cence, an Italian woman who worked in family take away business in the area. They had planned to abduct a vulnerable female. They were waiting adjacent to the car park at Heaton's in Longford.

4. As Ms. Cence approached her car which had been parked in the said car park she encountered two men dressed in black (one of whom also had a hi-visibility vest on over his clothes) and wearing balaclavas. She had a knife placed to her neck by one of them and was threatened. She offered them her purse and was told "*No, you give me the money and I'll be good to you*". She then had her car keys taken and was forced into her car. Both men had knives. One of them got into the back of the car with Ms. Cence and the other assumed the role of driver. The appellant was the driver. Money was demanded from Ms. Cence and a knife was continuously held to her throat. She was told "*Give me the money, Bitch*". She handed over a sum of €170. It was made clear to her that they wanted more money. The plan was to take Ms. Cence to an ATM machine so that she could take out money. Her bank card had been taken from her.

5. A concerned citizen had observed the two men, wearing balaclavas, behaving suspiciously in the car park prior to the abduction and had telephoned the Gardaí. Unluckily for Ms Cence's abductors, the Gardaí at Longford Garda Station happened to have the facility to view a live CCTV feed from a camera in the Heaton's car park. When the call from the concerned citizen came in Gardaí immediately logged in to the relevant CCTV system and saw the abduction actually taking place. A number of Gardaí were immediately despatched, in both marked and unmarked vehicles, with a view to intercepting the abductors.

6. On the way to Heaton's car park an unmarked Garda car encountered Ms Cence's vehicle travelling in the opposite direction, and it turned around and gave chase with blue lights and siren. At one point the Garda car had overtaken the stolen vehicle and pulled in ahead of it at an angle. Immediately after the occupants of the Garda car had alighted from their vehicle the appellant drove forward and rammed the Garda car and then continued to drive on. A high speed chase ensued in the course of which the car driven by the appellant drove in the middle of the road and against oncoming traffic forcing to take evasive action and to get out of its way.

7. Eventually the appellant, who had a considerable amount of drink taken, crashed the car. The air bags deployed and the car, which was extensively damaged, was written off. Both men left the car with a view to fleeing the scene. The other man was struck by a motorist whilst attempting to flee. He suffered significant injuries and is now in a persistent vegetative state. The appellant was arrested having been seen walking up the road nearby and heading towards Longford wearing black clothes. He was approached by a member of An Garda Síochána who noticed that he had cuts to his head and his hands were bleeding and that his clothes were wet through.

8. Ms Cence suffered a number of significant injuries in the crash requiring her removal to hospital and was extremely traumatised and was screaming uncontrollably when the Gardaí initially came to her aid.

9. Following his arrest the Applicant was detained at Longford Garda Station. He was interviewed and questioned after caution. He identified himself on CCTV and made certain admissions. However he sought to cast responsibility on the other man as being the prime mover. He accepted however that the abduction was planned and premeditated, and that they had brought rucksacks with them with alternative clothes to change into to facilitate their getaway.

The impact on the victim.

10. The injured party did not give victim impact evidence but a victim impact statement from her was read into the record, as were extracts from medical reports concerning her injuries.

11. In her victim impact statement the victim in the first instance described her material and economic losses. She stated that her

Mercedes car, which the court was told by counsel had been worth €20,000 to €25,000, had been written off. However, she was reimbursed for that by her insurance company. In addition, as a result of physical and psychological injuries sustained in the incident she had been unable to return to work in the family take away business. She did not quantify her economic loss.

12. As regards her physical and psychological injuries she stated:

"Since the 29th of October 2014, my life has drastically changed. From a psychological point of view I have lost trust in everything and everyone surrounding me to the point that I'm afraid of going to work or even outside. I cannot sleep anymore due to nightmares and panic attacks and my fear has affected my family members also as I must constantly check where they are in every moment.

I cannot go to work anymore, inability to park in the town centre, inability to go outside without having panic attacks. I cannot stay standing for more than 30 minutes due to a spine fracture caused by the accident. Weekly visit to psychologist and physiotherapist. Doctors don't know if I will have to go under an operation."

13. The injured party further referred to the fact that she had suffered a spinal vertebral fracture at T12 level, and this had necessitated expensive investigations including MRI and Bone Scans. She was to have further investigations to establish what further action to take or whether surgery was required on her spine.

14. A medical report from a consultant orthopaedic surgeon concerning Ms. Cence's injuries was also read into the record. The orthopaedic surgeon, having recited the history of the incident, stated that she had had an MRI of her thoracic spine which showed a compression fracture involving about 15 % to 20 % of the superior area of the first lumbar vertebra. There were some degenerative changes at the T.11 and T.12 disc spaces with posterior annular bulging. Otherwise there was no disc prolapse. The lower lumbar spine was satisfactory with some degenerative changes evident. An MRI of her cervical spine showed small left focal posterior lateral disc bulge at C6/C7 with no major pressure on the nerve roots. She was re-examined in March of the following year and she told him she had been having pain in her neck, her right upper arm and her left lower back, and also pain was going down her right leg to just below her knee. There were no pins and needles but she complained of numbness on and off. On examination she was tender on the left side of the lower part of her neck as well as over the left trapezius muscle. There was also tenderness at the left interscapular region. She had no neurological deficit in her upper limbs. She was tender over the T12/L1 area of her lumbar spine on the left side at the facet joint. She also had marked tenderness on the left at the L5/S1 facet joint and at her sacroiliac joint ligaments. The orthopaedic surgeon had referred her for a bone scan to establish whether the fracture was recent or old. He saw her again following the bone scan which had confirmed a fracture of her T12 vertebra, which was more marked on the right side of the midline. The scan had revealed a recent fracture which was in a healing phase. He was satisfied that that injury related to the incident in October 2014. The bone scan did not reveal any other significant abnormal uptake of radioisotope except at the left facet joint at C2/C3, which was in fact asymptomatic. She was recommended that to undergo physiotherapy for at least two or three months and if that failed to resolve her symptoms, or if she didn't experience improvement, he would consider giving her injections. He also advised swimming, walking, cycling using an exercise bicycle and various home exercises to aid her rehabilitation.

The appellant's personal circumstances.

15. The appellant was born on the 9th of February 1985 and is of Latvian nationality. At the time of the offence he had been living in Ireland for approximately a year and was unemployed. He has some living family still in Latvia including his mother, his father with whom he has no contact, and a sister and brother. He has another sister in the Netherlands. He is a widower with no dependents.

16. The appellant has no previous convictions. He speaks only limited English. He was assessed by the Probation Service as being of moderate risk of re-offending.

The sentencing judge's remarks

17. In sentencing the appellant the sentencing judge made quite detailed sentencing remarks. In the course of those remarks he described the circumstances of the case, and the impact on the victim, and then continued:

"In considering the appropriate sentence which I am bound to impose, I have carefully listened to what Mr Byrne has said on behalf of the accused, and considered the principles enunciated by the Court of Appeal which a judge must consider prior to passing sentence and which forms part of our jurisprudence. The principles to be considered are that the sentence must be proportionate to the crime. I must take into account any aggravating factors, mitigating factors and the circumstances of the accused. I must consider whether the accused has shown remorse and displayed appreciation for his wrongdoing. I must look at the accused's record and the likelihood of him reoffending. I must consider the accused's co-operation with the gardaí throughout the investigation of the offence, and I must also consider the effect and consequences of the offence on Ms Cence, the victim. As I've said, and I'm obliged to under section 5 of the Criminal Justice Act 1993, to take into account the victim impact statement. I also have the benefit of a report from the Probation Service which I must also take into account. In considering what the appropriate sentence should be in this case I am of the view that the punishment should be proportionate to the gravity of the offence and the culpability of the offender. Other goals such as rehabilitation must also be considered. Unfortunately restitution does not appear to be a viable option in this case.

The aggravating factors: (1) The offence involved a large element of premeditation. In his interviews with gardaí the accused accepted that he and his accomplice were looking for a vulnerable female to rob. This is both a shocking and frightening admission. It displays a frightening level of callousness on the part of the accused and his accomplice, the level of planning is evidenced by the fact that the accused and his accomplice brought with them changes of clothes, and this again demonstrates that this was not a spur of the moment act of criminality but something which was both premeditated and planned. A second aggravating factor was the use of a knife in the commission of the crime, and this puts the offence at the upper end of the sentencing scale. In fairness, the accused, through his counsel, Mr Byrne, who has made comprehensive and cogent submissions, accepted this to be the position. A third aggravating factor is the duration of the offending. The accused could have surrendered to gardaí when the patrol car blocked his passage but instead he chose to ram the patrol car and continued to drive in an extremely dangerous manner. The devastating effects and consequences of the accused's criminal activity on the victim is also a significant aggravating factor. The level of violence and aggression used in the perpetration of the crimes is a further aggravating factor. In this respect, I am mindful of the description which the victim gave of her initial assault and subsequent detention. It is clear that the accused and his accomplice used violence and threats to subdue the victim and to falsely imprison her. Another aggravating factor is the extremely dangerous nature of the accused's driving, which put not only the gardaí in danger but also the victim and innocent members of the public.

The mitigating factors I must take into account are: (1) The early plea of guilt which saved the State the considerable cost of a jury trial (2) The accused's co-operation with the gardaí and his admission during interviews are both mitigating factors as they eased the prosecution and investigation of the offences (3) The fact that the early plea saved the victim the added trauma of having to give evidence at a criminal trial is another mitigating factor. I am also taking into account the remorse shown by the accused for his actions and I'm satisfied that this is sincere and genuine. I am also taking into account the co-operation of the accused with the Probation Service for the purposes of preparing a report for these proceedings, and its determination that the accused is at a moderate risk of reoffending. I also take account of the heretofore unblemished record of the accused. It is extraordinary that given the gravity of the present offences the accused has no history of criminality. It seems clear that the accomplice had a negative influence on the accused. I note that the accomplice has a previous serious conviction whereas the accused has none. I am also taking into account that as a non-national in an Irish prison the accused will feel isolated and unable to have regular visits from his family. This is an additional punishment which Irish prisoners do not have to endure. I have noted with interest from the probation report that the accused does not want to be repatriated to Latvia to serve the balance of his sentence. The accused is of the view that the Irish criminal system is preferable to that in Latvia. I am also taking into account the fact that the accused was under the influence of alcohol when he committed these crimes and accordingly his judgment was impaired.

Mr Byrne has argued that the accused has made no effort to minimise his involvement in these crimes. The probation report indicates the opposite, and I am satisfied that the second interview given by the accused to gardaí while he was detained in Castlereagh Prison represented an attempt by the accused to place primary responsibility for the offences on his accomplice. I am absolutely satisfied that the accused and accomplice acted jointly in this criminal endeavour and that both are equally culpable. However, I do accept that the admissions made by the accused in his initial interviews with gardaí outweigh the negative impact of his efforts to minimise his involvement in the offences. Accordingly, his comments to the Probation Service and his second interview to gardaí while in custody are not going to influence the sentence I am about to impose.

In determining the sentence in this case, I am acutely conscious of the totality principle. While counts 1, 2 and 4 carry sentences of up to 15, 10 and seven years respectively, the Court is obliged to impose a sentence that reflects the totality of the gravity of the offences and the totality of the culpability of the accused for all of the offences combined. Accordingly, having taken all of the foregoing matters into consideration, and bearing in mind the needs of society as against the needs of the victim and the accused, I am satisfied that any sentence imposed, while taking account of the aggravating and mitigating factors outlined above, must reflect the need to send out a clear and unequivocal message that this type of crime will attract a heavy sentence in order to both punish the perpetrators and also to deter others who might be tempted to engage in such activity.

Accordingly, on count 1, which carries a maximum sentence of 15 years, I am imposing a sentence of 10 years imprisonment, with the final year suspended on condition that the accused leaves Ireland and returns to Latvia within 10 days of his release from prison, and also that he enter into a bond of €500 to keep the peace and be of good behaviour for a period of five years post-release. On count 2, which relates to unlawful imprisonment, I am imposing a sentence of seven years. On count 4 which is reckless endangerment of the gardaí, I am imposing a sentence of four years and on count 5 which is dangerous driving I am imposing a sentence of three months imprisonment. I am directing that all terms of imprisonment are to run concurrently and that the accused be given credit for time served. I am also disqualifying the accused from driving for a period of 15 years. The disqualification is being imposed under count No. 2. In conclusion, the sentences I have imposed have taken account of all mitigating factors and I am satisfied that given the seriousness of the charges it is not appropriate to suspend any further portion of the sentence."

The grounds of appeal

18. These can be distilled down to two complaints in substance. First, it is complained that the sentencing judge failing to sufficiently take into account the mitigating circumstances in the case. Secondly, in respect of the offences on which lesser sentences were imposed the sentencing judge's reasoning was not evident and it was impossible to know what discount, if any, was given for mitigation in respect of those offences.

The D.P.P.'s Response

19. Counsel for the respondent submits that the ultimate sentences imposed on the appellant were proportionate and appropriate to the circumstances of the case and that they should not be interfered with.

Analysis and Decision.

20. In this case the appellant asks this Court to interfere to quash the sentence imposed by the Court below on the basis that the sentencing judge erred in principle in making insufficient allowance for mitigation, and in only discounting from the headline sentence that he had nominated by an effective 10%.

21. It requires to be stated at the outset that even where the Court is satisfied in a particular case that the process by means of which an ultimate sentence is arrived at exhibits some defect or error this Court will not be disposed to interfere if the ultimate sentence is nonetheless correct and within what would have been the sentencing judge's legitimate range of discretion.

22. The most significant sentence in this case was in respect of the unlawful seizure offence. This might perhaps appear surprising in circumstances where the false imprisonment offences carries a maximum sentence of life imprisonment and the maximum sentence for unlawful seizure is fifteen years imprisonment. However, it appears the sentencing judge was erroneously told that false imprisonment carried a maximum sentence of ten years imprisonment. Be that as it may, in so far as the unlawful seizure offence was concerned the sentencing judge assessed the seriousness of that offence as meriting a headline sentence of ten years imprisonment on a scale from zero (representing non custodial options) to fifteen years imprisonment (being the maximum custodial sentence available). He then suspended the final year to reflect available mitigation and to incentivise rehabilitation. The appellant says that the discount for mitigation was too low, and too low by a considerable margin.

23. The available mitigation comprised the plea of guilty, previous good character, a degree of co-operation, remorse which the sentencing judge accepted as being genuine, and the fact that prison is generally regarded as being harder to cope with in the case of a foreign national with poor English and with little or no family in the jurisdiction. We agree that to have reflected these factors by an effective discount of only 10% was insufficient and that it represented an error of principle.

24. The normal consequence of finding such an error of principle is that the Court would then proceed to quash the sentence imposed by the Court below and then re-sentence the appellant afresh. In such a re-sentencing the Court is not bound in any way by the approach of the court below and it must independently assess the gravity of the offending conduct, by reference to culpability and harm done, taking into account both aggravating factors and any mitigating factors bearing on culpability and in that way arrive at an appropriate headline sentence. Then in the second stage of the process, there must be a further discounting for mitigation in general (of which account has not already been taken) leading to an ultimate sentence which is both appropriate and proportionate.

25. The argument advanced by the appellant in this case appears to be premised on the assumption that the headline sentence of ten years selected by the sentencing judge was correct and that it would be adopted by this Court in any re-sentencing. If so, the appellant would be mistaken in that assumption. Having considered the intrinsic moral culpability of the offending conduct, and the particular aggravating circumstances of the case, and the harm done, and in circumstances where there are no mitigating circumstances tending to reduce culpability, this Court is of the view that in fact the headline sentence should have been one of twelve years rather than ten years.

26. We further consider that to adequately reflect the mitigation in general that was available in the case, and rehearsed above, there should have been a discount on the headline sentence in the order of 25% in all the circumstances of this case. A 25% discount on a headline sentence of twelve years could be given effect to either by means of a straight discount, or by a combination of a straight discount and a suspended period, or entirely by a suspended period. Regardless of how it might be structured, the final sentence would in each case very closely approximate to the sentence ultimately imposed by the sentencing judge in the court below, in as much as the sentence to be actually served at this point would be nine years which equates exactly with what the court below required him to actually serve at this point.

27. In circumstances where we are satisfied that the sentence ultimately imposed by the sentencing judge would not be materially altered on a re-sentencing, we are not disposed to intervene and to interfere with it notwithstanding the identified error of principle which represented a defect in the process by means of which it was arrived at.

28. In so far as the sentences for false imprisonment, reckless endangerment and dangerous driving are concerned, the appellant complains that the sentencing judge's reasoning for the sentences imposed is not transparent, and that it is impossible to know what discount was given for mitigation in those cases. While there is substance to the complaint made in so far as it goes, we are not satisfied that the sentences ultimately imposed on those counts were inappropriate, save possibly in the case of the false imprisonment count, in respect of which, it appears to us, a sentence was imposed that was very lenient indeed, and which it might have been open to the Director to argue in another process was unduly lenient. We consider that the lenient sentence referred to is likely to have been the result of the fact that the sentencing judge was incorrectly told that the maximum sentence for false imprisonment was ten years imprisonment whereas in fact it is life imprisonment. Had the sentencing judge been furnished with the correct information it might well have influenced his assessment as to what was the appropriate headline sentence for that offence, and to the prejudice of the appellant. In circumstances where the appellant was the beneficiary of that particular error, and the Director has not seen fit to appeal on the grounds of undue leniency, we consider it that it would not be appropriate for us in an appeal such as the present to intervene so as to interfere with the sentence imposed by the court below.

29. In the circumstances we dismiss the appeal.