



THE COURT OF APPEAL

Record Number: 115CJA/2017

Birmingham P.
Edwards J.
McCarthy J.

BETWEEN/

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

- AND -

JOHN KERRIGAN

APPLICANT

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 19th day of March 2019 by Mr. Justice Edwards

1. This is a matter that is before the Court today for the re-sentencing of the respondent in respect of the offence of threatening to injure another with a syringe with the intention of, or where there was a likelihood of, causing that other to believe that he might become infected with disease as a result of the threatened injury, contrary to s. 6(1)(b) of the Non-Fatal Offences Against the Person Act 1997, in circumstances where in an earlier ruling on the 13th October, 2017 a different composition of this Court (comprising Birmingham P, Mahon J. and Hedigan J.) had found that a wholly suspended sentence of four years imprisonment imposed at first instance was unduly lenient.

2. Briefly, the circumstances of the case were that on the 13th June, 2015 the respondent, who was in the company of a female companion, was observed drinking in the Accident and Emergency Department of St. James Hospital by a security man and was asked to leave the premises. Sometime later a different security man, a Mr. John Paul Kavanagh, who had become aware of the earlier incident involving his colleague, observed on CCTV that the respondent and his companion had not, in fact, left the premises but had merely relocated to the main concourse of the hospital where they had continued drinking. Mr. Kavanagh proceeded to the main concourse and confronted the respondent and his companion and instructed them to leave. In response to this they did leave the building but did not leave the hospital grounds. Rather, they were observed again by Mr. Kavanagh to be in the car park and to be looking into cars and checking if they were locked. The respondent later told the Probation Officer, Ms. Kane, whose report is before us, that they were tired and intoxicated and were looking for a car to sleep in.

3. At any rate, Mr. Kavanagh approached the respondent and his companion a second time, and he ordered them to leave the hospital grounds. There was an exchange of words between them following which the respondent rummaged in his companion's bag and produced a syringe which he initially brandished, and then made lunging movements with, in Mr. Kavanagh's direction. The respondent is alleged to have said "I am going to fill you with the viruses. I will fill you with the viruses". Mr. Kavanagh backed off somewhat and radioed for assistance. Several other security men arrived rapidly on the scene. The respondent attempted to run away but he was pursued and apprehended following which he was handed over to gardaí who arrived short afterwards and arrested him. He was taken to a garda station where he was detained under s. 4 of the Criminal Justice Act 1984.

4. The respondent was significantly intoxicated with alcohol and possibly other substances when detained and he was certified by a doctor, Dr. Fakki, as unfit to be interviewed for some hours. He was subsequently charged with the present offence and after CCTV was shown to him at a pre-trial listing he agreed to plead guilty. It was accepted that it was a reasonably early plea.

5. Mr Kavanagh made a victim impact statement in which he claimed to have been put in great fear by what had occurred and to have suffered nightmares and a lack of confidence thereafter.

6. The court below heard that the respondent had thirty-seven previous convictions ranging between misuse of drugs, criminal damage, theft and road traffic matters. He also has one previous conviction for a s. 3 assault. No indication was given in the evidence as to any of the penalties imposed.

7. In the court below, the sentencing judge heard that the respondent had a significant addiction problem but that he was making demonstrable efforts to address that. Though he had in the past undergone residential programmes, he had relapsed. However, it was said that he had now re-engaged and was doing well on a current programme, initially commenced with Tús Nua and continued with JADD in Tallaght. He was in a position to point to a succession of clear urinalysis reports. The sentencing judge was impressed by this and although she considered that the offence was a serious one particularly involving, as it did, a security man in the Accident and Emergency Department of a major hospital, she nevertheless commented as follows: -

"The Court has to consider various issues in its sentencing, in particular deterrence regarding attacks on security personnel, and these are people who are working at a hospital, an institution where people are cared for, and security men there are involved in particularly difficult work. The probation officer acknowledges that Mr Kerrigan has taken steps to address the issues that led him to the offending, and he has addressed his chaotic drug problem and he has stabilised in respect of his drug use. The difficulty for the Court is in terms of ensuring that there is sufficient deterrent to persons against these kind of attacks and that persons such as Mr Kavanagh are protected fully, and there be personal deterrence to persons such as Mr Kerrigan, who has engaged in previous offending of this nature.

As against that, the Court must balance the prospect of rehabilitation. In the particular circumstances of this case, I'm

going to give Mr Kerrigan the opportunity to continue on the road to recovery that he has started on, and I believe that it is more in the interests of society to stop repeat offending, which is clearly informed by his drug addiction, or caused by his drug addiction. The fact that it's now almost two years since this offence and he hasn't come to adverse attention since, what I intend to do is to impose a sentence of four years, which I will suspend for the full four years, on condition that he remains under the supervision of the Probation Services for four years; that he attend for all counselling in respect of drug and alcohol addiction as directed by them; that he remain drug and alcohol free; that he undergo urinalysis and any other tests in respect of drug or alcohol addiction as directed by the Probation Services; that he follow all directions of the Probation Services; and that he engage with Probation Services with regard to addressing his offending behaviour and his attitudes in that regard."

8. This Court has already found the sentence to be unduly lenient. That having been said, nobody would gainsay that the respondent's efforts at rehabilitation should have been rewarded by a significant discount for mitigation. The error in principle was in wholly suspending the sentence.

9. In our view, the gravity of the offence was such that a custodial sentence could not have been avoided. In circumstances where we believed it was likely that the respondent would be going into custody, we put the matter back for a year to see the extent to which further progress would be recorded. As will be seen later in this judgment some further progress has been recorded but the picture also reveals some setbacks.

10. This Court having quashed the sentence imposed by the court below, we must now proceed to re-sentence the respondent. We consider that a custodial sentence is merited to mark society's censure of the respondent's offending and in furtherance of the penal objective of deterrence, both general and specific. Syringe attacks can be particularly frightening for the victims concerned, and the victim in this case was quite traumatised by the incident. We consider that the appropriate headline sentence was correctly measured by the judge at first instance at four years. The respondent did plead guilty and the sentence imposed must take account of that and the other mitigating circumstances in the case.

11. The most up to date probation report does not indicate that the respondent's continued progress towards mitigation has been uneventful and that it has all been in one direction. Regrettably, there has been some degree of relapse, although it is acknowledged that this may have been in reaction to two bereavements which impacted heavily on the respondent.

12. It has been urged upon us that notwithstanding these temporary relapses, the appellant has again re-engaged and the reports furnished to us most recently seem to bear that out. However, it is somewhat concerning that it is recorded that even at this remove the respondent has not achieved full insight into the seriousness of his offence and that he continues to be assessed as being at high risk of re-offending.

13. Doing the best we can for him in these mixed circumstances, we will suspend the final year of the four-year headline sentence we have nominated to reflect the mitigating circumstances in his case (apart from his progress to date towards rehabilitation) and to incentivise him in continuing his efforts at rehabilitation. Further, we will back date his sentence to the 24th April, 2017 being the date of his sentencing at first instance. This back dating, which is significant considering that he has not to date served any meaningful period in custody for this offence, is to reward his progress to date towards rehabilitation, albeit that it is not at a level that would have enabled us to avoid altogether imposing a custodial sentence on him; and also, although to a much lesser extent, in acknowledgment of the fact that having initially avoided custody it will be harder for him to now have to go in to custody.