THE COURT OF APPEAL

RECORD NO. 134/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

OLIVER KENNAWAY

APPELLANT

JUDGMENT (ex tempore)of the Court delivered by Mr. Justice Mahon on the 25th day of April 2017

1. The appellant was convicted (having pleaded guilty) on the 23rd June 2015 at Dundalk Circuit Criminal Court to one count of robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was sentenced on the 28th January 2016 to a term of imprisonment of four years with the final year suspended on conditions. The appellant has appealed against that sentence.

2. The offence occurred on the 27th July 2013 at Castletown Road Filling Station in Dundalk, at about 3.30 p.m.. Two employees were working in the premises. The appellant entered the shop with a hoodie drawn over his face, and pointed a large knife at one of the staff while he removed money from the till. He then ran from the premises and was chased by one of the employees. A sum of €355 was later recovered as were items of discarded clothing, which DNA analysis matched to the appellant. €145 of the total sum taken from the till was never recovered.

3. There are three grounds of appeal against sentence. They are:-

> (i) The learned sentencing judge erred in principle holding that there was an element of planning in the robbery in the absence of any evidence of same,
>
> (ii) the learned sentencing judge erred in principle in holding that the offence fell into the upper range of robbery offence, and
>
> (iii) the sentence imposed was unduly severe in all the circumstances.

4. The appellant had a difficult personal background. He was thirty three years old at the time of the offence. He had a poor employment record and had fifteen previous convictions. The previous District Court convictions dated between 1999 and 2006, and they included two s. 4 theft convictions, handling stolen property, entering a building with intent, threatening and abusive behaviour in a public place and other minor offences. He was previously sentenced to varying terms of imprisonment. He was however conviction free for approximately seven years up to the date of the offence.

5. In the course of his sentencing judgment, the learned sentencing judge accepted that the robbery was motivated by the appellant's chronic drug addiction. The learned sentencing judge noted what he described as the *substantial aggravating factors* as being the extent to which the robbery was planned. He described the robbery in the following terms.

> *"The manner of the robbery - the robbery was carried out in a frightening,intimidating and aggressive manner. Oliver Kennaway had a knife in the course of the robbery. … Oliver Kennaway subjected Ryan Sherry to a terrifying and horrific ordeal in the course of the robbery."*

6. He viewed the previous convictions as not being a major aggravating factor, but were instead *"a slight aggravating fact in the circumstances"*.

7. The learned sentencing judge identified the mitigating factors as including the plea of guilty, the appellant's cooperation with the investigation, his admissions and his expression of remorse. He also remarked on the positive steps being taken by the appellant in respect of his drug addiction.

8. In relation to the ground of the appeal to the effect that the learned sentencing judge erred in principle in determining that the offence had been planned, the facts suggest that this was indeed the case. While the offence may not have been planned for a significant length of time before its commission, it is evident nonetheless that the appellant identified the premises as a soft target for a quick cash robbery, and prepared himself in advance by, for example, attempting to conceal his face and arming himself with a knife, which he then proceeded to use in a very threatening manner having entered the premises. It certainly could not be said to have been an opportunistic robbery in any sense of that term.

9. In the course of his sentencing judgment, the learned sentencing judge stated:-

> *"There was some degree of planning in that he ensured that he had his hoodie up, that it was pulled up, that Mr. Sherry couldn't see his facial features. He had a knife with him going to the store. Castle Filling Station is easily accessed because it has to be easily accessed for persons to come and go. It's also a place where cash would be used in respect of purchases and normally cash would be found on these premises, so it is a easy or a soft target for persons to carry out a robbery in respect of a filling station such as the Castle Filling Station."*

10. The use of the term *degree of plann*ing indicates that the learned sentencing judge did not approach sentencing on the basis that this robbery was planned in any detail, nor indeed for any great length of time beforehand.

11. The learned sentencing judge's reference to the offences being in the higher range of robbery offences is criticised by the appellant as suggesting that the sentence imposed was too severe. The learned sentencing judge did not follow best practice by identifying a headline sentence prior to discounting for the relevant mitigating factors which undoubtedly were present. On the assumption that such a headline sentence was in the region of between five and seven years, such was appropriate and within the judicial discretion available at the date of sentence. Any suggestion that the headline sentence may have been greater is unrealistic given the net sentence actually imposed. Clearly therefore, the learned sentencing judge's reference to the offence as being in the *higher range* was not reflected in the sentence actually imposed, particularly its custodial element. In any event, it is the sentence as ultimately imposed which must determine whether or not it was unduly harsh and ought to be reviewed.

12. Against a background of understandably growing public concern and alarm at the increasing use of knives to perpetrate crime, a net custodial sentence of three years for this type of offence is not unduly harsh. Indeed, it could be described as being significantly lenient. Clearly, the learned sentencing judge was, as his final comments suggest, anxious to give the appellant the greatest possible chance to rehabilitate, and in this respect it is heartening to note that he is working to achieve that in prison, including, to his great credit, successfully passing the Leaving Certificate history paper.

13. However, and for the reasons indicated, the court must dismiss the appeal.