



THE COURT OF APPEAL

**Peart J.
Mahon J.
Hedigan J.**

150/CJA/16

In The Matter of An Application Pursuant to Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

Appellant

V

Aidan Keane

Respondent

JUDGMENT of the Court delivered on the 28th day of March 2017 by

Mr. Justice Hedigan

Introduction

1. This is an appeal by the Director of Public Prosecutions on the basis that the sentence imposed was unduly lenient. The respondent entered a guilty plea, on 13th November, 2015, which was the first mention date, to robbery and a threat to kill or cause serious harm. Two counts of s. 3 assault causing harm and production of an intimidating article were taken into consideration. The respondent was sentenced on the 11th May, 2016, to two and a half years on the robbery count. This was back dated to the 21st July, 2015, when he went into custody. The balance of the sentence not already served was to be suspended from the date the respondent was admitted to Cuan Mhuire. A sentence of one year was imposed on the threat to kill or cause serious harm also back dated to the 21st July, 2015.

2. The suspension was on the condition that the respondent go immediately to Cuan Mhuire for treatment for ADHD and addiction. On admission the balance of the sentence would be suspended for three years. This was on the condition that he voluntarily admit himself to a 20 week treatment program and follow any recommendations of a psychiatrist regarding treatment, that upon release from Cuan Mhuire he place himself under the supervision of the Probation Services for a period of 18 months on his own bond of €200 and that he engage in victim and offence focused work and any education/employment training offered. He should comply with all directions.

3. It is the sentence on the robbery charge which is being appealed on the grounds of undue leniency.

The Circumstances of the Offence

4. The offences arose out of two separate but related incidents involving two separate injured parties on the 17th April, 2015. The robbery occurred at Citywest Luas stop where the respondent with another man attacked Mr. Benson. He was kicked and punched onto the ground, knocked unconscious whereupon the respondent continued to kick him in the head. Then he stole his mobile phone. The injured party could not remember what happened. He was taken to hospital where he spent three days due to concussion. He had cuts to his head and it was swollen. His victim impact statement noted he still has pain in his neck and wrist, headaches and has trouble sleeping. He also referred to the psychological impact of the incident and that he is nervous and afraid when walking in public places.

5. Approximately an hour and a half later the respondent in the company of some other youths approached one Mr. Clinton who was working as a security guard at Citywest Shopping Centre. The respondent shouted abuse at Mr. Clinton, pulled out a Stanley knife and threatened to "strife" him. The respondent was known to the security guard.

6. When arrested the respondent made no admissions and sniggered when shown the video of the robbery.

The Respondent's Personal Circumstances

7. The respondent was 17 years old when these offences occurred. He left school after his junior certificate. He had done well in primary school but ADHD affected his schooling. The ADHD diagnosis was made by Dr. O'Domhnaill, a psychiatrist, who prepared a report for the defence. He reported that he had a chaotic home life and developed a serious drug habit at a young age. He now knows what he did was wrong and accepted responsibility. He wrote a letter to the Court and Dr. O'Domhnaill believes the remorse was genuine. His addiction resulted in a drug debt which lead to him being stabbed in the wrist and head. His habit was out of control and he was offending to pay his debts. He chose not to take up bail which was granted in the High Court. He underwent a detox programme and presented as drug free to the sentencing court. He had 16 previous convictions but nothing further was pending and this was his first time in the Circuit Court. His previous convictions were two s. 4 thefts; three for possession of knives; two for violent behaviour in a Garda station; two for criminal damage; one for possession of stolen articles; and the remaining for public order offences.

8. A probation report put the respondent at high risk of re-offending should he be without the intervention of probation services and detailed his poor past engagement. Mr. Richardson from the Solas Project informed the Court that the respondent was now willing to address his addiction difficulties.

Sentence

9. In sentencing the learned judge listed the aggravating factors for the robbery as the undoubted seriousness, viciousness and cruel nature of the crime, the method in which it was perpetrated and the respondent's previous convictions. It was noted that these included public order offences and some were before the juvenile courts. The sentencing judge found that the offence merited a four year custodial sentence as a headline. The mitigating factors identified were the respondent's youth, being 18 years old at sentencing, his early plea and cooperation with the Gardai, his family circumstances which could not be said to have provided him with the strongest platform for a crime free life and his extensive use of drugs and alcohol over a prolonged period, particularly, surrounding the time of the offence.

Appellant's Submissions

10. It was submitted that the sentencing judge failed to take into account the maximum penalty of life imprisonment for robbery. Four years imprisonment before mitigation was in error given the gratuitous violence involved which could have resulted in serious brain damage or death. The judge appeared to double count the mitigation. First, she reduced the sentence to two and a half years but then discounted again by suspending the balance. It is accepted that rehabilitation is one of the aims of the criminal justice system but it is submitted that undue weight was given to the perceived mitigation and insufficient to the very serious nature of the offence and the respondent's prior record of lack of engagement with rehabilitation.

11. The sentence does not contain any element of deterrence. Nor does it reflect the injury, both physically and psychologically to an innocent commuter. It does not reflect society's opprobrium for this type of random, unprovoked behaviour.

12. The sentence appears to have been based on the psychiatric report prepared from one interview. It was also submitted that the sentencing judge attached undue weight to the report of Dr. O'Domhnaill, psychiatrist, and his proposed treatment for ADHD. The judge failed to give sufficient weight to the Probation Services report. They had dealt with the respondent for a number of years since the 31st October, 2013. The report noted the respondent had not been well behaved in prison. His conduct included damage to prison property and being found with illicit alcohol in a cell on the 8th January, 2016. The report noted poor engagement, failure to attend appointments and follow directions and continuing to come to the negative attention of the Gardai. The report noted the most recent referral in April, 2014 when he failed to attend all appointments despite three court adjournments. It noted his high risk of re-offending in the next 12 months and that he didn't fully understand the full impact on the victims.

13. It was the appellant's further submission that the sentencing judge failed to give due regard to the aggravating factors. Particularly, the respondent's previous convictions and that the robbery involved an unprovoked attack and gratuitous violence involving kicking a person repeatedly in the head while he was on the ground unconscious.

14. The Court was referred to *The People (DPP) v. Gary Burke* [2015] IECA 186 at paras. 14 to 16 where this Court also referred to *The People (DPP) v. N.C.* (Unreported, Court of Appeal, Ryan P., 24th March, 2015). The Court warned against the dangers of over concentrating on one factor in sentencing while not giving due weight to other relevant factors. In *Burke* it was held that the sentence was unduly lenient for failing to have sufficient regard to the gravity of the offence and the impact on the victim and giving too much weight to the mitigating factors. It was submitted that this case contained a similar error. The judge placed too much emphasis on the psychiatric report and proposed treatment for ADHD and gave insufficient weight to the vicious nature of the offence, the impact on the injured party and the fact that the Probation Services did not give a positive report.

Respondent's Submissions

15. The respondent submitted that the high standard required demonstrating undue leniency has not been met. It was accepted that it was a very serious offence with aggravating factors. However, the two and half year sentence was imposed taking account of a large number of mitigating factors. The sentencing judge considered all the factors and constructed a sentence that reflected the seriousness of the offence balanced against those mitigating factors.

16. An error of principle such as would allow interference had not been established. The discretion was exercised in a reasonable manner.

17. The Court was referred to *The People (DPP) v. Byrne* [1995] 1 ILRM 279 on the jurisdiction under s. 2 of the 1993 Act. There must be a substantial departure to justify interference. In *The People (DPP) v. Redmond* [2001] 3 I.R. 390 at 404 to 505 it was held that undue leniency must be shown by specific factual or legal submissions. A sentence cannot be interfered with just because this Court would have imposed a different sentence. Unless there are exceptional circumstances an error of principle must be demonstrated.

18. It was submitted that the proper approach on an undue leniency appeal was set out in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 at 359 where it was held that the sentence should be appropriate for the particular offence committed by the particular offender.

19. It was submitted that the English courts have also taken a cautious approach regarding the level of disagreement necessary to justify interfering with the sentence imposed. In *Attorney General's Reference No. 4 of 1989* [1990] 1 W.L.R. 41 at 45 to 46 it was noted that a sentence was only unduly lenient if it fell outside the range of sentences that could reasonably be considered appropriate.

20. It is submitted that the appellant's submissions are based on the respondent receiving a nine and a half month sentence. This was based on the incorrect assumption that the respondent went immediately to Cuan Mhuire. Due to circumstances outside his control he was not given the opportunity to avail of a bed in Cuan Mhuire and has remained in custody.

21. It was submitted that it is clear from the transcripts that it is not the case that the judge failed to regard the aggravating factors. The judge had access to the CCTV of the offence which was viewed on more than one occasion and she noted the vicious nature of the offence. Further this Court was referred to her comments before imposing sentence about it being a vicious and sustained assault on an innocent party with grave and most significant consequences. She noted that it was a robbery with a very serious assault. She also listed the aggravating factors noted above.

22. In relation to the claim of over reliance on Dr. O'Domhnaill's report it was submitted that after reading it the judge requested a probation report against the respondent's wishes. It is incorrect to say she was overly influenced by that report as she did not sentence until also having the benefit of the Probation Services report. The sentence was not purely constructed on Dr. O'Domhnaill's report as she asked for the probation report to "complete the picture".

23. It was further submitted that the appellant did not reference the evidence of Mr. Richardson, the respondent's key worker. He noted the respondent's change in maturity level, that he had stopped abusing illegal substances and that further they had a recovery plan. The judge referred to this evidence as very helpful and was also influenced by it. The writer of the probation report also spoke to Mr. Richardson who advised that he had noted a "significant shift" in the respondent's "attitude in relation to his substance abuse".

24. It was submitted that the appellant unfairly characterised the probation report as "not particularly positive". The positives were ignored. It was accepted that he had unsuccessful dealings with the service in the past. This was addressed in Court and counsel for the Director had an opportunity to comment on the respondent's counsel's submissions but did not do so. The report noted that he "engaged well during interview" and had "a positive attitude towards any future engagement". His stated desire for assistance with alcohol and substance abuse was noted and that he was on the waiting list for addiction counselling in custody.

25. It was submitted that while the appellant noted the high risk of re-offending it did not mention that it was also recorded that the respondent expressed a desire to change his circumstances and there was a willingness to engage services to do so.

The appellant did not object or comment when counsel for the respondent dealt with the disciplinary issues in custody, indicated the report was largely positive and showed the respondent was fully open and cooperative when interviewed. The Probation Services showed a willingness to work with the respondent. It was submitted that it is unfair to criticise the report for the first time in this Court.

26. The Court was referred to *The People (DPP) v. McCauley* [2016] IECA 173 at para. 24 where it was held that the sentence was lenient but consideration was given to the aggravating factors and that the judge "must be afforded a significant margin of appreciation in the selection of what is the appropriate penalty". In the instant case the judge recognised and referred to the aggravating factors and weighted them against the significant mitigating factors. It was submitted that these included; He was a juvenile when he committed the offence, entered a guilty plea at the first available opportunity, had a chaotic and unstructured family life, remained in custody when he could have been released on bail, expressed genuine remorse, had significant substance abuse difficulties when he committed the offence, and his prior offences, which he had overcome and was anxious to retain his drug free status, the positive testimony of Mr. Richardson, the report of Dr. O' Domhnaill and the probation report and the turnaround in his attitude and his increased maturity levels.

27. It was further submitted that *Burke*, referred to by the appellant, was not a fair comparison being a case which involved serious previous convictions and grave concerns from the Probation Services about his propensity towards violence when living in the community. The instant case had none of those features. Moreover, in *Burke* it is notable that the sentence of five years was suspended in its entirety.

28. It was submitted that the sentence was structured appropriately given the respondent's youth at the time of commission and sentencing. The Court was referred to O'Malley, *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016) at 6.14 where the author notes that with young offenders the court "should have primary regard to the need to encourage desistance from future crimes". In *R v. Smith* [1964] Crim. L.R. 70 it was held that the public interest is that the young offender becomes a good citizen and the court has the difficult task of determining what treatment will best realise that objective.

29. The judge gave appropriate consideration to the respondent's sincere, genuine and successful efforts to overcome a relatively severe addiction. In *The People (DPP) v. Eccles* (Unreported, Court of Criminal Appeal, 8th October, 2003) the Court reduced a sentence of four years to three fully suspended on the basis of the rehabilitative efforts of the respondent.

30. It was submitted that the appellant did not, in all the circumstances, discharge the burden to demonstrate that the sentence was unduly lenient.

Decision

31. The assault in this case was a particularly atrocious one. The victim was an entirely innocent party awaiting his tram to return home. In company with another man, the respondent attacked the unfortunate victim who tried to escape but was not allowed to. He was kicked and punched until he fell unconscious to the ground. He was then kicked repeatedly to the head by the respondent himself who stole the man's mobile phone and only then departed the scene of this outrageous assault. It is entirely possible following this assault that the respondent might have faced a charge of murder. The other matters dealt with at sentencing are not the subject of this appeal. We are concerned only with the robbery count.

32. It is clear that the judge gave careful consideration to the sentencing procedure in this case. She watched the CCTV video and read the psychiatric report prepared by Dr. Seán O'Domhnaill. She also adjourned so as to allow her receive and read the Probation Service report. She gave some considerable weight to this report but also balanced it with the psychiatric report. Both seemed to impress her with the possibility of a favourable outcome if the respondent could be brought to mend his ways. Clearly her hope that this might be possible was the deciding factor in determining that the respondent should in effect serve just nine and a half months in custody on the robbery charge and then go into Cuan Mhuire for a 20 week treatment programme. Following this he would place himself under the supervision of the Probation Service for a period of 18 months. It is most unfortunate that this did not happen as a place there never became a feasible option for a number of reasons with which we need not concern ourselves here. In the result the respondent is now due for release in June but subject to no supervision nor participating in any programme that might assist him resist a return to crime. We are told that he is an enhanced prisoner as a result of his current good conduct in prison. We are also told that he has engaged in a course of bricklaying and that the Prison Service will arrange an apprenticeship programme in this regard when he leaves prison.

33. This Court will not interfere with a sentence unless it can identify an error in principle. There must be a substantial departure from the norm. See *DPP v. Byrne* [1995] 1 ILRM 279. Here the judge identified a 4 year headline sentence. The maximum penalty for robbery is life. This leaves a very broad range and we can accept that it is difficult to find the point at which the headline should be fixed in any given case. Here however owing to the egregious violence involved in this savage assault, we cannot agree with the sentencing judge's fixing that point at 4 years. The element of deterrence that must be contained in every sentencing process demands that the courts make clear that violent assault of the type involved here will not be tolerated and will meet with the strongest response in sentencing. We consider the judge erred in principle on this point. We consider the appropriate headline to be one of 7 years. Thus the Court will proceed to resentencing.

34. There are, as the sentencing judge found, good grounds of mitigation which she set out. There is some hope for rehabilitation on the part of the respondent and the most recent information indicates some optimism for a brighter future for the respondent provided he continues under some form of supervision as was wisely considered by the sentencing judge.

35. We must consider any resentencing as things stand now. The respondent did expect to be released in June. It was not entirely his fault he did not get into Cuan Mhuire. He has tried whilst in prison to improve and rehabilitate himself. We would wish this process to continue. We consider the appropriate sentence allowing for the aggravating and the mitigating factors involved here including the possibility of rehabilitation and employment is one of 7 years with 3 ½ years suspended for a period of 3 years including 18 months post release Probation Service supervision. This sentence will date from 21st July, 2015.