THE COURT OF APPEAL

Record No: CA 172/2014
Bill No : DU 658/13A

Sheehan J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

- v -
Ian Dent

Appellant

Judgment of the Court delivered on the 27th day of July, 2015 by Mr. Justice Edwards

Introduction

1. This is a case in which the appellant was convicted by an 11-1 majority verdict of a jury on the 17th of July 2014, following a lengthy trial in the Circuit Criminal Court spanning approximately two weeks, of two counts of violent disorder, contrary to s. 15 of the Criminal Justice (Public Order) Act 1994 (hereinafter the Act of 1994).

2. The incidents of violent disorder of which appellant was tried were committed on 29th of April 2012. The appellant had pleaded not guilty to both counts.

3. Following the appellant's conviction on 17th of July 2014, the sentencing judge heard submissions from the parties in relation to sentencing on 25th of July 2014 and 28th of July 2014. The appellant was then sentenced on 29th of July 2014 to two years of imprisonment in respect of the first count of violent disorder (Count No 7 on the indictment) and five years of imprisonment in respect of the second count (Count No 8 on the indictment), to run concurrently from the date of the conviction on 17th of July 2014.

4. The appellant now appeals against the severity of his sentences.

Relevant Background

5. In the early hours of the date in question the appellant, who was 21 at the time, and was in Dublin city centre with five other young men, comprising Mr Richard Fish, Mr Aidan Finnegan, Mr Anthony Clifford, and two others, having attended a 21st birthday party earlier in the evening at which a lot of alcohol had been consumed.

6. The injured parties were brothers, Mr Gareth Russell and Mr Patrick Russell, who were two American tourists visiting the city with other members of their family for the purpose of visiting their nephew, Mr Jonathan Carpenter, another American who was a student studying in Ireland at the time.

7. Mr Gareth Russell, Mr Patrick Russell and Mr Jonathan Carpenter had just left the Quays Bar and were walking through Merchant's Arch with two Irish women friends when they encountered the six Irish young men previously mentioned, one of whom appeared to be interfering in some way with another young man who was lying on the street. The group of six, which included the appellant, was then approached by Mr Gareth Russell who gave evidence at trial that he attempted to persuade them to desist from interfering with the young man lying on the street.

8. CCTV footage provided evidence of Mr Gareth Russell approaching the youths, despite the two Irish women attempting to bring him away from the group and, after skipping a few seconds, it showed a melee which ensued between the Irish and the American men. Mr Gareth Russell gave evidence that one of the Irish youths initiated this physical altercation. In addition, there was evidence from CCTV footage that the appellant had attempted to restrain some of the others involved in the incident.

9. Following the melee, the two groups exited Merchant's Arch, the three Americans and two Irish women turning right, and proceeding in the direction of O'Connell bridge, and the appellant and four of his group turning left, in the direction of Capel Street Bridge. The sixth youth, Mr Aidan Finnegan, momentarily separated from the appellant's group, exiting Merchant's Arch on the Temple Bar side.

10. However, shortly thereafter the appellant and his four friends then turned around, re-entered Merchant's Arch and re-encountered Mr Aidan Finnegan. Some of the group then armed themselves by removing glass bottles from a large rubbish container at Asdill's Row, following which all six youths proceeded back on the quays, turned right and ran in the direction of the O'Connell bridge, in pursuit of the Americans and the two Irish women.

11. A witness gave evidence to the effect that a member of the appellant's group was heard shouting "Bottle the c***s" (expletive deleted).

12. CCTV did not capture the incident which ensued and thus it was impossible to determine the exact actions of the appellant's group, however, it was established at trial that Mr Gareth Russell and Mr Patrick Russell received significant injuries as a result of being struck by glass bottles which had been in the possession of some of the members of the appellant's group. Mr Gareth Russell was struck firstly in the face, at which point he attempted to enter a taxi, but was then struck in the back of the head with another bottle. Mr Patrick Russell was struck in the arm, resulting in a fracture.

13. The two serious lacerations suffered by Mr Gareth Russell have required several cosmetic procedures in Ireland and in the United States and have left him, indefinitely, with pieces of glass in the skin under his eye and a visible scar. Mr Gareth Russell gave evidence that the injuries have had adverse consequences for his employment and his marriage, in addition to his physical and psychological health.

14. Mr Anthony Clifford pleaded guilty at an early stage to both counts of violent disorder. At his sentencing, Mr Clifford admitted that he had struck the blow that resulted in the fracturing of Mr Patrick Russell's arm. It followed from the way in which the evidence proceeded at trial that Mr Clifford was also responsible for throwing the bottle that struck Mr Gareth Russell in the back of the head.

The two Irish women companions of the Russell brothers testified that numerous bottles were thrown at the Americans by the appellant's group. However, the evidence did not establish which member of the group was responsible for Mr Gareth Russell's facial injury.

15. Following his arrest, the appellant identified himself on the CCTV footage recording those present and involved in the Merchant's Arch incident. As it was uncontroversial that the group of six of which he was a member had been involved in both incidents, it followed that he was also a participant in the incident which occurred on the quays. In the circumstances, he was convicted by the jury of being involved in violent disorder at both locations, first in Merchant's Arch and secondly during the pursuit of the Americans on the quays.

16. Five of the group of six Irish men were each charged with two counts of violent disorder and were returned to face trial as co-accused. The appellant and Mr Aidan Finnegan pleaded not guilty and their cases proceeded to trial. As previously stated the appellant was convicted of violent disorder both for the incident at Merchant's Arch and for the incident on the quays. Mr Aidan Finnegan was convicted by the jury of violent disorder for the incident on the quays only. Mr. Richard Fish entered a plea of guilty to both counts on a certain basis; that is, that he was armed with a bottle but caused no injury. As previously stated, Mr Anthony Clifford also pleaded guilty to both counts in circumstances where he it was clear that he had directly caused actual injury to both Russell brothers. Finally, the prosecution entered a nolle prosequi in respect of a fifth man who had initially been charged as a co-accused with the other four.

The Sentencing Hearing

17. The appellant was sentenced at the same time as Mr Aidan Finnegan and Mr Richard Fish. Mr Anthony Clifford had been sentenced at an earlier date and by a different sentencing judge.

18. In terms of the appellant's actual level of involvement in the two incidents the sentencing court heard that there was no evidence that the appellant had personally armed himself at any stage with a glass bottle or that he was directly responsible for the injuries sustained by the Russell brothers. The appellant admitted during the investigation that he had consumed a certain amount of alcohol on the night and that he did not have a clear recollection of the events. He thought that he might have been one of a number of individuals on the quays who was assaulted by Gareth Russell at one point in the proceedings, but he did not give himself any particular role beyond that. Mr Dent was seen on CCTV footage getting into a taxi and leaving the scene after the incident on the quays.

19. The sentencing court heard evidence that the appellant had a total of 26 previous convictions, all of which were District Court convictions relating to offences that had been committed between January 2011 and March 2012. Sixteen of these related to public order offences, seven related to the road traffic offences, one to an offence under s.3 of the Misuse of Drugs Act 1977, one to criminal damage and finally, one for an offence contrary to the Non Fatal Offences Against the Person Act 1997. Firearms and Offensive Weapons Act 1990. Six of the convictions had resulted in fines, 11 had resulted in the application of the Probation Act, community service orders, suspended sentences of binding to the peace. He had never previously been required to serve a custodial sentence.

20. In terms of the appellant's personal circumstances the court heard that at the relevant time the appellant's mother was seriously ill with cancer, that she relied heavily on the appellant for support and that he was carrying considerable guilt and it was weighing heavily on him that her burden had been added to by virtue of him getting into trouble.

21. Counsel for the appellant submitted that the appellant's previous convictions related to offences which had been committed during a period in which their client had "gone off the rails" whilst his mother was ill and the appellant himself had developed a drugs and alcohol addiction. It was contended that, since the events on 29th of April 2012, the appellant had taken a number of steps to leave delinquency and addiction behind him and was showing clear signs of progression towards a more constructive lifestyle.

22. A report was submitted on behalf of the appellant from Addiction Response Crumlin, (A.R.C) contending that the appellant was committed to a rehabilitation programme which he had voluntarily commenced in September 2013. Counsel for the appellant submitted that he was no longer utilising illicit substances.

23. A report was submitted from Dr Michael Rowan, of St Agnes's Medical Centre, where the appellant's mother was being treated for cancer, outlining the mother's illness and stating that the appellant helps her out at home; evidence which was supported by a letter from the appellant's mother.

24. The sentencing court heard testimony from Mr Brendan Dempsy, manager of a football club in Drimnagh and football coach of the appellant, who stated that the appellant had played for the club since the age of 9, that he had never caused any trouble in that regard and that he had good sporting prospects.

25. Counsel for the appellant also informed the court that the appellant had been accepted into Pearse College in September 2014 for a course in soccer and career development.

26. It was submitted on behalf of the appellant that he now regretted his involvement in the incident, and that while he had certainly been involved in the incident on the quays it was at a lower level than others who had armed themselves with bottles and had inflicted actual injuries. The court's attention was drawn to the fact that, at a point in the CCTV footage of the incident at Merchant's Arch, the appellant appeared to be holding back others.

27. In passing sentence on the appellant the sentencing judge noted that he had cooperated in the course of the investigation by identifying himself on the CCTV footage of the Merchant's Arch incident. He further noted that the appellant had not come to the adverse attention of the Gardaí since the incident.

28. Following the initial sentence hearing on the 25th of July 2014 the judge posed two questions to counsel for the DPP, and adjourned the matter to 28th of July 2014 in order to give counsel time to take instructions. First, the judge sought clarification from counsel for for the Director of Public Prosecutions as to whether, in circumstances where counsel had acknowledged that the participants in the violent disorder were not acting in joint enterprise, the prosecution was contending that it was relevant that significant injuries had been inflicted on the victims in the course of the incident on the quays, and if so, to what extent. In particular, the judge asked whether it was being proposed that he should isolate the role played by each of the convicted persons for the purpose of sentencing them or whether he should consider the collective actions of the group. Secondly, the judge queried whether he was bound to give consideration to the sentence which Mr Clifford had received and, if so, to what extent.

29. Counsel for the Director of Public Prosecutions responded at the hearing on 28th of July 2014 by re-iterating the D.P.P's view that as the parties were not acting in joint enterprise the appellant was not criminally liable for the injuries caused to the victims, and in particular for the actions of Mr Clifford who admitted causing actual injuries to both Russell brothers. Consequently, the DPP submitted that the judge was not bound by the sentence given to Mr Clifford; and that the appellant's involvement could and should be distinguished from that of Mr Clifford. In substance it was contended that in relation to the incident on the quays he should be sentenced only on the basis that his participation was confined to joining others in pursuing the Americans down the quays in a threatening manner that was likely to cause a person of reasonable firmness to fear for their safety or the safety of another. Nevertheless, counsel submitted, the sentencing judge was entitled to have regard to the fact that the incident had culminated in the causing of injuries to the Russells. That this had occurred was part of the overall circumstances and it was to be seen as an aggravating factor in terms of fixing where on the scale of seriousness the offending conduct lay.

30. In sentencing the appellant, the judge commenced with the following remarks applicable to the circumstances of all three persons before him for sentencing:

> "The three accused are before the Court now to be sentenced in respect of the offences of committing violent disorder on the streets of Dublin in April 2012. Initially, it was necessary to establish the correct basis upon which the Court could proceed to impose sentence, because of a an apparent contradiction that would seem to have emerged from the way in which the case was conducted. On the one hand, the evidence clearly indicated a group working together operating in similar circumstances that ultimately led to the serious injuries inflicted on Garth and Patrick Russell as described. And yet on the other, the state indicating that they were not relying upon the concept of common design, or joint enterprise. And that in effect, each of the accused is not responsible for the actions of the other. That being so, it was difficult to understand why then at sentencing the very extensive and detailed evidence was given as to those ultimate injuries suffered by Garth and Patrick Russell.
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> I put the matter back to hear submissions from both prosecution and defence because many of the submissions made on behalf of the accused was to the effect that the state in abandoning the principle of joint enterprise of each of the accused being responsible for the actions of the others provided the Court was satisfied there was a common end involved meant then that the accused ought to be dealt with differently and on each owns position. It also followed from it that in respect of the more serious incident, that on the quays, the second set of charges where the very very extensive injuries arising from two attacks with bottles on Garth occurred, and the breaking of Patrick's arm, no clear evidence was established fixing either of the three accused, any of the three accused before this Court with any of those injuries. The state's position is that clarified, and was clarified by Mr Naidoo very helpfully last evening, in which he indicated again and repeated that the state were not relying upon joint enterprise or so to speak, joint responsibility. The accused therefore do not carry the responsibility at law for the actions of others in the group, though they did start out as a group and it would seem very much ended as such. In particular, the state agreed that neither of the accused or any of them is responsible or answerable for the admitted action of one of their co accused,
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> Mr Clifford who has already been dealt with and who the Court was told was sentenced in terms to six years imprisonment because it was clearly identified of him that he had inflicted one of the injuries on each of both Gareth and Patrick Russell. So not answerable for Mr Clifford's, therefore equally not answerable for the actions of any of the other unidentified persons involved. Mr Finnegan and Mr Dent are both guilty of the offence on the quays. And Mr Dent in addition was found guilty by the jury of the offence at Merchant's Arch. The offence on the quays was made out by the prosecution and presented to the jury and found by the jury based upon the fact that the accused and each of them as a group turned on the quays near to Merchant's Arch and launched in the direction of the Farrell's, as they made their way home to their hotel. On the account given by the Farrell's, this group or some of them leading it in particular were armed with bottles and other weapons."
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> …
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> "All were present or thereabouts when the injuries were inflicted, words were spoken between them, no assistance was offered by any of the accused to the victims, and all left them there in the sorry condition they were ultimately found. The facts of this case cannot be dealt with in a vacuum, and the injuries and what ultimately occurred provided context for what was afoot on the evening. The nature of this offending must be commented upon. They arose out of a group, it would seem to me from looking at the CCTV footage, of a group who were out, for want of a better description, prowling the Temple Bar area of the city, walking about as a group with no real aim to their purpose or presence. I particularly remember the comment of one of the witnesses describing them as certainly not dressed for the evening festivities. They moved about through the Temple Bar area together, as I say in a random way and then ultimately found themselves in the merchant's arch where an attempt was made to take not a paper cup but property from the pocket of the man who was lying on the ground there. This was what caused the Russell's to react, because he was awoken by the attempt of one of the group to take from his pocket, remonstrated with them and Mr Russell intervened. It's quite clear that Mr Russell was certainly assertive of his position and challenging. A row broke out, and it would appear that each gave as good as the other.
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> They retreated, the Russell's, deciding it was over, moved on through the quays with the intention of finding their way home. The others regrouped, turned, armed themselves and set about the second set of events leading to the very very serious injuries suffered. Patrick and Garth Russell had just arrived in Dublin that day. They were holiday makers, intent upon enjoying the hospitality and the welcome of the city. They were left with horrific injuries, well-illustrated by the photographs, so shocking that the jury couldn't see it. How Garth Russell was able to in any way enjoy the remainder of his holiday is difficult to understand, and Patrick no doubt had his arm plastered. The consequences particularly for Garth Russell described in the victim impact report have been significant. He has been hampered in his career, and troubled in his marriage. So these injuries had a very significant impact immediately and in the longer run in particular with regard to Garth Russell.
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> The sentence imposed on Mr Clifford does not bind this Court as a tariff being set. But nonetheless, it is a sentence to be considered in the overall context of the case. One of the duties of the Court is to indicate its complete dissatisfaction and unacceptability of the conduct of the accused on this evening. And the fact that any person can be attacked so openly and so determinedly with weapons, and in a way that had little regard for the safety of those under attack.
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> Another feature of this case that has to be mentioned is the age of the accused and their circumstances. Their records show and I'll come back to this in respect of each one of them, a history of marked disregard for public good order. They also appear to be of a nature of young men who, as I say, frequent the streets taking their opportunities as they arrive.

Their record also shows that they have come through the unfortunately well-worn path of the juvenile criminal justice system, a system which does not appear in any way to be adequately resourced or capable of dealing with people of their position. They were time and again before the courts, dealt with on each of virtually every occasion without non custodial intervention, I'm not suggesting that that is the solution to all problems. But offered all of the various facilities and regimes of that system of community service, probation supervision, probation order by dismiss, fines and other non custodial formulae. And then the all too common event occurs, to the experience of these courts, that a day like today comes when they graduate in one fell swoop out of that overly protective system into the adults courts on a serious footing, where they are facing significant terms of imprisonment. It is regrettable that that is so, but it is something I believe that needs to be considered by the legislatures because it is a recurring feature of these courts."

"Looking to each of the accused personally then, …"

"The second accused, Ian Dent was convicted of both the offence at merchant's arch, and on the quays by the jury. And again, like Mr Finnegan co operated in the course of the investigation and identified himself on the for the purposes of the trial on the video at the merchant's arch. At the age of 21 he has managed to accumulate 26 convictions and of these, six of them were fines, 11 were probation or community service orders, suspended detentions and peace bonds. There is one suggested period of detention in 2012 for criminal trespass, and that alone. He has 16 public order offences recorded against him and as I say that is a pattern similar to the other two accused. A significant number of appearances in court where very little by way of order was achieved and the accused man simply repeated his offending with, it would seem, a degree of impunity. It is suggested that he is an avid footballer and a talented man in that area and I've heard evidence from Mr Dempsey very supportive of him. It's difficult, I have to say to measure what Mr Dempsey says about him and the testimonials speak of when it is also considered that he is someone who has in recent times developed a chronic drink and drug abuse chronic drink as opposed to drug, but nonetheless abuse of both of those substances. I have had fair regard to the letter written to me on his behalf by his mother. She complains that he hasn't been properly portrayed in the evidence at the trial, and that he's not a violent person. Again, I have to say it's difficult to measure that against a young man with so many convictions who seems to be out of control and had no regard to good order in public or elsewhere. Who hasn't responded to all of the probationary supervisions based upon him or the community orders marked against him. I regret that she won't be in a position to rely upon him for some time now, having regard to her medical condition. It has been said on his behalf by Mr Dwyer that he regrets his involvement in this event and that I take it is to some degree a guarded acknowledgement that again the verdict of the jury is a correct one, and I will give him the benefit of that attitude."

31. The appellant received two years of imprisonment in respect of the first count (the Merchant's Arch incident) and five years imprisonment in respect of the second (the incident on the quays), both sentences to run concurrently and to date from the day of his conviction. Mr Finnegan, who was convicted of only one offence (the incident on the quays), was sentenced to a term of four years imprisonment. Mr Fish received a term of one year imprisonment in respect of the first count and three years imprisonment in respect of the second, again both sentences to run concurrently. Mr Anthony Clifford was sentenced to six years on each count, also to run concurrently, with the last year thereof suspended for twelve months from the date of his release from custody.

Grounds of Appeal

32. The appellant contends that his sentence ought to be set aside on the grounds that it was excessive, and specifically: -

"(1) The sentencing judge erred in law in failing to take full account of the age of the appellant at the time of the offence and his age at the time of sentence.

"(2) The sentencing judge erred in law in failing to take full account of the rehabilitation undergone by the appellant in the period between the date of the offence and the date of the sentence.

"(3) The sentencing judge erred in law by failing to fully or adequately take into account the appellant's lack of charges from the date of the offence until the sentencing date.

"(4) The sentencing judge erred in law by not acknowledging that the appellant was seen in CCTV to be holding others back from getting involved in one of the violent disorders, a fact that was agreed by the Gardaí themselves while interviewing the appellant.

"(5) The sentencing judge erred in law by holding that the fact that none of the accused helped the victims of their crime was an aggravating factor.

"(6) The sentencing judge erred in law by wrongly taking into account the injuries suffered by the victims in this case, in a situation where the accused was not charged with causing any such injuries, and was not prosecuted on the basis on common design in causing such injuries.

"(7) The sentencing judge erred in law in failing to structure a sentence which encouraged rehabilitation by leaving the appellant 'light at the end of the tunnel', which it was contended was especially important in this case given his age, his ongoing rehabilitation, his prospects for the future, and the fact that he had not come to adverse Garda attention in the period between the offence and the sentence.

"(8) The sentencing judge erred in law by punishing the appellant more severely because he had not been jailed in the past for his previous convictions.

"(9) The sentencing judge erred in law in passing a sentence on the appellant which was disproportionate to those of his co-accused, and in particular one co-accused who pleaded guilty on the basis on actually causing serious injuries to the victims, an offence for which the appellant was not charged.

"(10) In all of the circumstances of the case the sentence was unduly severe.

Submissions

33. The appellant has submitted that, although the sentencing judge referred to the appellant's age, he did not take full account of the fact that the appellant was just 21 years old at the time the offences were committed. Secondly, the appellant argues that the

sentencing judge did not attach sufficient weight to the reports from Addition Response Crumlin (A.R.C), which were indicative of the appellant's rehabilitation progress. In light of the fact that rehabilitation is one of the primary goals of sentencing, and considering the progress that the appellant had made in that regard, he submits that it would have been appropriate for the sentencing judge to have chosen a more lenient sentence or to have suspended a portion of the sentence that was passed. Thirdly, the appellant argues that the judge attached insufficient weight to the fact that all of the appellant's previous offences had been committed in a concentrated timeframe in which the appellant was experiencing difficulties in his personal life, particularly as a result of his mother's illness and his addiction problems.

34. The appellant seeks to rely on his good behaviour, demonstrated by the fact that he did not come to adverse Garda attention between the commission of the offences and the date of his sentencing, his remorse, his intention to pursue studies at Pearse College and his rehabilitation progress. In addition, the appellant submits that the evidence from his football coach, attesting to his talent, reputation for good behaviour and sporting prospects, did not receive adequate attention from the sentencing judge and that these were also capable of constituting mitigating factors.

35. Furthermore, the appellant contends that the sentencing judge erred in law by not acknowledging that the appellant was seen on CCTV footage attempting to restrain his co-accused at the commencement of the incident in Merchant's Arch. In relation to the injuries sustained by the victims, the appellant argues that the sentencing judge erred in law by wrongly taking into account the injuries inflicted in a case in which there was no joint enterprise extending to the causing of actual injuries. Moreover, the appellant argues that the sentencing judge passed a lengthy sentence on the basis that the appellant had not received any custodial sentence for his previous convictions, and this, the appellant submits, was an error in law. Finally, it is argued that the judge erred in law by taking into consideration the appellant's failure to offer assistance to the victims and by passing a sentence which was disproportionate having regard to the sentences imposed on the appellant's co-accused, in particular that imposed on Mr Clifford, who had pleaded guilty to causing two of the injuries.

36. The respondent has submitted that the sentencing judge made clear that he was sentencing the appellant only in respect of the appellant's particular involvement in the offences. The respondent underscores the acknowledgment of the sentencing judge that the appellant was not responsible for the injuries caused to the victims and reiterates the judge's observation that the facts of this case could not be dealt with in a vacuum. In that regard, the respondent opines that the judge was correct to consider the effect of the pursuit, namely the injuries, which were inextricably linked to the appellant's actions in running down the quays after the Americans.

37. The respondent contends that the sentencing judge had due regard to the appellant's cooperation in the investigation, his young age (both at the time of the commission of the offences and at sentencing), his previous convictions, his remorse, and the testimonials proffered on his behalf, in particular that of Mr Dempsey, the appellant's football coach.

38. In addition, the respondent argues that the judge should not attach any weight to the fact that the appellant has not been the subject of Garda attention in the period between his commission of the offences and the sentencing. The respondent contends that this did not amount to a mitigating factor. The respondent does not readily accept that the appellant has made such significant progress at rehabilitation as the appellant contends. According to the respondent, true rehabilitation would be exemplified by acknowledgment of wrongdoing – something which, the respondent asserts, is not present in this case, given the absence of a guilty plea.

39. The respondent disagrees that the sentencing judge erred in imposing a severe sentence on the basis that the appellant had not been incarcerated hitherto for his convictions. It is submitted by the respondent that the objective of deterrence legitimately justifies the duration of the sentence passed, including in the light of the appellant's convictions. Finally, it was submitted by the respondent that the sentencing judge proceeded on an entirely proper basis, with adequate regard to the seriousness of the offences and the matters advanced in mitigation and, accordingly, there were no errors in law or in principle.

Section 15 of the Act of 1994 and the relevance, if any, of joint enterprise.
40. Section 15 is in the following terms:

> "(1) Where:
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> (a) three or more persons who are present together at any place (whether that place is a public place or a private place or both) use or threaten to use unlawful violence, and
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> (b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety,
>
> then, each of the persons using or threatening to use unlawful violence shall be guilty of the offence of violent disorder.
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> (2) For the purposes of this section—
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> (a) it shall be immaterial whether or not the three or more persons use or threaten to use unlawful violence simultaneously;
>
> (b) no person of reasonable firmness need actually be, or be likely to be, present at that place.
>
> (3) A person shall not be convicted of the offence of violent disorder unless the person intends to use or threaten to use violence or is aware that his conduct may be violent or threaten violence.
>
> (4) A person guilty of an offence of violent disorder shall be liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or to both.
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> (5) A reference, however expressed, in any enactment passed before the commencement of this Act—
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> (a) to the common law offence of riot, or

(b) to the common law offence of riot and to tumult,

shall be construed as a reference to the offence of violent disorder.

(6) The common law offence of rout and the common law offence of unlawful assembly are hereby abolished."

41. The offence of violent disorder created by s. 15 of the Act of 1994 is one of a number of statutory offences created by the Act of 1994 that were intended to replace the older and somewhat ill-defined common law offences of rout, riot or tumult, unlawful assembly and affray, respectively.

42. The offences of rout, riot or tumult, and unlawful assembly at common law were directed to the mischiefs of public violence, or planned public violence, or endangerment of the peace, by at least three people, either acting in pursuit of a shared or common purpose (i.e., it required to be proven that the participants were acting in joint enterprise), or alternatively, in the case of unlawful assembly, an unlawful purpose. The offence of affray at common law was directed to the mischief of persons fighting each other in public and did not require proof of any common purpose.

43. The offence of rout at common law was committed by a disturbance of the peace by persons who assembled together with an intention to do something which if executed would amount to riot and who actually made a move towards the execution of their common purpose.

44. The offence of riot (sometimes called tumult) at common law was defined as a tumultuous disturbance of the peace by three or more persons who assembled together of their own authority, with an intent mutually to assist one another against any who opposed them in the execution of an enterprise of a private nature, and afterwards actually executed the same in a violent and turbulent manner to the terror of the people. (See Archbold, Criminal Pleadings Evidence and Practice, 36th edition by Butler and Garsia, at § 3581; See also 1 Hawk c .65). In order to constitute a riot at common law five elements were necessary (1) the presence of not less than three persons; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against anyone who may oppose them in the execution of the common purpose; and (5) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness. References to "tumult" in the old authorities suggest that it is not a separate offence. Strictly speaking tumult is the violence necessary to prove common law riot but the word tumult was sometimes used interchangeably with riot to label the same offence.

45. An unlawful assembly at common law was an assembly of three or more persons (a) for purposes forbidden by law such as that of committing a crime by open force; or (b) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to endanger the public peace, or to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. (See Archbold, 36th edition, at § 3571)

46. The distinction between a riot, a rout and an unlawful assembly was that the first was a tumultuous meeting of persons who were guilty of actual violence; the second was where they endeavoured to commit an act that would make them rioters; and the last was where they met with an intention to make a riot, but neither carried their purpose into effect, nor made any endeavour towards it. (See Archbold, 36th edition, at § 3571)

47. The offence of affray at common law was defined as the fighting of two of more persons to the terror of another person, and was committed by a fight in public between two persons at least of such a nature as might well intimidate or frighten reasonable people. No common purpose or joint enterprise was required. (See Archbold, 36th edition, at § 3594).

48. All four of these common law offences were abolished by the Act of 1994 which substituted instead three new statutory offences, namely Riot (s.14), Violent Disorder (s.15), and Affray (s. 16).

49. The new statutory offence of riot requires the participation of a minimum of twelve persons, present together, using or threatening to use unlawful violence, in either a public or private place, for a common purpose, and whose conduct, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another's safety.

50. The new statutory offence of violent disorder created by s. 15 of the Act of 1994 is a lesser species of riot, but unlike the offence of riot created by s.14 of that Act, it requires the participation of a minimum of three persons and it is not a requirement that the participants should be pursuing a common purpose. The offence is committed where at least three persons, present together, use or threaten to use unlawful violence, in either a public or private place, and whose conduct, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another's safety.

51. Just for completeness in terms of this review, it may be stated that the new statutory offence of affray is committed where two or more persons at any place, use or threaten to use violence towards each other, and the violence so used or threatened by one of those persons is unlawful, and the conduct of those persons taken together is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety.

52. Accordingly, unlike in the case of the relevant common law offences now abolished, it is not necessary for the prosecution to prove the existence of a common purpose in order to establish the new statutory offence of violent disorder. However, it is important to appreciate that while acting towards a common purpose, i.e., in joint enterprise, is not a required ingredient of the offence of violent disorder; it may nonetheless be a feature, and for the purpose of sentencing an aggravating feature, of any particular incident of violent disorder that the participants were in fact acting in joint enterprise.

53. However, where a degree of common design can be inferred, only conduct within the tacit agreement can be taken into account as aggravation. Where one or more participants goes beyond that which is tacitly agreed the others cannot in justice be held to account for those actions of their co-participant(s) that go beyond that which was tacitly agreed.

54. Finally, the court notes that the offence of violent disorder contrary to s.15 of the Act of 1994 is very similar in its terms to the offence of violent disorder created by s.2 of the Public Order Act 1986 in the United Kingdom. In *R v Church* [2000] 4 Archbold News 3, CA cited in Archbold, Criminal Pleadings Evidence and Practice, 2014 edition, at para 29-15b) the English Court of Appeal, Criminal Division, held that running with a group, other members of which were armed and committed assaults, raised in the case of each member of the group a *prima facie* case of violent disorder.

Discussion

55. In the present case a tacit agreement between the participants in the incident on the quays might readily have been inferred, on precisely the same basis as in *R v Church*, at least to the extent that the Irish group, of which the appellant was part, pursued and menaced the Americans along the quays; though not necessarily in so far as the subsequent perpetration of actual injuries to the Russells was concerned. However, counsel for the Director of Public Prosecutions stated expressly, and twice, in the course of the sentencing hearing that the case was not being made that the participants were in fact acting in joint enterprise. In those circumstances the offence committed on the quays in respect of which the appellant faced sentence was not aggravated either by participation on his part in a joint enterprise, or by the fact that another participant, *i.e.*, Mr Clifford, went on to perpetrate actual assaults on the victims.

56. In the present case the trial judge expressly disavowed approaching the sentencing of the appellant and his co-accused on the basis that they were parties to a joint enterprise, either inter se, or with Mr Clifford. However, as he was entitled to do, the trial judge held that the case could not be dealt with in a vacuum and that the injuries and what ultimately occurred provided context for what was afoot on the evening. He went on to say that while the sentence imposed on Mr Clifford did not *"bind this Court as a tariff being set"*, it was nonetheless a sentence to be considered in the overall context of the case. This Court finds no error of principle in any of that.

57. However, while the trial judge was entitled to have regard to the context in which the offending behaviour occurred, and also to have regard to the sentence imposed on Mr Clifford who had actually inflicted injuries on both Russell bothers, he was nevertheless obliged to properly assess the culpability of the appellant as an individual participant in each incident of violent disorder, to consider the extent to which there were mitigating circumstances in his individual case, and to impose sentences upon him that were proportionate to both the gravity of the offence in each instance and the personal circumstances of the appellant as offender.

58. It is convenient to deal with at the outset with ground of appeal no 9, namely that the sentence imposed on the appellant was disproportionate to that imposed on his co-accused, particularly the sentence imposed on Mr Clifford.

59. A person guilty of the offence of violent disorder is liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or to both. The trial judge was correct in saying that the sentence imposed upon Mr Clifford did not represent the setting of any tariff that bound him. However, the sentence imposed on Mr Clifford was certainly something to which regard could be had in the sentencing of the other participants, as it would assist in ensuring consistency.

60. Consistency is desirable in sentencing practice. Disparity in sentencing as between different accused charged with the same crime can sometimes provide a legitimate basis for criticism of the sentencing process, and may sometimes justify the finding of an error of principle. However, it requires to be borne in mind that the circumstances of any two offenders, even if charged with the same crime, will rarely be identical. Moreover sentencing is not an exact science, and in many cases a judge may have available to him or her a range of legitimate sentencing options that he/she can avail of. This is particularly true in Ireland where there is little structuring of the sentencing system and sentencing judges have a wide range of discretion in the matter of sentencing. Moreover, co-offenders may sometimes be sentenced by different judges, a circumstance that arises in the present case. Accordingly, sentencing judges' must be afforded considerable latitude in their assessment of what constitutes the appropriate sentence in the case of a particular offence and offender.

61. Thomas O'Malley in his work entitled Sentencing Law and Practice, 2nd ed, (Thompson Round Hall, 2006) opines that "Disparity, properly defined, does not arise unless similarly situated offenders who commit similar offences are given manifestly dissimilar sentences," a sentiment this Court agrees with.

62. The Court does not consider that there is evidence to support the suggestion that there was an inconsistency or disparity in how the appellant was sentenced compared with Mr Finnegan, and Mr Fish, to such an extent as to amount to an error of principle. There was a legitimate basis for differentiating between each of them vis a vis the appellant. Mr Finnegan was before the court on only one offence whereas the appellant was before the court on two. Mr Fish had pleaded guilty, whereas the appellant had not. Although Mr Fish had armed himself with a bottle, and the appellant had not, Mr Fish did not in fact use it as a weapon. Moreover, Mr Fish's record of previous convictions was less bad than the appellants.

63. Mr Clifford, who caused actual injuries to the Russell brothers had received a sentence of six years imprisonment with the last year thereof suspended, giving him an effective custodial sentence of five years, in circumstances where had admitted his guilt at an early stage, had pleaded guilty at the first opportunity, was remorseful, but had 55 previous convictions including convictions for a number of s.15 drugs offences, for a number of other drugs offences, for a number public order offences, for a number of road traffic matters and one for an offence of unlawful seizure of a vehicle that was dealt with in the Circuit Court on indictment and for which he received 9 months imprisonment. His sentence of six years with one year thereof suspended for violent disorder was made consecutive to the sentence of 9 months imprisonment in circumstances where the violent disorder was committed while he was on bail in respect of the unlawful seizure offence. While the Court has no more detailed information concerning the sentencing of Mr Clifford, there is no reason to believe that the sentence imposed upon him was inappropriate.

64. The first thing to be said is that while the appellant and Mr Clifford received, in effect, the same amount of custodial time, their individual circumstances were quite different, both in terms of their culpability respectively, and the mitigation to which each of them was entitled. While they may have ended up with the same amount of custodial time, the point requires to be made that they did not in fact receive the same sentences, nor is it necessarily true that in ending up where they ultimately did that they departed from the same point and arrived at their final sentences via the same sentencing route.

65. This Court has no doubt that the culpability of the appellant was significantly less than that of Mr Clifford. The evidence was that appellant did not arm himself at any stage, nor did he perpetrate any injuries on either of the Russell brothers. Indeed, the CCTV evidence in respect of the Merchant's Arch incident showed the appellant endeavouring to hold back some of his companions who were intent on becoming involved in a physical altercation with Mr Gareth Russell after he had intervened to protest at the interference by some of the Irish group with the young man lying in the street. Moreover, the extent of the appellant's later participation in the incident on the quays appears to have been confined to chasing the Americans and their companions, as part of the Irish group, in a menacing fashion.

66. By the same token, the appellant and Mr Clifford had each met the case very differently. Mr Clifford had co-operated and admitted his guilt at a very early stage, and had pleaded guilty at the first opportunity. Full co-operation, admission of guilt, and an early plea of guilty is generally regarded by sentencing courts as reflecting genuine contrition and remorse, and allows for the granting of a considerable discount on any initial headline sentence that the Court might have in mind. In the appellant's case, while he was not uncooperative he did not admit his guilt, nor did he plead guilty. While there was no question of the appellant being penalised for having fought the case he would not have been entitled to the considerable mitigation that must inevitably have been afforded to Mr

Clifford on account of his plea.

67. Accordingly, all other things being equal, any sentencing judge would have been entitled to locate Mr Clifford's offending conduct at a higher place on the scale of seriousness in determining a headline sentence before mitigating factors were applied to reduce it, than he or she would in the case of the appellant's offending conduct. Equally, however, he or she would have been entitled to go on to afford Mr Clifford greater discount by way of mitigation than would be afforded to the appellant. In such circumstances it might be suggested that the fact that they ended up with effectively the same amount of custodial time might be no more than coincidence and by no means indicative of a disparity or inconsistency in sentencing to such an extent as to justify this Court in intervening.

68. However, the appellant's case goes further than that. It is contended that all other things were not in fact equal. It is argued that the trial judge unduly penalised the appellant on account of his record (ground no 8), and failed to afford any mitigation in recognition of the fact that notwithstanding adversities in the appellant's life that had led him into offending in the first place, such as his abuse of drugs and alcohol and the effect on him of his mother's cancer, he had made significant efforts at rehabilitation in the 27 months between the date of the offences and the date of sentencing (grounds no's 2, 3, and 7.). Counsel for the appellant also points out that while the appellant had a bad criminal record, manifesting considerable recidivism in the commission of public order offences in the run up to the incident with which this Court is now concerned despite having been previously given chances, his record was nowhere near as bad as that of Mr Clifford.

69. This Court is satisfied that the trial judge erred in treating the offences as having been aggravated by virtue of the appellant's previous record to the degree to which he so regarded it; and in failing to accord sufficient mitigation for the fact that the appellant's spiral into repeated offending conduct over a relatively short period had been arrested by strenuous and successful efforts on his part to address the various issues that had precipitated him into persistent re-offending. While the sentencing judge was entitled to comment adversely on the fact that the appellant had been before the Courts on sixteen previous occasions for public order offences and had in each instance been dealt with non-custodially, his further commentary rejecting the positive testimonials, the evidence of Mr Dempsey and the evidence of the appellant's mother on the basis that it was *"difficult to measure that against a young man with so many convictions who seems to be out of control and had no regard to good order in public or elsewhere. Who hasn't responded to all of the probationary supervisions based upon him or the community orders marked against him",* was not wholly merited.. It failed to take account of the entirety of the evidence and reflected only part of the picture. While the sentencing judge's comments might have been true with respect the period up until the commission of the offences for which he was then being sentenced they took no account of the uncontroverted evidence that the appellant had taken meaningful steps since then to turn his life around, that he had succeeded in staying out of trouble, that he was addressing his addiction issues, and that was no longer out of control and no longer getting into trouble. Moreover, although the trial judge had been asked in the plea in mitigation to have due regard to the sentencing objective of rehabilitation, there is no mention of it in his sentencing remarks.

70. While this Court readily accepts that there will always be cases where it is simply unrealistic to expect a judge to suspend all or portion of a sentence, or otherwise incentivise rehabilitation, it is an error in principle to foreclose on such options where there is uncontroverted evidence before the court of a demonstrated track record of progress towards rehabilitation. The possibility of incentivising continued rehabilitation should at least be considered, though having done so a judge may in an appropriate case be justified in rejecting it as a viable option. The difficulty in this case is that the sentencing judge did not expressly address the possibility of incentivising rehabilitation at all in sentencing the appellant. On the contrary, he implicitly appears to have foreclosed on it as a possibility on the basis of the appellant's previous criminal record, which he characterised as having involved *"[a] significant number of appearances in court where very little by way of order was achieved and the accused man simply repeated his offending with, it would seem, a degree of impunity."* While that remark was true as far as it went, namely up to the point in time at which the offences for which the appellant was being sentenced were committed, the evidence before the sentencing judge was that the situation so described had materially changed in the interim. In this Court's view it would have been appropriate to take such evidence into account.

71. In so far as ground no 1 is concerned, the Court is satisfied that the sentencing judge did take adequately take the age of the appellant into account.

72. In so far as ground of appeal no 4 is concerned, this clearly relates to the Merchant's Arch incident only. The sentencing judge imposed a considerably lower sentence on the appellant for that incident. Although the sentencing judge makes no specific mention of it in his sentencing remarks, the Court is not satisfied, having regard to the sentence actually imposed, that the trial judge failed to afford to take into account that the CCTV showed the appellant holding back others at one point in the proceedings. It seems to the Court that the sentence imposed for the Merchant's Arch incident was appropriate in circumstances where it was going to be made concurrent with a longer sentence to be imposed for the more serious incident on the quays.

73. The Court is also satisfied that the trial judge was in not error in regarding the failure of the appellant to assist the injured as a somewhat aggravating circumstance of the offence on the quays (ground no 5). The fact that the appellant failed to assist the injured does not reflect well on him, and indicates an indifference certainly at the time to the plight of those who had been initially been menaced by him and who were subsequently assaulted by another or others. If he was indifferent to their plight in the aftermath of them being assaulted it may be inferred that he was indifferent to their plight when joining in the violent disorder. Although the appellant did not himself cause the injuries caused by the assaults of others, the injured parties were still victims of his crime as well as being victims of assaults perpetrated by another or others. Indifference by an offender to the victims, or potential victims, of his crime, is indicative of higher culpability in committing the offence, and therefore aggravates the offence. There was no error in this regard on the part of the sentencing judge.

74. For reasons already stated earlier in this judgment the Court is not satisfied that the trial judge erred in taking into account that injuries had been suffered by the Russell brothers as part of the general circumstances, and context, in which the offences had been committed. The judge expressly acknowledged that none of the accused then before him for sentencing were responsible for the actions of Mr Clifford or any of the other unidentified persons involved in assaulting the Russell brothers. The Court is not therefore disposed to uphold ground no 6.

75. In all the circumstances of the case the Court considers that the sentence imposed on the appellant was in fact too severe and excessive, and upholds ground no 10. The Court will also in the overall circumstances of the case uphold ground of appeal no 9.

76. The Court finds no error of principle with respect to the two year sentence on Count No 7.

Conclusions

77. In circumstances where the Court has seen fit to uphold grounds of appeal no's 2, 3, 7, 8, 9 and 10, while rejecting grounds of

appeal no's 1, 4, 5, and 6, the Court will therefore allow the appeal in respect of Count no 8. The Court will set aside the sentence of 5 years imposed on the appellant in respect of Count no 8 and proceed to sentence the appellant afresh on that count.

78. For the avoidance of doubt, the Court affirms the two year sentence imposed on Count No 7.

The Appropriate Sentence

79. This was a serious offence that must have been very frightening for those at the receiving end of the appellant's violent disorder, and in particular his threatening and menacing behaviour towards them. Such behaviour appears to be all too common in the Temple Bar area late at night, and is to be deprecated in the strongest terms.

80. The Court considers that in all the circumstances of this case the appropriate indicative or headline sentence for this offence, taking into account relevant aggravating factors, was a sentence of four years imprisonment. When due allowance is made for relevant mitigating factors that existed on the date of initial sentencing, the Court considers that the four year indicative or headline sentence should have been reduced to one of three years imprisonment.

81. At the invitation of the Court, and in accordance with established jurisprudence, the parties were offered the opportunity of placing further materials before the Court. The appellant has done so, and the Court has now been furnished with a number of certificates in respect of courses completed by the appellant while in prison. These include a Motivational Enhancement Therapy for Addiction Program, and an Equal Skills course in computer skills. In addition, the Psychology Service at Mountjoy Prison has certified to the Court that the appellant has recently commenced individual therapy with their service as a follow on to his attendance as part of a group at Motivational Enhancement Therapy for Addiction. The Court has further received updated testimonials from Mr Dempsey, and from the appellant's mother as well as a personal letter from the appellant to the Court apologising for his offending conduct, and reiterating his determination to stay out of trouble in the future. It was confirmed to the Court that the appellant has behaved well in prison, and that he has not acquired any P.19's.

82. The Court has read and considered all of this additional material. It appears that the appellant's efforts at rehabilitation are genuine and are continuing. As a further incentive to him to continue along the path that he has now been travelling on for some time, this Court is prepared to suspend the final twelve months of the sentence of three years substituted today for the sentence of five years originally imposed on him, upon his entering into a bond to keep the peace and be of good behaviour for a period of twelve months from his release.