



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 186

[CJA 71/2013]

**The President
Finlay Geoghegan J.
Peart J.**

In the matter Section 2 of the Criminal Justice Act 1993,

The People at the Suit of the Director of Public Prosecutions

Appellant

v

Gary Burke

Respondent

Judgment of the Court (ex tempore) delivered on the 20th day of April 2015 by Ms. Justice Finlay Geoghegan

1. The respondent to this appeal pleaded guilty to one count of assault causing harm, one count of false imprisonment and one count of attempted robbery. He was sentenced on the 21st February, 2013, in respect of count No. 1 and the sentence was for a period of imprisonment of five years from that date, but the entire of the sentence was suspended for a period of seven years.
2. The suspension was on condition that the respondent follow any and all of the directions of the Probation Service in relation to his addiction and in relation to treatment of the addiction. The appellant brings this appeal pursuant to s. 2 of the Criminal Justice Act 1993, upon the grounds that the appeal is unduly lenient.
3. The submissions made both in writing and orally are to the effect that it was by reason of the suspension of the entire five years that this Court should consider the sentence imposed to be unduly lenient within the established principles. The facts were that the victim had been out for an evening in Waterford on the 19th January, 2010, where she was a student at that time. At 6.00 am she was walking home alone and when she had reached a car park close to her apartment, she was grabbed from behind by the respondent and dragged about 300 metres down the road, he threatened her with a knife and there is no evidence that he did in fact have a knife. The victim managed to call 999 and grab onto a railing. The respondent appears to have attempted to pull her from the railing and she fell to the ground hitting her head. She crawled across the ground and managed to grab a knocker on a door and banged the door. The respondent pulled her away again and she fell to the ground, but at that stage someone shouted from an upstairs window that they will call the gardaí and she managed to run away. The entire event appears to have lasted in the order of seven to eight minutes.
4. As a result of this the victim sustained bruising and a cut around her left eye, and bruising on the upper part of her skull. She may have been left with a scar below her eye. As well as the physical damage she suffered, in the victim impact report which was read to the court at the first of the two sentencing hearings in January 2013. She was reporting that she was unable to be alone, she awakens repeatedly, she was nervous, she had suffered a loss of confidence and had been unable by the date of the victim impact report to return to Waterford, spending most of her time in Dublin, from which it appears she was.
5. Prior to sentencing the sentencing judge had the benefit of a probation report and this Court has not seen the full probation report, it has seen references to it in the transcript of the two dates of the sentencing hearing. The import of the probation report was that they could not recommend the respondent as a suitable candidate for probation supervision in the community and the probation officer evidently indicated serious concerns about the respondent's propensity towards using violence when living in the community. The trial judge took the view that he was going to give the respondent an opportunity and in his words he says: "there has to be some ray of hope". The respondent had expressed the view that there was a ray of hope. The trial judge said he was not particularly worried about the respondent serving prison, because unfortunately he was well used to it, but he was inclined to the view, notwithstanding the Probation Service report to take the respondent at face value. The trial judge indicated that he knew he was taking a risk, but that it might be something that would come back and bite them all, but that he was going to take the chance. He then suspended the entire of the five years, but for a period of seven years.
6. There had been submissions made on behalf of the respondent in mitigation and also in relation to the background of the respondent and undoubtedly the respondent, unfortunately, has had a dreadful life history and circumstances since an early age. He appears to have been physically abused by his mother's partner. He was put into care at the age of eleven following his first conviction and made a first suicide attempt at the age of twelve. He has a long history of prior convictions, both in Ireland and in the United Kingdom and had spent most of his life in prison. There were 31 convictions in all at the time of sentencing.
7. At the time of the commission of the offence in 2010, there was evidence that he had consumed both alcohol and drugs and was struggling with alcohol and a drug dependency. He has a partner with two children. The younger one was two and half years of age and the elder one nine years at the time of the sentence.
8. At the time of the sentencing, the evidence was that he had been drug free since 2011. A certificate was produced from January 2011, of completion of a programme within a UK prison. There was also evidence adduced of contact with the Merchant Quay Ireland Addiction Counselling Service whilst he was in Cork Prison in the period leading to the sentencing hearing. The history of how the respondent came to be sentenced at two hearings on the 24th January, 2013 and the 21st February, 2013 was as follows.
9. The incident occurred on the 19th January, he was arrested on that day and was charged before the District Court on the 20th January 2010, at Waterford District Court and he was released on bail. He was due to appear again on the 23rd February, 2010, but did not appear and a bench warrant was issued for his arrest. He appears to have returned to England at that time and he had prior to this incident been serving a nine year sentence in the UK, but had been released in January or February 2009 and had come back

to Ireland. Having gone back to the UK sometime in early 2010, he was re-incarcerated in the UK.

10. The Irish authorities sought his extradition on a European Arrest Warrant and at that stage he was in custody in the UK and the UK authorities would not release him until the end of his custody period in the UK and this appears to have occurred on the 24th October, 2012, when he was accompanied back to Dublin. He was then arrested in Dublin airport and taken into custody in respect of this offence. He remained in custody from the 24th October, 2012, until the second sentence hearing on the 21st February, 2013. He spent that time primarily in Cork prison.

11. The other mitigating circumstances to which reference must be made, are his expressions of remorse, his cooperation with the gardaí and the fact that he pleaded guilty. It appears that in the first two interviews, he made no admissions, but in the third interview he did make admissions and expressions of remorse and he also assisted the gardaí in the detecting of certain items of clothing. It is relevant to note that he agreed to participate in an identification parade at which he was not identified. The incident took place of course at 6.00 am in the morning when it would have been still dark in January.

12. The applicant on this appeal submits that the sentence was unduly lenient and in particular submits that there were none of the exceptional or wholly exceptional features which would justify an entirely none custodial sentence for an offence such as this in line with the authorities of *DPP v. N.Y.* [2001] 4 IR 309 and *DPP v. Tiernan* [1988] IR 250. It was submitted that the trial judge failed to have adequate regard to aggravating factors of the offence, some premeditation, it was submitted though at the sentence hearing it was accepted by the gardaí that there was a relatively small amount of premeditation; the threat of a knife; the sustained nature of the incident and the fact that the attack only stopped because of a third party intervention. It is also submitted that insufficient weight was attached by the trial judge to the harm caused to the victim and that undue weight was given to the mitigating factors.

13. The respondent through his counsel in submission draws the court's attention to the relevant onus of proof on the Director in an application such as this, about which there is no dispute and to the mitigating factors to which I have already referred; the respondent's background, his efforts at rehabilitation, his cooperation with the gardaí, the guilty plea, the expressions of remorse and the absence of premeditation and the influence of drugs and alcohol. He draws the court's attention to what has previously been stated in relation to an application under s. 2 of the Criminal Justice Act and the principles that are well established and it is sufficient to refer perhaps to the authority of *DPP v McCormack* [2000] 4 IR 356 where the court said at p.359:

"In the view of the Court, undue leniency connotes a clear divergence by the Court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

14. This Court in a judgment delivered by the President on the 24th March, 2015, in the case of *The People at the suit of the Director of Public Prosecutions v. N.C.*, in considering the principles which apply to sentencing and the difficulty for sentencing judges said at para. 4:

"The point needs to be made that because of the jurisdiction to review cases for undue leniency, a Court may be doing no favour to an accused person by allowing itself to be excessively influenced by mitigating features of a case to the exclusion of the proper assessment of the gravity of the crime. It is well-established that a sentencing Court must direct its attention to the crime that was committed and the person who committed it. It is not the crime committed as a general concept or as being of a particular class, but the actual offence that the person before the Court committed. This is the primary determinant of sentence. What is the gravity of the crime that the guilty person committed? Relevant to this first question is what kind of crime was committed, what the particular circumstances were, how badly were other people affected, was lasting harm done, was there an antisocial element and any other matters that define severity of this class of offending. There may be features of the crime that make it more serious or less within this category of crime. For example, a sexual abuse crime committed by a person in a position of authority or trust is more heinous for that reason. That does not mean that if the crime was committed by a person who was not exploiting the advantage of his position, there will be mitigation to that extent. The crime is still serious and is not mitigated by the absence of aggravation. Another aggravating feature is the extent of the impact on the victim. Impact reports from victims are intended to remind the Court of the consequences of the crime and in many cases they may be long-lasting and profound, such as often is reported in cases of sexual abuse. Indeed, it may be that the damage to the victim far outlasts any sentence imposed on the perpetrator."

15. Later at para. 6 of the same judgment the court addressed the difficulties facing sentencing judges and stated:

"The general process of sentencing can be easily described but it is difficult to achieve justice by giving due but not excessive weight to the various elements that must be weighed carefully in the balance. Excessive concentration on one feature of the case upsets the delicate balance that must be observed in putting the crime in its context so as to assess the gravity of the offence in all the circumstances and then to apply the mitigating elements that operate to reduce the punishment."

16. This Court in applying the principles to which I have referred is of the view that the appellant, the Director, has discharged the onus of establishing that the sentence imposed by the sentencing judge in entirely suspending the full five year sentence was unduly lenient. This Court is of the view that the trial judge erred in principle in failing to have sufficient regard for the gravity of the offence and the impact on the victim, and erred in principle in giving too much weight to the mitigating factors when assessing the sentence to be imposed on the respondent for the offence committed by the respondent in the circumstances of the respondent. Accordingly, the court will allow the appeal.