



THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

Record No: 154/2017

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

JOHN DELANEY

Appellant

JUDGMENT of the Court (ex tempore) delivered 8th March 2018 by

Mr. Justice Edwards.

Introduction

1. This appellant pleaded guilty and was convicted on 9th May 2017 at Galway Circuit Criminal Court of the offence of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was sentenced on 13th May 2017 to imprisonment for six years, to date from the termination of a sentence for burglary which he was serving at the time, and from which he was due to be released on 26th August 2017, as the index offence was committed while the appellant was on bail. The final twelve months of the six-year term was suspended on certain conditions for a period of three years. He has appealed the severity of that sentence. The potential maximum sentence for the offence of robbery was life imprisonment.

2. On the morning of 15th February 2017 the appellant entered a hair salon in Galway. He went behind the counter and took between €40 and €80 from the cash box. While taking the money, he was disturbed and a struggle took place in the course of which the injured party, who was the salon owner, sustained a broken finger and certain psychological injuries. The appellant then left the premises with the cash but was later identified from closed circuit television, and was arrested and detained. When interviewed in the course of his detention he made full admissions. None of the stolen cash was recovered. The injured party was out of work for a period of six weeks and suffered financial loss and has ongoing psychological *sequelae*.

3. The appellant has one hundred previous convictions dating back to 2004 including four for robbery, twenty for burglary, a number for theft, and other convictions relating to drugs, assault, criminal damage and public order offences. Two of the robbery convictions resulted in the imposition of a four-year prison sentence (in 2010), and a nine-month sentence (in 2005), respectively.

4. At the time of the present offence, the appellant was thirty one years old and was married with two children, he was poorly educated and had a serious drug addiction problem. He had been in and out of trouble for many years.

Grounds of appeal

5. The appellant's grounds of appeal are as follows:

(i) that the sentencing judge failed to take into proper consideration the circumstances in which the robbery was committed;

(ii) that the sentencing judge erred in identifying a headline sentence of nine years' imprisonment, in that regard it was contended that nine years was too high on the scale of severity; and

(iii) that the sentencing judge failed to make an adequate reduction in sentence to reflect the mitigating factors in the case.

6. Of particular concern to the appellant is his contention that sentencing judge erroneously rejected the account he gave to the Gardai, namely that he was in the hair salon to get a haircut and that whilst there he had been tempted by a visible cash box, whereupon he decided to steal from it. The sentencing judge appears to have formed the view that the robbery was a pre-meditated one. In the course of his sentencing judgment he stated the following:

"I have briefly examined his statement and the reason he says he was there is to get a haircut and he says that he just noticed that the cash box was open and that he was tempted. It is difficult to accept that he didn't enter the premises deliberately with the intention of robbing them. As such, I take the view that this had to have been a pre-meditated case even though the particular target in case in question, being this particular shop and the unfortunate owner, were effectively an opportunistic target. Previous sentences have not acted as a deterrent so they were either not long enough or there was some other reason, but I don't have any other reason.

Now I take into account the impact on his victim, the aggravating factors in this case being the effects on his victim. I have come to the conclusion that it was pre-meditated and the previous convictions, his previous antecedents, elevate this to the high/mid-range on the scale of gravity. The headline sentence in this case is nine years imprisonment; the mitigating factors are his plea of guilty, his early admissions, he has apologised and has expressed remorse. The proportionate sentence is six years imprisonment. As this will be consecutive to the sentence he is serving at present, looking at the sentence in the round, I will suspend the final year of sentence for three years."

7. In reality, there is little difference between entering a hair salon with a view to stealing money, and entering the premises to have a haircut and moments later deciding to steal money. The evidence before the court suggested that the cash box was behind the counter, that the appellant was not simply sitting waiting for a haircut when he happened to observe a cash box but rather that he

had gone behind the counter where he had no business to be, and while there was in the course of stealing from the cash box when he was disturbed by the salon owner, so it was likely there was some element of pre-meditation involved. While this Court has dealt with robbery offences which have involved more violence than occurred on this occasion, it nevertheless considers the offending to have been very serious. Whether or not the theft was pre-meditated or opportunistic, it was directed at a small business. The injured party, i.e. the salon owner, was a woman working alone on the premises. The confrontation with the salon's owner involved considerable violence and left her with significant physical and psychological injuries.

8. These facts place the offence well within the mid-range on the scale of gravity for this type of offending. The sentencing judge determined upon a headline sentence of imprisonment for nine years. While that would have been appropriate towards the upper end of the mid-range on the scale, we agree with counsel for the appellant that it represented too high a starting point in the circumstances of this case. A more appropriate starting point would perhaps have been one of imprisonment for seven and a half years. Be that as it may, while to have fixed the headline sentence at too high a point on the scale was undoubtedly an error, this Court would not be minded to interfere with the sentence imposed by the court below unless satisfied that the error in question had resulted in an incorrect ultimate sentence.

If, however, notwithstanding the existence of an error of principle in his reasoning process, the sentencing judge ultimately arrived at what we consider to be a correct sentence, we will not interfere with it.

9. The appellant was entitled to an appropriate discount on the headline sentence for mitigation. However, this was a case in which the appellant had a very bad previous record. He has in excess of one hundred previous convictions, including four previous convictions for robbery and twenty previous convictions for burglary. He is a chronic recidivist. His record, which contains references to several suspended or part-suspended sentences, indicates that he has been given previous chances before but has spurned them. He was on bail for a previous burglary when he committed this offence. The principle mitigation available to him was in respect of his early plea of guilty. He was also entitled to have his admissions, his expression of remorse and his personal circumstances, including his family circumstances, his addiction problems and his difficult childhood, taken into account.

10. The ultimate sentence imposed in this case was one of imprisonment for six years with the final twelve months thereof suspended on certain conditions for a period of three years. Accordingly, in terms of prison time to be served, the net sentence was one of five years.

11. If the matter is approached on the basis that the correct starting point should have been one of imprisonment for seven and a half years, it begs the question as to whether discounting from that figure by one third, in effect, to arrive at a sentence that required five years' imprisonment to be served, represented a sufficient discount (i) for the mitigating circumstances in this case, (ii) to also take account of the totality principle in circumstances where the sentence was required to be made consecutive to the sentence already being served, and (iii) to offer some incentive to rehabilitation?

12. The sentence to which the present sentence was made consecutive was relatively short. Accordingly, the aggregate sentence was not that much longer than what the stand alone sentence would have been, but for the requirement of consecutivity. Consequently, only a minimal adjustment, if indeed any adjustment at all, would have been required to maintain proportionality in application of the totality principle.

13. Further, only a modest incentive to rehabilitation would have been justified on the evidence in this case, given the bad track record and the failure to avail of previous chances.

14. In all the circumstances, we consider that a discount of one third on the headline sentence, structured in the manner suggested, would have been sufficient and appropriate and we are therefore of the view that the ultimate sentence imposed by the sentencing judge was correct notwithstanding the error that we have identified, and that it should be upheld.

15. In the circumstances we dismiss the appeal.