



THE COURT OF APPEAL

Record Number 83CJA/2018

Birmingham J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

MICHAEL CUMMINS

RESPONDENT

JUDGMENT of the Court delivered On the 20th day of December 2018 by Mr. Justice McCarthy.

1. This is an application by the Director of Public Prosecutions for a review of a sentence of two years' imprisonment imposed at Dublin Circuit Criminal Court on the 27th February, 2018 pursuant to s.2 of the Criminal Justice Act 1993 (the "appeal"). The accused pleaded guilty to five offences committed on the 9th August, 2017, being: -

- (1) Theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences Act 2001);
- (2) burglary contrary to s. 12 (1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001;
- (3) threatening to cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act;
- (4) false imprisonment contrary to s. 15 of the Non-Fatal Offences against the Person Act; and
- (5) assault both also contrary to the Non-Fatal Offences Against the Person Act.

Sentence was imposed on the false imprisonment count and the others marked taken into consideration.

2. On the date in question two boys aged thirteen (one D.B.) and fifteen (one B.C.) respectively were sitting outside the former's house. The respondent called across the street and said "*why are you looking at me, I get very paranoid.*" The boys felt he was dangerous. He referred to a phone and said in respect of a girl's picture thereon "*why is she looking at me, my eyes see everything.*" He snatched the phone from D.B and demanded that he delete certain pictures. He punched D.B. because he asserted that he was taking too long to do that stating that he was part of a gang and made racist remarks. D.B. is not caucasian. He went into the house and went upstairs. The boys remained at the front door but within minutes he demanded that they enter the house. He engaged in what might be described as bizarre behaviour, for example he went upstairs in the house and put on a wig. He engaged in further violence towards D.B who was punched three times in all. He had removed the keys from the door thus locking the boys in. Both were afraid of him. D.B. feared that the accused would put what he thought was acid into his eyes (in fact the accused had a bottle of eye drops). He threatened to blow up the house. D.B. escaped by jumping from a first floor window. The Gardaí, when they arrived, had to negotiate with the respondent to gain access to the house. B.C. was in a position to leave only at that stage.

3. Needless to say this was a terrifying ordeal for the victims. Victim Impact Reports refer to their fear both at the time and thereafter and the adverse personal affects. The respondent was arrested and detained when he was found to be in an agitated and sometimes aggressive state. He was deemed unfit for interview for a number of hours. The investigating Garda, Garda Miriam Donovan thought that the accused appeared "*quite paranoid on the day in question*" He has a poor educational background. It is accepted that he was a drug user and that the paranoia was attributable to self-induced intoxication (with drugs).

4. The trial court had available to it a number of reports including a psychological report from "*Forensic Psychological Services*" and certain letters and certificates all supportive of the proposition that he was engaged in drug treatment programmes in prison, has insight into his addiction issues and is "*reflective*" in his approach towards developing a "*solid recovery plan moving forward with his life.*" Merchants Quay Ireland state that further therapeutic work would be of great benefit to the respondent and Fr. Peter McVerry refers to the fact that the respondent made what he describes as "*a great effort about three years ago to change his life*" when he apparently stopped taking tablets and was drug-free for a considerable time. The respondent is now drug-free in what is called the "Progression Unit" in Mountjoy Prison (a drugs-free environment). He will be afforded counselling in relation to drug use and any recovery will be monitored on an ongoing basis, including monitoring by regular drug testing by Fr. McVerry's organisation on release.

5. He was born on the 6th October 1985. He has no less than two hundred and thirty previous convictions extending to eleven burglary charges, seventeen charges of theft, five for possession of knives, twenty-two public order charges, seventeen of failing to appear in court and in or about one hundred road traffic offences (of which twenty-seven involved the unauthorised taking of mechanically propelled vehicles). It is not entirely clear whether or not any of these matters were dealt with on the indictment. On enquiry of his counsel, Mr Rea, it appears that one of them may be.

6. In the psychological report it is said that he presented as: -

"A person experiencing significant mental health difficulties; in particular paranoia and delusions. While Mr Cummins reported that since being on remand the aforementioned symptoms have abated, he was still somewhat confused and demonstrated a poor ability to communicate in a cohesive manner."

7. He informed the psychologists that on the day in question he believed that: -

"Two men were watching him in his house. He left his house to confront them and then noticed another young man watching him on the street. He reported that he approached this young man that he believed that he saw bizarre faces on this young man's phone. At this point, Mr Cummins reported that he entered a random local house, proceeded upstairs and collected items including a laptop. When he went to leave the house with the items he was arrested by the Gardaí."

It is stated that: -

"Looking back in hindsight, Mr Cummins reported that he was aware that at the time of his offending behaviour that he was experiencing mental health difficulties. He understands that he could not explain his behaviour otherwise and he realises that much of his thoughts and therefore his behaviour at the time does not make sense. He has a poor employment record and has a low level of intellectual functioning."

The report also states that: -

"At the time of the offence, Mr Cummins's lack of ability to differentiate reality from fantasy and was experiencing psychotic symptoms. However, given his chronic history of offending behaviour a holistic approach to rehabilitation is likely to be more successful to reduce recidivism"

He is described as someone who would benefit from ongoing psychiatric intervention.

8. Effectively the Director has appealed on the grounds that the sentencing judge give undue weight to the mitigating factors and insufficient weight to the aggravating factors. The following are stated to be those which aggravate it: -

- (a) The injured parties were children.
- (b) There was a racial element to the offence.
- (c) There were distressing threats to burn the injured parties' eyes and to blow up the house.
- (d) The offence of false imprisonment is a particularly serious offence. Although the incident was relatively short the fact that the accused entered the injured party's home and detained children.
- (e) D.B. had to endanger himself by jumping from a first floor window to make his escape.
- (f) The accused's criminal record of two hundred and thirty previous convictions.

9. The mitigating factors to which undue weight was allegedly attached were said to be the accused's personal circumstances and specifically his drug induced paranoia at the time of the offence. In our view the mitigating factors were not only such drug induced paranoia but also his larger mental health issues, his early plea of guilty, his progress to date in seeking to address his addiction and the prospect that he can be rehabilitated.

10. Nonetheless, we think that this offence was extremely serious. To us the principal aspects which make it so were the fact that the home of one of the boys was entered, the violence, threats and the racist overtones. We think that too much weight was given to the mitigating factors and that the sentence did not reflect the seriousness of the offence. We think accordingly that the learned trial judge fell into error on both grounds. We are of the view that the appropriate sentence for an offence of this kind could not be less than six years' imprisonment before one has regard to mitigating circumstances.

11. We think that having regard to the mitigating factors a sentence of four years' imprisonment would be appropriate. We think, however, that having regard to the importance in the public interest not only of deterrence and personal retribution but the achievement of rehabilitation (of which there seems a reasonably substantial prospect at this stage) it is appropriate to suspend part of that sentence. We think that the public interest would be best served by structuring a sentence so that he will be under supervision for a substantial period and would have an incentive to continue on the path of rehabilitation with the prospect of a return to custody if he re-offends or fails to otherwise comply with conditions.

12. In accordance with the *jurisprudence* of the court we should reflect the fact that the accused will be released early in the New Year and would legitimately have cause for complaint were the fact that the sentence will be lengthened was not taken into account. Having regard to all relevant factors, we think that it would be appropriate to suspend the final two years of that four-year sentence on terms for a period of two years. We do so on the following terms: -

- (a) That he will enter into a bond to keep the peace and be of good behaviour for the period in question.
- (b) That he will submit to any directions of the Probation and Welfare Service.
- (c) That he will undertake any and all courses (including residential courses) for drug treatment purposes, as directed and required by the Probation and Welfare Service.