THE COURT OF APPEAL

Peart J.
Birmingham J.
Edwards J.

Appeal Number : 219/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Alan O'Keeffe

Appellant

Judgment of the Court (ex tempore) delivered on the 18th day of December 2014, by Mr. Justice Edwards

1. This is an appeal by the appellant, in this case Alan O'Keeffe, against the severity of a sentence of four years imprisonment, with one year of it suspended, imposed upon him at Waterford Circuit Criminal Court on 1st October 2013 in respect of an offence of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997.

2. The assault in question arose out of an incident which occurred in the Anchor Bar in Dungarvan when the appellant was involved in an unprovoked attack on a young man called Alan Hogan, in which the appellant used a glass which was smashed into Mr. Hogan's face, thereby causing him severe and permanent injury.

3. The appellant was convicted by a jury on 10th May 2013 and was subsequently sentenced by the learned sentencing judge on 1st October 2013. The trial at which the appellant was convicted was a second trial. There had been an earlier trial at which the jury had disagreed.

4. The appeal is brought on the basis that the learned trial judge erred in principle in two main respects. It is alleged that in fixing the position of the offending conduct on the scale of seriousness appropriate to an s. 3 offence, he rated it too highly. It is also suggested that in imposing sentence the learned trial judge made insufficient allowance for the mitigating factors in the case, particularly the appellant's personal circumstances, his efforts at rehabilitation, his relatively minor previous record and the fact that he had expressed remorse and had made available the sum of €15,000 by way of restitution.

5. It is important to outline in a little more detail what were the facts of the case. The injured party, Mr. Hogan, was part of a group that was socialising with, and saying farewell to, one of their number who was about to go to Australia. They had been out for a meal and were having a few drinks after the meal and ended up at about 11 p.m. on the night in question, which was 10th May 2008, in the Anchor Bar in Dungarvan. They had just arrived in the premises and were proceeding towards the bar. Now, the appellant was also present in the Anchor Bar and he was part of another group that were participating in a stag party. As the injured party's group entered the Anchor Bar it seems that somebody in that group may have brushed off a member of the other group. The injured party turned around and as he turned around he was suddenly, and without any provocation offered by him, struck with a glass in the face by the appellant. Although the details were somewhat vague, the evidence before the court indicated that there may have been a prior altercation of some sort involving other persons in the two respective groups, but if there had been it had had nothing to do with the injured party and he was not involved in any such incident. The learned trial judge characterised the attack on Mr. Hogan as unprovoked and the court is satisfied that that characterisation was justified on the evidence before the court.

6. The injured party suffered very significant injuries. One has only to look at the photograph that has been handed up in the course of the hearing this morning to realise the correctness of the learned trial judge's rating of the case as being at the highest end of the available scale. The injuries to Mr. Hogan were truly horrific. He sustained a significant laceration to his face, running from his right upper eyelid, down along his cheek, along the side of his nose, culminating in a deep through and through laceration through his upper lip.

7. The court has the benefit of medical reports from the personnel at the hospital who attended to him. There is a report of Mr. Jason Kelly, who is a consultant plastic and reconstruction surgeon, setting out the treatment that he received. I should also state that Mr. Hogan lost a tooth in the incident and there is a dental report from a dental surgeon who attended to him in respect of that. The wound to his face was sutured in layers. He had complications in that he developed a subsequent infection which was troublesome. He is left with permanent scarring and, as stated, he has lost a tooth and now wears a denture. The denture is troublesome to wear insomuch as food becomes caught in it and he cannot wear it when he plays sports. The evidence was that the injured party is a sporty type of individual and is particularly involved in soccer. He cannot wear his denture when playing soccer and he finds this to be very embarrassing and it is impossible for him to have anything more permanent done with this tooth for as long as he continues to be involved in ball sports such as hurling or soccer. This is a source of distress and embarrassment to him. The scarring which he is left with is unsightly. He cannot shave with a manual razor anymore. He has to use an electric shaver and he now finds shaving to be a seriously irritating exercise and he feels that it makes his scars more visible.

8. Quite apart from these physical injuries that I have been describing, the young man in question has suffered very significant psychological injuries. He has suffered post traumatic stress disorder. He became depressed. He has found it difficult to move on from the incident. He still suffers from agitation and anxiety whenever he is in a crowded place. He has stated in his victim impact report that he eventually found himself wanting to get away from it all, and in particular to get away from being asked on a daily basis about the assault, and so he decided to move to Australia in order to get away from those distressing encounters.

9. As previously mentioned the learned trial judge characterised the offence as being unprovoked, and he placed it at the highest end of the available scale. The available range, it should be stated, was from a wholly non custodial sentence to imprisonment for up to five years.

10. This court does not consider that the learned trial judge was in error in so rating the offending conduct in this case. The facts of the case were extremely serious in this court's view. It was a horrendous assault which left the injured party with devastating injuries and in this court's view the seriousness of the offence was correctly rated and there was no error of principle.

11. There is, however, a second leg to the appellant's appeal and it is this. He contends that insufficient mitigation was afforded in terms of his personal circumstances and his efforts at rehabilitation. It is important in this context to allude to what the learned trial judge said with regard to that. Having described the injuries and the effects on the victim, and the appellant's attitude and manner of dealing with the investigation following the incident, particularly his lack of co-operation with the gardaí and his furnishing of a false

name and address, the learned sentencing judge continued:-

> "I must also take into account the accused's previous convictions and in this respect I am only taking into account the previous convictions up to 2008. The mitigating factors I have to take into account are the accused's expression of remorse, which has now been tendered to the court; the numerous references which have been furnished to the court and which indicate that the accused has turned over a new leaf since the incident; the accused's difficult domestic circumstances and, in particular, the serious medical condition of his daughter; the tendering, at great personal cost, to the accused of a figure of €15,000 in part compensation of the injuries caused to Mr. Hogan; the fact that the accused has been involved in gainful employment; the accused's admission and assertions that the Gardaí -- the admission that the assertions that the gardaí offered inducements for his voluntary statements are false; the fact that the accused has not been in any trouble since the incident.
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> Unfortunately, by reason of his conviction by a jury of his peers the accused is not entitled to the substantial discount in sentence which a plea of guilty would have attracted. The nature of the assault and the fact that it involved the use of a glass, together with the seriousness and permanent nature of the injury sustained by Mr. Hogan, puts it at the upper end in terms of sentencing. Taking into account the court's responsibility to protect society and to ensure that a strong message is sent that the type of activity in which Mr. O'Keeffe was involved in will not be tolerated and will be dealt with severely so as to act as a deterrent to others, I am satisfied that the appropriate sentence in this case is four years imprisonment. Taking into account the mitigating factors that I have outlined above,. I am going to suspend the last twelve months of the sentence for a period of five years on the following conditions: one, that the sum of €15,000 that has been lodged in court is paid to Mr. O'Keeffe *(sic)* and two, that the accused enter into a bond of €500 to keep the peace and be of good behaviour for a period of five years."

And that was how the learned trial judge dealt with the matter.

12. Now, it is clear from what I have just read out that the learned trial judge listed, in great detail, everything that could possibly be said in favour of this appellant. Indeed, some of the mitigating factors identified by him were factors which, in reality, one would have expected to carry little weight. But there were other things that it was entirely appropriate to take into account on Mr. O'Keeffe's behalf and every one of those was correctly identified and taken into account by the learned trial judge.

13. Clearly, if this man had met this case appropriately, if he had not given a false name, if he had not evaded apprehension, if he had offered a plea of guilty at the earliest stage, if he had paid compensation at an early stage when it would have represented a clear indication of his remorse and his desire to make restitution, he would have been entitled to a very substantial credit and it might well have been the case that he would have been dealt with much less severely than the manner in which he was dealt with on 1st October 2013 when sentenced by the learned sentencing judge. However, he did none of those things. Rather, he sought to evade apprehension, which does him no credit. He elected to fight the case, which he was absolutely entitled to do, and he should not be penalised for that. But, equally he receives no credit in respect of it.

14. The matter went to trial on two occasions. The injured party has moved to Australia and came back on two occasions for the purposes of giving evidence. The admissions which the appellant made and which, in large measure, did lead to his conviction, were disowned by the appellant at the trial. He sought to suggest that they had been procured from him by An Garda Siochána by means of threats and inducements that had been offered to him. He now accepts that there were no such threats or inducements and that, in fact, the admissions that he made were voluntary. He was maintaining that attitude up until the date of his conviction in May 2013. Over the five month period between the date of his conviction and the date of his sentencing on 1st October 2013, he appears to have had a change in attitude. He did offer an apology and he did express remorse and he did offer compensation, albeit late in the day, in the sum of €15,000 and the learned trial judge accepted that that money had been raised at considerable cost to him.

15. However, apart from the offer of restitution and the accompanying expression of remorse and apology, he was entitled to have taken into account as part of his personal circumstances that his daughter is seriously unwell. It is not necessary for the purposes of this ruling to go into the details of her condition but the court accepts that the family is facing a significant adversity on that account and it is also accepted that the appellant is personally very significantly involved in her care and welfare. However, there was no failure to that these unfortunate personal and family circumstances of the appellant into account. The learned sentencing judge specifically referred to the accused's difficult domestic circumstances and, in particular, the serious medical condition of his daughter.

16. The learned trial judge also accepted that the appellant's previous record was relatively slight. He had two previous convictions which were taking into account namely a public order offence dating back to 5th February 2008 and an offence for possession of a controlled drug for sale or supply contrary to s. 15 of the Misuse of Drugs Act 1977 in respect of which there is a conviction recorded on 26th June 2008. However, between those two offences in 2008 and the date of sentencing there were no further offending and the learned trial judge took that into account.

17. So, it is this court's view and conclusion that the learned trial judge took into account and gave appropriate credit for everything that could have been said in favour of this appellant and he was afforded appropriate mitigation for those factors.

18. The court finds no error of principle in respect of this sentence and, in those circumstances, the court will affirm the order of the learned Circuit judge and dismiss the application.