THE COURT OF APPEAL

Birmingham J
Sheehan J
Edwards J

Appeal number: 347/12

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Glen Douche

Appellant

Judgment of the Court (ex tempore) delivered on the 9th December 2014 by Mr. Justice Edwards

1. In this case the appellant appeals against the severity of the sentence imposed upon him at Dublin Circuit Criminal Court on the 7th of December 2013 when he was sentenced in respect of two counts of assault causing harm, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, and a further count of reckless endangerment, contrary to s.13 to of the Non Fatal Offences Against the Person Act 1997. The appellant had pleaded guilty to all three counts. The appellant was sentenced to three years imprisonment on one of the counts of assault causing harm and the other two counts were taken into consideration.

2. The essential facts of this particular case are that on the night of 11th July 2009 there was a party at No 47, Primrose Grove in Darndale, Dublin 17, which was the home of Anthony Byrne, who was one of the injured parties in this case. Mr. Byrne was present at the house along with the other injured party, a Mr. Conor Lunders who was there as a visitor. Elizabeth Chaney Senior, who is the mother of the appellant's partner, Elizabeth Chaney Junior, lived nearby at No 44, Primrose Grove. Elizabeth Chaney Senior was concerned, apparently, about the level of noise emanating from the party and sought to remonstrate in respect of it. This gave rise to some altercation between persons attending the party and persons at No 44, Primrose Grove.

3. The evidence was that the appellant received a call from his partner who was at her mother's house and who asked the appellant to come and assist them. Upon his arrival he witnessed his partner being hit on the head with a sweeping brush by Mr. Byrne. Apparently Mr. Byrne admitted to doing this in his statement to the gardaí. This fact emerged in the course of the sentencing hearing and the learned sentencing judge was aware of it. The evidence was that the appellant was incensed by the treatment of his partner.

4. The Court heard that the appellant left No 44, Primrose Grove with his partner but later returned in a car accompanied by a Mr. Howard, who subsequently was co-accused with the appellant in the prosecution. The appellant drove his car, which was a silver Volkswagen Bora, towards a group of people outside the house. Mr. Byrne, who was still present, attempted to pull one individual out of the way and his ankle was clipped by the car driven by the appellant. This was the basis of the endangerment charge. Upon the appellant and Mr Howard exiting the car they became involved in a melee with some of the individuals who had been attending the party at No 47. During the course of this melee the appellant's co-accused, Mr. Howard, stabbed Mr. Byrne and Mr. Lunders. The appellant was charged, and offered a plea of guilty, to the charges of assaulting Mr Byrne and Mr Lunders, respectively, causing them harm, on the basis that he was party to a joint enterprise.

5. Both injured parties suffered significant injuries. Mr. Lunders had stab wounds to his scalp, to his right lower chest below his ribs, to his back, to his left forearm and to his right wrist. Mr. Lunders received stitches for these injuries and had a stent fitted in his kidney.

6. Mr. Byrne was also stabbed a number of times. He was bleeding from the left shoulder and from his back. He had also an injury to his left ankle sustained in the course of being clipped by the car driven by the appellant.

7. The Court had evidence that the appellant had 109 previous convictions, the vast majority of which related to road traffic matters and public order offences. There was one conviction for a drugs offence, and one serious conviction for possession of explosives for which the appellant received a sentence of nine and a half years, with the last two and a half years of that term being suspended, the said sentence to date from 28th June 2010

8. The learned trial judge had faced the following difficulty in sentencing the appellant. The evidence was that at the time at which these offences were committed the appellant was on bail in respect of another serious offence. Accordingly, having regard to the terms of s. 11 of the Criminal Justice Act 1984, the learned trial judge was obliged to impose a sentence consecutive to any sentence that he had received for the offence in respect of which he had been on bail. That offence was the possession of explosives offence previously referred to. He was also obliged to take into account that the very fact that the offences were committed while the appellant was on bail was an aggravating circumstance in and of itself. He was also obliged to have regard to the totality principle in imposing sentence.

9. As indicated at the commencement of this judgment, the learned sentencing judge adopted the expedient of imposing a single sentence for what, he believed, to be the more serious of the two s. 3 assault charges and took the other two matters into account. He stated that he was "sentencing globally in relation to the matter". As he was required by law to do, he further made the single three year sentence that he imposed consecutive to the sentence in respect of the explosives offence.

10. In sentencing the accused, the learned trial judge stated, *inter alia*:

> "Obviously, whatever sentence I impose upon him in this case must be consecutive as it appears that these events occurred while he was out on bail in relation to the explosives matter. Therefore, I have to consider what added sentence I impose upon Mr. Douche in relation to what he did on the night in question. Now, obviously, the best way I can think of approaching it is, if all of these matters had been dealt with together, if these assaults and the explosives matter were before this court; and I have to engage in, I suppose, a process of thinking what this court would have done if that was the situation; and, I think, taking all the factors into account, including his plea of guilty, his record of conviction which is serious enough, his age, his personal circumstances - which are difficult for him, and his family, I think, if both of these matters had been heard before this court, the term of imprisonment I would have imposed was a term of 10 years' imprisonment altogether effectively. Therefore, what I am going to do is impose a term of three years imprisonment in relation to Mr. Glen Douche in relation to the assault, I think the assault of Mr. Lunders, and I am going to take all two remaining counts into account."

11. At the sentencing hearing it was common case, and accepted by the court, that the intention on the applicant's part to plead guilty was communicated at a very early stage. The learned sentencing judge was also made aware, and took account of the fact, that the appellant in this matter did not personally stab either injured party but was prepared to accept responsibility on the basis that he was a party to a joint enterprise. However, there was evidence before the court that he did bring two knives to the scene. Two bloody knives were found in the glove compartment in a car in which he was travelling with the co-accused, which was stopped by gardaí very shortly after the incident. It transpired that both of these knives had the DNA of the appellant on them, and one of the knives also had the DNA of Mr. Lunders on it. The Court heard that both men were arrested and detained by the gardaí following the stopping of this vehicle and that in a subsequent follow up search of the premises at number 44, Primrose Grove, another bloody knife was found and this had the DNA of the victim, Mr. Byrne, on it.

12. There was also evidence that subsequent forensic examination of the appellant's clothing had found the blood of Mr. Lunders on it, and that during interviews with the gardaí the applicant had made admissions about his conduct. In particular he admitted taking knives to No 44, although he maintained one of those was for his own protection. He admitted being present for the altercation and he admitted also striking Mr. Byrne with his car in the clipping incident to which this court has referred earlier.

13. Accordingly, the learned sentencing judge was aware that, notwithstanding that pleas of guilty were offered at an early stage, the evidence against the appellant had been very strong.

14. Insofar as the co-accused was concerned, he also pleaded guilty to both assaults as well as to an offence of possession of a weapon with intent to injure, contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990 In his case he had forty three previous convictions for various matters. It is not necessary, as he is not before the court, to go into in enormous detail. The co-accused received a sentence of 5 years imprisonment for the assault on Mr Lunders and the other matters were taken into consideration.

15. The appellant alleges that the learned sentencing judge was guilty of several errors of principle.

16. He complains that the manner in which the sentence was imposed, which treated the sentence for the explosives offence as having been an effective sentence of seven years, created uncertainty in the calculation of the consecutive sentence. The basis advanced for this contention was that the sentence imposed for the explosives offence was not actually a seven year sentence but, rather, it was a nine and a half year sentence with the last two and a half years of it suspended. It was submitted that a suspended sentence is still a sentence and that the length and gravity of the sentence for the explosives offence was underestimated in the circumstances.

17. There is a further complaint that that the learned sentencing judge, in deciding to sentence the appellant "globally", as he characterised it, did not personally hear the evidence concerning the facts of one of the cases to be taken account of in a global sentencing process. The appellant had been sentenced for the explosives matter, not by the learned sentencing judge in this particular case, but by another Circuit Court judge. It was contended that in those circumstances the learned sentencing judge in this case was not in a position to adjudicate upon an appropriate global sentence.

18. A further ground of complaint is that the learned sentencing judge had insufficient regard to the appellant's personal circumstances. The appellant says that the totality of his personal circumstances were not fully taken into account, in particular his youth, his expression of remorse, his early plea, his progress towards addressing his addiction problems, the impact on his family relationships and the impact of a long sentence on him personally. There is the further complaint that the learned trial judge failed to have any, or any sufficient, regard for the impact which the ultimate sentence imposed might have on his children. In that regard, the appellant referred the Court to *People (Director of Public Prosecutions) v Jervis and Doyle* [2014 IECCA 14, and, in particular to the judgment of Fennelly J at paragraphs 65 to 67 respectively, where he stated:

> *"It is, of course, the case that the personal circumstances of the individual and the effects of the sentence on his family are relevant considerations in sentencing. In her judgment in Director of Public Prosecutions v. M [1994] 3. I.R. 306, Denham J, as she then was, said:*
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> > *'However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court.'*
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> The effect of the breaking up of a family unit by separating children from one or both of parents is a highly material consideration in sentencing. This proposition is so obvious that it only has to be stated for it to be accepted. There are, however, some crimes that are so serious that this necessary consequence follows from the commission of the crime itself. Everything would depend on the circumstances of the case".

19. As a further aspect of the complaint that the learned sentencing judge had insufficient regard to the appellant's personal circumstances, it was urged in written submissions, although it was not pressed in oral argument, that the learned sentencing judge would have had sound reasons to partly suspend the sentence he was imposing due to the respondent's personal circumstances, his addiction problems and the length of the existing sentence. While it was conceded that this was not a case which would have justified a complete suspension of any proposed sentence, is it suggested that a partially suspended sentence should have been considered to mark the appellant's efforts at rehabilitation, and that the failure to do so was a further error of principle. In that regard, the Court had heard evidence that the appellant had attended "Alternatives to Violence" programmes in prison, and also an eight weeks relapse prevention programme. He had produced a letter from Fr. Peter McVerry, who had expressed the opinion that the applicant appeared committed to dealing with his addiction problem. He had also produced a letter from Mr. Roy Barnsley, a counselling psychologist, who confirmed that the applicant had requested referral to him. This was put forward as evidence that the accused was making real efforts to achieve rehabilitation.

20. It was submitted on behalf of the respondent that the circumstances of the case warranted a meaningful and significant sentence, even allowing for the ameliorating effects of the totality principle and that there had been no error of principle.

21. The respondent referred the Court to *People (Director of Public Prosecutions) v Yusef* [2008] 4 IR 204; *People (Director of Public Prosecutions) v Melia* [2008] IECCA 106 and *People (Director of Public Prosecutions) v M* [1994] 3 I.R. 306.

22. Counsel for the respondent has submitted that s. 11 of the Criminal Justice Act 1984 normally, but not always, requires that some sentence be added on. Due regard must be had in all cases to the totality principle and accordingly an "add on" is not something that will be required in every case. But, it is commonly required having regard to the legislative policy as expressed in the statute. Indeed,

in *People (Director of Public Prosecutions) v Melia* the Court of Criminal Appeal stressed that it is important that the sentencing judge should not set about structuring a sentence so to avoid the consequences intended by the legislature in passing s. 11(1) of the Criminal Justice Act 1984. It was submitted, and the Court readily accepts, that the requirement that a consecutive sentence be imposed is one that must be respected. It is the policy of the legislature and, save in exceptional circumstances, it is a policy to be adhered to.

23. The respondent further submits that, in basing his sentence on what he described as an 'effective' seven year sentence imposed by the Circuit Court in the explosives matter, it was not a case of the learned trial judge disregarding the fact that the total sentence imposed was nine and a half years of which two and a half years were suspended. However it was the case that the 'effective' sentence was a seven year sentence. The respondent has submitted that the complaint that the learned trial judge was not in a position to determine the appropriate global sentence, because he was unaware of the circumstances of the explosives charge, is simply not a valid complaint. He was attempting neither to re-open the explosives case, nor to re-sentence the appellant for the explosives offence. He had no jurisdiction to do so, and could not do so. Precisely because he could not do so, he was obliged to, and it is submitted he did, take the effective seven year sentence as a given.

24. The point was also made in written submissions, although again it was not pressed in oral argument, that it would have been open to the learned trial judge to give consecutive sentences for the two assaults and not necessarily to have fallen outside of the principles in *People (Director of Public Prosecutions) v Yusef.*

25. Counsel for the respondent also made the following points in respect of why this case required a meaningful and significant additional sentence on the accused, even allowing for the ameliorating effects of the totality principle:

- o There were two separate victims arising from out of three separate attacks;
- o The knives were deliberately brought into the dispute by the appellant and by his accomplice;
- o The assaults occurred after there had been an opportunity to leave and cool off and, to that extent, they were pre-meditated;
- o The offences were at the very highest end of the range for a s. 3 offence, concerning as they did multiple stab wounds in proximity to vital organs, particularly in the case of Mr. Lunders;
- o Any sentence(s) was/were required by law to be made consecutive;
- o The fact that the later offences were committed while Mr. Douche was on bail was an aggravating factor in and of itself.

26. Counsel for the respondent draws the court's attention to the fact that the learned trial judge specifically noted that the applicant's personal circumstances were difficult. It was submitted that the sentence imposed was proportionate and in accordance with the statement of principles set forth in the *People (Director of Public Prosecutions) v M*. It was submitted that any other sentence would not have reflected the seriousness of these knife assaults and indeed the offence of endangerment or the accused's culpability with respect to any of those offences.

27. The court has carefully considered the complaints made by the applicant in respect of alleged errors of principle and the court is not satisfied that the learned trial judge committed any errors of principle. The court was obliged to impose the consecutive sentence in this case and to regard the commission of these offences on bail as an aggravating circumstance in and of itself. He was also obliged to have regard to the totality principle and while he did not refer to the totality principle in terms, he spoke of sentencing globally in relation to the matter and the court is satisfied that the learned trial judge did, in fact, have regard to the totality principle.

28. We are also satisfied that the learned judge, in referring to the effective sentence of seven years, did not disregard the fact that a sentence of nine and a half years had been imposed of which two and a half years had been suspended. He was entitled to regard what he described as the effective sentence of seven years as the lawful and appropriate custodial sentence for the explosives offence. In so far as he imposed a further three years for the offences that were before him, a three year sentence for those offences was not in breach of principle. Indeed, counsel for the applicant has acknowledged this in an exchange with the Court.

29. The other accused in the case received the maximum sentence of five years. Both had bad criminal records. While this accused had not wielded the knife and did not personally inflict the stab wounds, he has pleaded guilty on the basis of joint enterprise. It is also material in terms of his culpability that he was the party who brought the knives to the scene. So, in terms of a basis for differentiation between the two, there was little enough basis for doing so.

30. Notwithstanding that that was so, the appellant received a significantly lighter sentence than his co accused. It can be said in the circumstances that the judge did, in fact, take into account the matters that were urged upon him with respect to the respondent's personal circumstances. He expressly acknowledged that this man's personal circumstances were difficult for him and his family and while the judge did not enumerate in specific terms the addiction problems, the difficult family history that this man had had, and did not list the components of the personal circumstances individually, the court is satisfied that the learned judge had taken all of the relevant matters into account. The evidence before the learned judge had been to the effect that the applicant was twenty two at the time of the offence – he is twenty seven now, that he was co-operative, that he had literacy problems, that he was in a long established relationship, that he had two children now aged six years and five years and that they would have been four and three at the time of sentencing, that he had lost two brothers, one to a drug overdose and one to a homicide while he was in Mountjoy, that he had drug addiction problems and that he had been making efforts in prison to address his various issues. The judge had all of that before him. He referred non specifically to the man's personal circumstances which he acknowledged were difficult for him. The court is satisfied that all relevant matters were taken into account, and that all appropriate sentencing options were in fact considered. It was a legitimate exercise of the learned sentencing judge's discretion to adopt the approach that he did, and to impose a single custodial sentence, measured with due regard to the effective sentence imposed earlier for the explosives offence, to which it was required to be made consecutive, so as to be proportionate and so as to take account of the totality principle.

31. Accordingly, the court is not disposed to allow the appeal. The appeal must be dismissed.