



THE COURT OF APPEAL

Record No. 26/2016

Sheehan J.  
Mahon J.  
Edwards J.

Between/

The Director of Public Prosecutions

Respondent

- and -

Donal Lehane

Appellant

**Judgment (ex tempore) of the Court delivered on the 16th day of June 2016 by Mr. Justice Mahon**

1. The appellant was found guilty by a jury at the Central Criminal Court in Dublin on 2nd December 2015 of two counts of intimidation of a witness contrary to s. 41 of the Criminal Justice Act 1999. He was sentenced on 25th January 2016 to a term of imprisonment of eighteen months in respect of both counts, with the eighteen months sentence on the second count to commence on the legal expiration of the sentence of eighteen months imposed in respect of the first count. It was further directed that the second eighteen month sentence (in respect of the second count) be suspended for a period of eighteen months conditional upon the appellant entering into a bond in the sum of €100. The period applicable to the suspended eighteen month sentence was stated to be during the appellant's period of imprisonment, and for eighteen months post release. He was also directed not to have contact with the victim. This is the appellant's appeal against his sentence.

2. In 2010, the appellant pleaded not guilty to a number of sexual offences arising from his encounter with the complainant. At the time, the complainant was a provider of sexual services for money, and her services were engaged by the appellant. He was acquitted by a jury of those sexual offences.

3. In the period March / May 2010, the appellant sent texts and e-mails to the complainant which were of a lurid and threatening nature. In them, he stated that unless she withdrew the allegations of sexual assault, her family and neighbours would be informed of her working as a prostitute. Her home location was identified and reference was made to a video clip of a compromising nature been released. There was no threat of violence in any of the communications.

**The sentencing judgment**

4. In the course of his sentencing the appellant, the learned sentencing judge identified a number of mitigating factors, including the appellant's lack of previous convictions, his otherwise good character, his good employment record and the fact that he was married and had small children. He also referred to character evidence given by a Mr. Lyons and his description of the appellant as a *very straight, very decent kind of person*.

5. The learned sentencing judge also reviewed the victim impact statement.

6. The learned sentencing judge also emphasised the seriousness of the offences. He stated:-

*"... We cannot ignore the seriousness of offences of this kind. Offences of this kind undermine the administration of justice. They do not just undermine the administration of justice in this case. They also have had a direct adverse affect on the victim.."*

**The impact on the victim**

7. The impact of this offence on the victim was considerable. Her victim impact statement was read to the sentencing court, and it stated:-

*"This crime has had a huge impact on my life and that of my family. I was left alone, terrified with no support. Each time my phone rang or I received an e-mail, I immediately thought it was Donal Lehane attempting to intimidate me. He knew where I lived and said he was going to expose all, that it went into my family and friends. I was in constant fear of what would happen next and didn't know who I could turn to. As I said previously, Donal Lehane knew where I lived and I didn't know what he would do next to get me to withdraw my statement. I installed CCTV at my house because I was so afraid. I really couldn't cope with the constant looking over my shoulder and for the welfare of my family I moved out of home. This crime has resulted in me having to upend my family and move to another part of the country so I can feel safe. I now live a large distance away from my family and friends and this isolation and distance is one of the major life changes for me and my family."*

**The grounds of appeal**

8. The sentence is appealed on essentially two main grounds:-

*(i) The learned sentencing judge failed to attach sufficient weight to the appellant's previous good character and his complete lack of previous convictions,*

*and*

*(ii) the learned sentencing judge failed to attach sufficient weight to the severely punitive effect of a custodial term of*

*eighteen months, having particular regard to the fact that the consequences of conviction and a period to be spent in custody would be catastrophic for the appellant and his family.*

9. Mr. Gillane, for the respondent, brought the court's attention to the comments of the learned sentencing judge as to the seriousness of this type of offence, and its potential to adversely impact on the administration of justice. This court absolutely and wholeheartedly agrees with these remarks. It is undoubtedly the case that these offences were serious, and that a custodial sentence was entirely appropriate.

10. Indeed, the appellant's counsel, Mr. Creed, does not disagree with the fact that these offences deserve an immediate custodial sentence. His contention, however, is that, in all the circumstances, a custodial sentence of eighteen months was unduly harsh.

11. The court accepts that a custodial sentence of any duration is particularly difficult for a first time offender, and indeed for a father of three young children and in circumstances where he is the family's sole breadwinner. While severe financial problems frequently arise as a consequence of a family breadwinner being incarcerated in prison, that fact alone will not normally be a sufficient reason of itself to avoid the imposition of a custodial sentence where such is required for reasons, including the public interest.

12. In general, the court seeks to avoid the imposition of immediate custodial sentences for first time offenders except in very serious cases, and particularly where there are present positive indications for rehabilitation and where the likelihood of re-offending is remote. Both these factors are present in this case.

13. In his book, "Sentencing Law and Practice" (2000 Edition) at p. 187, Prof. O'Malley writes:-

*"It is widely accepted, even by ardent retributivists who would insist that punishment would be strictly proportionate to the crime, the previous good character justifies mitigation.. There was a general policy that penal servitude, when it existed as a distinct form of custody, should not ordinarily be imposed for a first time offence unless it is particular serious. Today, the same policy would apply to imprisonment and, when a custodial sentence is imposed, the absence of previous convictions provides a valid ground for making it as short a period as it is at all consistent with the gravity of the offence.."*

14. This view is echoed by Hardiman J. in his judgment in *DPP v. Kelly* [2004] IECCA 14, when he stated the following:-

*"The absence of previous convictions may also indicate that the offence was out of character and unlikely to be repeated. It has also been said that for a person of previous good character, the first time in prison is likely to be a more severe punishment than the same period would be for a hardened criminal or even when suffered for the second time. Under a totality of hardship approach, a first time offender should therefore receive a lighter prison sentence than would be appropriate for a more seasoned criminal."*

15. In this case, the court has identified error of principle in relation to the sentences as imposed to the following limited extent.

(i) Insufficient weight was afforded to the fact that the appellant was a first time offender, with little likelihood of re-offending,

and

(ii) insufficient weight was afforded to the fact that the consequences of any period spent in custody would have very significant adverse effect on the appellant's family, and particularly the appellant's three young children ranging in ages between twelve months and four years, and that such an effect would likely be extremely serious if such period in custody was to be lengthy. Of particular relevance in this regard is the fact that the appellant was self employed at the time of his conviction, and was the sole breadwinner for his wife and young children.

16. In these circumstances, it is necessary for the court to re-sentence the appellant as of today. In so doing, it has particular regard to the following:-

(a) It is entirely appropriate and correct that notwithstanding the fact that the appellant was a first time offender and that any period spent in custody would have negative consequences for his family, as indicated, these offences call for a custodial sentence having regard to their serious impact on the victim, the threat that such offences pose to the administration of justice and the public interest.

(b) The appellant's lack of previous convictions, the positive signs for rehabilitation and the absent risk of re-offending.

(c) The severe impact for the appellant's family, and especially his three very young children, and which has resulted from his incarceration for approximately six months to date, and which include the threat to the family home from a failure to meet mortgage re-payments. There are other grave financial consequences for the appellant's family because of the fact that he was its sole breadwinner.

17. The court is in agreement with the appropriateness of the two eighteen month sentences imposed in the court below, but will direct that they be concurrent rather than consecutive as originally ordered and will be back dated to 2nd December 2015, the date on which the appellant initially went into custody. The court will direct that the final nine months of the sentence be suspended for a period of two years post release on the appellant entering into a bond in the sum of €100. Finally, it is ordered, as it was in the court below, that the appellant have no further contact with the complainant.