



THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

V

C.L.

166/2015

Respondent

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 25th day of February 2016 by

Mr. Justice Sheehan

1. On the 27th April, 2015, at the Circuit Criminal Court in Cork, a suspended sentence of three years imprisonment was imposed on the appellant following his plea of guilty to a robbery charge and a burglary charge. The appellant committed both of these offences on the 21st September, 2014.

2. On the 18th June, 2015, the sentencing judge received unchallenged evidence that the appellant had breached the terms of the suspension on several occasions and as a result of this the sentencing judge activated the three year sentence of imprisonment following a sentence hearing in the Circuit Criminal Court.

3. Counsel on behalf of the appellant now submits that the learned sentencing judge erred in failing to impose a proportionate reactivation of the three year sentence and further erred by failing to structure the sentence in light of the evidence of the applicant's hypothyroidism and alcohol addiction. A written submission to the effect that the breaches were *de minimus* was not pursued at the oral hearing by counsel on behalf of the appellant.

4. Of the two offences committed by the appellant on the 21st September, 2014, the robbery of a Mr. Patrick McCarthy was by far the most serious. Indeed were it not for this offence the burglary would undoubtedly have been dealt with at the Children's Court in Cork.

5. On the 21st September, 2014, at 12.30 am the gardaí observed the injured party lying on the ground and being kicked and punched by the appellant and two co-accused in the course of being robbed of his mobile phone and €40. Prior to this incident, the appellant along with two other co-accused had stolen a cash register from a premises they had entered in Cork City. They had abandoned the cash register sometime later.

6. While the injured party's injuries were described by the prosecuting garda as being of a minor nature she nevertheless told the court that he was a 52 year old man who had been fitted with a pacemaker following a heart attack in 2007 and that on the night he was very concerned that he might have another heart attack. He decided not to make a victim impact statement.

Personal circumstances of the appellant

7. The personal circumstances of the appellant at the time of sentence were that he was a person with no previous convictions and was sixteen years old. He has significant medical problems which require constant attention, in addition to having difficulties with alcohol and drugs. The probation report which was before the sentencing court at the time of sentence, indicated that the appellant was at moderate risk of being involved in further criminal behaviour. Nevertheless the report concluded by stating that:-

"C.L. is presently doing well. He is in every night on time and is not actively using substances. He will need ongoing assistance if he is to redirect his life in a positive way. Perhaps the court may feel he would benefit from being placed under the supervision of this Service. The focus of supervision would be to monitor C.L.'s efforts to make changes to enable him to lead a law abiding lifestyle."

8. At the original sentence hearing the learned sentencing judge found that the principle aggravating factor was that the injured party was a man in his 50's with a heart condition and that he could have died as a result of the attack on him. He described the mitigating factors as the early plea of guilty, the appellant's remorse, his cooperation with the gardaí and the fact that he had no previous convictions. He noted that the appellant had said he was very drunk at the time of the offence.

9. The judge measured the sentence as being at the mid to high end on the scale of penalties available. Initially he proposed to deal with the matter by means of a detention and supervision order pursuant to s. 151(3) of the Children's Act 2001, which provides:-

"(1) Where a court is satisfied that detention is the only suitable way of dealing with a child who is between 16 and 18 years of age, it may, instead of making a children detention order, make a detention and supervision order.

(2) A detention and supervision order shall provide for detention in a children detention centre followed by supervision in the community.

(3) Subject to subsection (4), half of the period for which a detention and supervision order is in force shall be spent by the child in detention in a children detention centre and half under supervision in the community."

10. The effect of such a sentence would have been a period of detention in Oberstown followed by supervision in the community. However, when he was about to impose this sentence the judge was told that there was only one place available in Oberstown at the time and took the view that it would be inequitable to differentiate between the two accused who were then before him. He then imposed a three year sentence of detention on each of those accused. He imposed conditions in respect of the appellant as follows:-

1. That he will keep the peace and be of good behaviour towards all the people of Ireland for a period of three years from the 27th April, 2015 and further that he would come up if called upon to do so at anytime within the said period of three years to serve the sentence imposed, but suspended, on him entering into this recognisance.
2. That he place himself under the supervision of the Probation Service for the period of eighteen months and comply with all the directions of the probation service.
3. That he observe a curfew by being at home from 10.00 pm to 8.00 am for a period of six months.
4. That he stay out of Cork City Centre as defined by channels of the river between 6.00 pm and 8.00 am for a period of twelve months.

11. At the sentence hearing on the 18th June, 2015, Garda Marja Furphy told the court that on the 5th May, 2015, at 6.00 pm C.L. had been stopped and searched on Cornmarket Street in Cork City Centre and he was not supposed to be there at that time. She further told the court that on the 16th May, 2015, at 21.30 hours C.L. had been arrested for a breach of s. 4 for a public order offence at Grand Parade and that on the 23rd May, 2015, he had again been arrested in Cork City Centre in respect of a Public Order Act offence. She further told the court that he had been similarly arrested on the 29th May, 2015, at 10.15 pm in Cork City Centre. Finally she told the court that at 12.22 am that morning, the appellant had been stopped and searched in Cork City Centre.

12. In the course of submissions on behalf of the Director of Public Prosecutions counsel submits that when activating the suspended sentence following evidence of the breaches, the sentencing judge noted at the time that the appellant was out of control. Counsel for the respondent concedes that while two breaches of a curfew order might be regarded as *de minimus*, four certainly were not and indicated that the appellant had shown by these breaches that he had did not care about his own rehabilitation.

13. Given that the sentencing judge's original intention was to impose an eighteen month detention order coupled with post release supervision for the same amount of time, we consider that the sentencing judge erred at the final sentence hearing in failing to address the issue as to whether or not it was necessary in the circumstances of this case to activate all of the three year prison sentence that had originally been suspended. In view of this finding the court then proceeded to a new sentence hearing and in this regard received additional documentation on behalf of the appellant. The court received a psychologist's report and a report from the Assistant Governor of Wheatfield Detention Centre which indicated that the prison authorities were presently considering a temporary release programme for this appellant given the very serious concerns that existed about his psychological health.

14. This is the first time that the appellant has been in detention in an adult prison albeit that he is imprisoned in a section devoted exclusively to the detention of 17 to 21 year olds and more recently in a section that appears to be exclusively for 17 year old detainees. This information is of assistance to the court and it is undoubtedly the case that the appellant has experienced his incarceration as highly punitive compounded as it is by his present physical disability. We take the view that the exceptional circumstances in this case in particular where we have evidence from the Assistant Governor that the prison staff along with the prison Medical and Probation Services have expressed great concern about the affects of continuing detention on the appellant. We also of course have already noted that it is the intention of the Governor in due course to allow the appellant to be temporarily released from prison.

15. We took the unusual step of having a further inquiry made following receipt of the report from the Assistant Governor to ensure that any order that we might make would assist in the structured release of the appellant and adjourned the matter to the afternoon. Both counsel for the appellant and counsel for the Director of Public Prosecutions have been of considerable assistance regarding the time it will take to put in place a post release programme and in these circumstances what we propose to do is to suspend the balance of the sentence originally imposed as and from the 18th March, 2016. That will provide for the release of the appellant at that time.

16. Accordingly we will vary the order by activating one year of the said sentence with the further stipulation that any unexpired part of that sentence will be suspended from the 18th March 2016 for a period of two years on condition that the appellant enters into a bond to keep the peace and be of good behaviour for that period and to comply with all the directions of the Probation Service during that time. Liberty to apply.