



THE COURT OF APPEAL

Birmingham J
Mahon J
Hedigan J

The People (at the suit of the Director of Public Prosecutions)

And

Rebecca McNamara

[99/2017]

Respondent

Appellant

JUDGMENT of the Court delivered on the 10th day of May 2018 by

Mr. Justice Hedigan

1. The applicant pleaded guilty to a charge of robbery and was sentenced to 5 years imprisonment with the final year suspended. This is an appeal against the severity of that sentence.

Background

2. The offence in question occurred on 14th May, 2016 at Davis Street, Limerick. The appellant robbed the injured party, Mr. O'Neill of €200.00 and a Nokia mobile phone. Evidence was heard before the learned sentencing judge on 9th February, 2017, and sentence was handed down on 30th March, 2017. The applicant has been in custody since 2nd June, 2016.

3. The injured party in this case was a man in his 60's who had just undergone heart surgery. In order to rehabilitate himself post-operation and ready himself for further surgery, he was to walk 2 miles a day. At approximately 7:00 pm, the appellant was on one of his post-operation walks, and went down a side lane off Davis Street in Limerick city. He noticed a young man and woman standing near to him. They were later identified on CCTV cameras as being the appellant and her co-accused, Mr James Price Moore. The appellant followed the injured party down the laneway. As the injured party was walking down the laneway, he received a knock to the back of the head. He fell to the ground, and a struggle ensued between himself and the appellant. She attempted to take his wallet from him. Mr Moore followed after the appellant and kicked the injured party on left side of his body. At this stage, the appellant was able to take the wallet from the injured party, and Mr Moore is said to have grabbed his phone. The two can be seen making their escape from the laneway at approximately 7:15 pm in a taxi. An ambulance was called by men who were drinking in a pub near-by. When the ambulance arrived, the injured party was in a conscious and alert state. He had sustained no major injuries and declined being taken to hospital.

4. The appellant was arrested on 1st June, 2016, and in the course of her interviews with the Gardaí she admitted to being present when the robbery took place, and identified herself as the woman in the CCTV footage. In the course of her admissions, she sought to place some blame on Mr. Moore for the offence, however she accepted her own culpability in the matter and expressed remorse, stating "I'm sorry to that man and if I could have helped him I would have".

Personal Circumstances of the Appellant

5. The appellant was born on 11th August, 1995, and is now 22 years old. She was 20 years old at the time of the commission of the offence, and was known to the Gardaí at the time as a chronic drug user. Her father died when she was three years old. She left school at fourteen years of age. Around this time, she witnessed what can only be described as a horrific accident in which there was a fire in a building in Limerick city. The appellant saw a man falling from a window of the building and impaling himself onto railings as he tried to escape the fire. The appellant was traumatised as a result of these events and attended counselling for some months thereafter. It was around this time that the appellant started to abuse drugs. It was accepted by Garda Laide that at the time of the commission of this offence, theft and prostitution were the appellant's means of supporting her drug habit.

6. The appellant has several previous convictions for theft. On 29th April, 2014 she received a suspended sentence for robbery and theft, a five month sentence which was suspended for 18 months. Her most recent conviction dates from the 8th January, 2016, for which she received a six month prison sentence. There were in all 29 previous convictions. 22 were for s. 4 theft. She was subject to a suspended sentence at the time of committing this offence.

Sentence

7. The learned sentencing judge delivered his sentence as follows:

"Insofar as the Court is concerned, this is a serious matter. Robbery; a very traumatic incident for the victim. There was violence used, it was a very, very frightening experience and as such, the Court is of the view that the appropriate sentence in the circumstances would be one of five years. However, taking the aggravating and mitigating circumstances into account, the Court is prepared to suspend the last 12 months on condition that the accused be of good behaviour and keep the peace for a period of five years from today. Furthermore, the Court intends to backdate the sentence to the 2nd of June which I think is the date I was given."

8. The learned sentencing judge set out that the aggravating factors in the case included: the age of the victim; the violence used, in that he was struck on the head from behind; the fact that the victim was an easy target. The learned sentencing judge further stressed the premeditated nature of the offence and the appellant's previous convictions.

9. The learned sentencing judge considered the following as mitigating factors to take into account: her admissions identifying herself on the CCTV footage; her early plea of guilt; the remorse expressed by her; her young age at the time of the offence. The appellant's difficult personal circumstances were accepted, having been outlined to the sentencing court in a psychologist's report. It was acknowledged that whilst in custody, the appellant had engaged in education and was off methadone having engaged with drug treatment services. Further, the learned sentencing judge accepted that despite her list of previous convictions, this was the first time that the appellant had appeared on indictment for any matter.

Grounds of appeal

10. It is submitted that the learned sentencing judge erred in failing to place the offence in question on a scale of offending.

11. Further, it is submitted that the learned sentencing judge failed to attach sufficient weight to the mitigating factors in the case, namely: the applicant's youth; her personal circumstances; the advances she had made in custody at the time of sentence; her potential for rehabilitation.

Submissions of the Appellant

12. It is submitted that the learned sentencing judge failed to place the applicant on the 'notional scale of offending'. The learned sentencing judge failed to follow what this Court has determined to be best practice. In *Director of Public Prosecutions v. Flynn* [2015] IECA 290, Edwards J stated:

"It is convenient to deal first with the complaint that the judge failed to identify his starting point (ground ii) i.e. the appropriate headline sentence having regard to the available range based on an assessment of the seriousness of the offence taking into account aggravating factors but before applying any discount for mitigating factors. It is correct, and it represents a legitimate criticism, to say that the trial judge failed to indicate his starting point, and merely indicated where he ended up. The trial judge's failure to do so represented a departure from best practice, and has made this Court's task somewhat more difficult."

13. In *Director of Public Prosecutions v. Farrell* [2010] IECCA 116, Finnegan J. stated:

"A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered".

14. It is submitted that insufficient weight was attached to the relevant mitigating factors in this case. Reference in written submissions was made to the case of *D.P.P. v. M* [1994] 3 IR 306, wherein it was stated: "thus, having assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered."

15. Emphasis was placed in written submissions on the psychiatric history of the appellant, outlined in the report of Dr Bogue, which was produced at the sentence hearing and handed in to the court. It is submitted that insufficient weight was given to the fact that the appellant was a chronic drug user and that theft was the reason and motivation for feeding her habit.

16. Little consideration was given to her early plea of guilt, her considerable youth at the time of the offence, and her admissions. The learned sentencing judge was asked to give credit to the appellant for her admissions, given that an admission by an accused in a case such as this is of considerable importance, particularly where there was no evidence on camera of the crime itself.

17. Further, it is submitted that the learned sentencing judge failed to give appropriate consideration to the rehabilitation of the appellant. At the time of her sentence hearing, the appellant had regularly attended the education centre in prison, undertaking classes in art, poetry, home economics, card making, music, yoga, crochet and P.E. The learned sentencing judge heard that she had completed a course in addiction studies and was attending therapy sessions run by Bedford Row Family Support. Counsel put to the learned sentencing judge in mitigation that the appellant had stated that she was hopeful for the future, that her life had changed significantly since entering prison, and that she was determined to stay clean – she had expressed a strong desire to attend a residential drug treatment centre such as Coolmine.

Submissions of the Respondent

18. It is submitted that a sentencing judge is not bound to follow a mechanical formula in constructing a sentence. This Court has repeatedly stated that sentencing is not a formulaic process.

19. It is submitted that regard ought be had to the substance of the learned sentencing judge's ruling. The learned sentencing judge clearly set out his reasons for the sentence imposed. It is submitted that, in substance, the sentencing judge identified five years as the appropriate headline sentence for the offence. It is submitted that the aggravating factors which the sentencing judge clearly identified constituted a notional starting point.

20. It is submitted that the learned sentencing judge addressed the relevant mitigating factors by suspending the final year of the five year sentence. It cannot be said that the learned sentencing judge erred in principle in the sentence he imposed – every sentencing judge must be afforded discretion in deciding what precise weight to give to mitigating factors.

Decision

21. It may well be that the learned sentencing judge did not strictly follow the best practice outlined by Edwards J. in *DPP v. Flynn* cited above. However, as pointed out by Mr. Cooney on behalf of the DPP, that does not decide the appeal. At para. 12 of that judgment Edwards J. continued:-

"However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld."

22. Mr. Barriscale on behalf of the appellant has referred the Court to Professor O'Malley's publication on *Sentencing* where, dealing with these types of offences at p. 449, he finds that sentences for the mid-range fall within a range of two or three years to ten years. The sentence herein falls within this range and this Court would broadly agree with that. However, considering the nature of the offence, it falls toward the upper reaches of that mid-range. We consider that the learned sentencing judge could well have fixed the sentence anywhere between five and seven years. It was a violent assault upon a very vulnerable man. He was in recovery from heart surgery. He was knocked violently to the ground and was kicked while he was on the ground. His phone and his wallet were stolen. It was a despicable attack upon an innocent man. There were many aggravating factors attendant upon this particular offence.

23. When apprehended the appellant tried to place the blame squarely upon her boyfriend who had also assaulted this poor man. Her plea of guilty was however of some benefit in that it spared her victim the ordeal of a criminal trial where he would have been the

main witness. Other mitigating factors were her dysfunctional family background, together with a traumatic event witnessed when she was just 14 years old. The learned sentencing judge outlined all these mitigating factors and took them into account in balancing them with the aggravating factors. He also took account of her very bad record of previous offences, including robbery and an offence involving a knife.

24. Taking all these factors into account, it seems to the Court that although the learned sentencing judge may not have followed the best practice to the letter, he arrived at a sentence with which we can readily agree when he fixed it at five years. We also agree with his decision to suspend the last year. We therefore can identify no error of principle. The appeal is dismissed.