THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

173/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Lounes Ouachek

Appellant

Judgment of the Court (ex tempore) delivered on the 20th day of October 2015 by Mr. Justice Edwards

1. This is an appeal by the appellant against the severity of a sentence of fifteen years imprisonment, with the last three years thereof suspended upon conditions, in respect of the offence of the attempted murder of his wife on the 23rd of August 2012, such sentence to date from the 19th day of February 2013.

2. The facts of the case may be summarised as follows. The appellant, an Algerian national, met the injured party, Mrs Ruta Ouachek, who is a Lithuanian national, in Germany in the year 2000. They entered a relationship and were married in 2001. The appellant and his wife then moved to Ireland in 2005 and eventually took up residence at No 2, St Dominic's Terrace in Tallaght. They later had a daughter, Amira, who was born on the 2nd of September 2007.

3. Following their daughter's birth the injured party entered full time education at UCD with a view to securing a third level qualification. The appellant had worked in various jobs in Ireland including at Lidl and in a fish and chip shop. However, at the time of his wife's return to education the appellant was not working, having suffered an accident at work. The sentencing judge heard evidence that the appellant developed a resentment of his wife's new found independence. The Court heard evidence that he was a devout Muslim and was unhappy with the social aspect of his wife's student life and the fact that she was spending a lot of time away from home.

4. By the beginning of 2012 the couple were experiencing marital difficulties. Matters escalated when, on the 28th of February 2012, the appellant travelled to Algeria and took Amira with him without his wife's knowledge or consent. The injured party travelled to Algeria herself about a week later and managed to persuade the appellant to return to Ireland with Amira.

5. However, by May 2012 matters had further deteriorated to the point where the couple had separated, and the injured party was indicating that she wanted a divorce. Solicitors were engaged and the parties entered into a legal separation agreement. Correspondence from a firm of solicitors was produced before the sentencing judge referring to the appellant making a payment of €12,000 to the injured party at this time as part of the said separation agreement.

6. On the 11th of July, 2012 the appellant travelled again to Algeria where he remained for just over a month. Then on the 12th of August, 2012 he returned to Ireland and over succeeding days engaging in stalking the injured party, demanding from her the return of various items belonging to him and still in the family home, and endeavouring to ascertain the whereabouts of the child, Amira. On the 19th, 20th and 23rd of August the appellant called to various childcare facilities and crèches in Tallaght in an effort to locate Amira.

7. On the 21st of August, 2012 the injured party, who was fearful of the appellant, obtained an interim barring order from The District Court barring the appellant from the former family home at No 2, St Dominic's Terrace, Tallaght.

8. Despite the existence of this interim barring order the appellant called to the former family home on the 23rd of August, 2012. Neighbours observed an argument between the appellant and the injured party in the driveway in front of No 2, St Dominic's Terrace at around midday on that date. The sentencing judge heard evidence that the appellant had earlier called to collect his things, and that the injured party gave them to him in the driveway of the house. Both parties were seen at the back of the injured party's car on the footpath, and she was observed taking items out of it and giving them to the appellant.

9. Amongst the items the appellant was demanding was a metal dumbbell used for physical exercising, known as a kettlebell. According to the injured party's account this was still in the house. She went into the house to retrieve it and did so and went back outside and handed it to the appellant when he was still outside the house. The appellant's next memory is of being on the kitchen floor, lying on her back, with the appellant sitting aside her thighs and striking her repeatedly across the head, and on both sides, with the kettlebell.

10. The injured party, who believed she was going to be killed, attempted to block and fend off the appellant's blows with her hands. She was screaming and shouting for help and managed to get away from the appellant and make her way to a bathroom where she locked herself in. She was found there many hours later by Gardaí covered in blood and seriously injured.

11. The circumstances in which the injured party was found were that the injured prty had a neighbour whose child attended the same childcare facility as the child Amira. On the afternoon of the day in question this neighbour went to the childcare facility to pick up her own child, and discovered that Amira was still there and had not been collected. She took Amira home. She endeavoured to find the injured party without success and became concerned when she noticed that the blinds were drawn down in the house such that nobody could see into the house. She discussed the matter with another neighbour and they decided to call the Gardai. The Gardai arrived at approximately 8.50pm and effected a forced entry into the house where they found the injured party on the bathroom floor in extremis.

12. An ambulance was called and the injured party was taken to Tallaght hospital initially, from where she was later transferred to Beaumont hospital. CT examination showed the injured party to have a depressed right sided comminuted parietal skull fracture and right parietal lobe contusion. There was also a small right sided temporal extra axial haemorrhage, left parietal subarachnoid

haemorrhage, left sided temporal contusion and compression of the left lateral ventricle. There was a pneumocranium with no midline shift. In addition the injured party had facial injuries that included a right sided sphenoid fracture, right zygomer or jawbone fracture and fractures of her maxillary sinuses bilaterally.

13. The subsequent Garda investigation discovered that the appellant, having left No 2, St Dominic's Terrace, Tallaght following the assault on his wife, proceeded directly to Dublin Airport from where he flew to Tunisia via Paris departing at 3pm. He was made the subject of a Schengen alert issued through Interpol, and a European arrest warrant was issued by the High Court seeking his arrest for the purpose of prosecuting him for the attempted murder of his wife. He was eventually located as being in Germany. On the 19th of February 2013 he was arrested on foot of the European arrest warrant and on the 7th of March 2013 the German authorities surrendered him to the Irish authorities. The appellant then immediately arrested, and charged with the attempted murder of his wife. In response to the charge he stated "I didn't mean to do that, it was an accident". Moments later, when shown the charge sheet, he further stated, "I haven't tried to kill her, no. I was in shock because her friend was waiting outside, he's stocky, I have a picture of this person." The appellant, having been brought before the District Court and remanded in custody, was in due course served with a book of evidence and returned for trial to the Central Criminal Court. He pleaded guilty to attempted murder before that court on the 26th of May 2014, in advance of his scheduled trial.

14. The injured party made a victim impact statement which was read to the court by Detective Sergeant Mary Fitzpatrick. In that statement the injured party describes both ongoing physical injuries and emotional and psychological injuries. She required surgery while in hospital for her neurological injuries and was an inpatient for a number of weeks during which time her daughter was placed in foster care. Amongst her ongoing physical injuries are numbness in the fingers of her left hand which renders it difficult for her pick up certain objects and also makes typing difficult. In addition she has numbness in the left side of her face resulting in difficulty in eating or drinking, and causing her to dribble which is embarrassing for her. In addition, she complains that her smile is no longer straight. While her skull fracture and facial injuries have largely healed she is left with some scarring, she has ongoing difficulties in concentration, and she suffers from mental fatigue and forgetfulness. Due to her concentration problem UCD has allowed her to extend her studies. She has attended a psychologist who assessed her clinical presentation as being indicative of significant post traumatic stress symptoms including hyper vigilance, disturbed sleep, intrusive thoughts, avoidance and increased anxiety. She felt vulnerable and insecure and feared constantly for her own safety and for that of her daughter. Happily the injured party has responded well to treatment and her symptoms of post traumatic stress disorder have diminished in intensity and frequency. However she continues to attend for treatment and will do so for some time.

15. At the time of the assault the injured party was aged 32, having been born on the 13th of December 1979. The appellant was aged 43 at the time, having been born on the 6th of April 1969. The appellant had no previous convictions.

16. A number of testimonials were handed into court at the sentencing hearing. The first was from the prison education service indicating that, while on remand, the appellant had been applying himself diligently to attempting to better himself. He had made steady progress in English and had also achieved certificates in various other disciplines, including art and drawing, and had applied himself on the Gold Mile to try to better others. The appellant was reported as being polite and courteous at all times, as getting on well with staff and other students, and as participating fully in the extracurricular activities on offer.

17. There was also a letter from the prison governor confirming that while he had come to the governor's attention on one occasion he had not otherwise come to any adverse notice during his time in Cloverhill Prison, and that he is on enhanced privilege level on account of good behaviour. It was stated that he had had to stop working as a cleaner due to medical reasons but that he was a regular attendee in the school and library. His conduct was reported as being very good and he was said to be courteous to prisoners and staff alike, and to be compliant in his duties.

18. There were also letters from the appellant's former employers, being Lidl and Burdocks Restaurants testifying to his hard work, diligence and trustworthiness while in their employment.

19. The sentencing court was also provided with a medical report from the appellant's General Practitioner, Dr Claire McNicholas confirming that he had suffered an injury to his back in 2008. In March 2012 he had attended with low mood on account of not working and having no great purpose in his life. In April of 2012 he had informed the doctor of his marital difficulties and had been prescribed with an antidepressant, Citalopram. He attended again on the 11th of May 2012 when his mood was much better and he had stated he was going to Algeria for a holiday. He was last seen by her in early June 2012 due to a flare up in his back symptoms, following which he was referred to the orthopaedic unit at Tallaght hospital.

20. Finally the sentencing court was provided with a brief and positive testimonial from two of the appellant's friends, a Mr Saleem Sabowi and a Mr Mohammed Sabowi. These gentlemen testified as to his care for his daughter and stated that they regarded him as a person who cared deeply for his family and always did his best to provide for them.

21. It was submitted on behalf of the appellant that the appellant accepted responsibility for his actions and was remorseful. It was further submitted that what had occurred had been totally unplanned, that it had occurred against a background of the appellant suffering mental, physical and emotional pain, and that he had panicked afterwards and fled the country. The court was asked to take the appellants plea of guilty as a signal of his remorse and to consider a part suspended sentence, possibly conditioned upon a requirement that the appellant should return to Algeria.

22. In sentencing the appellant, the sentencing judge, having summarized the salient facts, stated:

> "I'm required by law to, one, identify the range of penalty available, two, place the instant case, having regard to all its circumstances and those of the accused, at its appropriate place on that scale, and, three, identify such factors as may be found in favour of the accused and on the basis discount -- on the basis of those, discount from the figure arrived at in phase two above. The range of penalty available is obviously from suspended sentence to imprisonment for life.
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> Having regard to the callous and brutal nature of the accused's attempt on his wife's life and his fleeing the scene in circumstances of total indifference as to whether she would be found or left to die where she had been bludgeoned close to death, I assess the case as meriting a penalty of 15 years' imprisonment and sentence the accused to that term, to date from 19th February 2013. In favour of the accused, I take account of his plea of guilty and absence of previous convictions. I'm also required to take account of his being a foreigner in an Irish jail. To take account of these matters, I suspend the final three years of his sentence on his entering into a bond, self in the sum of €1,000, to keep away from his wife in perpetuity, the bond to be entered into before the prison governor. I direct that the accused undergo 18 months' post-release supervision, and I'm obliged by law to inform him that he may be subject to further terms of imprisonment in the event of the breach of any term of post-release supervision. Post-release supervision will not be required in the event

of the accused leaving the country permanently on completion of his sentence."

23. The appellant now seeks to appeal against the sentence imposed upon him on five grounds:

> 1. That the learned trial Judge erred in law and fact in failing to give due weight to the appellant's early plea of guilty.
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> 2. That the learned trial Judge erred in law and in fact in failing to give due weight to the appellant's good character and absence of previous convictions
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> 3. That the learned trial Judge erred in law and in fact in failing to give due weight to the factor of provocation and the absence of premeditation on the part of the appellant.
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> 4. The learned trial Judge erred in law and in fact in failing to give adequate consideration to the fact that the appellant is a foreign national.
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> 5. The learned trial Judge erred in law and in fact in failing to give adequate consideration to the appellant's mental state and physical condition at the time of the offence.

24. It has been argued on behalf of the appellant that whilst the maximum sentence of life imprisonment was not given in this case the term imposed is wrong in principle in appearing to give negligible allowance for the appellant's plea of guilty. In support of this submission the Court was referred, *inter alia,* to *The People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250.

25. It was further argued that though the absence of previous convictions is acknowledged by the trial judge it is difficult to see where any allowance was made for this or the otherwise good character of the accused. There had been evidence of the appellant's dutiful conduct towards his daughter and a good employment record before his injury at work. It was further submitted that the sentence imposed failed to take account of the lack of premeditation by the appellant or the provocation of incidents which took place immediately before the commission of the offence. It has been emphasized to this Court that in so far as the appellant's submissions refer to provocation of incidents it is not being contended that provocation was an excuse for what occurred. However, that there may have been provoking incidents tends to support the appellant's claim that the attack was unplanned and spontaneous and it may therefore be regarded as possibly less culpable than one that had been planned and premeditated. The Court was referred to *The People (Director of Public Prosecutions) v. Kelly* [2005] 1 ILRM 19 at 33 in support of this submission.

26. Counsel for the appellant further complains that, while it is acknowledged that the testimonial material and reports relied upon by the appellant were handed up to the trial judge who perused them on the bench, and listened to defence counsel's summary of their contents, he refused to retain them, notwithstanding that he proposed reserving judgment for a week, stating: "I do not carry scraps of paper around the country with me so I'm going to give you all these back."

27. Counsel for the appellant further complains that while the trial judge did explicitly refer to the fact that the appellant was a foreign national the manner in which that factor was taken into account was wrong in principle and only served to create uncertainty as to the term to be served. It was submitted that given that the appellant's daughter will only be in her mid teenage years by the time the appellant has served a sufficient term to qualify for that part of the sentence which was suspended the broad terms of the requirement that he "keep away from his wife in perpetuity" may prevent any rehabilitative contact with his daughter.

28. Finally, it was further submitted on behalf of the appellant that sentence was wrong in principle in failing to take account of the physical and mental state of the Appellant at the time of the commission of the offence. The Court was referred to *The People (Director of Public Prosecutions) v. Creighton*, (Court of Criminal Appeal, *ex tempore*, 21st December 1998), cited in O'Malley on Sentencing, 2nd ed, at para 6-66, in support of this submission.

29. In response to these submissions, counsel for the respondent points to the fact that, having determined that the offence was one that merited a penalty of 15 years imprisonment, the learned sentencing Judge suspended the final three years thereof by reference, *inter alia*, to the appellant's plea of guilty and his absence of previous convictions.

30. The respondent takes no issue with the appellant's claim to have been a caring and dutiful parent, or that he was a good employee. It is accepted that the learned sentencing judge's sentencing remarks make no express reference to that which is described as the appellant's dutiful conduct towards his daughter or to his employment record. However the respondent submits that the sentence imposed was still the appropriate one and that there is no error of principle. In support of that, this Court was referred in the respondent's written submissions to passages from the following cases, which have been duly noted: *The People (Director of Public Prosecutions) v. R Mc C* [2008] 2 I.R. 92; *The People (Director of Public Prosecutions) v.M* [1994] 3 I.R. 306; *The People (Director of Public Prosecutions) v. Kelly* [2005] 2 I.R. 321; *The People (Director of Public Prosecutions) v. Cullen*[2013] IECCA 47; *The People (Director of Public Prosecutions) v.Fitzgibbon* [2014] IECCA 12 and *The People (Director of Public Prosecutions) v. Fitzpatrick* [2010] IECCA 31.

31. In rejoiner counsel for the appellant refers to the case of *The People (Director of Public Prosecutions) v Fitzgibbon* which the respondent has submitted is of relevance to this case. He makes the point that in the *Fitzgibbon* case, the learned trial judge had referenced case law to indicate that neither drunkenness, nor dysfunctional background were legally relevant to sentence. That was identified by the Court of Criminal Appeal as an error. He submitted that this case demonstrates a similar error, i.e. failing to take into account relevant material.

32. More counsel for the appellant further submits in rejoinder that insofar as the respondent identifies authorities demonstrating that sentencing need not be accompanied by a slavish summary of all relevant and irrelevant materials, such is indeed the case. However, the matters taken into account in favour of the accused occupied just four lines of the transcript. Given that the judgment was reserved, he contends that it is an inevitable inference that the testimonials did not form part of the partial suspension of the sentence imposed, and that they ought to have done so.

33. The Court has given careful consideration to the submissions on both sides and hesitation in rejecting grounds 1, 2, 3 and 4 of the appellant's grounds of appeal as being without merit. This was a very bad case involving a number of quite egregious circumstances. In saying that, the Court acknowledges counsel for the appellant's point that the attack was not premeditated, and was ostensibly spontaneous. Nevertheless, this Court is happy that the trial judge was entirely correct in assessing the case as meriting a sentence of fifteen years imprisonment before taking account of mitigating factors. Moreover, some account was clearly taken of mitigation in that the sentencing judge went on to suspend the final three years of the fifteen years he had nominated as being appropriate, and

in doing so he specifically referenced the plea of guilty, the appellant's previous good character and the fact that he was a foreign national. The amount of discount afforded represented an effective 20% on the headline sentence. In this Court's view it cannot be said that this was a manifestly insufficient or inappropriate discount for the factors identified having regard to the particular circumstances of the case.

34. However, the Court does have some unease with respect to the remaining ground, namely ground 5. This was originally narrowly framed as a complaint that insufficient account was taken of the appellant's mental state and physical condition at the time of the offence. However, it has been expanded somewhat to embrace the wider complaint that no account was taken of any other potential mitigating factors beyond the three specifically referenced by the sentencing judge, and in particular the matters that were the subject matter of the various testimonials and reports handed up to the sentencing judge by the appellant's counsel. An important contextual detail and circumstance specifically relied upon by the appellant is that the trial judge refused to retain the material handed up in the circumstances described earlier.

35. It is clear that from established jurisprudence that a sentencing judge is not required in a sentence ruling to slavishly refer to and describe in detail every piece of evidence relied upon as a mitigating factor. Clearly, the greater the weight that can be attached to a piece of evidence the greater the obligation to refer to it specifically. Equally, if the potential mitigating effect of a piece of evidence is adjudged to be slight or minimal a judge ought not to be obliged to specifically refer to it, although he or she must take it into account. It is not at all uncommon in sentence rulings for judges to state on a roll up basis that they are taking into account all of the potentially mitigating factors urged upon the Court, and then to refer only to those to which significant weight manifestly attaches, and there is nothing wrong with that. A judge who proceeds in that way commits no error of principle.

36. However, what is troubling about the present case is that the trial judge made no reference whatever, either specifically or on a roll up basis, to potentially mitigating factors other than the three that he expressly identified. Even that circumstance, while not an ideal situation, would not necessarily have precluded this Court from drawing an inference that other matters that had been the subject matter of counsel's submission and plea in mitigation had been considered and taken into account. However, the failure to reference other circumstances is coupled in this particular case with two other factors. The first is that the sentencing judge did not immediately proceed to sentence the appellant following the plea in mitigation. In such a situation there is less basis for inferring that matters that had been urged upon the judge in mitigation were in fact properly considered and taken into account, than if the judge had proceeded to rule when such matters were metaphorically ringing in his ears. Secondly, the sentencing judge had expressly refused to retain the testimonials and reports handed into to him, preferring instead to rely upon the transcript which only contained counsel's summary of what they had stated. These two circumstances not only fail to lend support for a possible inference that the additional material was in fact taken into account, but if anything they serve to undermine any basis for possibly drawing such an inference.

37. It was urged upon this Court by counsel for the respondent that the materials, and matters, not referenced by the sentencing judge would have afforded little or no additional mitigation, and were comprised for the most part of circumstances that are commonplace and features of the lives of many people. The Court agrees that their additional mitigating effect was probably slight but it cannot and does not agree that they were of no importance. In the particular circumstances of this case, where an insufficient basis exists for inferring that the materials, and matters, not referenced were in fact taken into account, the Court considers that the failure to do so constituted an error of principle. In the circumstances the Court will quash the existing sentence and proceed to resentence the appellant.

38. In accordance with established jurisprudence the parties were invited on a contingent basis to place any additional materials before the Court that they might wish to have taken into account. A number of additional testimonials were submitted on behalf of the appellant indicating that he continues to get on well in prison, and that he has completed a number of further courses, and these will be taken into account.

39. The aggravating and mitigating factors are well rehearsed at this point. Suffice it to say that the court wishes to indicate that it regards this as being a very serious case. As already stated it considers that the trial judge was correct in assessing the crime as meriting a sentence of fifteen years before application of mitigation. Moreover the Court agrees that the appropriate discount for the plea of guilty, previous good character and the fact that the appellant was a foreign national was three years, reflected at first instance in the suspension of the final three years of the fifteen year sentence. However, to take account of the relatively slight additional mitigation provided by the matters that were perhaps not taken into account this Court will proceed to re-impose the fifteen year sentence originally imposed but will suspend an additional year of it, making a total of four years to be suspended in all, on the same terms as heretofore. The Court does not propose to make any change to, and simply affirms, the order of the court below with respect to post release supervision.

40. While in another case such a minor adjustment might be regarded as a mere tweaking of the sentence at first instance, and as being therefore inappropriate, this Court wishes to make it clear that it has felt it necessary to do so in the particular circumstances of this case and having regard to the particular error of principle identified here. Had the Court not done so the appellant might have been left with a justifiable sense of grievance.