



THE COURT OF APPEAL

Record No. 41/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

CHARLES HUTCHINSON

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 12th day of May 2017 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted on the 22nd November 2015 at Dundalk Circuit Criminal Court of manslaughter contrary to common law. He was sentenced on the 8th February 2016 to a term of imprisonment of seven years with the final twelve months of that term suspended on conditions for a period of two years post release. He has appealed against the sentence.
2. The victim of the manslaughter was Lawrence Michael McGeown who died on the 6th March 2014 from injuries sustained when he was assaulted by the appellant at Fagans Public House in Dundalk on the 28th February 2014. The injuries sustained by the deceased were the result of a single punch to the right side of his head. An eye witness described the punch as not being of particular force. There was medical evidence to the effect that the deceased had a number of health issues at the time.
3. Following the assault, the deceased was medically examined some six hours later at the Louth hospital in Dundalk and at Our Lady of Lourdes hospital in Drogheda. He was released from hospital and went home and proceeded to go to work and socialise in Dundalk on the 1st and 2nd March 2014. On the 3rd March 2014 he was found unconscious in his home. He dies without regaining consciousness some three days later.
4. The appellant's grounds of appeal are as follows:-
 - (i) The learned trial judge determined that the appropriate sentence for the offence and the offender was one of below five years and in the region of three years. The learned sentencing judge erred in law in further determining that such sentence should, with respect to the appellant's previous convictions, be increased to a seven years sentence with one year suspended with particular regard to the appellant's previous conviction for a s. 3 assault. In increasing the said sentence by reference to the appellant's previous convictions the learned sentencing judge imposed a sentence which was not proportionate to the offence which the appellant was sentenced nor was it proportionate to the circumstances of the offender;
 - (ii) the learned sentencing judge in imposing sentence took into account matters not based in evidence and over which the appellant had no control or influence with particular regard to his view that the defendant had failed to apologise to the deceased at the time of the incident or at any time prior to his death;
 - (iii) the learned sentencing judge further erred in law in discounting the significance of admissions by the appellant at the trial pursuant to s. 22 of the Criminal Justice Act 1984 to the effect that he assaulted the deceased and was present at the scene, and
 - (iv) the learned sentencing judge failed adequately or at all to consider the appellant's attempts to address his alcoholism and family circumstances proposed in mitigating of sentence and subsequently proceeded to impose a sentence of undue severity.
5. The appellant had a number of previous convictions. He was convicted of an assault in 2010 and sentenced to imprisonment for two years, suspended entirely for two years. He had twenty other previous convictions, including a number for public order offences, criminal damage, driving without insurance, dangerous driving, unauthorised taking, unauthorised interference and another number of minor offences.
6. The appellant is thirty four years old. He has a son from a previous relationship in 2002. He has a significant alcohol addiction problem and a poor employment history.
7. In the course of his sentencing judge, the learned sentencing judge noted that the deceased had not provoked the appellant in any way, that there was no possible justification for the assault. The deceased was in his early sixties while the appellant was a much younger and fitter man. He went on to state:-

"It is ... in the lower end of the type of case of manslaughter that comes before the courts ... my own view is that it is at the start off point, as it were, the lower or towards the lower end of the scale. ... I would have thought that (the sentence) was in the region of somewhere below the five years, somewhere in the region of three ..."
8. The learned sentencing judge then went on to consider what he termed as *"another aspect to this case"*. This was a reference to the appellant's twenty one previous convictions and in particular, a s. 3 assault conviction in 2010, in respect of which he received an entirely suspended three year sentence. Arguably, the other previous convictions have little relevant to the very serious manslaughter conviction. The learned sentencing judge also considered the 2010 conviction to be evident of a *bad record and a history of violent conduct*.
9. The appellant's previous assault conviction was the major aggravating factor. It is this factor which resulted in the increased

headline sentence of seven years, and which is perhaps in the region of twice the headline sentence that was deemed otherwise appropriate.

10. This was a so called one punch case. This somewhat glib and insensitive description of an unlawful killing should not take from the fact that a very serious offence was committed, and with dreadful consequences. In his book "Sentencing Law and Practice" (2nd edition), Prof. O'Malley (at p. 255) described this type of manslaughter offence in the following terms:-

"So called 'one punch' cases may fall on either side of the custodial threshold. The English Court of Appeal has said that when death was caused primarily by falling against the pavement or other hard object, the starting point on a guilty plea would be in the region of twelve months imprisonment, though a non custodial sentence might be appropriate in exceptional circumstances. The court was careful to distinguish such a case from one in which the victim is kicked while on the ground, or in which a weapon is used to inflict injury, or in which death resulted from the blow itself as opposed from the fall. Mitigating factors include the absence of pre-meditation and the fact that no more than a single blow of moderate force was delivered. The more usual mitigating factors such as remorse, admission of guilty, previous good record and so forth will also apply. Aggravating factors would include a propensity on the part of the accused to outbreaks of violence, the fact that the assault was gratuitous and unprovoked and the delivery of repeated blows."

11. This court is in general agreement with the learned sentencing judge's assessment that an appropriate sentence, absent this significant aggravating factor, for this offence, having regard to all the circumstances, is between three and five years. Mr. O'Kelly S.C., counsel for the respondent does not take issue with this view.

12. Undoubtedly the previous conviction for a s. 3 assault was an aggravating factor and was properly treated as such.

13. The real issue in the case is the extent to which the previous conviction, as an aggravating factor, ought properly have served to increase the headline sentence as such as in fact it did.

14. It is of course noteworthy, as Mr. O'Kelly has reminded the court, that this violent incident occurred just months after the operative period of a suspended sentence relating to the 2010 assault conviction had expired. It is perhaps appropriate nonetheless to bear in mind that the previous assault occurred in 2010, some four years prior to the instant offence. Also, the operative period of the suspended sentence was, at three years, relatively lengthy. In the appellant's favour is the fact that he remained free of conviction for any violent offending for the intervening period of time.

15. The court is satisfied that the extent to which the learned sentencing judge decided to increase the headline sentence to reflect the aggravating factor of the 2010 previous conviction constituted an error of principle. It was appropriate and certainly within the learned sentencing judge's discretion to increase the headline sentence for this reason, but not to the extent he did.

16. If the appropriate headline sentence, absent the 2010 previous conviction, is to be taken at four years (being a midway mark between a three and five years mentioned by the learned sentencing judge as being appropriate), an appropriate increase to reflect this aggravating factor would be in the region of twelve months, bringing the revised headline sentence to one of five years.

17. The court has been provided with a number of testimonials and certificates of achievement which clearly point to significant and impressive efforts by the appellant to acquire skills and improve his education, training and social awareness. It is evident that rehabilitation is underway and is likely to continue. In recognition thereof, and to incentivise further rehabilitation, the court will suspend the final twelve months of the five year sentence for a period of two years post release. The net custodial sentence is therefore reduced from six to four years.