THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Appeal No.: 210/13

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Keith Hall

Appellant

Judgment of the Court delivered on the 21st day of January 2016 by Mr. Justice Mahon

1. The appellant was convicted of the manslaughter of a sixteen year old girl, Melanie McNamara, on 1st July 2013. He had earlier pleaded not guilty to murder, but guilty to manslaughter, and this plea was accepted by the Respondent. The appellant was sentenced to imprisonment for a period of twenty years, the sentence to run from 21st February 2012. This is the appellant's appeal against that sentence.

Background facts
2. On the night of 8th February 2012, Ms. McNamara was sitting in a parked car with two friends at Brookview Way in Tallaght. A black jeep pulled up alongside the car and a shotgun was discharged from the driver's side of the car hitting Ms. McNamara in the head. She was immediately driven to Tallaght Hospital, but was pronounced dead soon thereafter. The black jeep was subsequently found abandoned at Citywest, and a number of items were discovered in the vehicle including a previously stolen double barrelled shotgun. The appellant's DNA was found on gloves which also contained some firearm residue, and this led to the appellant's arrest on 16th February 2012.

3. The appellant's involvement in the killing of Ms. McNamara arose in the following circumstances. Earlier on the evening of 8th February 2012, the appellant agreed with others to throw a rock at a particular house in Tallaght for the purpose of enticing certain people out of that house to facilitate them being shot. The appellant accepted that he knew that these people were to be shot on leaving the house. It was alleged that one or both of them had, approximately one week earlier, been involved in a serious assault on the appellant and this prompted the appellant's agreement to undertake the attack on the house.

4. The appellant was not directly involved in the shooting of Ms. McNamara but assisted to a significant extent in events both prior to, and subsequent to, the shooting. His involvement was substantial, and it is fortunate for him that he did not face a murder trial. By all accounts, the decision to accept the plea to manslaughter was a pragmatic one having regard to possible legal issues which might have arisen had the appellant been tried for murder.

The appellant's personal circumstances
5. The appellant's personal circumstances were outlined to the sentencing court, and also to this court. He has a dysfunctional background and has had addiction problems for a number of years. Indeed, on the evening in question, he had taken drugs. He was known to gardaí to have a serious problem with drug addiction.

6. The appellant has one hundred and eleven previous convictions, all of which relate to District Court offences. Most concern road traffic matters, while others involved burglary, theft and possession of drugs for the purpose of sale and supply. He has a conviction for possessing a knife, and three convictions relating to criminal damage. A sentence of eleven months was the longest sentence imposed on him prior to this incident.

7. While none of the previous convictions came close to manslaughter in terms of their seriousness, their number is nevertheless indicative of an individual who has shown a propensity to engage in criminality on a regular basis.

8. The appellant pleaded guilty to manslaughter and showed remorse at an early stage. His remorse was accepted by the investigating gardaí as being genuine. The sentencing court was informed that the manner in which the appellant dealt with the investigation of this incident while in custody was of considerable assistance to the prosecution.

9. The appellant's admissions, albeit it at the tail end of a series of twenty one interviews, and his plea of guilty are also important features of the case in that such acts of co-operation were mitigating factors.

The grounds of appeal
10. The appellant's grounds of appeal are as follows:

> (i) The learned sentencing judge erred in law in failing to properly conduct the sentencing process having regard to the settled law with regard to the approach and procedure to be adopted.
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> (ii) The learned sentencing judge erred in law in failing and refusing to have any regard whatsoever to the issues of addiction and substance abuse on the part of the appellant, and in explicitly disregarding this as a factor capable of being accepted in mitigation.
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> (iii) The learned sentencing judge erred in law in failing to have any or any adequate regard to the dysfunctional background of the appellant and in disregarding this as a matter which might be a potentially significant factor in the sentencing process.
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> (iv) The learned sentencing judge erred in law in failing to have any regard whatsoever to the personal circumstances of the appellant.

(v) The learned sentencing judge erred in law in failing to have any regard whatsoever to the rehabilitative efforts made by the appellant.

(vi) The learned sentencing judge erred in law in failing to have any regard whatsoever to the admissions made by the appellant while detained in custody and the co-operation displayed by him towards the investigation authorities, and to thereby afford the appellant a reduction in terms of sentence.

(vii) The learned sentencing judge erred in law in failing to have adequate regard to the remorse displayed by the appellant, and accepted as genuine, and to afford the appellant a reduction in terms of sentence having regard to same.

(viii) The learned sentencing judge erred in law in failing to have adequate regard in all the circumstances of the case to the plea of guilty entered by the appellant.

(ix) The learned sentencing judge erred in law in failing to have any regard whatsoever to the youth of the appellant.

The sentencing judgment

11. In submissions made to the learned sentencing judge immediately prior to sentence by Counsel for the appellant, considerable emphasis was placed on the appellant's dysfunctional background and his difficult history with drug addiction, and the fact that drugs influenced his involvement in this particular crime. His plea of guilty to manslaughter and his remorse and shame for his involvement in this matter were also emphasised.

12. The brief sentencing judgment did not clearly identity the extent (if any) to which the plea of guilty or the appellant's dysfunctional background resulted in any reduction of what otherwise would have been an appropriate sentence for this crime. The learned sentencing judge sentenced the appellant as follows:-

> *"One learns a new feature about criminality every day in this court and the new thing to emerge today is that if a stone comes through your window, it is probably to draw you into a line of fire. Manslaughter is known for having the most elastic penalty known to the law. It can range from a fine or suspended sentence to imprisonment for life. At the lower end, that would arise where what occurred was virtually an accident or out of compassion, at the higher end of the range, where it is akin to murder or worse. This case clearly falls into the higher range. I accept the matters mentioned by Mr. Grehan as being aggravating. In mitigation of the fact that the accused showed remorse and that is accepted as being genuine, but he would, of course, have been some sort of automation if he had not shown remorse in the circumstances of this case. I accept that his plea of guilty is mitigating, though again he did not have much room to manoeuvre in that regard.*
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> *As regards the background involvement of drink and drugs, I am bound by the ruling of Murray, Chief Justice as he then was, that not only do these matters afford no defence, they also afford no mitigation in one's responsibility to society. In relation to his dysfunctional background, I follow the ruling of Mr. Justice Geoghegan in the case of DDP v. Martin Stafford that this affords little, if any, mitigation.*
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> *I sentence the accused to twenty years imprisonment to date from .. 21st February 2012."*

13. Immediately following the imposition of the sentence of twenty years, Counsel for the appellant asked that consideration be given to suspending a portion of the sentence. The learned sentencing judge declined to do so.

14. The aggravating matters suggested by Counsel for the respondent and which were accepted as being present by the learned sentencing judge included the appellant's knowledge that two people were to be shot, that he had played a critical part in the operation by luring persons from a house by firing a brick at the house, his involvement in the disposal of the firearm and other items after the incident, and his willing participation and overall significant role in the incident. Account was also taking of the fact that the attack was clearly pre-mediated and planned in some detail, although Ms. McNamara was not the intended victim.

15. Prior to the imposition of the twenty year sentence, the learned sentencing judge had also heard and considered a very moving impact statement read to the court by Ms. Jennifer Roche, Melanie's godmother, on behalf of her parents, family and friends. That statement very fully and impressively emphasised the enormous grief and loss inflicted on Melanie's family by her death at a time when she had her entire adult life yet to live. Such grief and loss was undoubtedly rendered significantly more painful for the parents and family because of the brutal and senseless nature of Melanie's death.

16. The learned sentencing judge correctly placed the offence at the higher end of the range for manslaughter. Manslaughter carries a maximum sentence of life in prison. In allowing for a life term the legislature clearly recognised that manslaughter is an offence which can occur in hugely different circumstances, and can, and in practice does, attract a great variation of sentences; from a suspended sentence up to a life sentence, with these two extremes occurring quite rarely.

17. It goes without saying that this case presents as a very serious example of manslaughter and therefore required the imposition of a lengthy sentence. Indeed it was serious enough as to have potentially attracted a life sentence, but such would arguably have been excessive in all the circumstances given, in particular, the fact that the appellant was apparently not in the vehicle from which the fatal shot was fired, and also because of his plea of guilty to manslaughter. The issue that arises for consideration by this court is whether firstly, in all the circumstances, a sentence of twenty years imprisonment was the appropriate sentence for the appellant, having regard to, in particular, the extent of his involvement in this dreadful crime, and secondly, if such a sentence was appropriate, ought some portion of that term have been suspended having regard to, not only the mitigating factors, but the possibility of rehabilitation for this relatively young offender with due regard to his significant involvement in criminality prior to this offence. In the course of his sentencing judgment, the learned sentencing judge referred to judgments in the cases of *DPP v. Keane* [2008] 3I.R. 177 and *DPP v. Stafford* [2008] IECCA 15 in the context of the role played by the appellant's drug addiction in this offence. Both were considered, in a similar context by Mr. Justice Clarke in his judgment in the case of *DPP v. Adam Fitzgibbon* [2014] IECCA 12, when he stated the following:

> *"It does not seem to this Court that, in Keane, Murray C.J. was laying down a broad principle that the fact that an accused suffers from difficulties with substance abuse cannot be a factor to be taken into account in the sentencing process. Rather, this Court was making clear that the mere fact that an offence is committed by a person who is under the voluntary influence of drink or drugs does not, of itself, offer any significant mitigation. If people get drunk and*

commit offences while they are drunk, then they cannot be heard to use their drunkenness as a mitigating factor. However, that is not to say that, in particular, persons who suffer from a persistent problem of addiction or substance abuse should not have, in an appropriate case, that factor taken into account. There is a world of difference between a case in which a person seeks to rely on the fact that they were drunk to provide some partial mitigation for an offence and one where a person who suffers from substance abuse. and in particular, may be seeking to take steps to deal with their problem although not yet successfully, may seek to offer that as part of the general circumstances which ought to be taken into account."

18. Clarke J. went on to consider the judgment in the *Stafford* case and said:-

> *"It seems to this Court that Geoghegan J. was doing no more than emphasising that the mere fact that a person may have some unfortunate elements to their background cannot, of itself and by itself, amount to a significant mitigating factor. As Geoghegan J. pointed out many families suffer difficulties and do not resort to crime. However, it again seems to this Court that the judgment delivered by Geoghegan J. in Stafford is not authority for the proposition that a dysfunctional background, no matter how severe, can not be a potentially significant factor to be properly taken into account in the sentencing process.*
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> *To say, as the sentencing judge in this case said, that the combined effect of the judgments of this Court in Keane and Stafford is that drink or drugs and a dysfunctional background cannot be of any great weight seems to the Court to be a significant misreading of what this Court was saying in those cases. This Court went no further than to say that drink, of itself, or drugs, of itself, cannot be a mitigating factor. Likewise, some degree of dysfunctionality in background is not likely to provide a mitigating factor.*
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> *However, that being said, a sentencing court is required to consider as part of the overall circumstances, whether a persistent problem with substance abuse, most particularly if it could be said to stem from a particularly difficult upbringing, can amount to a factor which can weigh significantly in an appropriate sentencing process on the facts of a particular case. This will be so, as Geoghegan J. pointed out, especially if there are attempts at rehabilitation, or, in the view of this Court, where the accused was particularly young at the time of the offence and where there may be a realistic prospect of rehabilitation in the future."*

19. This Court re-iterates the views expressed by Clarke J. in the foregoing extract from the judgment in the *Fitzgibbon* case.

20. Undoubtedly, in this case, the appellant has a difficult and dysfunctional personal history and has had a very significant drug addiction problem. It may well have been the case, and probably was the case, that drugs did play a role in his involvement in this crime, and, while, contrary to the view indicated by the learned sentencing judge in his judgment these factors are matters which ought to have been taken into consideration in the sentencing process, neither his dysfunctional background or his involvement with drugs, including taking drugs at the time of the commission of this crime, can in any way excuse his role in the killing of Ms. McNamara and his culpability for that involvement. This was not a crime which occurred in the heat of the moment; the appellant knew that someone was to be shot, albeit not a fourteen year old girl, and he played a role in events which followed the killing.

Decision

21. This Court is satisfied that the twenty year sentence imposed by the learned sentencing judge was the correct headline sentence for this very serious crime, before taking account of the mitigating factors. However, the twenty year sentence imposed was the bottom line figure after taking account of mitigation. It is impossible to discern from the sentencing judge's remarks what headline figure the sentencing judge had in mind before taking account of mitigation, and consequently it is impossible to discern what actual reduction in sentence was allowed for the mitigating factors.

22. As stated in a number of recent judgments of this Court (see *The People (DPP) v Davin Flynn* [2015] IECA 290 and *The People (DPP) v MC* [2015] IECA 313 the failure to clearly identity the extent to which allowance had been made for mitigating factors represented a departure from best practice. However, as we pointed out in the *Davin Flynn* case:

> *"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."*

23. The Court considers that the learned sentencing judge did err in principle in relation to the imposition of the twenty year sentence in this case in ostensibly failing to take sufficient account of mitigating factors.

24. In saying this, the Court is prepared to infer that some modest allowance was in fact made for the plea of guilty, because the learned sentencing judge, who was very experienced, specifically made reference to it and said that he was taking it into account. However, in circumstances where it is impossible to discern how much actual allowance was given for it, and where the bottom line sentence was one of twenty years, this Court finds itself concerned and doubtful that sufficient allowance was in fact made for the plea. Furthermore, what is clear from the learned sentencing judge's remarks is that, based on his misunderstanding of the judgments in the cases of *DPP v. Keane* [2008] 3I.R. 177 and *DPP v. Stafford* [2008] IECCA 15, he was incorrectly prepared to take little or no account of the appellant's drug addiction and his dysfunctional background.

25. This Court considers that the appellant's co-operation and plea of guilty to manslaughter should have been afforded greater recognition in this case than they appear to have been afforded in the court below. In addition, some further modest allowance should also have been made for the appellant's drug problem and his dysfunctional background.

26. We further consider that the learned sentencing judge ought to have given greater consideration to the prospect of rehabilitation, in the interest not only of the appellant himself, but of society generally. At the time of sentencing, the appellant presented as an individual who had had a serious drug addiction problem to a point where it may have played a role in the commission of this crime. The learned sentencing judge ought to have taken account of the fact that the appellant while serving a lengthy prison sentence would not have, in the ordinary way, access to drugs and to this extent would have a real opportunity to cure his drug addiction and thus considerably reform himself. In addition, as was explained to the learned sentencing judge, the appellant had strong family supports and was genuinely remorseful for his involvement in this crime. All of these factors point to, at least, the possibility of rehabilitation. A recent report from the Head Teacher in Wheatfield prison, and a number of certificates for achievements to date while in prison, indicate that the appellant's rehabilitation is already underway.

27. Accordingly in circumstances where this Court finds that there were errors of principle in the learned sentencing judge's approach,

it is necessary for this Court to quash the twenty year sentence imposed by the Central Criminal Court and sentence the appellant afresh. This Court is prepared to interfere with the sentence imposed by the Court below to the extent, and only to the extent, that it is necessary to afford recognition to, and make due allowance for, the matters it has identified as being relevant mitigating circumstances and to incentivise rehabilitation.

28. As the court considers that a sentence of twenty years imprisonment is the appropriate headline sentence, it will re-impose that sentence, but will suspend the final two years and six months of that twenty year term. In so doing, the Court is conscious that such a limited restructuring of the sentence originally imposed in The Central Criminal Court may be regarded as mere "tinkering" with that sentence. It is however necessary in some cases to either alter or restructure sentences in a fairly limited manner to order to ensure that justice is done or is seen to be done, and to give guidance to judges in the sentencing of offenders and, also, in the interest of enabling the sentenced person and the general public to fully understand the basis for a particular sentence.

29. The court has already referred to the brevity of the sentencing judgment in this case. We reiterate, yet again, that it is important that sentencing judges should take care to set out clearly, and in sufficient detail, the reasons for their decisions to impose particular sentences in order to ensure, as far as possible, that the basis for those sentences are apparent to those being sentenced, to the victims of crime and to the general public.