THE COURT OF APPEAL

[21CJA/19]

The President
McCarthy J.
Donnelly J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

JOSEPH HILLEN

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of November 2019 by Birmingham P.

1. This is an application brought by the DPP pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review a sentence on grounds of undue leniency. The legal principles applicable to undue leniency reviews have not been the subject of any controversy between the parties, and indeed, those principles have not really been in doubt since the first such case, that of DPP v. Byrne [1995] 1 ILRM 279. Those principles have been referred to in many decisions of this Court, and, as they are at this stage very well-known, it is unnecessary to refer to them once more.

2. The sentence sought to be reviewed was one imposed on 28th January 2019 in the Central Criminal Court. The respondent was charged with murder but ultimately convicted of the offence of manslaughter and sentenced to seven years imprisonment, with the final year suspended. It is the case that the appellant had offered a plea of manslaughter prior to trial, arguing that he had engaged in excessive self-defence, but that was not acceptable to the DPP. In those circumstances, the appellant instead pleaded not guilty simpliciter when arraigned, as distinct from pleading not guilty to murder, but guilty to manslaughter.

3. The background to the trial, the sentence hearing, and now to this appeal is to be found in the fact that the deceased, Mr. Martin Mulligan, was a taxi driver. He was aged fifty-three years at the time of his death. He had been working as such in the early hours of 28th September 2015 and was last seen transporting four people from a public house in Dundalk to Forkhill in County Armagh. There was evidence that these four passengers left the vehicle around 1.45am. Later that morning, the body of the deceased was found at 3.06am on Carnmore Road, a quiet rural road some miles from Dundalk. The body was discovered by three ladies who happened to came upon it.

4. At trial, the evidence of Dr. Curtis, the Assistant State Pathologist, dealt with the cause of death. He identified two fatal stab wounds. One was through the right side of the abdomen, severing the abdominal aorta, and one to the right thigh which severed the femoral artery and the right quadriceps muscle. The stab wounds caused catastrophic bleeding, resulting in Mr. Mulligan's death. The wound into the abdomen was 22.5cm deep. The second stab wound, the thigh wound, was what was described as a "through and through" wound i.e. piercing right through the entire thigh and exiting the other side. The Court heard that the deceased suffered other injuries, including blunt injuries to the head, injuries to the trunk, torso, both upper limbs, and both legs.

5. By way of further background, it should be explained that on the night of the crime, Gardaí had received information about a Toyota Avensis spinning its tyres on Park Street, Dundalk. The vehicle was pursued by an official Garda car, but it had to discontinue the pursuit due to the danger that was being posed to members of the community. At a later stage, Mr. Hillen admitted being the driver of the vehicle after being shown CCTV footage.

6. At an earlier stage that day, a Mr. McGeough had been a passenger in the car. The Court heard that the respondent to this review application had been assisting Mr. McGeough on a casual basis in looking after a section of land the he owned. It was contended that there was a history of illegal dumping on the land, and it was confirmed that some eleven days prior to the fatal incident, that Mr. McGeough had made a complaint about illegal dumping on his land to the County Council. The relevance of this is that Mr. Mulligan was killed and his body was found in close proximity to the entrance to this land.

7. On examination of the preserved crime scene, nineteen blood droplets were found in the vicinity of where the killing occurred and these droplets provided a match to the DNA of the respondent. There was evidence that the respondent to this application fled the scene after delivering the two fatal stab wounds, leaving the deceased seriously injured on a remote road. There was no attempt made to notify Emergency Services or Gardaí that the deceased was in need of assistance. The car that had been driven to the scene by the late Mr. Mulligan was removed from the vicinity by CM, a companion of Mr. Hillen's who had been a passenger in the respondent's vehicle. The removal of the vehicle meant that the late Mr. Mulligan was left with no means of escape from the crime scene. In the days following the killing, the respondent, along with CM, drove to Victoria Lough in Northern Ireland, and there, disposed of the knife. The knife has never been recovered. The understanding and working assumption at trial was that it was in the nature of a carving knife, such as would be found in any kitchen.

8. The respondent was detained and interviewed on a number of occasions between 23rd May 2016 and 25th May 2016. During these interviews, the respondent did not make any admission to killing Martin Mulligan. He was subsequently rearrested on 10th November 2016 and questioned in relation to the blood droplets matching his DNA. Upon being asked to account for the presence of his blood, the respondent said that the Gardaí must have put it there.

9. Some two months prior to the start of the trial, the respondent made a voluntary statement, providing what purported to be an account of what occurred in the build-up to the killing of the deceased. This was made in circumstances where he had requested, through his lawyers, that Gardaí would visit him while he was incarcerated in order to take a statement from him. In that statement and later statements, the taking of the statement was interrupted, the respondent outlined that he found the deceased or came upon him when driving by the section of land owned by Mr. McGeough. It appears that Mr.Hillen thought that the deceased was dumping rubbish on Mr. McGeough's land from the window of his taxi, and on seeing this, gave chase to the taxi in his own vehicle. The respondent further claims that the deceased stopped suddenly, at which point both men exited their respective vehicles, and that the deceased punched the respondent in the face. He claimed that a struggle developed between himself and the deceased, and that meanwhile, his friend, CM, who had been travelling with him as a passenger, got into and drove the deceased's taxi some distance away. In a later statement, he referred to the fact that the passenger took the keys from the taxi ignition and threw them into a nearby field. Mr. Hillen said that the deceased went to his own vehicle and retrieved something from the driver's side door. He says that after this, the deceased sprinted back down the road and got into the driver's side of Mr. Hillen's car. Mr. Hillen believed the deceased had decided to take his, Mr. Hillen's, car. The respondent said that at this point, CM, opened the front passenger door of the Toyota Avensis, found a sewer rod there, and struck the deceased twice on the shoulder and head region while standing on the roadway, leaning into the vehicle. The respondent claimed that the deceased thereafter exited the vehicle and that he had in his possession a long, stainless steel kitchen knife. The respondent then described "flipping" the knife from the hand of the deceased following a struggle, receiving punches to the back of his head from the deceased, and then, as he describes it, "jabbing out" twice at the deceased with the knife in his right hand, he being underneath the deceased at this point. The respondent refers to the deceased man limping away, that he and CM got into the Toyota Avensis and left the scene, bringing the knife with them.

The Sentencing Hearing

10. The sentence hearing heard about the devastating lifelong impact that the incident has had on family members of the deceased. A statement prepared by his widow, Grainne, was read to the Sentencing Court. Two of the victim's daughters, Sharon and Shauna, presented oral victim impact statements. A further statement prepared by the victim's mother was read by counsel and there was a composite statement from the victim's siblings, Gerard, Kevin, Imelda and Claire.

11. In terms of the background and personal circumstances of the respondent, the Sentencing Court was told that he was born on 21st April 1994 and so was twenty-one years of age at the time of the offence. He was the father of two young children. He had a number of previous convictions recorded against him on both sides of the Border, but notably, none involved violence. There were fifteen convictions in all, including offences under the Road Traffic Act, these were at the more serious end of road traffic offences, not being purely documentary offences. There were also recorded offences in the nature

of theft and fraud. Some offences had gone back to his period as a juvenile, but the defence was content for the Court to hear his entire record. At the time this offence was committed, he was carrying out community service, which he had been required to do as an alternative to a sentence of four months imprisonment. Also of note, and this is matter upon which some reliance is being placed on by the DPP in the course of this appeal, is that the respondent had gone on to reoffend since committing the offence the subject of the review application. On 29th April 2016, he committed an offence of handling stolen property, and on 1st May 2017, two offences of dangerous driving. For clarification, it is worth noting that he was on bail for the present offence at the time of those dangerous driving offences.

12. The judge's approach to sentencing was to place the offence in the upper midrange of seriousness and to identify a headline sentence, or pre-mitigation sentence, of ten years and then reduce it to a sentence of seven years with the final year suspended. It is this sentence which the DPP now seeks to review.

Summary of the Submissions

13. In contending that the judge erred in her approach to sentence and that the sentence imposed by her should be reviewed on grounds of undue leniency, the DPP relies on three key points. The DPP says that there was a clear error on the judge's part in placing the offence at the upper midrange. The Director says that by reference to the categorisation of manslaughter cases, in the case of DPP v David Mahon [2019] IESC 24, that the offence properly fell into the category of worst cases. If that was not accepted, then at the very least, the offence very definitely fell into the high culpability category. The DPP says that the judge was further in error in giving excessive credit for the pre-trial offer of a plea to manslaughter and the furnishing of two voluntary statements. Finally, the Director says that extraordinarily, there is no reference in the judge's sentencing remarks to aggravating factors.

14. In resisting the Director's application, counsel on behalf of the respondent says that the trial judge was obliged to respect the jury verdict. He says that the submissions now made in seeking a review of sentence are redolent of the submissions made at trial in urging the jury to return a verdict of murder. He says that, in truth, the DPP's position is that the narrative provided by the accused ought to have been rejected. Counsel says that there can be no question whatever of the offence being placed into the category of worst offences or high culpability offences, that, on the contrary, the offence fits fairly and squarely within the midrange. He says that the sentence imposed does not diverge significantly from sentences that have been imposed in broadly similar cases. He accepts that some judges might have imposed a somewhat higher sentence, though some, he says, might equally have imposed a somewhat lower sentence. Regardless, the respondent argues that the sentence fell within the available range. Indeed, he says that while the sentence imposed might be seen as falling at the more lenient end of the available spectrum, it could not be seen as a sentence that was excessively lenient or so lenient as to justify an intervention by an appellate court.

Discussion

15. It goes without saying that this was an offence of very considerable seriousness. In the Court's view, there are a number of factors present which mean that the sentence has to be seen as higher than midrange. There is, first of all, the fact that the respondent did not act alone, but rather, this was a confrontation between two younger men and their unfortunate victim. The fact that two wounds, each incredibly serious, were inflicted, is a matter that cannot be lost sight of. In making that observation, the Court does not ignore the fact that the State Pathologist was prepared to accept that the injuries inflicted could be explained in the manner described by the respondent in his statement to Gardaí. It must also be recognised, however, that the victim was treated with shocking callousness in this case. He was left seriously injured, to die alone on a remote country road. With his car removed to another location and his keys disposed of, Mr. Mulligan was left without any prospect of being able to get away and summon assistance.

16. Insofar as the respondent's personal circumstances are concerned, we would not see his previous record, which does not include offences of violence, as actually aggravating this offence. Equally, however, the existence of a not insignificant record does mean that the mitigation that would be available to somebody coming before a sentencing court without a prior record is not available to Mr. Hillen. We must also be cognisant of the fact that this very serious offence was committed at a time when he had been already given a chance by a court on a previous occasion, which had ordered him to undertake community service. The further fact that he reoffended since committing this desperately serious offence gives rise to some real disquiet.

17. On the other side of the equation, the factors present by way of mitigation are quite limited. He did offer a plea of guilty to manslaughter and he is entitled to some credit for this, but not the extent of credit that he could expect to have received had he followed through on that by entering a plea of not guilty to murder, but guilty to manslaughter. While the fact that he has fifteen convictions in all recorded against him is not to his credit, account does have to be taken of the fact that none of them were for crimes of violence. Perhaps the most significant factor in his favour is his relatively young age, which leaves open a hope of rehabilitation. An unusual aspect of the case is that a number of character references that were submitted at the sentence hearing were withdrawn. In a situation where we are told that the references in question were provided to the lawyers for the then accused very shortly before the sentencing hearing by members of his family, and at a time when the accused was in custody and had been for a significant period, we would not attach any particularly great significance to this, but it is not a factor that inspires confidence.

18. Overall, it seems to the Court that this is a case that falls into the high culpability category, as identified by Charleton J. in DPP v. David Mahon [2019] IESC 24 albeit not at the upper-end of that category. We do not believe that this case falls into the worst category of offending as suggested by the DPP. The review of sentences carried out by Charleton J. suggested that cases in the high culpability category tend to attract a punishment of between ten and fifteen years. In our view, an appropriate headline or pre-

mitigation for the present case would have been twelve years. We have stated that we do not see the mitigating factors present as being exceptionally weighty, and in our view, giving full value to those factors that are present would not have seen the sentence reduced to below that of nine years to be served. Had a sentence of ten years imprisonment been imposed, it is unlikely that we would have intervened if the sentence was appealed on grounds of severity. We make that observation only to indicate our assessment of the gravity of the offence and we recognise that it has always been accepted that asking whether a sentence more severe than that sought to be reviewed would have been upheld is likely to be of limited assistance.

19. However, we are also required to resentence as of today's date. In doing so, we are conscious of the fact that we are resentencing at a time when the respondent is well into his sentence and that the sentence imposed in the Central Criminal Court was backdated to 3rd April 2017 to take account of time spent in custody. We have been told that the respondent is working productively within the prison system and enjoys an enhanced status. In recognition of the fact that being resentenced at this stage must be the source of considerable disappointment, we will suspend the final year of the nine-year sentence that we are imposing in substitution for the sentence imposed in the Central Criminal Court.

20. Accordingly, the order of the Court is that we will quash the sentence imposed in the Central Criminal Court, impose a sentence of nine years imprisonment, with the final year suspended, and that sentence will date from the same day as the sentence that had been imposed in the Central Criminal Court.