



THE COURT OF APPEAL

**Peart J.
Birmingham J.
Edwards J.**

247/14

**The People at the Suit of the Director of Public Prosecutions
V
Paul Doolan**

Appellant

Judgment of the Court (ex tempore) delivered on the 18th day of December 2014, by Mr. Justice Birmingham

1. In this case the appellant, Mr. Doolan appeals against the severity of a sentence that was imposed on him in the Circuit Court on the 19th November, 2014. On that occasion he received a sentence of two years imprisonment, with one year, the final year, suspended in respect of the offence of robbery. The robbery in question is one that occurred at Hacketts Bookmakers on the 5th December, 2013.

2. The appeal is put very clearly and firmly on the basis that this is a case that could and should have been dealt with by way of a community service order or by way of an entirely suspended sentence and it is said that the error in principle was to require the appellant to serve a custodial sentence.

3. There are really two arguments that are made. The first is that there was an insufficient distinction drawn between the appellant's situation and the situation of a co-accused Mr. Fitzpatrick and we will return to Mr. Fitzpatrick's role in this in a moment. The second argument is that the consideration that was given was inadequate because it did not sufficiently address the prospects of dealing with this other than by way of an immediate custodial sentence. In that regard attention is drawn to the fact that the defence at the arraignment stage, when the plea of guilty, which was an early plea, was entered, had sought a probation report and that was an issue that was returned to at the time of the sentencing hearing.

4. The trial judge did not accede to the application for a probation report and instead listed the matter for sentence at a date when it would not have been possible to have a probation report ready and it is said that the failure to seek and avail of a probation report constituted an error in the sentencing process.

5. The basic facts of the underlying offence can be stated briefly. The position is that on the 5th December, 2013, Ms. Tracey O'Mahony who is a lady in her 50s was working at Hacketts Bookmakers in Cork. While she was on duty, a lone male, who was Mr. Fitzpatrick, entered and shouted at her demanding money. He had covered his head with a hood and was wearing a scarf. He leaned over the counter and demanded money and she gave him a sum of €900. His response was to say that that was not enough and she then gave him another bundle of €5 notes. While this was going on, Mr. Fitzpatrick was poking at her with a stick and he was generally aggressive and it is clear that the incident has had a significant effect on Ms. O'Mahony, she had been working in that general role for a number of years and she had found this a particularly troubling, distressing and traumatic incident.

6. Witnesses informed the gardaí that the robber had been seen in a silver Ford Fiesta and that vehicle was traced by gardaí to an address in Ballypheane. When the gardaí arrived at that address they met the appellant and he admitted that he had loaned Mr. Fitzpatrick a hoodie and that he gave Mr. Fitzpatrick a lift towards the bookmakers. When giving that lift, he had two of his children in the car with him at that stage and he was on the way to pick up a third child. He claimed, with what credibility people will have their own views on, that he thought that Mr. Fitzpatrick would not proceed with the robbery, but that later he knew that the robbery had proceeded, because Mr. Fitzpatrick returned to the house and gave him €70. Subsequently the appellant attended voluntarily at the garda station and said that Mr. Fitzpatrick had picked up something from the garden. The item picked up would appear to have been the stick carried into the bookies shop.

7. When Mr. Fitzpatrick was apprehended, he indicated that the appellant had a more active role in this whole incident than the appellant had conceded and indeed he contended that the appellant had received the full proceeds of the robbery. This contrast in the versions that were presented caused the trial judge to comment that this was a question of thieves falling out. The trial judge took the view that the involvement of Mr. Fitzpatrick was at the mid higher level and that of the appellant at the lower mid level.

8. So far as the two points that are made are concerned the court is not of the view that there is merit and substance in the suggestion that there was an inadequate differentiation of the role of the two participants. It is clear that the judge was conscious that their roles were different. He did, as I say, put their participation at different points on the spectrum, and that was reflected in the sentences that he imposed. He differentiated both in terms of the period in custody to be served and also in terms of how the suspended period and interactions subsequently with the probation service were to be structured.

9. It is the view of the court that the court was conscious both of their different roles and also conscious of their different backgrounds and personal circumstances. So far as the appellant is concerned, he did not come before the court as a person with previous convictions. He did have some what were described as minor road traffic offences some ten years earlier. It was also clear that he had a work history, he was a married man with three children and he had employment prospects. So far as the employment prospects are concerned, that too featured in the request to defer sentence. One purpose of deferring sentence was so that a probation report could be obtained and the second reason why it was said that the sentence should be deferred, was because the appellant believed that he could make restitution in respect of the money taken.

10. It is also the position that the case against the appellant depended very significantly on his own admissions and the cooperation that he had provided to gardaí. Without those admissions it would appear that there would not have been the ability to bring him to justice.

11. The court's view is that the case that the learned trial judge was required to consider was a difficult one and a sensitive one. It was difficult because the offence of robbery is inherently a serious offence, but on the other side of the coin, the judge was being asked to proceed to sentence somebody who was a first time offender, somebody with the family background and circumstances described, somebody with a good work record, somebody who had pleaded at an early stage and had provided very meaningful cooperation indeed to the extent that he made possible the prosecution that was brought against him, which would otherwise have been impossible.

12. It seems to the court in that situation where the case was, as we would identify it, quite finely balanced as to what the outcome should be, that the judge erred in not seeking a probation report and in not maximising the amount of information that would be available to him when it came to performing the difficult and sensitive task of sentencing in this particular case. It is the court's view that not obtaining the probation report was an error and that it is an error that requires an intervention at this stage from this Court. The Court is conscious of the fact that the appellant has been in custody now for just a month and takes the view that that is not insignificant in the context of somebody who was a first time offender and for whom this was their first experience of custody.

13. Had the probation report been available, that might have resulted in an order in relation to community service, it might have resulted in an order where the balance as between custody and suspended sentence was different to the one that was the actual outcome or it might have resulted in an entirely suspended sentence.

14. In a situation where the appellant has spent the month in custody, to which I have referred, what this Court is minded to do is to deal with it now on the basis of requiring him to undertake community service. Accordingly, what the court will do is the court will put the matter back to 2.00pm today with a view to having his suitability for community service assessed as it is our understanding and our experience of other cases in the list that that can be done within the day. If he is regarded as suitable for community service, then the court is proposing to direct him to undertake 200 hours of community service as an alternative to twelve months imprisonment and that order does take account and recognises the fact that he has in fact spent a month in custody. For the moment we will simply put the matter back to 2.00 o'clock today.

At 2.00 pm Peart J.:

15. We have received the report and the court is most grateful to the Probation Service for the speedy manner in which they have dealt with this matter for us today. The report as the appellant's counsel says is a positive report and indicates his suitability for community service and that there is suitable work available apparently. As Mr. Justice Birmingham indicated this morning, the court is minded to substitute 200 hours of community service, provided of course that the appellant is willing to undertake that and he will understand that in the event that he does not complete the 200 hours, he is liable to serve the term of imprisonment. This is the decision of the Court and the order will reflect that. Obviously any breach of the undertaking to do to the 200 hours will result in the matter coming back to the court in some fashion to deal with it differently.