



**THE COURT OF APPEAL**

**[203/2017]**

The President

Edwards J.

McCarthy J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**JAMES BARRY**

**APPELLANT**

**JUDGMENT (Ex tempore) of the Court delivered on the 9th day of October 2018 by Birmingham P.**

1. This is an appeal against severity of sentence. The sentences under appeal is an aggregate sentence of seven years' imprisonment made up of a sentence of two years and six months with a consecutive sentence of four years and six months, but with the final two years and six months suspended that was imposed by Judge Melanie Greally in the Circuit Criminal Court in Dublin on 5th July 2017. The sentence was backdated to 4th February 2017. The sentences were imposed in respect of two robbery offences.

2. The facts in relation to the robberies are that on 5th March 2015, the appellant entered Bridge Pharmacy in Upper Camden Street, Dublin, grabbed a staff member by the shoulder and "guided" her towards the till. He said to her "I'm not going to hurt you – give me 20 minutes". He was given the contents of the till and left the pharmacy pursued by a staff member. Neighbouring business owners also assisted in the pursuit. The appellant made an unsuccessful attempt to board a bus, but was apprehended by Gardaí. He was arrested and detained and in the course of detention, made full admissions. All of the money that had been taken from the till was recovered. In the course of his detention, he offered the explanation that he had fallen behind with maintenance payments, and indeed, referred to the fact that he had missed a hearing date in the Family Court on the day in question.

3. The appellant entered a guilty plea on 20th December 2016, and the case was then adjourned for sentence to 20th March 2017, but while awaiting sentence on bail, he committed a second robbery on 4th February 2017 at McDonald's in Rathmines in Dublin. On that occasion, he entered the restaurant, he had disguised himself by wearing glasses and had a scarf covering his nose and mouth. He approached a staff member and held a knife, approximately 10cm in length, to her rib area. She opened four tills and the appellant left the restaurant with some €330. In the course of this incident, he made aggressive demands that the money be handed over. Having left the restaurant, he got into a taxi. The taxi driver was contacted by Gardaí and the appellant became aware that his driver was in contact with Gardaí so he exited the taxi. He ran into Dodder Park, and in the erroneous belief that a helicopter had been deployed to assist in the search for him, he entered the river from which he was removed by a member of the Gardaí. In the course of the subsequent arrest and detention, when questioned about the incident, he indicated that he had produced a metal cross to the staff member. However, when the CCTV footage of the incident was viewed by Gardaí, it was perfectly clear that he had in fact produced a knife.

4. As far as the appellant's personal circumstances are concerned, he was thirty-three years of age at the time of the sentence hearing. He was, the Court was told, the primary carer for a five-year old child with a number of health issues. The child had a tumour behind the left eye as an infant. Said eye was removed and the child now has a prosthetic eye. The Court also heard that the child's mother had her own vulnerabilities and the effect of that was to increase the responsibilities of the appellant. Apart from that child, he had three other children from a previous relationship and the maintenance obligations to which he had referred when questioned in relation to the first offence related to these children. He himself had a very troubled and difficult childhood. He was brought up by his mother and had little contact with his father who left Ireland and went to Australia, dying when the appellant was just 18 years of age.

5. The appellant had a number of previous convictions. In April 2011, he received a sentence in respect of an offence of attempted robbery and linked with that an offence of possession of a syringe and blood in a container. The Garda records which were produced at the sentence hearing and handed into Court indicate that a sentence of four years was imposed in respect of the syringe element and a sentence of two years in respect of the robbery. Both at the sentence hearing and again here on appeal, it has been suggested that Mr. Barry's recall is that the actual sentence that he was required to serve was less. There were also a number of other offences. In May 2010, there was an offence of the possession of certain articles, apparently a screwdriver and balaclava, and further back in time, in 2005, a s. 3 Misuse of Drugs Act case and further back again, in 2003, a s. 113 Road Traffic Act matter. Finally, back in 2000, there was a s. 2 larceny. So, the substantial commission is that in 2010 for the offence of attempted robbery and possession of a syringe. The Court heard that there is a question of the use drugs and alcohol extensively and there was also reference to gambling.

## Grounds of Appeal

6. So far as the Grounds of Appeal are concerned, a number of criticisms are advanced of the sentencing process. The judge is criticised for not nominating a headline figure and not having then proceeded to mitigate from that headline figure and it is said that it is the case that the judge did not follow the two-stage process that this Court has recommended. In that regard, the Court has, on a number of occasions, made clear that a failure to follow the best practice recommended will not of itself see a sentence quashed necessarily. It is also said that the judge erred in assessing the gravity of the offence. She is criticised for not making specific reference to the absence of the infliction of physical injuries. It is also said that the judge did not reference specifically the fact that the offending had to be seen against the background of a serious relapse into addiction. Finally, it is said that inadequate attention was paid to the mitigating factors that were present. These were identified as the early pleas, the appellant's difficult upbringing and background and his significant family responsibilities.

7. In the course of the oral presentation, it became clear that Mr. Barry's real objective in pursuing the appeal was to alter the balance between the portion of the sentence that was required to be served and that which was to be suspended by increasing the suspended element.

8. This Court has stated repeatedly that it is not sufficient to justify an intervention by it, that the Court would, had it been called on to sentence at first instance, perhaps have imposed a somewhat different sentence. Still less would the fact that any individual member of the Court would or might have imposed a somewhat different sentence justify intervention. Before the Court will intervene, an error in principle must be identified.

9. So far as the offences that the Circuit Court was dealing with here which are now the subject of this appeal, by any standards these were serious offences, in particular, the second offence involving as it did the production of a knife was a serious matter. The sentencing Court was told that the McDonald's victim was quite traumatised. The investigating Garda, in the course of his evidence, had referred to non-physical injuries. It is also the case that the McDonald's offence was committed while on bail so that by statute, the offence had to be consecutive and it was also the fact that by statute, the fact that it was committed on bail had to be regarded as an aggravating factor.

10. Looking at the offences committed, as they were, by someone with a relevant previous conviction, the Court cannot identify any error. It seems to the Court that the sentence imposed fell within the available range. The fact that a somewhat different balance might have been struck between the portion to be served and the portion to be suspended, and it must be noted that might that have seen a shortening of the suspended portion, is really neither here nor there. Overall, the Court is in no doubt that the sentences decided upon by the sentencing judge were ones that were available to her and ones that fell very firmly within the available range.

11. In those circumstances, the Court will dismiss the appeal.