



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

V

Jakub Jesenak

38/17

Respondent

Appellant

JUDGMENT of the Court delivered on the 13th day of October 2017 by

Mr. Justice Hedigan

Introduction

1. This is an appeal against severity of sentence. The appellant entered guilty pleas, in the Dublin Circuit Criminal Court, to s. 3 assault causing harm, which was entered on the new mention date and s. 5 threat to kill, entered prior to sentencing on the 10th February, 2017, both contrary to the Non-Fatal Offences Against the Person Act 1997. There were two further counts for offences contrary to s. 2, assault, for which a *nolle prosequi* was entered.

2. The appellant was sentenced to concurrent sentences of three years with the final year suspended for 18 months. The suspension was on condition that he enter a bond of €150 and remain under the supervision of the probation services. That he undergo an alcohol awareness programme, remain alcohol free, undergo urine tests and undergo an anger management programme, as directed by the probation services.

3. The appellant was given credit for the three months and ten days he had already served.

The circumstances of the offence

4. The offence occurred on the 12th June, 2016, at the home the appellant shared with his former partner and another flatmate. The offences were committed against his partner. At the time they had a 20 month old daughter and the injured party was seven months pregnant. Garda Curley gave evidence of what was reported by the injured party.

5. The appellant had been drinking over the weekend. They had plans to attend a baby market but the appellant indicated he would not go. The injured party went alone and returned to the appellant sleeping. He awoke and became angry with her over who had helped her buy things at the market. The appellant started shouting at the injured party causing their daughter to run out into the garden. The injured party followed their daughter and the appellant followed after her. He continued shouting at her. He grabbed her arm and punched her in the face. The injured party was then on the ground with their daughter next to her screaming "mamma".

6. The injured party described being punched in the face about five times and having her hair pulled with the result that she had a lump on the back of her head. Her nose was bleeding and the appellant shouted at her that he would kill her and destroy everything and burn everything she has. He said to her, "Do you not think I have the power to kill you?" she said, "I'm afraid to be killed and I want to stay alive to mind my children"? He said to her then he would get an axe and kill her and bury her in the ground so that no one would ever find her. She said that he then let go of her and kicked her a few times across the legs.

7. Then the appellant went back into the house and started throwing the things that she had bought for the baby out the back door and she was trying to bring the things back in, but he said that she would have to leave the house, but that their daughter would have to stay with him. The injured party described then crying and lying on the ground outside in the garden, she didn't know what to do or where to go.

8. About five minutes later, she said that he opened the door and told her to come back inside in case the neighbours saw her. She went back inside and upstairs and he stayed downstairs in the dining room. She sat on the stairs and then described that he came back and tried to grab her through the rails and that she ran upstairs and again, he chased her and started to pull her hair. She described trying not to fall because she was trying to protect her baby.

9. The appellant said to her that it was all her fault, and now that she is pregnant, that all she does is cry. He started to punch her again and then he told her to go to the bathroom and clean herself up, that she was a stupid bitch and dirty and that he couldn't bear to look at her and that she had to do something about her face. When she splashed water on her face in the bathroom blood splashed on the wall and he started to shout at her, telling her to stop dirtying the place.

10. She described then how he grabbed her neck and tried to strangle her. He threw her on the ground and he was trying to strangle her with one hand and he put his other hand across her mouth and he started to stick his fingers down her throat. He was shouting at her and choking her.

11. At that stage, he then left and went downstairs and she could hear him say that there was somebody knocking at the door. Two members of the Gardai had arrived and the appellant was directed to leave the property. The flatmate stated that she had heard the incident and was afraid to leave her room. She had phoned a friend and asked them to call the Gardai as her English wasn't that good.

12. He returned at approximately 5 am. The injured party stayed in bed with him until he fell asleep and then went to the kitchen and made contact with the Gardai. She was crying, visibly shaken and had bruising to her face and legs when Garda Curley arrived.

13. The appellant was then arrested and taken to Clondalkin Garda station and charged. He was taken to Court the following morning and remanded in custody. He was granted bail by the High Court on the 22nd September, 2016. He has not had contact with the

injured party since being bailed.

14. The injured party did not wish to complete a victim impact statement or attend Court. While she had no fractures there was bruising and cuts to her face and bruising to her legs. Garda Curley noted that the injuries were perhaps not as serious as originally made out. Follow up medical attention was required. Their baby was delivered healthily.

The appellant's personal circumstances

15. The appellant is 31 years of age, originally from Slovakia and moved to Ireland in 2005. The injured party was also from Slovakia and had moved to Ireland with her family. They met in or about 2011. Prior to coming to Ireland the appellant had trained as a sculptor and spent one year on an agricultural course. He initially worked as a plasterer but became unemployed during the recession. He began to drink more and more. This developed into an addiction.

16. The appellant has two previous District Court convictions, from 2013, for s. 4 Theft for which he received a €100 fine and intoxication in a public place which was taken into consideration. These convictions were alcohol related.

17. It was accepted that there was never going to be a trial in respect of the charges. He asked the Garda to pass on his apology. It was a low point in his life when he allowed alcohol to distort his feelings. He was very hostile and unpleasant. This part of his personality is normally kept under control. He thought there were things going on behind his back. He accepts that the injured party is blameless. There have not been incidents since. He had returned to plastering through the enterprise scheme. He was living in a hostile at the time of sentencing. He hopes to rebuild the trust of his former partner.

Sentence

18. The sentencing judge noted that the significantly aggravating factors were the fact that this was an assault first of all on a woman, and a defenceless, seven-month pregnant woman. The follow through, where it continued up the stairs and was coupled with verbal abuse and threats. The fact that it was executed on his partner and took place in front of their young child, which is shameful action for any father to behave in such a manner in front of his own children. The appellant's previous convictions were not considered as aggravating factors.

19. The mitigating factor was the appellant's guilty plea. His personal circumstances were considered. While the judge considered that the offence took place in the context of excessive consumption of alcohol this did not mitigate the offence.

20. The sentencing judge placed the offences within the upper level of assault and noted that had the matter gone to full trial, she would have considered a four-year custodial sentence to have been the appropriate sentence. In respect of the threats to kill, she was of the view that they come within the upper mid-range for offences of that type, having been accompanied by physical violence and abuse. A sentence of three years was imposed on each count to run concurrently. The final year was suspended for 18 months on the strict conditions noted above.

Appellant's submissions

21. The appellant appeals on the following grounds. The sentencing judge failed to give adequate credit and weight to the appellant's early guilty plea, his good behaviour post offending, his strict compliance with the terms of his bail which separated him from his family, the absence of a weapon and long term permanent physical injury, his apology, lack previous convictions involving violence, his drunken state, the effect of unemployment, the onerous nature of imprisonment for him when frequent family visits are unlikely and his English is limited, the fact that the appellant was re-entering the workforce and seeking to rehabilitate himself. It is submitted that in light of the above and the evidence that the sentences were unduly severe.

22. The appellant refers the Court to *The People (DPP) v. O'Driscoll* [1972] 1 Frewan 351 at 353 where it is stated that the sentence must suit the crime and the criminal and it must not only deter but induce a criminal to turn away from a life of crime. The Court in that case also had regard to the fact that it was the offenders' first violent crime. The appellant herein had no previous violence based convictions. While employed he was crime free. In depressing circumstances he abused alcohol. The sentence did not adequately provide for his turnaround or his compliance with the bail conditions.

23. While in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 the Court was dealing with very different offences it was noted that a custodial sentence is never mandatory unless directed by statute. Each case depends on its own special circumstances with the sentence being appropriate for the crime committed by the particular offender. In the instant case there is no mandatory sentence. Inadequate weight was given to the fact that he was unemployed at the time of commission but employed at sentencing. While the presence of his daughter made the offending worse this was given undue weight.

24. The Court is referred to *The People (DPP) v. Jennings* (Unreported, Court of Criminal Appeal, 15th February, 1999) where that Court considered that at make or break time an offender could be given one last chance. In the instant case at the time of sentencing the appellant was well down the road of rehabilitation. Despite not having a fixed address he had not re-offended, he found employment and kept his bail terms which denied him access to his family.

25. In *The People (DPP) v. Maguire* [2015] IECA 350 this Court, when dealing with fraud type activities, held that where someone is without previous convictions and had a previous good character the focus should be on identifying the minimum period to meet the situation. The Court referred to cases where it was held that with previous good character offenders it was the fact of the imprisonment and not the duration which was the main punishment. It is submitted that while the appellant does not have anything like the range of good character evidence that was available in that case he did not have previous violent offences. He had a clear record prior to his unemployment. It is submitted that his nightly change of address should be viewed in light of his adherence to his bail conditions.

26. The appellant refers to s. 29(1) of the Criminal Justice Act 1999 and noted that the plea to s. 3 was entered on the new mention date. This was done without prejudice so that the prosecution could take instructions on the remaining counts. At no point was a trial sought. It is submitted that the sentencing judge gave this inadequate weight.

Respondent's submissions

27. It is submitted that there was no error in principle. The sentencing judge was entitled to place the s. 3 offence at the upper end of the range of available penalties. The maximum penalty is five years. The judge was so entitled as while the harm was not as serious as in some cases there were aggravating factors. These included their relationship, that the injured party was pregnant, that it took place in front of their child and that he returned after being directed to leave.

28. The maximum penalty for a s. 5 offence is 10 years. The judge was entitled to place it at the upper end of the mid-range. It was

aggravated by taking place during an assault, in front of a child and including a threat to bury her where no one would find her.

29. The sentencing judge expressly noted the significant benefit of the guilty plea and then discounted from four to three years and suspended the final year. It is submitted that this was in recognition of the significance of the guilty plea.

30. It is submitted that the appellant abiding by his bail is not mitigation but simply the absence of aggravation. In relation to rehabilitation it is submitted that there was no evidence of the appellant's efforts in respect of his alcohol problem. Despite this the final year was suspended as a deterrent and an incentive to work with the probation services. The judge more than adequately reflected his efforts.

Decision

31. In *The People (DPP) v. Byrne* [2017] IECA 97 at paras. 26 and 27 Edwards J. helpfully set out the process which should be undertaken by a court when sentencing:-

"...the exercise of sentencing generally involves a two stage process. The first stage involves assessing the gravity of the offence, with reference to culpability (including aggravating factors tending to increase culpability and mitigating factors tending to reduce culpability), and the harm done, and determining where on the scale of available penalties the offence should be located before account is taken of any mitigating factors not already taken into account as bearing on culpability. In this way the sentencing judge determines on a headline sentence in the first instance.

The second stage involves discounting from the headline sentence arrived at in the first stage for any mitigating factors not already taken into account, such as a plea, previous good character, age, remorse, co-operation, restitution, a good work record, adversities in the accused's person's life and life history, public service or positive contributions to society, good works, efforts at rehabilitation and any other relevant circumstances capable of going to mitigation. In this way the Court endeavours to arrive at a just and proportionate ultimate sentence."

32. The assault involved here was on a woman who was seven months pregnant and was perpetrated in the presence of the 20 month old daughter of them both. There was extreme violence used, threats to kill, to destroy and to burn everything. The injured party was threatened that he would use an axe on her. He locked her out of her own home. When she was let back in he continued his violent assault and tried to strangle her. The Gardaí arrived at the house having been alerted by another woman who was living in the flat. The Gardaí told the appellant to leave. He did so. He returned however at 5 a.m. but when he fell asleep his partner called the Gardaí again. They came, they arrested him, he was remanded in custody and he remained in custody until he got High Court bail on 22nd September, 2016.

33. The appellant is a plasterer by occupation. He has two previous convictions, neither of which are particularly relevant to these offences. The sentence involved was a headline one of four years reduced to three in recognition of the guilty plea. The final year was suspended as an incentive to continuing rehabilitation. The assault and the threat to kill involved here was of the most violent nature. The fact that the entire assault was carried out upon a woman seven months pregnant at the time and in the presence of her twenty month old daughter was of a particularly aggravating nature. It is hard to imagine circumstances that could have been more aggravating in the particular assault.

34. The maximum sentence for Count 1, threat to kill, is ten years and for Count 2, assault, is five years. In fixing upon a headline sentence of four years the learned trial judge said she was placing the Count 1 offence in the upper mid-range and Count 2 in the upper level of assault. The learned trial judge might on this headline basis have fixed the Count 1 headline sentence at five to six years and this Court would have been unlikely to interfere.

35. In fixing upon a headline of four years the learned trial judge was in our view lenient. However, it is not in our view so lenient as to justify us in finding an error of principle. There is certainly no case to be made that the sentence imposed was too severe. We consider the sentence to have been a lenient one and will not interfere with it. The appeal is dismissed.