THE COURT OF APPEAL

[35/12]

The President

Birmingham J.

Irvine J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KASTRIOT BOZA

APPELLANT

JUDGMENT of the COURT (Ex tempore) delivered by The President on the 10th day of November 2014

1. This is an appeal against the severity of the sentence imposed on the appellant at the Central Criminal Court on 6th February 2012. He was sentenced to six years imprisonment with the final two years suspended on condition. On 16th December 2011, the accused had pleaded guilty to two counts of a three count indictment and the matter was put back for the sentence hearing which took place on 30th January, 2012. The trial judge reserved his decision on sentence for one week until 6th February, 2012. The indictment charged the accused with three offences contrary to s. 72 and 74 of the Criminal Law Act 1997, of doing acts with the intent to impede the apprehension of prosecution of an offender.

2. On 4th January 2009, the appellant was one of a number of persons who were present in a flat in Cabra in Dublin when the late Peter Gunn was murdered. There is no suggestion that the appellant was in any way implicated in the murder, which on the evidence given to the sentencing court appears to have been a sudden and spontaneous malicious act carried out by one of the party on the unfortunate victim.

3. Following the commission of the crime, the appellant assisted in or carried out a number of acts that were the subject of the charges, namely, disposing of the deceased's body after the murder and some days later taking up the bloodstained carpet from the flat floor and disposing of it and the fatal weapon.

4. Count 1 related to assisting in the disposal of the body of the deceased, Count 2 concerned the carpet and Count 3 disposing of the knife used to kill the deceased. The Director accepted that the accused was acting under duress and in fear of his life from the perpetrator at the time of disposal of the body. That amounted to a defence in the circumstances and the prosecution did not proceed on that count. It was also accepted that there was an element of duress in respect of the acts giving rise to Counts 2 and 3, but not such as would have constituted a defence to those charges.

5. In cross-examination of Detective Garda Gleeson, the Officer in charge of the case, Counsel suggested that the appellant's motive was still fear, despite the intervening period of days and the Officer accepted that. Counsel for the prosecution submitted that the offences were at a medium level of seriousness of their kind.

6. The appellant was born on 22nd March 1973 and is from Albania. He came to Ireland in 1998 and got married in 2001 and has one child. He has 28 previous convictions between 2005 and 2010 for a variety of offences including burglary, theft and public order offences of a relatively minor nature. There is no record of violence or anything similar to the crimes in question. The trial judge did not refer to the appellant's criminal record in considering sentence.

7. The appellant's submissions draw attention in the first instance to the fact that the trial judge made an error when he began to deliver his judgment. The judge began:-

> "In this case the unfortunate Peter Gunn was killed for no apparent reason in very distressing circumstances. The accused man was present, but it is accepted by the Director of Public Prosecutions that on the occasion of the killing he was subject to duress and not criminally responsible for his actions on that occasion. Subsequently however, he assisted in the disposal of the body and the murder weapon and assisted generally in preventing the immediate apprehension of the person responsible and for this he does bear criminal responsibility. The circumstances of the killing were most distressing, the circumstances of the disposal of his body were most distressing and I have regard to the inherent gravity of offence and its effects on the family."

At this point, Counsel for the prosecution intervened to point out that:-

> "It was expressly part of the prosecution case that he, that is the accused, bore no criminal responsibility in respect of the disposal of the body, but that he did bear responsibility in respect of the disposal of the murder weapon and a blood stained portion of carpet on a date subsequent to the murder."

The judge said he would take into account the situation as counsel has corrected him and said:-

> "That being so I moderate what I had previously in mind and I assess the case as meriting a sentence of six years imprisonment. The accused is then entitled to credit in respect of his plea of guilty and also in respect of genuine remorse and to take account of that I suspend the final two years of that sentence."

The judge confirmed that in taking account of the matter as corrected by counsel, he had moderated downwards the sentence he had in mind from seven years to six.

8. The submissions put forward four grounds of challenge as follows:

> 1. The trial judge having made the mistake about Count No. 1, did not give an adequate recognition of the difference as to the level of seriousness in of the of disposing of the body as compared with interfering with the scene of the crime and getting rid of the murder weapon knife. Moreover, the judge failed to give any adequate rationale for the one-year reduction that he made in light of the error pointed out by Counsel.
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> 2. The trial judge departed from proper sentencing practice as mandated by the relevant authorities and specifically by the Supreme Court in the case of People v. M. [1995] but this point was not proceeded with on this appeal.
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> 3. The judge did not give sufficient weight to the mitigating elements and imposed a sentence that was disproportionate in all the circumstances.
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> 4. In supplemental submissions dated 5th November 2014, the appellant cites a sentence imposed by the same judge for an offence under the same section and subsections by way of comparison of a case of acts following a murder and in which there was also an element of fear on the part of the accused. In that case, a sentence of eighteen months imprisonment was imposed on 14th January 2014 on a woman who cleaned up the scene of the crime. Although the submission does not actually say so, the implication is that the sentence in this case is inconsistent with the decision in the later case and is evidence of an error of principle.

5. At the hearing in this Court, Mr. Condon S.C., Counsel for the appellant, said that two further elements ought to have been taken into account in the calculation of the sentence. The first is that the appellant was in custody for a period of four and a half months on the relevant charges and the relevant charges alone, following the expiration of a sentence of imprisonment imposed by the Circuit Court which he was serving at the time when he was questioned by the Gardaí in relation to the instant offences. Secondly, if the Gardaí had gone to Castlrea Prison and arrested the appellant at an earlier time, it is likely that he would have got the benefit of some overlap of the sentence he was then serving.

9. The respondent's submissions may be summarised as follows. The trial judge expressly said that he took into account the correction pointed out by counsel and reduced the sentence accordingly. It was unnecessary for him to furnish a detailed explanation as to the basis of the distinction he drew between the seriousness of the offence in Count 1 as compared with Counts 2 and 3. The judge reacted to the corrected information in a rational and proportionate manner and it is clear from the circumstances why and how he arrived at the decision.

10. The learned trial judge adhered to the principles of sentencing laid down by the authorities and that he first looked at the range of penalties applicable and then decided where on the range the case should lay following which he applied relevant mitigation. He did not fall into the error of looking at the maximum penalty provided by law and applying mitigation thereto. There was no error in principle and this Court ought not to interfere merely because it might have imposed a different sentence. The appellant pleaded guilty to serious crimes and the Court was also entitled to take into account his previous record of criminal activity amounting to some 28 convictions. It is clear, having said that, that the appellant's record does not reveal any comparable offence to those in question in this case.

11. This as unusual and difficult case. The offences are serious, but there is also substantial mitigation. The circumstances of the killing of Mr. Ward are frightening and distressing. The appellant was not responsible for that and the trial judge did not take his presence on the occasion into account. The appellant was involved in getting rid of the deceased's body, but it is accepted that he did that under duress or fear of such a nature as to relieve him of criminal responsibility. The offences therefore are helping to remove the blood stained carpet and to dispose of it and the murder weapon. A clear distinction must in the view of this Court be drawn in point of heinousness and character of criminal activity between the conduct for which the appellant is free from criminal responsibility and the acts comprised in the guilty pleas.

12. The proposed comparison between this case and the one decided two years later is not helpful, in our view. In order to decide whether the cases are comparable, one would have to know all the relevant facts of the later one. The Court would then have to conclude that the sentence in the later case was correct before it could condemn the present one as being incorrect. The common features of the two cases are that they relate to the aftermath of murder but that does not mean that the decisions must be the same or even that they are comparable. The facts of the cases may differ significantly in detail as may the circumstances of the respective accused. This objection is of course quite different from the provision where available of general statistical information about sentencing that the Court of Criminal Appeal has endorsed and encouraged in pursuit of consistency of approach and in sentencing.

13. Two difficult questions remain, however, and a third one that arose this morning that go to the substance of the sentence consideration rather than the procedure. Did the learned judge address himself to the distinction of blameworthiness between Count 1 and Count 2 and 3. This Court is of the view, as stated above that there is a significant difference to be drawn. The question is complicated by the error that the trial judge made, but the fact is, nevertheless, that the judge immediately accepted the correction offered by Counsel and proceeded to make an adjustment.

14. However, the essential point, in the view of this Court, is that the learned trial judge did not sufficiently allow for the extra element of mitigation in the acknowledged presence of duress operating on the appellant in his carrying out of the other acts of obstruction. Such pressure or fear did not excuse the commission of the crimes, but the existence of pressure was clearly relevant in reducing their heinousness.

15. In addition, the failure to take account of the time in custody, a fact which is accepted by the Director amounts to another error in the view of this Court. The possibility raised by Counsel, Mr. Condon, of the potential for coincidence of sentencing, such as might operate in favour of the appellant, seems to this Court to be too remote to amount to a matter that can impact on the issues in the appeal.

16. The Court's decision, accordingly, is that the learned trial judge did fall into error and the sentence must be set aside and the Court will proceed to consider the appropriate sentence to impose instead.

17. The situation here is that the Court has decided that there was error in principle in the sentence and now the court has to consider the appropriate sentence as of today. There are obviously very unusual circumstances, the appellant has been in custody for some seventeen and half months, taking account including the four and a half months that we mentioned in our judgment.

18. The Court is of the view, and so holds that the proper sentence in the case is four years, subject to mitigation which justifies a reduction of that sentence by suspending two years, so the sentence that the Court imposes considers appropriate is four years with two of those years suspended. There are special circumstances in addition in this case, in that the appellant, as pointed out by Counsel, followed through on his commitment to participate in the prosecution of the alleged perpetrator and gave evidence, and secondly, he is now in the Witness Protection Programme and issues arise in that regard. Although no specific information has been furnished, it is obvious that there would be very serious implications if he were now to be required to return to prison to serve any balance of sentence.

19. Therefore, in the special circumstances of this case, the Court will, in addition, suspend, to the extent that it is necessary, any remaining balance of the sentence over and above the amount of time that the accused has spent in jail, either on remand for the four and half months pending this case or as a result of the sentence imposed by the Court before he was granted bail.

Approved: Ryan P.