THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

176CJA/16

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Michael Lyons

Appellant

JUDGMENT of the Court delivered on the 18th day of May 2017 by Mr. Justice Hedigan

Introduction
1. This is an appeal against the severity of the sentence imposed on the appellant in Donegal Town Circuit Criminal Court. The appellant entered a plea of guilty to the offence of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997 on the 24th March, 2015. The appellant was sentenced on the 9th June, 2016, to four years imprisonment.

The Circumstances of the Offence
2. On the 12th October, 2013, in Quiggs Bar, Carrick, County Donegal the appellant and Mr. Byrne ("the injured party") were drinking heavily and became quite drunk. They were told to quiet down on two occasions. On the second occasion the injured party had his hand on the appellant and was told to let go of his grip. The appellant said that he thought this was a bit of silliness and things were said. The appellant said that he felt the injured party was swinging for him and reeled back. The appellant threw a number of punches. There seems to be some dispute about whether they made contact. He then punched the injured party again causing him to fall to the ground and bang his head on a solid wooden floor. This final punch resulted in the injury.

3. An ambulance was called. The appellant stayed and assisted in what way he could. He was on his knees beside the injured party crying. The injured party remained on the floor and was bleeding heavily. He was brought to Letterkenny General Hospital, arriving at 12.45 am on the 13th October, 2013. He was discharged after 11 days.

4. The medical report noted that on arrival he was combative, vomiting, bleeding from his ear and there had been a witnessed loss of consciousness. He suffered a scalp injury, head injury, fractured skull and intracerebral contusion and/or subarachnoid haemorrhage and/or subdural haemorrhage. The symptoms of post traumatic amnesia suggested that he sustained a traumatic brain injury of at least moderate severity, secondary to the injury sustained. The injury is serious, permanent and irreversible. It has seriously affected his personal, domestic, occupational and recreational life. In the victim impact statements his wife notes that he hasn't been right since the incident, needs constant supervision and his day to day functioning is limited. We have received and considered updated particulars of Mr Byrne's condition which were furnished to the court on the 17th of May.

5. The appellant contacted the injured party's family that night to enquire about his welfare. He called to his house the next day to apologise. He then attended Carrick Garda Station where he made a voluntary statement with full admissions and apologised again. This statement and one from the barmaid and the injured party's wife were read to the Court. Mr Byrne is unable to recall the incident.

The Appellant's Personal Circumstances
6. The appellant had no previous convictions and had not come to Garda attention before or after the incident. Five character references were handed into Court. A probation report was also before the Court. The appellant has peripheral vascular disease and has had stents inserted in his heart including an operation since the incident which may have been induced by way of stress from the case. He expressed deep remorse and shame. He accepted that he had consumed excessive alcohol but did not regard that as an excuse. He was not a regular drinker. The report concluded that he was at a low risk of re-offending and deemed him suitable for community service.

7. After the incident he became depressed and barely left the house for three to four months. He offered €13,000 compensation notwithstanding his limited means. This offer was however refused by the injured party's wife.

8. The appellant has two children who are aged 12 and 16. He also helped look after his mother who is now 97 years old.

Sentence
9. The sentencing judge noted that he was taking the case as being at the lower end of the middle range and he stated that the bottom of that range would be about six years. The aggravating factors he found were that the blow was of such a severity as to cause the injury and he also took into account the presence of alcohol. The judge then added one year for the aggravating factors.

10. The mitigating factors were noted to be numerous. These were:-

(i.) the guilty plea,

(ii.) his remorse,

(iii.) that his life was immeasurably changed,

(iv.) his lack of previous convictions,

(v.) that he is a husband and father,

(vi.) that he stayed at the scene,

(vii.) he immediately fully cooperated,

(viii.) he apologised to the family the next day,

(ix.) his very positive probation report which noted he was suitable for community service,

(x.) his low risk of re-offending,

(xi.) his references,

(xii.) his offer of compensation and

(xiii.) the consequences of his having never been to prison before.

The judge stated that because the mitigating factors were "so strong and so poignant" he would take three years off the seven and he imposed a four year custodial sentence.

Appellant's Submissions
11. The appellant appeals on the grounds, *inter alia*, that the sentencing judge imposed an excessive sentence and the headline sentence was set unduly high. He failed to consider the possibility of suspension. He erred in law or in fact and law in determining the aggravating factors. He failed to adequately regard the submissions in mitigation. He misdirected himself in law or in fact and law in assessing the sentence imposed and in disregarding *The People (DPP) v. Cullen* [2015] IECA 4.

12. It was submitted that this was a single action which was immediately regretted and the appellant confessed and expressed remorse at every opportunity. This was not an offence that merited a starting point of seven years or a finishing point of four years. This was not proportionate to the significant mitigating factors.

13. it was submitted that the headline sentence was set unduly high. The learned sentencing judge had been referred to *The People (DPP) v. Fitzgibbon* [2014] IECCA 12 at paras. 8.10 to 8.14 which offers guidance on sentencing. It was held that the middle range carries a sentence between four and seven and a half years. It is admitted that the severity of the assault is highly significant. The injuries must also be taken into account. These two will not always exactly correspond. Greater weight attaches to the consequences where they might be reasonably expected to result from the assault or are not entirely disproportionate. The degree of culpability is also important. An unprovoked attack will be more serious. The general circumstances of the assault are also a factor, such as the use of weapons.

14. The judge assessed the offence to be at the lower end of the middle range but measured the sentence at six years instead of four. An extra year was then added for the alleged aggravating factors. It was submitted that this was incorrect and that the level at which the judge started would already include aggravating factors. There was double counting.

15. It was submitted that it was an error of law and fact to find the severity of the blow to be an aggravating factor when the evidence showed it was the fall onto the hard floor that caused the injury and both parties had consumed a lot of alcohol. The injuries were not directly from the punch. This can be distinguished from cases where weapons are used and cause direct injuries. This, it was submitted, was a relatively minor attack with severe consequences. It was not planned, anticipated or pre-meditated. The circumstances were very different from an unprovoked attack. Both men had been drinking and arguing and were told to quiet down. The appellant felt the injured party was swinging at him.

16. This can be distinguished from cases where weapons are used. In *The People (DPP) v. O'Donovan* [2016] IECA 119 this Court refused an undue leniency appeal against a sentence of three years with two suspended for an assault causing harm in relation to a glassing.

17. It was submitted that in the circumstances of this case the consumption of alcohol was not an aggravating factor. In O'Malley, *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016) para. 6.27 the author writes that alcohol is only an aggravating factor when the offender knows it is likely to have an adverse impact on his behaviour. In fact it was noted that it might be mitigation to some degree where the offender acts out of character like the appellant did. O'Malley refers to *The People (Attorney General) v. McClure* [1945] I.R. 275 where leniency was extended following the consumption of a large amount of alcohol, the offence was out of character and the probation report confirmed there was no alcohol problem.

18. It was also argued that the sentencing judge failed to have any or any adequate regard to the submissions in mitigation and to consider the possibility of suspending all or part of the sentence. The judge recognised the significant mitigation and reduced the sentence but did not adequately consider them by not suspending all or part of the sentence.

19. In *The People (DPP) v. Collins* [2016] IECA 35 a sentence of eight years was reduced on appeal to five with one suspended. This was an unprovoked head butt in a nightclub with no previous contact. The victim had a clot between his skull and brain. Collins initially denied the assault but made certain admissions and pleaded guilty. He had 15 previous convictions including one for assault for head butting a doorman. It was found that the trial judge had placed the offence too high on the scale. This Court saw it as mid-range. The mitigation was his cooperation, plea, offer of limited compensation and that this was to be his first time in prison. It was submitted that the appellant's circumstances differ greatly. It is also mid-range but with additional mitigation.

20. It was submitted that in terms of mitigating factors the sentencing judge did not adequately take into account his early guilty plea, not coming to Garda attention before or after, remaining at the scene and trying to assist, his concern and enquires immediately and during the night, his very difficult and significant health problems requiring heart stents one of which was post incident and may have been caused by stress, his stable and supportive family, his depression and removal from society, the offer of compensation despite his limited means, that he helped look after his mother and his insight and regret focused on the consequences for the injured party and an understanding of his suffering. Considering the extensive mitigation a sentence of four years was a significant departure from an appropriate sentence.

Respondent's Submissions
21. The respondent submitted that it was because of the severity of the injury that it was indicated to the sentencing judge by the DPP, in line with *Fitzgibbon*, that the case should be viewed as one that starts at the upper range with a penalty starting at seven and a half years without mitigation.

22. A punch to the head is inherently dangerous. The assailant assumes responsibility for the consequences. The appellant's submission that several punches did not make contact is at odds with the witness statements. The appellant pleaded guilty without caveat. This is not a one punch case. The claim is at odds with the two statements other than the appellant's read into evidence. This point was deliberately clarified by re-examination. There were multiple punches with both fists, a pause and a final punch to the head causing very serious injuries. Thus the case fell into the most serious category.

23. The respondent and the sentencing judge were in substantial agreement as to the appropriate pre-mitigation sentence. The judge was highly experienced and would have sentenced several s. 4 cases previously. The respondent was asked by the judge to submit the appropriate sentencing bands following *Fitzgibbon*. This was an experienced sentencing court which maintained a correct sense of proportion and this undermines the argument that there was an error of principle.

24. The sentencing judge identified the case as being at the lower end of the middle range of four to seven and a half years. This was the outcome arrived at.

25. The only contention for a double count of aggravating factors is that it was indicated that the case was at the lower end of the middle range and then a sentence of six years with an additional year for the aggravating factors was nominated. The judge outlined his thinking in relation to the factors and appropriate proportions involved. There was a correct sense of proportion in every aspect of the case and no error of principle to the appellant's detriment.

26. It was submitted that, nevertheless, the appropriate range for a multiple punch assault resulting in serious and permanent brain injury is seven and a half to twelve years before mitigation.

27. The single punch was not held to be an aggravating factor but the force of the final punch which caused the injury was.

28. There was no error in principle regarding the possibility of suspension. The judge had regard to the public interest in preventing and deterring incidents resulting in such injuries, the actual injuries suffered, the mitigating circumstances and the appellant's rehabilitation prospects.

Decision

29. In *The People (DPP) v. Duffy* [2016] IECA 331 at para. 12 Birmingham J. stated that:-

> "This Court has said on many occasions that the fact that there might be another way of dealing with matters does not justify an intervention by this Court. Indeed even in a situation where the individual members of the court might have been minded to adopt a different approach, if such was the case, would not of itself justify an intervention. Rather the court can intervene only when an error in principle is identified where the approach taken falls outside the permissible range."

30. The consequences of this violent incident in Quiggs Bar on 12th October, 2013 have been devastating for both men involved and for their families. The learned sentencing judge and this Court have heard of the tragic effect on the victim's family. The victim impact statements on behalf of the Byrne family outline in detail the impact on them of this assault. Not only has Anthony Byrne's life been upended but so also has that of his wife and children. We are told of his daily enduring of headaches, back and neck pain and of his ongoing fatigue. His life's work on his farm has been effectively ended. He is frequently confused and has difficulty with short term recollection. His family life has been changed completely. He has four children, one of whom is confined to a wheelchair and another has ongoing health problems. He can no longer be of much assistance to his wife with these children because of his lack of strength and recurring dizziness. All this appears due to his having sustained a traumatic brain injury of at least moderate severity. He will continue to require the consistent and significant level of family support that he needs at present. As noted above, the court has received and considered the most recent report on Mr Byrne's ongoing and severe problems and the impact on all the family, particularly Mrs Byrne, of these problems.

31. The effect on the life of the appellant of this incident has also been traumatic. He was a man with significant health problems prior to his assault on Mr. Byrne. Since the incident he has had further cardiac problems and issues associated with stress related to this incident. His wife has written to the Court outlining the impact of these events on her two teenage boys and on Mr. Byrne's 97 year old mother who asks for him constantly but who has not been told that he is in prison. Mrs. Lyons' letter is a striking and heart rending account of the impact of prison on a prisoner's family. Many impressive testimonials to his character have been submitted by a range of people from the small South Donegal community where the family live. Unfortunately, unlike Mr. Byrne, he is the author of his own misfortune.

32. In his careful and detailed analysis of the facts of this case, the learned sentencing judge considered the nature of the offence, its tragic consequences and the degree of culpability of the appellant. He had been referred to the case *of The People (DPP) v. Fitzgibbon* [2014] IECCA 12 where Clarke J. delivered the judgment of the Court and at para. 8.10 set out the following in relation to sentencing for offences under s. 4 of the Non-Fatal Offences Against the Person Act, 1997:-

> *"… in the absence of such unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between 4 and 7½ years would also seem appropriate. In the light of the authorities to which counsel referred, and which have been analysed in the course of this judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of 7½ to 12½ years."*

The sentencing judge then went on to assess the offence before him as one on the lower end of the middle range. We would agree with this assessment. However the judge then went on to state that the bottom of the middle range would equate to six years in prison. It would appear that, regrettably, the learned sentencing judge fell into error in this regard. The bottom of the middle range as per *Fitzgibbon* is a prison sentence of four years. The lower end could not be far removed from this base figure. Six years however is clearly in the upper end of the range. The learned sentencing judge having located the offence within a particular range, then added one year to the headline sentence he had identified. This, he said, was to take account of the aggravating factors of the severity of the blow and the presence of alcohol. In this regard also, we are of the view that the learned sentencing judge fell into error. The severity of the blow and the presence of alcohol are the essential nature of this particular assault itself. Those characteristics are reflected in the location of the sentence within the available range. In the result the Court will quash the sentence imposed and will proceed to resentence the appellant. We must do so in the light of circumstances as they exist now.

33. As noted above, the Court has received extensive testimonials on behalf of the appellant. They confirm the evidence that was before the learned sentencing judge and which was carefully analysed by him. The mitigating factors remain the same i.e. his plea of

guilty, his extreme and obvious remorse, the absence of any previous convictions, his co-operation with the Gardaí, his taking of full responsibility for the offence, his remaining at the scene to assist Mr. Byrne and his visit to his family the next day. Moreover a very positive probation report indicated a low risk of reoffending and recommended him for community service. He is now detained in Loughan House where according to the Assistant Governor, he is engaging with all services, works full time in their waste management section and has no disciplinary issues. His wife has written to the Court outlining the effect on the appellant of these recent events and the effect upon her, her children and his aged mother. This morning we received a report from the community mental health nurse of Glencolumbkille. We have taken full account of all of these.

34. As also noted above in para. 30, we have before us the evidence that was before the learned sentencing judge, of the impact of the assault upon the unfortunate Mr. Byrne together with the most recent nursing report furnished yesterday by his solicitors and the updated victim impact report furnished this morning. We have carefully considered these latest documents. It cannot be forgotten that Mr Byrne and his family suffer all the problems outlined therein as innocent victims.

35. Save in very unusual circumstances, any violent assault resulting in the disastrous consequences presenting here must be reflected in a custodial sentence. As noted above, we agree with the learned sentencing judge when, following his careful analysis of the evidence, he located this offence at the lower end of the middle range. That range, as per *Fitzgibbon*, is between four years and seven and a half years. The mitigating factors, carefully identified by the learned sentencing judge, remain the same. Taking those into account, he allowed three years off the headline sentence he had fixed upon of seven years. Like the learned sentencing judge, we consider that the appropriate sentence is one just above the bottom of the middle range but in accordance with Fitzgibbon will fix that at four years and six months. Given that reduced headline sentence, a reduction by three years would result in an inappropriately short sentence. We will thus reduce it by fifty percent to a sentence of two years and three months. We will therefore sentence the appellant to two years and three months in prison commencing on the 9th June 2016.