



THE COURT OF APPEAL

RECORD NO. 43/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SHANE DINEEN

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 3rd day of March 2017 by Mr. Justice Mahon

1. On the 26th January 2016 at Cork Circuit Criminal Court the appellant was sentenced in respect of a number of offences. In relation to an offence committed on the 8th November 2014 at Cobh Street, Cork, namely robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, the appellant was sentenced to three years imprisonment to date from the 2nd July 2015. The appellant has appealed this sentence.

2. The other offences (numbering sixteen in total) concern a number of serious road traffic offences and offences contrary to s. 2(1) of the Criminal Damage Act 1991 in respect of which the appellant received concurrent sentences ranging from six months to three years, with the final eighteen months suspended on certain conditions. These concurrent sentences were directed to commence on the lawful expiration of the three year sentence under appeal.

3. On the 8th November 2011 Mr. Ateef Akbar, a delivery driver for a pizza company, received an order for delivery to 35, Cobh Street, Cork. The value of the order was €51. When Mr. Akbar arrived at the address he was approached by a man who acknowledged making the order. He was joined by another man. Mr. Akbar handed over part of the order to one of the men who proceeded to walk away. When payment was requested before the rest of the order was handed over, the appellant produced a knife and told Mr. Akbar to "fuck off". The appellant then took possession of the remainder of the order and walked away. Retrieved CCTV footage identified the appellant and his co-accused as being the two men involved in the robbery. The appellant admitted to having telephoned the order and that he had never intended to pay for it. The appellant was also identified as the person holding the knife.

4. The appellant pleaded guilty to the offence. The other sixteen offences committed by the appellant, and referred to above, and which are not the subject of this appeal were committed while the appellant was on bail for the robbery offence.

5. The appellant's grounds of appeal are as follows:-

(i) The learned sentencing judge did not construct the sentence by transparently taking account of the aggravating factors and the mitigating factors in accordance with best practice, as determined by this honourable court.

(ii) The learned sentencing judge did not afford sufficient weight to the personal circumstances of the appellant. Mr. Cread has today indicated that this is the principal ground of appeal.

(iii) The learned sentencing judge did not give sufficient weight to the appellant's early plea of guilty.

(iv) The imposition of a three year sentence for the index offence led to a disproportionate overall sentence.

6. The personal circumstances of the appellant at the time the offence was committed were difficult. He was homeless and addicted to alcohol and drugs. Both his parents died while relatively young. During his earlier childhood years living in the U.K. he was placed in State care for a period of time. He was subsequently placed in foster care. He has some family support from three sisters. The appellant left school at junior certificate level, and has an extremely poor employment history. Approximately one year prior to the commission of this offence, the appellant became the father of a child. The appellant has eight previous convictions from the District Court.

7. The appellant's co-accused received a sentence of three years with the last twelve months of that term suspended on conditions for the purposes of facilitating rehabilitation.

8. In the course of his judgment the learned sentencing judge stated:-

"I think the production of a knife to an innocent delivery man is utterly inexcusable; there is no possible excuse that one can have for this. As I say, it was a planned robbery and the production of the knife was guaranteed and intended to terrorise and intimidate and it seems to me from the victim impact report that that is what had happened. I think the appropriate sentence in relation to that particular offence since that is the first in time, has to be a three year custodial sentence with no portion suspended."

9. In arriving at the sentence of three years, the learned sentencing judge did not, contrary to best practice, identify a headline sentence based on the gravity of the offence. Consequently, the court is unable to identify, in particular, any discount afforded by the learned sentencing judge in respect of mitigating factors, including the plea of guilty and the appellant's personal circumstances. However, while that criticism is well made, it does not necessarily follow that a sentence imposed in this way should be quashed. What is important is the final sentence as imposed and whether that indicates an obvious error of principle. (See *DPP v. Flynn* [2015] IECA 290).

10. In *DPP v. M* [1994] 3 I.R. 306, Egan J. stated:-

"It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence available. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made."

11. In *DPP v. Farrell*, Finnegan J. stated:-

"A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered."

12. A further practical difficulty facing this court in its task of assessing if the three year custodial sentence imposed was appropriate and within the discretion available to the learned sentencing judge is the fact that the appellant was sentenced in respect of the robbery offence, and the other sixteen very serious offences at, essentially, the same time and, understandably, consideration was given to the principle of proportionality and totality in the overall sentencing of the appellant. Because there is no appeal in respect of the sentences imposed for the other sixteen offences it is assumed that there is no criticism of those sentences being made by the appellant and, more particularly, the structure of those sentences and which involved a significant portion being suspended. The issue that arises is whether the robbery sentence should have been afforded its own element of a suspended period because of the mitigating factors irrespective of and separate to the structure of the sentences for the other sixteen offences.

13. Clearly the learned sentencing judge decided on the sentences in both cases, and their structure, as a whole. Had the instant case been dealt with on its own it may well have been the case that a portion of the sentence imposed would have been suspended to provide for the mitigating factors, and particularly the plea of guilty. In those circumstances a headline sentence of anything between three years and four years but with the final six, nine or twelve months suspended would have been appropriate and within the discretion available to the judge, and unlikely to have altered on appeal.

14. However, the learned sentencing judge was faced with imposing two sets of sentences and was required to direct that the second set of sentence be served consecutively to the first sentence. This he did by structuring them in the manner in which he did.

15. The second set of offences were obviously offences of a most serious type and required significant imprisonment terms in their own right. Taken on their own, and separate to the burglary offence, sentence of up to three years with the final eighteen months suspended would have been almost certainly unduly lenient. In sentencing the appellant for the second set of sentences the learned sentencing judge undoubtedly had regard to the totality principle, and correctly so.

16. The court is satisfied that it is appropriate that it consider the sentences imposed on the 26th January 2016 in the aggregate. The total custodial term was four and a half years. Having regard to the offences in their totality, such an overall sentence was not excessive, indeed, arguably it was lenient.

17. Even if the sentence under appeal was to be considered on its own it could not reasonably be said that a three year custodial term for a planned robbery involving the use of a knife on a man simply doing his job, committed by a person with a number of, albeit minor, previous convictions is unduly harsh.

18. The appeal is therefore dismissed.