THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Appeal No. 35/14

The People at the Suit of the Director of Public Prosecutions

Respondent

- and –

James McNamee

Appellant

Judgment (ex tempore) of the Court delivered by Mr. Justice Mahon on the 22nd day of June 2015

1. This is an appeal against the severity of a sentence of four years imposed on the appellant at Dundalk Circuit Criminal Court on 31st January 2014. It followed a plea of guilty by the appellant to one count of arson contrary to s.2(1) of the Criminal Damage Act 1991. The plea of guilty was made on 8th October 2013.

2. The facts of the case are briefly stated as follows. On 30th June 2010, the appellant with three others climbed a perimeter fence and entered the loading bay of a retail park in Dundalk, the Northlink Retail Park. While in the loading bay and having unsuccessfully attempted to set alight a piece of timber, a sofa was successfully set on fire using a cigarette lighter. Whereupon, the group of four then left the scene. The fire took hold and a number of business units and their contents were seriously damaged by fire and/or smoke. The total amount of damage caused was €2.2m., of which €745,000 was uninsured. There was also a significant loss of business for the units involved, in some instances lasting for weeks, in others for months. Businesses were forced to close and people were forced out of work. The consequences of this crime were extremely serious.

3. The appellant was identified by a member of an garda siochaná from CCTV images.

4. While the appellant himself maintained that the offence was not pre-meditated prior to entering onto the premises, it was accepted on his behalf that he had acted impulsively and with what his counsel described as a *"high degree of recklessness".* The learned sentencing judge, however, did not appear to accept that entirely, in that he expressed the view that the appellant must have known that the deliberate setting alight of a sofa was likely to lead to a substantial fire and very serious damage.

5. The appellant pleaded guilty to the arson charge, although not at a very early stage in the proceedings. Furthermore, he did so in the knowledge that he had been recognised on CCTV so that the likelihood of him successfully contesting the charge in court was remote.

6. The appellant was eighteen years at the time. His three colleagues were younger. The other three were not prosecuted, although one of them was dealt with under the juvenile liaison scheme. The appellant was therefore the only individual prosecuted and punished in relation to the incident. The appellant had a number of previous convictions, being twenty five in number, and these occurred mainly over a period of a couple of years in 2010 and 2011. They included possession of a knife, a s.2 assault, trespass, theft, and public order offences. He had been sentenced to Community Service on at least two occasions. The appellant came from a somewhat difficult background which included problems with drug addiction. At his sentencing hearing, there was evidence to suggest that he was dealing with this problem with the help of an addiction counsellor. He had achieved a reasonable level of education, having passed his junior certificate examination and his applied leaving certificate examination. Between the date of the offence and the sentencing date, the appellant suffered a serious head injury as a result of an assault.

7. The main grounds of appeal in this case included the following:-

> (i) The learned sentencing judge failed to take into consideration *"the context of the offending behaviour"*. It is suggested that the appellant had acted impulsively with other youths, and that the offending was not pre-mediated, nor was the extent of the damage anticipated.
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> (ii) The learned sentencing judge failed to attach sufficient weight to the appellant's plea of guilty and his co-operation.
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> (iii) The learned sentencing judge failed to take into account sufficiently the appellant's lack of maturity, and his young age at eighteen at the time of the commission of the offence, and the fact that there were three other youths involved, none of whom were prosecuted.
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> (iv) The learned sentencing judge failed to sufficiently allow for likely rehabilitation, and did not sufficiently take into account the appellant's progress in overcoming his drug addition at the time of sentencing.
>
> (v) The sentence of four years in prison was unduly harsh and ought to have, as a minimum, involved some element of a suspended sentence.

8. It is clear from the remarks made by the learned sentencing judge in the course of his sentencing judgment that he attached a significant degree of culpability on the appellant's shoulders and that he did not accept entirely that this was a crime without pre-meditation. He noted the fact that the culprits had left the premises fully aware that the sofa was on fire, and no attempt was made to call the fire brigade. He decided that this particular offence was at the higher end of the range. He also referred in some detail to the appellant's personal circumstances, and the extent to which he was at the time of sentence attempting to deal with his alcohol and substance abuse difficulties. While he referred to the appellant's plea of guilty and his co-operation, as well as his admissions and his expressions of remorse as all being matters in mitigation, the learned sentencing judge did not appear to address specifically the question of rehabilitation in the context of the appropriate sentence to impose.

9. The learned sentencing judge also noted that the maximum prison sentence for arson was life imprisonment.

10. Ultimately, it is clear from the learned sentencing judge's remarks that he regarded the aggravating factors as "extreme", and especially the serious nature of the arson and its significant consequences. He did not appear to attach particular importance to the lengthy list of previous convictions, but undoubtedly they contributed in some way to his decision to sentence him to four years in prison.

11. Much reliance has been placed by counsel for the appellant on his client's youth at the time of the commission of the crime, and as such his lack of appreciation of the risks associated with setting fire to a sofa in or close to a building. However, at eighteen, a person undoubtedly has a significant insight into the dangers of fire and the possible serious consequences that can occur from setting fire to soft furnishing, and the real risk of such fire spreading. The appellant therefore must take full responsibility for what occurred on this occasion and should regard himself fortunate that no one was injured or killed.

12. That said the appellant's youth is nevertheless a factor in relation to, in particular, the duration of the appropriate prison sentence and the time to be actually spent in custody. Undoubtedly, in this case a custodial sentence was required. The issue is whether a four year term with no suspended element was unduly harsh in all the circumstances, and more particularly, in the context of continuing or future rehabilitation which is a crucial factor where an offender is very young at the time of the commission of the offence. As of the date of sentencing, there was evidence that pointed, to some extent at least, to positive signs of rehabilitation, including the fact that the appellant had begun to deal with his drug addiction problem, and he was no longer associating with individuals who were likely to lead him into more trouble. There were also indications that the appellant had become interested in pursuing educational opportunities and which might well be the key to opening doors for employment.

13. While the learned sentencing judge did refer to these factors it does appear that he permitted himself to be unduly swayed by the seriousness of the offence (and which indeed it was) and to a degree which clouded his consideration of the prospects of rehabilitation having regard to the matters already referred to. To this limited extent there is an error of principle evident in the imposition of a sentence of four years, without any suspended period, in the particular circumstances of this case.

14. The court will therefore allow the appeal. Having regard to the positive evidence supporting the rehabilitation already underway at the date of sentencing and the prospects of further rehabilitation, and the potential for this young offender changing his ways in his early adult life, the court is satisfied that the four year term, an appropriate sentence for this offence, should include a significant suspended element in addition to a lengthy period during which that suspended element will continue to act as a deterrent against further offending. The court believes that this is an important aspect of the sentence having regard to the number of previous convictions.

15. The sentence which this court will now substitute for the existing sentence is a sentence of four years with the last eighteen months suspended (on conditions) for his remaining period in custody, and for a period of four years post release. There is, therefore, a strong incentive for the appellant to avoid all criminal activity for a prolonged period after his release from prison, and indeed for his lifetime.