



THE COURT OF APPEAL

Record No. 115/16

**Peart J.
Mahon J.
Hedigan J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SEAN O'DEA

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 28th day of March 2017 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted on the 9th February 2016 at Dublin Circuit Criminal Court of three offences, namely:-

- Assault contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997,
 - assault contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997,
- and
- production of an article capable of inflicting serious injury contrary to s. 11 of the Firearms and Offensive Weapons Acts 1990

2. Sentences were imposed in respect of the first two offences on the 21st April 2016 of three and a half years imprisonment and three years imprisonment respectively. The third offence was taken into consideration. The appellant has appealed against sentence. The maximum sentence for each offence is one of five years imprisonment.

3. On the morning of the 21st September 2013 the two victims of the assault, Mr. O'Meara and Mr. Hadi, were in their room with a female companion at the Radisson Hotel in Dublin 2, when the appellant forced his way into the room armed with a metal wheel brace. Shortly beforehand, the appellant maintained that his then, as he described her, on/off girlfriend had claimed that she had been raped by Mr. Hadi some hours earlier in the hotel room. Mr. O'Meara was persuaded to open the bedroom door on the pretence that the appellant's former girlfriend had returned to collect some belongings earlier left behind by her. On opening the door Mr. O'Meara was confronted by the appellant in an aggressive state and wielding the wheel brace, and being urged by the young woman accompanying him to attack Mr. Hadi.

4. In the ensuing struggle, Mr. O'Meara was hit on the head several times by the wheel brace. The appellant smashed a glass over Mr. O'Meara's head and struck and lacerated Mr. Hadi's lip with the broken glass. Mr. Hadi was also struck with the wheel brace.

5. A lady visitor in the room ran to reception and the gardaí were called. The gardaí stopped a BMW car near the hotel and arrested the blood stained appellant. He claimed that he was on en route to St. James Hospital with his former girlfriend whom he said had been raped.

6. Both victims sustained significant injuries. Mr. O'Meara has been left with permanent scarring to his lip and forehead, while Mr. Hadi suffered lacerations to his face, chin and upper lip. Between them they sustained financial losses of €6,000, including €1,000 paid to the hotel for damage to the room.

7. The rape allegation against Mr. Hadi was pursued to the extent that he was arrested and interviewed by the gardaí, but ultimately there was no prosecution.

8. The appellant offered €10,000 in compensation to the victims, which was declined.

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

- (i) Inadequate weight was afforded to the mitigating factors,
- (ii) excessive weight was afforded to the aggravating factors,
- (iii) the learned sentencing judge failed to take a individuated approach to sentence,
- (iv) the learned sentencing judge made findings of fact which were not based on evidence, and
- (v) the sentences were excessive.

10. The appellant had twenty seven previous but relatively minor convictions. Almost all were for public order or road traffic offences. He was educated up to and including third level, and had a solid work history. He continues to have an involvement in a security company although these convictions prevent him from acting as a director of that company. He has two children from previous relationships, including one with the woman who alleged she was raped on the date in question. He has access to both children and provides financial assistance for them.

11. When sentencing the appellant the learned sentencing judge stated:-

"In deciding the issue of sentencing, the court must therefore balance the matters urged in mitigation against the essential serious nature of the offences. The aggravating factors are the use of the wheel brace and glasses and the manner in which they were used. The accused's conduct on the occasion in question was violent in the extreme and is not mitigated by the context. Criminal acts committed in retaliation for other perceived criminal acts do not belong to any special category. The accused works in the security business and as such a responsible attitude to the law is not only expected but demanded. His actions on the occasion demonstrated an intolerable disregard for the law. Therefore, taken his plea of guilty into account, his cooperation, his remorse, his absence of conviction for violence, his work record, his family circumstances and all of the matters so comprehensively urged in mitigation, I am sentencing the accused to a sentence of three and a half years imprisonment in respect of count no. 2 and three years in respect of count no. 3."

12. It is contended on behalf of the appellant that the learned sentencing judge attached some relevance to the fact that the allegation of rape was subsequently investigated but ultimately was not the subject of a prosecution. However, while this fact was mentioned by the learned sentencing judge, she does not appear to have taken the Director's decision not to prosecute as being of particular relevance to the appellant's motivation to assault the victims. She appears to have accepted that the appellant was, rightly or wrongly, of the genuine belief that a rape had indeed occurred.

13. The focus of the appeal is on the contention that the learned sentencing judge failed to afford sufficient weight to the mitigating factors, including, in particular:-

- (i) the plea of guilty,
- (ii) the lack of previous convictions other than for relatively minor offences,
- (iii) the appellant's strong work record and his commitment to financially assisting his two children from previous relationships, and
- (iv) the provocation involved.

14. In relation to the provocation issue, it is conceded on behalf of the appellant that provocation in its strict legal sense is absent given the gap in time between the appellant being told of the rape allegation and his confrontation with his two victims. The respondent has also emphasised the fact that within this period of time the appellant took the opportunity to arm himself with the wheel brace, and by subterfuge find his way into the victims' hotel room, suggesting premeditation rather than provocation.

15. However, the court is nevertheless satisfied that there was in very general terms an element of provocation, and also pressure from his female companion, to act aggressively towards the victims. It is important nonetheless to emphasise that irrespective of what had been told to him and his understandable sense of outrage and anger, physically attacking the victims in a very violent fashion was completely unjustified.

16. Contrary to what this court has on many occasions suggested to be best practice in approaching sentencing matters, the learned sentencing judge did not identify a headline sentence appropriate to the gravity of the offending before discounting for the relevant mitigating factors, of which she was aware and clearly took account of. The sentences imposed of three and a half years and three years respectively are clearly the net prison terms imposed having first applied such discounting suggesting that the headline sentences may have been in the region of five years. Nonetheless, it is, ultimately, the net sentence which must be the focus of the court's attention.

17. In the court's view, a headline sentence of in the region of five years suggest that undue weight was afforded to the aggravating factors, and to this extent it finds there to have been an error of principle. An appropriate headline sentence would have been in the region of three and a half to four years for both offences. If taking at three and a half years, discounting for the mitigating factors must then be calculated and provided for in the sentence ultimately imposed.

18. In these circumstances it is necessary for this court to resentence the appellant as of today. That sentence will be three and a half years imprisonment for both offences, to run concurrently, from the date directed by the court below. In recognition of the mitigating factors and to incentivise rehabilitation the court will suspend the final eighteen months of both sentences for a period of three years post release subject to a sum of €10,000 being paid by and or behalf of the appellant to a nominated charity within three months from today's date, such a payment to be receipted to the respondent within ten days of payment. The appellant will also be required to enter into a bond in the sum of €100 to keep the peace and be of good behaviour. In making its decision, the court has taken into account the testimonials provided to it and the appellant's achievements while in prison, including the very positive Governor's report.