THE COURT OF APPEAL

Record Number 32/2018

The President.
Edwards J.
McCarthy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

CLODAGH FORDE

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 14th day of January 2019 by Mr. Justice McCarthy

1. This is an appeal against the severity of sentence imposed by the Dublin Circuit Criminal Court on the 19th January, 2018 on a charge of assault with intent to rob committed at Capel Street Dublin on the 2nd July, 2015, and one of robbery at Dame Street Dublin on the 17th May, 2016. A sentence of three years' imprisonment commencing on the 13th July, 2016 was imposed in respect of the first of these and one of five years' imprisonment, the last two years whereof were suspended on certain terms on the second to run consecutively to it.

2. At the time of the sentence the appellant was serving sentences of three and half years' imprisonment which had commenced on the 21st July, 2016 in respect of four other offences of robbery dating back as far as the 23rd June, 2015; these four and that of the 2nd July were described by counsel for the appellant to the trial court as forming part of a "spree" of offending in the summer of that year.

3. On the 13th April, 2016, she had been sentenced to terms of imprisonment of four and a half years of four each on an earlier group of four. The sentences were all suspended and were to run concurrently. Due to breaches of the conditions imposed the suspensions were revoked and sentences were activated in part to the extent of three and a half years thereof as and from the 21st July, 2016.

4. The offence of the 2nd July, 2015 was charged only on the 16th December, 2016 and it was manifest that it would have been dealt with at the same time as them had the appellant been charged earlier. When dealing with that offence, the trial judge did so on the same basis as the others which form part of the so called "spree" in the summer of 2015, and thus the appellant had the benefit of the fact that she was being sentenced as a child even though this was not as a fact due to the delay. Obviously she made a distinction between the offences of robbery and an assault with intent to rob having regard to the imposition of the lesser sentence of the three years on it.

5. In respect of the offence of the 2nd July in the early hours of the morning, Ms. Petroskova was struck by the appellant's companion and both of them proceeded to punch and drag her onto the street. She dropped her phone which she did not recover and it is to be inferred that it was stolen. She showed some spirit in seeking the recovery of the item but to no avail. As a result of the assault her nose was bleeding, she was dizzy and her hair had been pulled. The appellant was identified on CCTV footage of the scene and when arrested, made full admissions as to the offence. Happily, there are no significant consequences in the case of Ms. Petroskova.

6. In respect of the offence of the 17th May, 2016, again in the early hours of the morning, Mr. Carthy was attacked by a group of whom the appellant was one. He was jumped on from behind by one or two people, brought to the ground, punched and kicked and held down by the arms. His wallet, his cash and bank cards, mobile phone and a ring of sentimental value were stolen from him. He was rendered into a disoriented state. He returned home and the next day sought medical attention. He was bruised on the face, chest, back, arms and legs, had a burst and swollen lip and a fracture of the left eye socket with severe swelling of the left eye and left cheek. He had a headache for some days and has had neck and back pain which at the time of the sentence hearing was ongoing.

7. Over a period of time, there was a difference in appearance of the eye areas and this was a source of embarrassment to him. The offence has had serious psychological effects on him including the loss of his sense of personal security and a loss of confidence in his chosen profession in the social care system which gave rise to missed employment opportunities. Again, the appellant was identified on CCTV and after arrest made full admissions.

8. The sentencing judge was well acquainted with the appellant by virtue of the fact that she had imposed the sentence in April 2016 and explicitly referred in her judgement to the fact that she had reviewed the evidence given in that context. It appears that evidence had been given at that time to the effect that the appellant had had a difficult upbringing, psychological difficulties as she grew up, had taken an overdose, had been bullied, suffered from low self-esteem and poor concentration, had not achieved well in education and that there had been a possible diagnosis of ADHD. The appellant has also, as appears from the judgment, been a resident in Oberstown Detention Centre and a rehabilitation centre at Cavan. She was living in sheltered accommodation in the city centre at the time of the 2016 offence.

9. Subsequent to her imprisonment she used her time productively by engaging in a number of worthwhile courses and obtaining a

place at the well-known Coolmine Centre for Addiction Treatment. She has undertaken further education courses and continued to seek and better herself whilst in prison. She gave evidence at the sentencing hearing about her desire to become a productive member of society and showed contrition for her wrongdoing. The trial judge accepted that she was an intelligent person with undoubted potential to be a productive member of society and gave her credit for her remorse and for using her time in custody well.

10. She was born on the 18th April, 1998.

11. In her notice of appeal, the appellant pleaded nine grounds but in her submissions these were summarised as being six in number and relating to errors on the following matters;

(1) error of fact in relation to Bill Number 1173/2017;

(2) disparity with treatment with co-accused in respect of Bill Number 1004/2017;

(3) failure to adopt best practice when identifying an appropriate sentence;

(4) attachment of undue weight that the appellant was an adult at the time of the offence in Bill Number 1173/2017;

(5) insufficient weight given to delay in prosecution breach of the rules of proportionality and totality.

12. In respect of the first of these, the error allegedly made by the judge was as to the extent of the injuries suffered by Mr. Carthy and in particular whilst he suffered a fracture to the eye socket, he did not suffer one to the face – the latter merely being something which was suspected at one time. We think that this is not a point of substance and does not go in any meaningful way to the seriousness of the adverse effects on the victim of the crime.

13. With respect to the disparity of treatment between the appellant and the second female engaged in the assault with intent to rob in 2015, it was submitted that there is a disparity of treatment of such a kind as to give rise to an error in principle. It appears that the second female was dealt with under the juvenile liaison scheme and was not accordingly prosecuted. The only information which we have about her is that she was a year younger than the appellant. There is no basis in the evidence upon which we can make any judgment as to whether or not there was any unlawful disparity of treatment giving rise to an error of principle.

14. As to the failure to adopt what is described as best practice when identifying appropriate sentence, by identifying a headline sentence and thereafter applying mitigating factors, we do not think this undermines the clarity and comprehensive nature of the judgment and our capacity to consider whether or not there are any errors of principle.

15. As in the submission that undue weight was given to the fact that the appellant was an adult at the time of the 2016 offence, we think that the trial judge went no further than recognising the bald fact that as an adult offender she was in quite a different position to that which pertained when she committed the 2015 offence and must be treated as such, with the differences of approach which apply between adults and children.

16. In so far as it is suggested that insufficient weight was given to the delay in the prosecution of the 2015 offence, this is manifestly wrong in as much as the judge dealt with it on the same basis as the other offences which occurred in the summer of that year. Counsel has put a gloss on this proposition by saying that if the sentencing judge at the time of sentence considered that the sentence in respect of the 2015 offence ought to be suspended, she should have done so notwithstanding the fact which she accepted that as a probability the suspension would have been revoked at least in part in 2016. This submission is entirely contrary to the thrust of the manner in which it was dealt in the Circuit Court which was that this offence should be dealt with in the same way as the four robberies dealt with in April 2016. This she did and accordingly and no adverse consequence of any kind followed from the delay.

17. As to the alleged breaches of the principles of proportionality or and totality, we do not understand Mr. Monaghan to seriously contest the proposition that even of itself the sentence of five years imprisonment the last two years of which were suspended was erroneous rather that in as much as it was consecutive to the sentence in respect of the 2015 offence, the totality principle was breached or to put the matter in another way the cumulative penalty was disproportionate because it was excessive.

18. He could not really contest the proposition that some custodial element should arise. This must be a matter of judgment on the facts of the case and we do not think that for a person who at the time of the offence of the 17th May, 2016 stood guilty of no less than eight robberies and, though she had not been charged, was guilty also of an offence of assault with intent to rob in whose favour no less than four substantial sentences had been suspended could have any legitimate ground of complaint in respect of the cumulative sentence imposed. This is notwithstanding the age of the complainant and the undoubted progress which she has made whilst in custody.

19. It is quite plain that the trial judge was conscious of the necessity of affording her light at the end of the tunnel and accordingly structured the sentence with a significant suspended element. Neither have we any doubt but that the sentence actually imposed was well within the margin of discretion of the trial judge. We think accordingly that there was no error of principle and we accordingly dismiss his appeal.