



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

54/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Trevor O'Donoghue

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 18th day of October 2016 by Mr. Justice Sheehan

1. This is an appeal against sentence. On the 5th February, 2015, the appellant pleaded guilty to robbing €750 from Donal Lucey at the Cork City bus station on the 29th June, 2014. He was sentenced to five years imprisonment with the final eighteen months of that sentence suspended on the usual terms and also on the term that he be subject to the Probation Service for a period of two years following his release from prison.
2. On the night in question Mr. Lucey was on his way home when the appellant and an associate approached him and spoke to him for a few minutes and then grabbed him. It was in fact the appellant who held Mr. Lucey while his then associate forced the money from Mr. Lucey's hands. They then ran away. At the time Mr. Lucey was 61 years old and walked with the aid of a stick. The robbery was recorded on CCTV. Mr. Lucey did not wish to make a victim impact statement and requested that the appellant not be sent to jail.
3. The principal ground of appeal advanced on behalf of the appellant is that prior to sentence the trial judge was wrongly told that the appellant had a previous conviction for rape. Prosecution and defence counsel attempted to have the sentence hearing re-opened some weeks later on the 27th February, 2015. The learned sentencing judge in response to this request said that he could not say whether or not this conviction was in his mind at the time of sentence and that in this new situation he was going to let the Court of Appeal deal with the matter.
4. While there is no dispute between the parties about the evidence that was given, counsel for the Director of Public Prosecutions in opposing this ground of appeal points out that in the course of the sentencing remarks, the learned trial judge only referenced relevant previous convictions, referring solely to a previous conviction for robbery and to one for assault. Counsel for the Director of Public Prosecutions also pointed out that while the appellant had no convictions for rape, he did in fact have a conviction for sexual assault.
5. We are of the view that once the sentencing judge decided not to re-open the matter, it is proper for us to do so, if for no other reason than that the appellant could well have a sense of grievance believing that the conviction wrongly attributed to him could have led to a higher sentence.
6. The appellant is 33 years old. He has 44 previous convictions, including one for robbery in 2003. He apparently left school when he was eleven years old and began using drugs three years later. The sentencing judge was told that from 2007 to the time of sentence in the present case, the appellant has been addicted to heroin. His own partner, who was also addicted, died a year ago and his nine year old son is being reared by his sister. It appears that since going to prison, the appellant has made a serious effort to deal with his addiction. We also note in the general context of the appellant's background that his associate on the night that this robbery was committed died from heroin addiction prior to this case reaching court.
7. In proceeding to sentence the appellant afresh and in particular bearing in mind that the evidence of the rape conviction might be seen to have impacted on the original sentence, this Court will reduce the headline sentence of five years imprisonment to one of four years imprisonment. Our task in doing so is made easier by the position that Mr. Lucey has taken.
8. The sentencing judge sought to support what he had been told about the appellant's efforts to deal with his addiction by suspending part of the sentence in order to further incentivise his rehabilitation. We will also suspend the final eighteen months of the said four year sentence on terms similar to those imposed by the sentencing judge.