



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Record No: 155/15

156/15

**THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS**

Respondent

V

DAMIEN FITZGERALD & BILL O'DRISCOLL

Appellant

JUDGMENT of the Court (ex tempore) delivered 22nd of January 2018 by Mr. Justice Edwards.

Introduction

1. On the 1st of May 2015, the appellants were both convicted by a jury of causing serious harm to Karol O'Keeffe on the 25th of November 2013 contrary to s. 4 of the Non-Fatal Offences against the Person Act, 1997, as well as robbery of the victim's mobile phone, worth €50, on the same occasion contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

2. A third accused, Mark O'Driscoll (who was not related to the second named appellant Bill O'Driscoll), had earlier pleaded guilty to identical charges of causing serious harm, and robbery, of the same victim on the same occasion.

3. The appellants were sentenced on the 1st of May 2015 to eight years imprisonment on both counts, to run concurrently and to date from the 22nd of February 2015.

4. The appellants appealed against both their conviction and sentence. In a judgment of this Court delivered on 28th July 2017, the appellants' convictions for robbery were overturned, in circumstances where this Court considered that the trial judge ought to have instructed the jury that it was open to them to return an alternative verdict of handling stolen property under s. 17 of the Act of 2001, or of possession of stolen property under s. 18 of the Act of 2001 (as appropriate to the circumstances as found by them) in substitution for the robbery count on the indictment. However, the convictions for assault causing serious harm were upheld.

The Court is now concerned with the appellant's respective appeals against the severity of their sentences.

The Grounds of Appeal

5. Both appellants rely on similar grounds of appeal. In substance these are three fold. First, it is complained that their sentences were disproportionate when compared to that of Mark O'Driscoll who they contend was the principal aggressor. Detective Garda O'Sullivan who gave evidence of the circumstances of the crime at the sentencing hearing accepted that he was "the main thrust of the violence here". Secondly, it is said that the trial judge must have treated the robbery of the mobile phone as an aggravating factor in sentencing the appellants for the assault and in circumstances where the robbery convictions had been quashed it could no longer be regarded as an aggravating factor. Thirdly, it is complained that insufficient account was taken of the appellants' addictions to alcohol.

6. The Essential Facts of the Case

7. The essential facts of the case are fully set out in this Court's judgment of the 28th of July 2017. A précis was given at the sentencing hearing by Detective Garda O'Sullivan, and that précis will suffice for the purposes of this ex tempore judgment.

8. Detective Garda O'Sullivan told the court below that on Sunday night, the 24th of November 2013, Karol O'Keeffe was out socialising in the Military Hill area in Cork city off Old Youghal Road. CCTV footage showed him leaving a public house at approximately 12.20 am. He appeared to be in good form. He was in good spirits. He wasn't drunk. He was walking fine and he was in the company of other people who stated that he was in good humour but was merry. CCTV footage also showed him walking down steps that linked the Old Youghal Road to Ballyhooly Road. These steps are called the Quarry Steps. He walked down there at 12.25 am. At 12.59 am a call was made to Mayfield Garda Station reporting that a man had been found at that location in a helpless position. He was stated to be in a helpless stupor, to be covered in blood, and to be trying to, but unable to, get up. He was said to be in a bad way. Gardaí went to the scene and located the injured man him. He was missing his jacket and his scarf and his pockets had been emptied. He was lying on the ground trying to get up. He was observed to be pawing the wall with his blood-stained hand trying to get up and it was obvious that he had been the victim of a horrific assault. He was brought by ambulance to Cork University Hospital. Gardaí were unable to identify him for a number of hours and he was only identified by his elderly father coming to see him the following morning. The victim's house was within a hundred metres of the crime scene, and his father went looking for him the next morning when he hadn't come home, and upon speaking to Gardaí at the crime scene which was being preserved at the time, the connection was made that his son might in fact be the victim. Mr Karol O'Keeffe's wallet and keys were found discarded with his leather jacket in a green area inside the railing of the Quarry Steps. Subsequently his mobile phone was found in a crevice of a wall next to a walkway leading from Clifton Terrace to Lower Glanmire Road. Some of the injured party's cigarettes, Marlboro Lights, were found at the scene and they appeared to have been smoked.

9. The appellants were identified as possible suspects from a review of CCTV footage taken from cameras in the areas, and their movements were traced using such CCTV footage. They were arrested later that morning and were detained and interviewed. Neither of them made any significant admissions, apart from being in the area at the time. Even though they had been captured on CCTV secreting the victim's mobile phone in the crevice mentioned earlier, they denied having a mobile phone or knowing anything about it.

10. Both appellants were found to have blood on their clothing and/or footwear, which was later forensically identified to be that of the victim.

The impact on the victim

11. Mr O'Keeffe had given evidence at the trial stating that remembered leaving the pub and his next memory was of waking up in hospital. He had no recollection of the assault.

12. He described his condition on waking up in hospital, stating that his ear was "nearly severed off", that his face was "unrecognisable", that he had no strength in his arm, that there were marks on his head, that his memory was impaired and that he was very confused. He spent two weeks receiving acute care in hospital, following which he was transferred to the National Rehabilitation Hospital in Dún Laoghaire. He told the jury at the appellants' trial that he had ongoing sequelae in that he remained very prone to fatigue, had no sense of taste or smell, continued to have impaired memory and to suffer from confusion, and had no self confidence since the incident.

13. A medical report from Dr Gerry McCarthy, Consultant in Accident and Emergency Medicine was read into the record in the court below. It described how Mr O'Keeffe was admitted to Cork University Hospital, the various injuries that were noted by the examining doctor, the treatment afforded to him and the fact that he had to go under the care of Dr Hanrahan, a Consultant in Rehabilitation Medicine. It concluded: "Mr O'Keeffe suffered a traumatic brain injury to a significant degree, required intensive care initially, on review a couple of months later appeared to be suffering from problems with motivation, mood, concentration, balance and other problems that could easily be ascribed to the degree of brain injury suffered to him.

14. The Court below also received a report from the victim's General Practitioner, Dr O'Sullivan, which described how Mr O'Keeffe continues to attend his GP on a regular basis since his injuries and how he is reporting that his right arm has decreased strength. He further has right ear discomfort, a loss of smell or taste, a reduction in interaction and sport, tiredness, headaches and sleep disturbance. The G.P confirmed that he continues to attend at Headway and the Neurological Department of Cork University Hospital, and that he takes analgesia.

15. Dr O'Sullivan opines that due to his loss of sense of smell and taste he is unlikely to work as a plumber again and will have to retrain.

16. In a victim impact statement read to the court at the sentencing hearing Mr O'Keeffe further stated:

"Since the crime was committed I have suffered a lot of physical and mental damage. I was lucky to get a placement in the NRH to help me deal with the changes in my life. I feel nervous and intimidated everywhere I go. I suffer a lot with depression after the incident and feel like I'm always looking over my shoulder. I had to move back home with my elderly parents. Since the incident I have not regained full strength in my right arm and I have lost my sense of smell and taste. I am a qualified plumber and since the incident I have been laid off as I am unable to work as a plumber because of my loss of smell. I am also suffering with constant fatigue and tiredness and I will no longer be able to work as a plumber. Since the incident I have lost all confidence and feel unable to drive which also affects my ability to get a job. This caused me great stress and upset as it is the only qualification that I have. I also have no regard for food anymore as I cannot taste it. Since I am not working I cannot afford to pay rent to my parents, which is not fair. My quality of life has drastically decreased and I am suffering with fatigue. Every day I used to train my son in hurling and football but these days I do not have the energy, and tiredness gets the better of me."

The accuseds' personal circumstances

17. Damien Fitzgerald was 27 years of age at the date of sentencing. He had 202 previous convictions, accrued between November 2004 and the date of sentencing (15 June 2015), including 52 convictions for theft, convictions for burglary, for threatening to kill, assault causing harm, obstruction, possession of a knife, robbery, handling stolen property, numerous public order convictions, s. 112 of the Road Traffic Act 1961, and for simple possession of drugs. His most recent sentence was a sentence of 12 months for a s. 112 offence imposed on the 18th of April 2013. He was on temporary release from prison when he committed the present offence.

18. Mr Fitzgerald is from the Fairhill area of Cork and is said to be a chronic alcoholic.

19. Bill O'Driscoll was 30 years of age at the date of sentencing. He had 139 previous convictions, including six for s.2 assault, eight convictions for burglary, convictions for handling stolen property, obstruction, possession of a knife, theft, and numerous convictions for public order offences. He was also on temporary release when the present offence was committed. The prosecuting garda said his life was blighted by alcohol issues and medication issues.

The sentencing judge's remarks

20. In passing sentences of eight years on both appellants the sentencing judge noted that the offences carried up to life imprisonment. Prosecuting counsel having submitted that the offences fell "at the higher end in relation to the Fitzgibbon judgment", the sentencing judge said in relation to Damien Fitzgerald: "...the first matter I've got to do is to scale this offending in the scale starting at the lower end of the scale, mid-scale or higher end of the scale and I take on board what has been said by various counsel in respect of how that might be done. I see these matters as coming into the higher end of the scale." Similarly in relation to Bill O'Driscoll he said: "I take on board what has been said by counsel and I calculate that this -- these offences ... lie at the upper end of the scale, namely at the higher end of the scale but not exceptional."

21. He alluded to the sentencing principle of proportionality and to the penal objectives of rehabilitation and deterrence. He regarded the fact that the victim was coming down the quarry steps when he was assaulted "in the most appalling manner, horrific" as an aggravating factor. He acknowledged that the effect of the assault on the victim was catastrophic.

22. In relation to the personal circumstances of the appellants he noted with reference to Damien Fitzgerald:

"He is a man of 27 years of age and was reared by his mother and sister here in Cork having being born in Kerry, is a man who has laboured under a significant alcohol addiction problem for years according to Sergeant O'Sullivan and indeed by his counsel according to his counsel. And he is an easy enough man to get along with when he is not challenged on drink. His family background was difficult as has been explained to me. Since going into prison he has been involved in courses with the Red Cross and is proceeding well in that regard. He is a man with a very high level of previous convictions, 202 being the figure given and has a number of previous of convictions before this Court, seven indeed in all, one of which was a threat to kill sorry, threat to kill or cause harm, theft and robbery and burglary

charges. And he had received a conviction previously in '05 for assault under section 3, that's assault causing harm. As I say, one of the aggravating factors is the fact that he was on temporary release at the time."

23. He concluded in the case of Mr Fitzgerald:

"Clearly the case calls for a sentence of imprisonment and in looking at this, the Court must have regard to the principle of proportionality. The appropriate sentence in respect of the assault is eight years' imprisonment."

24. He added:

"Having regard to the fact that this offence -- these offences were committed while he was on temporary release is not suitable in my view for a suspended sentence so it will be a full sentence of eight years."

25. With respect to William O'Driscoll, he noted:

He is a man of 30 years of age. He is a person who has again laboured under a problem with alcohol abuse for a long time in his life and he is not working. He does not have children and he comes from a settled traveller background. He is a person who has significant literacy issues and communication with society in general. I will take it as being put in that way. He has some convictions previously for assault but this would -- these would generally be accompanied by assaults when being arrested so they would be arrested upon members of An Garda Síochána. As was pointed out, Mark O'Driscoll, the co-accused who pleaded guilty, had six previous convictions for section 3 assaults.

Mr Bill O'Driscoll has 139 previous convictions. The vast majority of these, sorry, all of them are for -- of a summary nature and were tried in the District Court. He has no previous convictions before this Court. He was, on the date in question, on temporary from Cork Prison having been given a sentence at Cork District Court on the 11th of October in the year '13. He has previous convictions for assault, ... eight for burglary, 10 for theft and some public order.

26. The sentencing judge concluded:

"In the case of Mr O'Driscoll, the offending by him in this case warrants a custodial sentence and having regard to the matters which have been disclosed to me, I believe the appropriate sentence is eight years' imprisonment for the offence of assault pursuant to section 4 ..."

27. He then added:

"Having regard to the fact that he was on temporary release when he committed the offence, I'm not persuaded that he is a person who would benefit or would be capable of traction by giving his word to behave and accordingly, I will not suspend any part of his sentence."

Analysis & Decision

28. It is correct to say that it is a principle of sentencing that co-offenders should receive the same or very similar sentences unless there is some appreciable difference in their level of personal culpability or personal circumstances.

29. In this case Mark O'Driscoll is accepted as having a worse criminal record than either of the two appellants. This is put forward as an important differential of which adequate account was not taken, it is said. Amongst his 27 previous convictions he has six previous convictions for assaults, four of them for assaults causing harm. However, both of the appellants also had previous convictions for crimes of violence, and it cannot be gainsaid but that they each have a great many more convictions than Mark O'Driscoll. An important circumstance in our view is that Mark O'Driscoll pleaded guilty and was co-operative whereas these appellants were not.

30. We consider that there were sufficient distinguishing features between the appellants' cases and Mark O'Driscoll's case to justify the sentences imposed by the sentencing judge. We find no error of principle in that regard. This was a horrific assault and fully merited the sentences of eight years imposed on the present appellants.

31. As to the second point raised by the appellants, no error of principle has been identified on this account either. We are satisfied that the sentencing judge did not in fact treat the robbery as an aggravating factor in sentencing for the assaults. He did not do so because he sentenced for the robbery on a stand-alone basis, and imposed separate and discrete sentences on each accused for that offence to run concurrently with the sentences imposed for the assault offences. It is true that the convictions for the robbery offences having been overturned, the sentences imposed for the robbery offences have been quashed in consequence. However, the fact that they have been quashed has no implications for the correctness of the sentences imposed for the assaults.

32. We also find no error of principle in relation to the third ground of complaint. This relates to alleged failure by the trial judge to afford the appellants the opportunity to deal with their respective addictions to alcohol, and the unwillingness of the sentencing judge to suspend any portion of the sentences to incentivise rehabilitation in that regard. The sentencing judge specifically referenced the fact that both appellants have chronic alcohol problems and took that into account as part of the personal circumstances of each appellant respectively. However, no specific proposals for their rehabilitation from alcoholism, or criminality, were advanced in the court below, and in circumstances where both had re-offended while on temporary release the sentencing judge had no grounds for optimism that if a portion of their sentences were suspended to incentivise rehabilitation, that the chance given would be taken. The judge specifically remarked with respect to Mr O'Driscoll, that *"I'm not persuaded that he is a person who would benefit or would be capable of traction by giving his word to behave"*. Although he did not make an identical comment with respect to Mr Fitzgerald it is clear that he had no basis to differentiate the circumstances of Mr Fitzgerald in that regard. The position taken by the sentencing judge was a legitimate one within his range of discretion having regard to the evidence before him, and we do not criticise him

33. The appeals are dismissed.