THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 2016/158

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

GARY RIORDAN

Appellant

JUDGMENT of the Court (ex tempore) delivered 11th May 2017 by Mr. Justice Edwards.

Introduction
1. On the 11th of February 2016 the appellant pleaded guilty to three counts on an indictment viz:

> Count 1: Attempted Robbery, contrary to common law;
>
> Count 2: Production of an article, to wit a knife, capable of inflicting injury contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990;
>
> Count 3: Assault contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997.

2. In relation to Count 1 the appellant was sentenced to five years imprisonment with the final 12 months suspended on entering into a bond to keep the peace for a five year period. He was sentenced to two years imprisonment in relation to Count 2 while Count 3 was taken into consideration. All sentences were to run concurrently and to date from the 9th of September 2015.

3. The appellant now appeals against the severity of his sentences, but primarily the sentence on Count 1.

The Relevant Background Facts
4. The Court heard from Garda Paul Griffin in relation to the circumstances surrounding the events which occurred on 8th of September 2015. Garda Griffin told the Court the Gardaí became aware of an incident that had occurred at Charleville Mall in Dublin 1, when a taxi man contacted them. The taxi man, Mr. Pferst, was working at approximately 9:50 p.m. on Tuesday the 8th of September 2015 when he picked up two passengers – a male and a female – on the Quays. The appellant was identified as one of the passengers. Garda Griffin told the court there was initially some suggestion the appellant might need change for 100 euro. Mr. Pferst suggested stopping to get change but the appellant asked him not to. Garda Griffin told the Court that Mr. Pferst reported the appellant began "acting weird". He said he was instructed to drop the female passenger off and park up by Charlevile Mall. The appellant asked him to turn around from where the female had been dropped off and to park between two vehicles, however he could not do so as parking between two vehicles was advised against under security protocol. Mr. Pferst stopped the car. Garda Griffin told the court that when the taxi stopped the appellant produced a knife and went to attack Mr. Pferst. The court learned Mr. Pferst saw the knife coming and managed to grab the blade and shouted at the appellant to get out of the car. The appellant initially refused to get out of the car but eventually did get out of the car. Mr. Pferst then drove away with the knife still in his possession and contacted the Gardaí. Mr. Pferst was able to keep the appellant in sight and within five minutes the Gardaí arrived. Garda Griffin told the court that when he arrived on the scene with two colleagues Mr. Pferst pointed the appellant out. Garda Griffin's colleague Garda Cummings removed the knife from the scene. The appellant was trying to get into another taxi when Garda Griffin arrested him and conveyed him to Mountjoy Garda Station where he was detained under s. 4 of the Criminal Justice Act. Nothing of probative value emerged from the detention.

The Appellant's Personal Circumstances
5. At the time of sentencing the appellant had 25 previous convictions, six of which were for robbery and five of which had been dealt with in the Circuit Court in 2011. A further 29 matters were to be dealt with in the District Court on the 12th of February 2016, i.e. the day after the sentencing hearing in respect of the present sentence. These 29 matters related mostly to theft and burglary and the appellant had pleaded guilty in the main.

6. At the time he committed the offences the subject of this appeal he was serving a suspended sentence which related to one count of attempted robbery, four counts of robbery and one count of assault causing harm ("the 2011 convictions"). For the 2011 convictions he received suspended sentences amounting to seven years in aggregate, comprised of a four year sentence and a three year sentence to be served consecutively, but each suspended in its entirety for a specified period. The sentencing judge in respect of those matters had regarded the circumstances as "highly unusual", the appellant being a young man at the time and having committed the offences in a sudden cluster after becoming addicted to "snow blow" – a legal high. The sentence was suspended on condition that the appellant undergo a 20 week addiction counselling course, which he did. In 2013 the sentence was partially reactivated on foot of a re-entry under s. 99 of the Criminal Justice Act 2006 and the appellant was released in 2014.

7. It now appears the appellant has replaced his addiction to "snow blow" with an addiction to alcohol. The sentencing court in the present case was provided with a letter from Fr. Peter McVerry which records that the appellant had previously completed a 20 week residential drug treatment programme, and had remained drug free for a considerable period of time before relapsing. Fr. McVerry remains willing to assist the appellant with his addiction and is prepared to offer him a place on a drug relapse prevention programme. A letter was also submitted from Mr. Dowling, the drugs counsellor at Cloverhill Prison who had previously assisted the appellant, and who had engaged with him once again whilst he was on remand in Cloverhill. The letter intimated that the appellant had self referred and was focussed and motivated.

8. The sentencing court had the benefit of a psychological report that was prepared in 2011. The report gave a detailed account of the appellant's upbringing and social circumstances and concluded by noting the appellant presented as a vulnerable man who needed help to develop skills to cope with the stresses of life. His re-offending at that time was related to continuing substance abuse. The court had the further benefit of a probation report. It recorded that the appellant has an exceptionally poor history of engagement with the Probation Service and he presented as a very high risk of re-offending within the succeeding 12 months. While the report was not positive it noted that the appellant had a number of difficulties, including homelessness and addiction issues, which the probation services were willing to help the appellant through. The support offered was acknowledged to be badly needed.

9. The appellant was born in 1989 and is originally from Ballymun. His father died in 1995 when he was only six years old. He completed most of his secondary education but left in sixth year before completing his leaving certificate due to the stresses of his then girlfriend becoming pregnant and he becoming a father. His then girlfriend duly gave birth but the child was taken into care and this added to the appellant's difficulties precipitating him into downward spiral culminating in his committing a cluster of crimes in 2010 and 2011. The appellant is now a father of five and has almost no work history or vocational training.

10. The court was informed that the appellant had a supportive family. He has an older brother who had never been in trouble and a younger brother who had criminal convictions before he turned his life around and became a productive member of society. The court was told that the appellant regretted not following the same path as his younger brother when he was afforded his chance.

11. It was submitted to the court that there were two identifiable periods of stability since the imposition of the suspended sentence in 2011. The most recent period of stability came to an end when the appellant became the victim of a savage assault and a particularly bad stabbing to his back. He had some 76 stitches and spent a number of days in hospital. This incident is said by the appellant in a letter to the court to have triggered his recourse to alcohol to which he is also addicted and this addiction in turn lead to the attempted robbery and related matters the subject matter of the present case.

12. The appellant through his counsel asked the court to consider forwarding a letter of apology to the victim. The appellant had entered an early guilty plea before his arraignment date by way of ex-parte application and was subsequently sentenced a week later.

The Victim Impact
13. A victim impact statement prepared by Mr. Pferst was handed into the court. In it the victim, who is a Polish national, told the court that he has always worked as a taxi driver while in this jurisdiction. He told the court that the incident had an impact on his livelihood as he no longer able to do his job. He is now finding it difficult to go back out in public and work. Overall the incident had a very negative impact on Mr. Pferst.

The Sentence Imposed
14. In passing sentence the sentencing judge made the following remarks:

> *"At the time of the offence, you were still under a suspended sentence which had been imposed by Judge Hunt in December of 2011; it was a sentence which was obviously for serious offences, in that a total of seven years imprisonment was imposed for a series of offences, six of which were robbery offences and which also involved, on occasion, the production of a knife. And the position is that that was suspended in full. Due to a lapse when you were convicted of a further offence in 2013, three years of that sentence was subsequently reactivated, and I have heard evidence also that you are due to be sentenced before the District Court tomorrow on 29 further offences, many of which involve theft and there are also three further incidents in which knives were produced. So it is a deeply disturbing episode of very serious offending which occurred against the backdrop of the Court having dealt with you in a very lenient fashion for very similar offences in the past.*
>
> *Now I have heard that you have had a background which has not been without its difficulties, that your father died when you were very young and that you have essentially lacked a male role model in your life since then. You did receive a good education and you had a supportive mother and you appear to have had other members who were supportive of you and who are not involved in any form of criminality. Like so many of the people that come before this Court, the root of your problem is … addiction …; you were addicted to Snow Blow at one stage, and having very successfully overcome your addiction to that particular substance, you then developed an addiction and an abusive relationship with alcohol, and it is that particular issue which has been the driver of all of your recent criminal activity. Now I note that you are still a very young man, you have five children, you have not had much in terms of structure put into your life; you don't have much in the way of a work history or skills to bring to a work situation, and they are matters which clearly need to be addressed by you at some stage if you are to engage in some kind of productive life in the future. I note also that you have had periods over the course of the last decade where you have managed to stabilise and stay out of trouble.*
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> *So I must balance the nature of the offence, the serious nature of the offence and the context within which the offence was committed against all of the matters which have been urged in mitigation, most notably, the very early plea of guilty in the case, the fact that that was a valuable plea and relieved the already traumatised victim of the stress of having to give evidence in the case, and the remorse expressed by you in your letter. And I accept that you have developed some insight in relation to the effects of your conduct on your victims. I also accept that you have, in the past, been capable of addressing yourself to overcoming your difficulties and addictions. And I also note that Fr McVerry certainly is willing to continue working with you with a view to emulating the success that you've had in the past in conquering your addiction, and I also note that the probation service has indicated a preparedness to work with you at some point in the future. But your conduct and its effect on your victim must be marked by a serious custodial sentence, and in all the circumstances of the case, the appropriate sentence in relation to count number 1 is five years' imprisonment, but I'll suspend the final 12 months on your entering into a bond to keep the peace and be of good behaviour for a period of five years following your release, on the condition that you undergo probation supervision for that period for a period of two years and that you comply with all of the directions of the probation service in relation to educational advancement, in relation to addressing your alcohol addiction and in relation to addressing any housing needs which you may have upon your release."*

Grounds of Appeal
15. The appellant appeals on the following grounds: firstly that the sentencing judge erred in law in imposing a sentence which was overly severe; secondly that the sentencing judge erred in failing to give sufficient weight to the appellant's personal circumstances;

and finally that the sentencing judge erred in failing to take the appellant's attempts at rehabilitation into account

The Appellant's Submissions
16. In rather brief written submissions filed to this Court, the appellant submits that while the trial judge did identify the appellant as having made successful efforts to rehabilitate himself in the past, he contends that she failed to consider that although the appellant had relapsed, he had by the 11th of February 2016 evinced an intention to renew attempts at rehabilitation having made contact with Fr. Peter McVerry who wrote to the court expressing a willingness to engage with the appellant. The appellant also made contact with Noel Downing, the addiction counsellor in Cloverhill Prison who wrote to the Court indicating he would work with the appellant in whatever capacity is conducive to his long term recovery. These offers of rehabilitation were further supported by the probation service who also offered their service to the appellant.

17. Consequently, the appellant has submitted, the sentencing judge erred in law in imposing a sentence which was overly severe and which failed to take sufficiently into account the personal circumstances of the appellant and the attempts he was making to once again rehabilitate himself. It is further submitted the sentencing judge did not give sufficient weight to the fact the appellant had successfully rehabilitated himself in the past and that this relapse was contributed to by a savage attack perpetrated on him. The sentence imposed was not an appropriate sentence because if failed to have adequate regard to Mr. Riordan's personal circumstances.

The Respondent's Submissions
18. The respondent relies upon the Supreme Court decision of *The People (Director of Public Prosecutions) v Francis Cunningham* [2002] 2 IR 712 wherein with regard to the application of "error in principle" Hardiman J held the following at p. 741:

> *"It appears to me, in light of the principles summarised above, that the accused is attempting to introduce, at the "error in principle" stage of the appeal, material which would be relevant (if at all) only at the "appropriate sentence" stage. He will not get to this stage unless he establishes an error in principle. Moreover, that error must be in the approach actually adopted by the learned trial judge to sentencing."*

19. The respondent submits that the appellant has not established any such error.

20. The respondent submits that the sentencing judge manifestly attributed sufficient weight to the personal circumstances of the appellant, including his attempts to rehabilitate himself, before determining an appropriate sentence.

21. We are asked to note that the appellant's own counsel admitted that the Probation Report before the court at the sentencing hearing was

> *"…not a very glamorous report, there is reference to the fact that Mr Riordan is at a high risk of reoffending in the particular circumstances which pertain in his case."*

22. It was further submitted that the sentencing judge carefully considered the appellant's personal circumstances, in particular his difficulties, which included his addiction issues, whilst acknowledging the appellant's periods of stability.

23. It was however further submitted that a number of additional factors, which could be considered aggravating, were also present in this case, and were correctly considered by the sentencing judge, namely, the appellant's attempts to get into another taxi following the incident; his highly intoxicated nature; nothing of probative value arising from the appellant's detention; as well as the appellant being under a suspended for serious offences at the time of the offence

24. Lastly, the sentencing judge clearly outlines an appreciation of the required balancing exercise to be engaged in between the gravity of the offence on the one hand, and relevant mitigating factors including the personal circumstances of the appellant, on the other hand, when stating:

> *"So I must balance the nature of the offence, the serious nature of the offence and the context within which the offence was committed against all of the matters which have been urged in mitigation, most notably, the very early plea of guilty in the case, the fact that that was a valuable plea and relieved the already traumatised victim of the stress of having to give evidence in the case, and the remorse expressed by you in your letter. And I accept that you have developed some insight in relation to the effects of your conduct on your victims".*

25. Moreover, it is highlighted that even at this juncture, the sentencing judge continued to consider the appellant's previous ability to overcome his difficulties and addictions, as well as the willingness of Fr. McVerry to work with the appellant:

> *"I also accept that you have, in the past, been capable of addressing yourself to overcoming your difficulties and addictions. And I also note that Fr McVerry certainly is willing to continue working with you with a view to emulating the success that you've had in the past in conquering your addiction, and I also note that the probation service has indicated a preparedness to work with you at some point in the future."*

26. However, ultimately and correctly it was submitted, the sentencing judge, concluded that the appellant's conduct and its effect on the victim required to be marked by a serious custodial sentence, and she imposed a sentence of five years imprisonment on the attempted robbery count and two years on the production of an article count. The other count was taken into consideration. However even then she was prepared to incentivise the appellant's rehabilitation by suspending the final 12 months of the five year sentence for a period of five years from his release from custody.

Analysis and Decision
27. Counsel for the appellant has sought to argue that the sentencing judge's assessment of the gravity of the offence was too high. We are faced with the difficulty, in this as in so many cases, that the sentencing judge does not indicate where exactly she was prepared to locate the offence on the spectrum of available penalties before discounting for mitigation. We do know where she ended up, namely at five years, following which she suspended a further year to incentivise rehabilitation. While the sentencing judge clearly departed from best practice in not nominating a headline sentence this does not form the basis of any ground of appeal.

28. Rather the appellant's complaint is that even if five years was to be treated as the headline sentence, and it is clearly to be inferred it was more than that as it is conceded there were aggravating circumstances in the case, it was too high. We cannot agree.

29. This was an attempted armed robbery. A knife was produced during the attempt to rob the victim. The victim, who was

significantly traumatised, was a taxi driver. Taxi drivers provide an essential service, often at unsocial hours, and regrettably are particularly vulnerable to attacks and robberies by knife wielding assailants such as this appellant. Accordingly, any contemplated penalty for this type of offending must have particular regard to the legitimate penal objectives of deterrence, both general and specific. It must also have regard to the aims of retribution and rehabilitation. In this case the victim very bravely, but perhaps foolishly in terms of the risk to himself, succeeded in disarming the appellant. The appellant is fortunate the victim did not suffer injury, or worse, in the struggle as the appellant would undoubtedly have been held responsible for it.

30. The offence was further aggravated by virtue of being committed during the currency of a suspended sentence for a similar type of offending. There had been an earlier breach of the same bond to keep the peace, which had resulted in the reactivation of one of two consecutive sentences both of which had been suspended conditionally on the appellant's undertaking to keep the peace and be of good behaviour. The appellant has a bad record of similar type offending and was given chances in the past which he spurned. Counsel for the appellant has suggested that a headline sentence in the three to four year range would have been appropriate. This was wholly unrealistic in our view and represents an under-appreciation of the gravity of the appellant's offending behaviour. We have no doubt but that this was an offence which would have justified a headline sentence in the high single digit range.

31. There were, however, also significant mitigating factors in the case and these were all correctly identified by the sentencing judge. While we do not know her exact headline sentence following her assessment of the gravity of the case, we do know where she ended up and, to have ended up at five years, bearing in mind the gravity of the offence, it is clearly to be inferred that she must have afforded significant discount to take account of the mitigating factors in the case including the personal circumstances of the appellant to which she was fully alive.

32. She also went further, in suspending the final twelve months, and this was clearly with a view to incentivising rehabilitation.

33. In the circumstances we find ourselves in manifest agreement with counsel for the respondent that the appellant has failed to demonstrate any error of principle. In the circumstances we must dismiss the appeal.