THE COURT OF APPEAL

[2021] IECA 124

Record No. 143/CJA/20

McCarthy J.
Kennedy J.
Donnelly J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND–

STEPHEN JOYCE

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 5th day of March 2021 by Ms. Justice Donnelly

1. This is an application taken by the DPP to review the sentence of the respondent on the grounds of undue leniency pursuant to the provisions of Section 2 of the Criminal Justice Act, 1993. The respondent pleaded guilty to a single count of robbery contrary to Section 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The offence was committed on the 26th September, 2019 at The Square Tallaght. On the 18th June, 2020 he was sentenced to twenty-one months, that was backdated to the 26th September, 2019.

The Facts

2. The facts of the case can be summarised as follows: -

   (a) The victim had finished work on the 26th September, 2019 at approximately 21:00 and was standing at the bus stop on her own. She was approached by the

respondent who was initially looking for a light and then asked for a smoke which she gave to him. He was walking around and telling her that he was cold.

(b) Shortly after that he grabbed her by the shoulder and told her that he had a knife. He first asked for her bag and then he grabbed it and ran off. She did not resist as she thought that he might have a knife.

(c) A security guard in The Square heard what had happened over the radio and the description of the suspect. He noticed a person running past the door that matched that description. As a result, the Gardaí were able to apprehend the respondent very shortly afterwards when he was still in possession of some of the injured party's property.

(d) There was CCTV footage of the incident and the respondent was also identified from this. He was arrested that evening, detained and interviewed but nothing of evidential value arose.

(e) The victim did not wish to make a victim impact statement. Section 4 of the Criminal Procedure Act, 2010 provides that where there is not a victim impact statement that the court cannot draw an inference that the offence had little or no effect.

(f) The respondent had seventeen previous convictions, ten of which were Circuit Court convictions and included five robberies, two burglaries, four assaults and possession of a firearm or ammunition with the intent to endanger life. There was a gap in the convictions between 2001 and 2012.

(g) He had been in custody since the date of the offence.

(h) It was also accepted that while the respondent did not physically harm the injured party "*he was using his weapon as a means of intimidating the victim.*"

(i) The defence also lead evidence that the respondent had been arrested and charged earlier in the evening and released after tablets that he had in his possession were taken off him.

(j) The Gardaí did not have any difficulties in managing him while detained

(k) He entered a guilty plea at an early date – being the arraignment date. He was very remorseful.

3. In terms of the respondent's personal circumstances: -

(a) He was 50 at the time of sentencing.

(b) He had seven children and grandchildren and was '*a hands on father*.'

(c) His mother had custody of three of his children at the time of the hearing.

(d) He developed a drug addiction, having started to take drugs at eleven years of age.

(e) He has periods where he is stable and not committing offences.

(f) His offending behaviour is linked to his drug addiction.

(g) His long-term partner of twenty-three years had committed suicide on 12th March 2018 when he was in custody serving a three-year sentence with one year suspended.

(h) He began '*dabbling in heroin*' when he was released from that sentence.

(i) He was on 50ml of methadone.

4. The respondent gave evidence to the sentencing court. He apologised and said that he was '*out of [his] head on tablets that day*'. He also said that he had gone downhill after the death of his partner. He said that he had been off heroin for fourteen years and had relapsed. He wanted to go for bereavement counselling when he got out of custody. He asked for the sentence to be finalised on that day and did not want any reports.

The Law

5. The principles in an undue leniency appeal were set out by the Court of Criminal Appeal in *The People (DPP) v Byrne* [1995] 1 ILRM 279 and a number of other cases. They were not in dispute in this case. The principles establish that: -

(a) The DPP bears the onus of proof in showing that the sentence was unduly lenient,

(b) The appeal court should always accord great weight to the trial judge's reason for imposing the challenged sentence,

(c) It is unlikely to be of help to the appeal court to ask if, in the event that a more severe sentence had been imposed, it would have been upheld in a defence appeal based on error of principle. Different criteria apply to prosecution appeals,

(d) It is clear from the wording of Section 2 of the 1993 Act that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the appeal court's intervention.

(e) A finding of undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error of principle.

The Sentencing Remarks of the Sentencing Judge

6. The sentencing remarks were as follows: -

> *"Thank you. Stand up, please. On the particular date, it seems this defendant robbed the injured party. He grabbed her by the shoulders and threated her that he had a knife. He took, I think, her bag and made his escape. He was easily*

apprehended. It seems he was spotted and, it seems, when he was arrested he had certain items of property belonging to the injured party.

Now, Mr Joyce is a 50-year-old man. He has a history of offending. I think 17 convictions in all. Some for quite serious offences. I suppose it's noteworthy that these 17 offences have been spread out over 20 years. It seems he has gone on the straight and narrow for periods of time, but he has relapsed into crime, it seems to feed his drug problem.

He is a man with seven children in total. While seven children, it seems three of them are still dependent. It seems three children are living with his mother in Cushlawn. And it seems when he emerges from prison he will live there with his mother and children. It seems he is an intelligent man. He has had challenges and, I suppose, tragedies in his life. The mitigating factors are clear. He has pleaded guilty. It seems he is remorseful and it seems he can reform himself. There is no doubt about that. And I think the appropriate sentence, taking all the factors into account, obviously including the mitigating factors, is a term of imprisonment of 21 months to be backdated to the date when he went first into custody -- what date's that? Sometime in September, wasn't it?"

Grounds of application

7. The grounds of application are that: -

   (a) The sentencing judge did not identify a headline sentence.

   (b) As no headline sentence was identified, it is not possible to ascertain what credit was given to the mitigating factors.

   (c) The sentencing judge attributed too little weight to the aggravating factor.

Headline Sentence

8. Both sides accept that the sentencing judge did not identify a headline sentence. The DPP submits that is an error in principle while the respondent submits that it is within the discretion of a sentencing judge to adopt a different approach i.e. that of "instinctive synthesis" based upon his considerable experience gained from many years of sentencing in the Dublin Circuit Criminal Court.

9. The nomination of a headline sentence has been recommended as best practice by this Court in numerous cases. In *DPP v Flynn* [2015] IECA 290 Edwards J stated: -

   "13. It is convenient to deal first with the complaint that the judge failed to identify his starting point (ground ii) i.e. the appropriate headline sentence having regard to the available range based on an assessment of the seriousness of the offence taking into account aggravating factors but before applying any discount for mitigating factors. It is correct, and it represents a legitimate criticism, to say that the trial judge failed to indicate his starting point, and merely indicated where he

ended up. The trial judge's failure to do so represented a departure from best practice, and has made this Court's task somewhat more difficult.

14. *There is a strong line of authority starting with The People (Director of Public Prosecutions) v M [1994] 3 I.R. 306; and continuing through The People (Director of Public Prosecutions) v Renald (unreported, Court of Criminal Appeal, 23rd November 2001); The People (Director of Public Prosecutions) v Kelly [2005] 2 I.R. 321; and The People (Director of Public Prosecutions) v Farrell [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in The People (Director of Public Prosecutions) v McCormack[2000] 4 I.R. 356.*

…

18. *Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.*

19. *However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld. In the present case, however, this Court's task has been made, as already stated, somewhat more difficult by an inability to discern from the sentencing judge's ruling exactly where he started and how much discount he gave for mitigation. This creates a real difficulty in a situation where one of the grounds of appeal in effect complains that the sentencing judge over-assessed the seriousness of the case (ground no ii), and another complains that insufficient account was taken of mitigation, and specifically the plea of guilty (ground no. iv).”*

10. In *DPP v Molloy* [2018] IECA 37 the approach was favoured on the basis that: -

> *"20. … it seems to us that it is likely to best focus judges at first instance on the overriding criterion of ensuring that sentences are proportionate both to the gravity of the offence and the circumstances of the offender, and in particular that the sentence 'to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused' - see The People (DPP) v McCormack [2000] 4 IR 356. In addition, it has the advantage of producing better reasoned sentencing judgments, that better explain to the interested parties why a particular sentence was imposed and which are also more readily amenable to review at appellate level…"*

11. Edwards J also noted: -

> *"9. This is yet another case in which this Court is faced with the difficulty that no headline sentence was identified, and no indication of the quantum of discount afforded for mitigation was given by the sentencing judge. This creates a real problem for us in circumstances where the appellant is making the case that by virtue of where the sentencing judge ended up, which we do know. namely at a sentence of imprisonment for six and a half years, the sentencing judge must have either over-assessed the gravity of the offending conduct, or failed to have afforded sufficient discount for mitigation, or a combination of both of those things."*
>
> *…*
>
> *11. The practice commended involves a staged approach in which gravity is assessed in the first instance with reference to the range of penalties available and taking into account culpability (including factors tending to aggravate or mitigate the intrinsic gravity of the offending conduct) and the harm done, leading to the nomination of a so-called 'headline sentence' and then in the second stage discounting from the headline sentence to take account of any mitigating factors not already taken into account (which will be those not bearing on culpability). and in that way to arrive at the appropriate ultimate sentence."*

12. This is a case where no headline sentence has been nominated by the sentencing judge. The sentencing judge did not indicate even in general terms where on a spectrum of offending behaviour that this offence might lie. We are not convinced however that this of itself establishes an error of principle. The Court will however have to examine carefully the facts of the case to establish where on the scale this offence lay and then assess the mitigation that should be applied.

13. In this case, neither party put before the Court the important decision of *DPP v Byrne* [2018] IECA 120 ("*Byrne*"). We drew it to the attention of counsel and submissions were made upon it. We consider that it represents the current law as to bands for sentencing in robbery case.

14. Before we embark on that, it is important to deal with a point raised by counsel for the respondent. Counsel submits that as the DPP did not make certain submissions or

engage with certain factors in the court below, the DPP was precluded from doing so here. Counsel relies upon *DPP v FE* [2019] IESC 85

> *"38. What sentencing band the Director of Public Prosecutions considers an offender fits within should be the subject of a specific submission by counsel to the sentencing court. Precedents are decisions of law that at least influence subsequent decisions by courts. As a matter of logic, a court is left without a necessary analysis where a party does not reference a point of law but instead chooses to raise an argument based on it on appeal. This is the situation with s. 2 of the Criminal Justice Act 1993 which enables an appeal by the prosecution if "it appears to the Director of Public Prosecutions that a sentence imposed by a court … on conviction of a person on indictment was unduly lenient" he or she "may apply to the Court of Appeal to review the sentence." There, the powers to be exercised on appeal are to refuse the application or "quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned". It may be that the interpretation of cases such as The People (DPP) v FitzGibbon [2014] IECCA 25 and The People (DPP) v Husseyn [2015] IECA 187 has led to a misunderstanding. Given the general wording of s. 2 of the 1993 Act, an appellate court is not trammelled by an argument not being made before the sentencing court and on appeal. The duty of the court is more than as between the parties and involves finding the correct sentence as a matter of justice. Thus, while it is not a rule of law, it is a rule of good practice to mention if the view of the prosecution is that some conviction fits within the principle of a possible consecutive sentence. Further, the prosecution, while not demanding a sentence or suggesting it, should make a submission as a matter of law as to the appropriate band. That, after all, is what happens on appeal."*

15. We consider that this paragraph has to be read in the context of the previous paragraph where Charleton J. says:-

> *"37. ….it has been stated that because the Director of Public Prosecutions did not look for a consecutive sentence in respect of the vicious assault with the hammer about 10 weeks after the rape, that a court should not do so of its own motion. That is not correct."*

16. Therefore, while it may be best practice, it does not appear to represent the law that the DPP must point to having made a particular submission in the court below before she can rely on that submission in this Court. There is also another difficulty for the respondent. In the present case, the respondent submitted to the sentencing judge that this offence was within the lower range but when queried about an aspect of it by the sentencing judge, counsel replied "…or the lower scale or a little bit above the lower in terms of the scale of offending for that particular offence." We do not understand the DPP to be objecting to that characterisation at all.

17. The respondent also said in written submissions "It is accepted that the offence of robbery is a serious one and that aggravating features existed in the case and additionally that the respondent has a history of offending."

18. We must approach this Court by considering what the Court said in *Byrne* as follows: -

> *"60. In fixing a headline sentence a judge's scope for action is determined in the first instance by the spectrum of penalties available to her. In this instance that spectrum ranged from non-custodial options up to imprisonment for life. On the basis that a life sentence is likely to be reserved for only the very worst and most egregious offences of this type, the practical reality is that the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. An effective fifteen year range allows for a low range of zero to five years, a mid-range of six to ten years and a higher range of eleven to fifteen years."*

In *Byrne* the Court fixed 5 years as the appropriate sentence in that case. We accept that the facts there were different. The victim in that case was accosted in his apartment building (not his own apartment) and was grabbed for a period of time by the neck resulting in some physical injury. There was also a threat to kill. Here, however, there was a woman alone, at night, at a bus-stop who was in effect targeted by the respondent having engaged her already in conversation. He also made a threat to use a knife (regardless of the fact that the victim did not see it nor is there any proof he had one) in conjunction with grabbing her by the shoulder. He had just been released from custody in the Garda station, a factor that is not insignificant but not the same as if the offence had been committed on bail. Most importantly here, unlike the position in the *Byrne* case where there were no previous convictions, this respondent had 5 highly pertinent previous convictions for robbery. He also had four convictions for assault. These particular offences were a factor which aggravated the offence because they pertain to the intrinsic moral culpability of this particular offender. We consider that the appropriate headline sentence for this robbery in light of these factors was one of 6 years. This is a little higher than the top end of the lowest scale because of the particular aggravating factor of his highly relevant previous convictions.

19. As that is the correct headline sentence, the reduction to a sentence of 21 months was a clear divergence from the norm even allowing for mitigation for his early plea of guilty, his addiction, his sad personal circumstances, namely the bereavement of his partner, his other circumstances and his determination to remain free of heroin. That reduction would represent a deduction of more than 66% which is far in excess of any possible deduction that could be merited in this case.

20. We consider therefore that the sentence was unduly lenient.

21. We will now proceed to resentence the respondent. We have heard that he has been released from prison in January 2021 and is on methadone maintenance. He has a new

partner and is seeking to engage with various services. Unfortunately, we have no documentation to that effect, but we bear in mind the circumstances of the pandemic.

22. We consider that the mitigation in the present case amounted to no more than a third from the headline sentence. The correct sentence in the Circuit Court should have been 4 years but in light of the fact that he has been released from prison and is now engaging with various services we believe it is appropriate to suspend the last 6 months of that sentence.

23. We therefore allow the appeal. We quash the sentence imposed in the Circuit Court and resentence the respondent to 4 years imprisonment with 6 months suspended on condition that he enter a bond of €100 to be of good behaviour for a period of 2 years. He is to be credited for the portion of the sentence already served.