THE COURT OF APPEAL

Record No: 251/2020

Birmingham P.
Edwards J.
Donnelly J.

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

DANIEL O'BRIEN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on 17th day of May, 2021 by Mr Justice Edwards.

Introduction

1. The appellant in this case came before Judge Ó Donnabháin in the Cork Circuit Criminal Court on the 4th of December, 2020, and pleaded guilty to four counts on the indictment, namely: two counts of endangerment contrary to Section 13 of the Non-Fatal Offences Against the Person Act 1997; one count of driving a mechanically propelled vehicle whilst there was no insurance covering same contrary to Section 56, subsection (1) and subsection (3) of the Road Traffic Act, 1961; as amended by Section 18 of the Road Traffic Act, 2006; and one count of driving a mechanically propelled vehicle whilst not having a driving licence contrary to section 38 of the Road Traffic Act, 1961 as amended. A *nolle prosequi* was entered in relation to two other counts.

2. The appellant was sentenced to six months' imprisonment in respect of the s. 56 count and was disqualified from driving for a period of 12 years in respect of same. He received a sentence of four years' imprisonment in respect of the s. 13 counts, and the s.38 offence was taken into consideration. The appellant now appeals against the severity of his sentence.

Factual Background

3. The court heard evidence from Garda Ryan Dillon, who on the 6th of February, 2019, was on duty conducting a checkpoint on the South Douglas Road in Cork. At approximately 4.00 p.m., Garda Dillon observed a black BMW, license plate 06 C 20779, approaching the checkpoint from the direction of Douglas and heading towards Cork City . The vehicle

slowed as it approached the checkpoint but did not stop. Garda Dillon recognised the driver as being the appellant. It then swerved at speed in direction of Garda Dillon, requiring him to take evasive action. In the process, his hand trailed behind him and was clipped by the wing mirror of the BMW.

4. The appellant continued driving towards Cork City at speed. He overtook a vehicle which had stopped at a set of traffic lights displaying red. The BMW then narrowly avoided colliding with a Ms Brenda O'Malley, who was attempting to cross the road at the time with her child's buggy. Ms O'Malley had to pull the buggy back onto the footpath in order to avoid collision.

5. Following the incident, the appellant presented himself at Togher Garda Station, Cork. He was identified by Garda Dillon, and was arrested and detained. An interview was conducted but yielded nothing of evidential value. It transpired that the appellant had no insurance or driving license at the time of the incident, and that the appellant had previously been disqualified from driving for a period of eight years, and that disqualification was still in effect at the time of the incident.

Impact on the victims

6. Ms O'Malley did not wish to give a victim impact statement but did say that the incident was shocking for her and that she was glad to hear of it being over.

7. Garda Dillon stated that he feared for his life in the moment but had been able to continue with his duties.

Personal circumstances of the appellant

8. The appellant was 28 years old at the time of sentencing. He is married and has three young children aged between two years and nine years. He spent a considerable time in custody as a juvenile and completed his junior cert whilst incarcerated. He thereafter qualified as a personal trainer and worked for a period of time as such. The appellant suffers from epilepsy and is taking medication for that, although had never been refused a licence on medical grounds.

9. The appellant had 44 previous convictions, although none related to endangerment, with the most recent dating from the 17th of September 2020, for road traffic offences. He had three previous convictions for assault, the most recent being a conviction for s. 3 assault recorded in 2013. At the time of sentencing he was in custody, serving a sentence for the road traffic offences recorded on the 17th of September 2020. It was accepted by Garda Dillon that the appellant was engaging with services there to address certain addictions, and that he was also availing of the school and gym in an attempt to get his life back on track.

10. Garda Dillon acknowledged that the appellant had presented himself to the Gardaí at Togher Garda station after the events. He agreed with defence counsel that the appellant had entered an early plea and that Ms O'Malley had been grateful for this as it meant the matter was coming to an end. Garda Dillon acknowledged that the appellant had

expressed remorse for his actions and had directed Counsel to apologise directly to the two victims.

Remarks of the sentencing judge

11. The sentencing judge began his remarks by acknowledging the guilty plea, and then concluded from the evidence that there was an element of definite deliberation about the appellant's driving. It was bad enough that the appellant knew that he had been recognised by Garda Dillon and had then driven the car at him, but he had then gone further by proceeding through a red light in disregard of the safety of other road users, including Ms O'Malley and her child. The sentencing judge referred to this aspect as representing actual endangerment, involving the elements of recklessness and disregard for the safety of others. It was specifically noted that the appellant was disqualified from driving at the time and should not have been on the road. The sentencing judge also expressed concern about the medical condition (uncontrolled epilepsy) suffered by the appellant and wondered whether the appellant was a person capable of holding a driving licence at all and if he had disclosed his condition when he had applied for a licence. He was of the view that the medical condition was a matter which he had to consider.

12. The appellant's previous convictions in relation to having no insurance and being off the road at the time were identified as an aggravating factor. Also identified as an aggravating factor was the appellant's continuation of his reckless behaviour after escaping from Garda Dillon, which the sentencing judge referred to as being "*a definite stepping up of the endangerment*". In sentencing for the endangerment counts, the sentencing judge acknowledged that the plea entitled him to some discount from a potential higher sentence, before determining upon a sentence of four years. The sentencing judge declined to suspend any portion of the sentence due to the fact that the appellant had been disqualified at the time of the offending. Having requested and received confirmation from Counsel that the potential maximum sentence for driving without insurance was imprisonment for six months, the sentencing judge proceeded to sentence the appellant to six months' imprisonment with a 12-year disqualification from driving, taking into consideration the fact that the appellant had already ignored a previous 8-year disqualification. Due to the epilepsy issue, the sentencing judge directed that the appellant must undergo a full driving test assessment before he can get another licence. The count of driving without a licence was taken into consideration with the others, and a *nolle prosequi* was entered in respect of two other counts with which the appellant had originally been charged.

Grounds of Appeal

13. The appellant appeals his sentence on the following grounds:

    (i) That the sentence was excessive and disproportionate in all the circumstances.

    (ii) That the sentencing judge erred in principle in failing to afford any or sufficient weight to the various mitigating factors in the case.

(iii) The sentencing judge erred in principle in failing to give any or any adequate consideration to the prospect of structuring the sentence and suspending a portion thereof to allow for the appellant's rehabilitation.

(iv) That the sentencing judge erred in principle in imposing the within sentence in that sufficient weight was not afforded to the public interest in the appellant's rehabilitation.

Submissions of the appellant

Headline sentence and mitigating factors

14. It is contended on behalf of the appellant that the sentencing judge took the view that the early plea of guilty was the sole mitigating factor and omitted other relevant aspects. It is further complained that the sentencing judge did not specify a headline sentence and emphasised the aggravating factors in arriving at his sentence while neither listing nor discounting sufficiently for mitigating factors.

15. The appellant points to the case of *DPP v Brandon Crosbie* [2019] IECA 28, in which this court endorsed the sentencing judge's thorough consideration of all mitigating factors including youth and substance abuse issues in imposing a three-and-a-half-year sentence for a s. 13 offence.

16. It is further contended that the appellant's diagnosis of epilepsy should be treated as a mitigating factor and that the sentencing judge treated it instead as an aggravating factor.

17. Given that the appellant had no previous convictions for endangerment, the offences should have been considered at the lower end of the scale of gravity. This could not be clarified by the court without a headline sentence.

18. In *DPP v Melissa Whelan* [2018] IECA 142, this court quashed the sentence imposed by the court below where the sentencing judge did not take account of certain mitigating factors and did not distinguish between what he allowed for the various mitigating factors. It is submitted that a similar error occurred herein and led to an excessive and disproportionate sentence.

Comparators and Partial Suspension

19. It was submitted that the sentencing judge did not afford sufficient weight to the prospect of rehabilitation in failing to balance punitive, deterrent and rehabilitative elements in the sentence, particularly in circumstances where the appellant had been making progress towards rehabilitation.

20. In *DPP v Gary O'Connell* [2020] IECA 237, this court re-sentenced an appellant charged with some similarity to the present case in order to reflect mitigating factors and incentivise rehabilitation by part-suspending a portion of the headline sentence. There it

was also said that that the true value of comparators lies in their indication of a trend in approaches to sentencing.

21. This was echoed in *DPP v Byrne* [2015] IECA 51, in which an appellant was resentenced on the grounds of rehabilitation and accounting for mitigation. A partial suspension was also granted in *Lawlor v DPP* [2016] IECA 23 to incentivise rehabilitation.

22. A similar approach was again taken in DPP v O'Rourke, in which this court suspended a sentence in recognition of genuine remorse, a guilty plea, and to incentivise rehabilitation. There it was stated that it was desirable to strive for consistency in sentencing for broadly similar offending.

23. It was suggested that these comparators show a consistent pattern in sentencing for such offences which was not followed on this occasion, and it was submitted that a partial suspension should have been granted.

Submissions of the respondent

Headline sentence

24. The respondent submitted s that given the relevant facts, the offending in the present case should warrant a headline sentence on the higher range of the scale of gravity. As no explicit headline sentence was nominate, it can be inferred that a sentence at the higher end was selected and was within his discretion.

Comparators and Partial Suspension

25. Concerning the comparators proffered by the appellant, it was submitted that the facts of *Crosbie* are not comparable to the present case. The appellant there was 18 years old and made full admissions and apologised immediately upon arrest. Nevertheless, he still received a sentence just six months short of that imposed on the appellant here.

26. The case of *Whelan* had related to a different factual scenario concerning theft and s. 4 assault. It was true, however, that this court had held in that case that specific significant mitigating factors had not been given due weight, including a particularly helpful early plea, the weight of which was accepted by the DPP.

27. Here, there was no evidence that the plea was a particularly early one. However it could be accepted that it was entered somewhat in advance of the sessions where the case was listed for trial. There was an expression of remorse, but this came at the sentence hearing itself. The respondent did not accept that there was significant value in the plea, in circumstances where the evidence against the appellant was strong.

28. It was submitted that sentencing does not have to be approached in a rigid and mechanical way, and that discretion must be afforded to the sentencing judge. The totality of the sentence hearing must be considered.

29. Concerning rehabilitation, the respondent referred to *DPP v Polanski*, in which there had been substantial evidence of rehabilitation efforts before the sentencing court, for the purpose of contrasting the situation in that case with the present case. It was submitted that the evidence before the court in relation to the appellant's rehabilitation attempts in the present case was quite bare. There was no requirement for the sentencing judge to give it more weight than he did.

30. It was submitted that it is not an error to refuse to partially suspend a sentence in circumstances where there was no evidential basis for doing so.

31. Finally, it was submitted that the sentences imposed here were fair and proportionate in all circumstances.

Discussion & Decision

32. The appellant complains in the first instance that the sentence was excessive and disproportionate in all the circumstances of the case. It is correct to say that the sentencing judge did not nominate a specific headline sentence. It would have been preferable if he had done so, but his failure to do so is not an error such as would justify this court in intervening. The sentencing judge stated:

> *"I think the -- in relation to the endangerments, even with the plea, and giving him a discount for the plea from a potential higher sentence, I think a sentence of four years is merited."*

We may infer from the sentencing judge's remarks that he must have had in mind a starting point that was significantly above the post mitigation figure of four years that was mentioned, given the circumstances of the case and bearing in mind that the maximum potential penalty for an offence of endangerment was imprisonment for seven years.

33. This was an instance where multiple offences were committed as part of a single criminal event. What occurred on the occasion in question was in effect a continuum during which two serious instances of criminal endangerment were committed, as well as a number of lesser offences. In the circumstances the sentencing judge had options as to how he might structure his sentence.

34. Focusing primarily on the endangerment offences, he could have imposed consecutive sentences for each of the two instances of endangerment as they had involved separate victims and separate circumstances, albeit that they occurred close in time and as part of a single incident. Had he done so, he would of course have had to ensure that the cumulative sentences imposed were proportionate, if necessary by making adjustments in application of the totality principle.

35. An alternative approach open to him, and the one that he in fact adopted, was to impose concurrent sentences for all of the relevant offences but to ensure that the sentences to be imposed for the most serious offences (i.e. the endangerment offences) adequately reflected the totality of the offending behaviour.

36. In this case there were very considerable aggravating circumstances including those specifically isolated and referenced by the sentencing judge, namely the deliberateness of the driving; the fact that the appellant consciously drove at Garda Dillon; the fact that he struck the Garda on the hand with the wing mirror of his car; the fact that having continued on at speed he then saw a red traffic light and proceeded to drive through it in disregard for people who were, or who were likely to be, on the road; the fact that a mother with a baby in a buggy were very nearly struck by his vehicle and had had to retreat to the pavement in haste; and the fact that he was disqualified from driving at the time and had been endeavouring to evade Garda interception on that account. A further aggravating factor, not specifically identified by the sentencing judge but which was clearly relevant and which he would have been entitled to take account of, was the fact that the victim of the first endangerment offence was a member of An Garda Siochána acting in the course of his duty.

37. We are satisfied that to reflect the totality of the offending behaviour the sentencing judge could not have reasonably have envisaged starting below six years on the available range. Although his starting point is unstated we are prepared infer that it could not have been less than six years. On that basis the post mitigation sentence of four years imprisonment which was imposed would imply that the appellant received a discount of one third to reflect the mitigation in the case.

38. Counsel for the appellant further complains that the sentencing judge only identified one mitigating factor as being relevant, namely the pleas of guilty. That is a fair observation to far as it goes. However, counsel for the appellant properly acknowledged the jurisprudence of this court to the effect that it is not necessary for a sentencing judge to itemise every relevant mitigating factor in his or her sentencing remarks. The critical issue is whether adequate discount was in fact given for such mitigation as was available to an offender. In this case, counsel for the appellant contends that there were several mitigating factors which were sufficiently significant to have merited being specifically referenced, and she expresses concern that they were not referenced.

39. Counsel specifically points to the fact that the appellant presented himself voluntarily at Togher Garda Station after the incident. She further points to his expressions of remorse which he had asked to have conveyed through his counsel to both victims at the sentencing hearing. She further points to the fact that he has addiction issues and that it had been accepted by Garda Dillon that he was engaging with relevant services while in prison to address those issues.

40. While it would have been better if the sentencing judge had made specific reference to these factors in circumstances where they had been pressed in the plea in mitigation, we are not persuaded that these factors, together with the pleas of guilty, would have entitled the appellant to anything more than the one third discount which we estimate him to have received.

41. The appellant was certainly entitled to some credit for his pleas of guilty. However, this was not a case in which he was entitled to a particularly generous discount on account of

those pleas. He had been recognised by Garda Dillon during the incident as being the driver of the BMW. There was reliable eyewitness testimony as to the commission of the endangerment offences. The case against him was accordingly very strong. Moreover, while the victim of the second endangerment offence was relieved not to have to give evidence it was not the type of case where she might have been intrusively cross-examined such as might occur in a sexual offence case or domestic violence case. While it cannot be gainsaid that the victim was spared the inconvenience of having to attend and testify at a trial, the extra credit that is sometimes available to an offender for sparing his victim possible re-traumatisation by having to testify at a trial and be subject to rigorous and possibly distressing cross-examination, would not have been merited, or certainly not merited to any significant extent, in the circumstances of this case. Accordingly, this accused could only have expected to receive moderate credit, perhaps a 15% to 20% discount, for his pleas.

42. It was to his credit that he presented himself at Togher Garda station after the incident. However, that was apparently the limit of his co-operation with the investigation, and this factor would only have entitled him to very modest additional credit.

43. As regards his addiction issues it is again to his credit that he is seeking to address these while he is in custody. However, there was no evidence that his addiction issues were of any specific relevance to his offending on the occasion in question. It has not been suggested that he was under the influence of an intoxicant at the time of the reckless endangerment, or that addiction played any role in what occurred. Indeed, the evidence is to the contrary. The evidence is that he realized that Garda Dillon had recognised him as being the driver of the BMW, and he knew he ought not to have been driving because he was disqualified. Accordingly, he had driven recklessly, endangering both Garda Dillon and subsequently Ms. O'Malley, in an effort to evade Garda interception. Drugs or substances to which he was addicted had nothing to do with it.

44. We recognise that even if an offender's addiction issues do not bear on culpability, being addicted to substances is still part of the offender's personal circumstances to which a sentencing court must have regard. However, in circumstances where the sentencing judge in this case had received no evidence that this accused's addiction issues were likely to make prison harder for him to bear, and where it had nothing to do with his culpability for the offending for which he was being sentenced, the weight to be attached to that circumstance was minimal.

45. Counsel for the appellant has suggested that this court ought to have incentivised the appellant towards rehabilitation by suspending a portion of the sentence. We have said many times that while rehabilitation is an important objective of sentencing, a court will only be justified in going the extra mile in the interests of rewarding progress towards rehabilitation to date, and incentivising further progress towards rehabilitation, where there is a sound evidential basis for doing so. This appellant had placed no reports before the court suggestive of any track record of progress towards rehabilitation. Neither had he called any witnesses, expert or otherwise, to support a claim of commitment to

rehabilitation, The high water mark of it was an acceptance by Garda Dillon, elicited in cross-examination, of an awareness that the appellant was seeking to engage with addiction services while in prison, and also that he was using the gym and attending school while in prison. In our estimation, this would not per se have justified the sentencing judge in suspending part of the sentence.

46. A judge's decision to suspend or not to suspend part of a sentence is very much a matter within his/her discretion, and this court will always be very slow to criticise or interfere with the exercise of such discretion. Given the evidential deficit to which we have alluded, we consider that the sentencing judge in this case cannot be criticised for how he exercised his discretion.

47. Moreover, we find that his stated rationale for not suspending any portion of the sentence, namely that the appellant had committed the offences while disqualified from driving, is not suggestive of any error. It was a legitimate consideration that the appellant, who was pressing the court for exceptional leniency based upon an intention to reform, had shown blatant disregard for the lengthy disqualification imposed upon him in respect of earlier road traffic offenses. He clearly had not learned any lesson, and the sentencing court could have had no confidence that if afforded exceptional leniency by the partial suspension of the otherwise appropriate sentence as an incentive to rehabilitation he would take the chance offered to him.

48. In the circumstances we are satisfied that the sentence imposed here was neither excessive nor disproportionate. We also find no error of principle with respect to how the mitigating circumstances in the case were dealt with, including the fact that no portion of the sentence was suspended.

49. The appeal is dismissed.