



THE COURT OF APPEAL

Record Number: 109/2021

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

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

AND

TYLER LEWIS

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 10th day of October 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. On the 23rd November 2020 at Cork Circuit Criminal Court, the appellant pleaded guilty to one count of possession of a knife contrary to s. 9(1) and (7) of the Firearms and Offensive Weapons Act, 1990 as amended, one count of unlawfully interfering with the control of a motor vehicle contrary to s. 10 of the Criminal Law (Jurisdiction) Act 1976 and one count of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997. He was sentenced to 4 years' imprisonment on the first two matters and 6 years' imprisonment in respect of the false imprisonment offence. All sentences were imposed concurrently.

Background

2. At approximately 7:15 pm on the 20th July 2020, the injured parties, Mr G and Ms D, were having a cigarette outside their vehicle in a carpark in Cork City Centre when they were approached by the appellant who asked them for a light. He had difficulty lighting his cigarette as he was wearing yellow washing up gloves. The couple became nervous and got into their vehicle. At this stage, the appellant opened the back passenger door of the car and jumped into the back seat and, as a consequence, Ms D jumped out of the car in fear. The appellant produced a knife which was described as being approximately 15 centimetres in length with a black handle which he pointed at the driver, Mr G. The appellant told Ms D to get back into the car or else he was going to stab Mr G. He repeated the threat. Ms D believed the appellant would carry out this threat and feigned a panic attack. As a result of this, the appellant fled the scene on foot.

3. The couple telephoned 999 and gave a description of the appellant to the Gardaí upon which the investigation commenced. CCTV footage was recovered showing the appellant purchasing the knife and yellow gloves from a Supervalu at 5:34pm that evening. Further CCTV footage shows the appellant fleeing from the incident, discarding items of his clothing and the packaging of the knife. Gardaí carrying out a search the following day, recovered the knife used in the incident in a park in Cork City Centre and the appellant was arrested later that evening.
4. Due to the state of intoxication of the appellant, he could not be interviewed until the morning following his arrest. He made full admissions and was remorseful.

Personal circumstances of the appellant

5. The appellant was 20 years of age at the time of sentencing. He is the father of two young children, and he suffers from addiction issues.
6. He has 31 previous convictions, these include three convictions for the possession of knives, assault causing harm, the possession of drugs, criminal damage, violent disorder and public order matters.

The sentence imposed

7. The sentencing judge identified a pre-mitigation headline sentence of 9 years' imprisonment in respect of the false imprisonment count, citing inter alia the "extremely stressful circumstances" endured by the two injured parties.
8. In terms of mitigation, the judge took into account the appellant's guilty plea and his cooperation. He took these factors to reduce the headline sentence to one of 6 years' imprisonment from the date of the sentencing hearing.

Grounds of appeal

9. The appellant appeals his sentence on 4 grounds which are set out in the submissions. It appears that the appellant sought an enlargement of time which contained 4 potential grounds of appeal, however those grounds are somewhat reformulated in the submissions. Moreover, leave on the date of this hearing was granted to permit an additional ground relating to the failure of the judge to backdate the sentence. In substance, therefore, the grounds related to: -
 - (1) The headline sentence;
 - (2) The weight attached to the mitigating factors;
 - (3) The question of rehabilitation and
 - (4) The failure to backdate the sentence.

The Nominated Headline Sentence

10. It is clear from the submissions that the appellant's primary appeal rests with the sentence imposed for false imprisonment where it is submitted that the headline sentence

of 9 years' imprisonment is excessive in all the circumstances. In support of this contention, the appellant points to the relatively short duration of the incident, the absence of any actual use of violence and the fact that no property was taken or damaged. It is also submitted that it is significant that the appellant ceased his actions and fled the scene upon Ms D feigning a panic attack. This, it is said, suggests an unwillingness to progress the offending past the point at which the victim exhibited signs of significant distress and indicates a lack of intention to do harm to the injured parties. The appellant further points to the level of intoxication of the appellant at the time of the offending as reducing his culpability.

11. The appellant refers to a number of cases where sentences were imposed in instances involving false imprisonment. It is submitted that the headline sentence imposed in the present case is excessive when compared with other cases where lower headline sentences were nominated for more prolonged offending, using actual violence against vulnerable victims.
12. The appellant relies on *The People (DPP) v Halligan* [2010] IECCA 17 which concerned an accused who gained entry to a shop and tied up the owner, an elderly and almost entirely blind gentleman, and imprisoned him for approximately 40 minutes. An initial effective sentence of two years was imposed, and this was increased in the context of an undue leniency appeal to one of six years. It is submitted that it is significant that the Court of Criminal Appeal in *Halligan* nominated a headline sentence of eight years, placing the offending involved there at a lower level than that in the present case, notwithstanding the serious aggravating factors in *Halligan*.
13. *The People (DPP) v Maguire* [2018] IECA 71 is also cited, in which case, the appellant entered the home of his estranged wife in breach of a barring order and assaulted and falsely imprisoned her in a bedroom for an extended period of time. An effective sentence of four years with the final two years suspended was imposed at first instance with this being replaced by a sentence of four years with twelve months suspended on appeal.

Mahon J said:

"Kidnapping offences cover a great variety of situations and are often committed in circumstances where, save for the victim being physically deprived of his or her liberty, there is otherwise little or no violence involved. Often in such cases, it is the fear or threat of violence which is used for coercive purposes, such as, for example, the type of case where a bank employee's family are kidnapped in order to facilitate a bank robbery. In the instant case the primary purpose on the respondent's part in entering the bedroom, and which he did in breach of a barring order, was to assault his former partner. It is unclear if he locked and re-locked the bedroom door to prevent his victim escaping, or to prevent the older children intervening to protect their mother, or merely to prevent them witnessing their mother being assaulted. In any event it was an incident which, when considered in its entirety, any right minded person would consider reprehensible and utterly deplorable."

14. Reliance is also placed on *The People (DPP) v Freeman* [2018] IECA 312 as a comparator case, where the appellant armed with a hurley, broke into the home of two elderly injured parties late at night with a group of other men and confined them to their bedroom for an extended period of time. The couple were assaulted and repeatedly threatened with violence. The appellant was 22 years of age and had 62 previous convictions. In the context of an undue leniency appeal, This Court nominated a headline sentence of 10 years. It is submitted that to equate the offending in the present case with that in the case of Freeman by imposing the same headline sentence in both cases is manifestly an error in principle.
15. Comparison is also drawn between the present case and the case of *The People (DPP) v Michael Cummins* [2018] IECA 413 in which the appellant detained two children in a house requiring one of them to jump from a first floor window to escape. The appellant was a man with some 230 previous convictions. It is noted that this Court took into account the intoxicated state of the appellant during the offending in mitigation, stating that it had merited a headline sentence of six years' imprisonment.
16. Further comparison is drawn between the present case and the case of *The People (DPP) v Michael Cummins* [2020] IECA 42 which involved an attempt to rob the injured party at an ATM. The injured party was assaulted and serious threats were made. It is pointed out that the appellant was intoxicated at the time of the offence. In the context of an undue leniency appeal, this Court imposed a sentence of four years' imprisonment with the final 18 months suspended.
17. The respondent does not accept that the nine-year headline sentence nominated for the false imprisonment offence was too high. It is submitted that the gravity of the offence was quite significant. The respondent says that the appellant had purchased the knife and gloves earlier in the evening, demonstrating premeditation, that he produced the knife in a frightening manner and made very serious threats to the injured parties. Moreover, that he had the presence of mind to dispose of the incriminating items in three separate locations. Further, the respondent points to the fact that the appellant was under a bond in respect of a two-year suspended sentence when this offence was committed. Furthermore, the appellant was on bail for another offence of possession of a knife (for which he was convicted in October 2020) at the time of the offending herein.
18. The respondent also submits that two powerful victim impact statements were before the court below which demonstrate the impact of the offending on the injured parties.
19. In addressing the appellant's comparator cases, the respondent notes that these cases arose in the context of undue leniency appeals which this Court has stated are of limited value as comparators due to the different factors to be considered in reviews of sentence on the basis of undue leniency and appeals against severity of sentence.
20. The respondent acknowledges that the circumstances of *Halligan* were more serious than those in this case but submits that Mr Halligan did not have the aggravating factors of being on bail and also being on a bond at the time of the commission of his offences. In

terms of the appellant's use of *Maguire* the respondent submits that the primary offence in that case was the s. 3 assault and the false imprisonment fell to be considered as part of the background of the case rendering it of limited assistance to the appellant. Similarly, the respondent submits that the *Freeman* case is of little value as a comparator as it relates primarily to aggravated burglary and considers the criteria which have been identified for same.

21. Furthermore, it is submitted that as the appellant in *Cummins* laboured under serious mental health problems and there was no weapon used nor were the factors of being on bail and on a bond present, that case is also of limited assistance to the appellant in this appeal. The same is said of the *Cummins* (2020) case.

Discussion

22. Counsel for the appellant helpfully indicated from the outset that this ground is the one which he seeks to urge with the most force. The nominated headline sentence was one of 9 years which it is said is excessive in the circumstances. He says that this is so in circumstances where it is contended that no actual violence was used, however, we immediately comment that the essence of the incident was one of violence. Mr McCullough BL goes on to say that other factors to be considered are that the incident itself was not prolonged in contradistinction to other cases involving false imprisonment and that the incident ended when one of the injured party's exhibited signs of distress.
23. First, we are grateful to the parties for the caselaw furnished to the Court, however it must be said that such are of limited precedential value in that the range of offending in cases of false imprisonment is extensive and so the factual matrix in each is generally very different. In addition, in many cases which come before the courts, the offence of false imprisonment may not necessarily be the primary offence. For example, in *The People (DPP) v Freeman*, the primary offence was that of aggravated burglary.
24. We look to the aggravating factors taken account of by the sentencing judge in the present case and we find they are many. It must be recalled that the appellant pleaded guilty to the within offences on a full facts basis. Therefore, insofar as the false imprisonment count is concerned, two injured parties were detained against their will by the appellant. Moreover, there was certainly premeditation involved on the part of the appellant, he purchased the knife and the marigold gloves earlier in the day which he then used in the very frightening ordeal to which the injured parties were subjected. The incident itself, although short lived was terrifying and had a profound impact on the two unfortunate victims. The nature of the incident must have been rendered all the more terrifying by the fact that the appellant was intoxicated. Add to those factors, that the appellant, (notwithstanding his intoxication) had the presence of mind to dispose of the incriminating items in several locations in the aftermath of the offending conduct. We further add that this is a man with relevant previous convictions for possession of knives.

Conclusion

25. Whilst the offending itself was short lived, we are not at all persuaded in light of the manner of the offending, the premeditation and the factors mentioned above that the

judge erred in his nomination of the headline sentence. We accept that the sentence nominated was on the high side, but given the aggravating factors, we are satisfied that such falls within the margin of appreciation afforded to a sentencing judge and so this ground fails.

Mitigation

26. It is submitted that the sentencing judge failed to attach any or any sufficient weight to the various mitigating factors in the present case. *The People (DPP) v O'Sullivan* (Unreported, Court of Criminal Appeal, 22nd March 2002) is cited in this regard which found that the failure to properly consider mitigating factors in sentencing can constitute an error in principle.
27. As regards the appellant's history of addiction and his difficult youth and upbringing, it is submitted that this appeared to weigh against him in terms of his sentence structure. Quotes are taken from the Transcript of the 23rd November 2020 in support of this submission. It is further pointed out that no mention was made of the fact that the appellant had been addressing his addiction issues in custody, that he was participating in a methadone programme or that he had successfully reduced his methadone intake from 100ml to 40ml.
28. It is the appellant's position that the reduction of three years from the headline sentence was in order to give effect to the totality principle and was not a reflection of the court's consideration of the appellant's mitigation. *The People (DPP) v McKeon* [2021] IECA 212 is cited in this regard.
29. In response to the appellant's submission that insufficient credit was given for the mitigating factors, the respondent notes that the headline sentence was reduced by one third for the mitigating factors which, it is submitted adequately reflects the mitigation present. Further, it is not accepted that the appellant's history of addiction and background were counted against him. It is submitted that in the portion of the transcript relied upon by the appellant, the sentencing judge was merely reciting the facts and not holding them against the appellant as aggravating factors. The respondent also submits that there is no evidence of the appellant's success in reducing his methadone intake himself.

Conclusion

30. Counsel points to the mitigating factors present including inter alia the admissions and the early plea of guilty, together with the appellant's own circumstances, his addiction difficulties and his youth. Specific complaint is made that the judge failed to expressly mention the appellant's age in passing sentence.
31. It must be recalled however, that the judge reduced the nominated headline sentence by one third in coming to the final sentence of 6 years for the false imprisonment of two people. It is, of course, preferable if a sentencing judge refers clearly to the matters being taken into account in the interest of transparency and as an aid to assessing if the reduction afforded for mitigation was sufficient. On appeal, however, it will not always amount to an error in principle, and we must look to the reduction afforded and the

ultimate sentence imposed to assess whether such sentence was just. In the present case, we are not at all persuaded that the judge did not afford an adequate discount and so this ground fails.

Rehabilitation

32. It is submitted that the sentencing judge made inadequate provision for the possibility of rehabilitating the appellant. *The People (AG) v O'Driscoll* [2021] IECA 212 is quoted in support of this submission. It is said that as the appellant is a young man whose offending is inextricably tied to his addiction issues and there was evidence before the Court of his steps to address same, the failure to impose a partially structured or suspended sentence was a failure to have adequate regard to the public interest in rehabilitation.
33. In addressing the appellant's submission that the public interest in rehabilitation was not adequately taken into consideration, the respondent quotes from *The People (DPP) v Coughlan* [2019] IECA 173 in which Edwards J stated that in order for an intervention to be made by way of sentence structure or suspension "there has to be evidence of a real prospect of rehabilitation." In that vein, it is pointed out that a fully suspended sentence was imposed on the appellant less than a year prior to the occurrence of the offending herein and therefore the sentencing judge was entitled to use his discretion not to structure or suspend the sentence

Conclusion

34. We intend to address this ground in short form as we are not satisfied that the judge erred in this regard. Rehabilitation is of course a most important aim in sentencing an offender. However, in deciding whether to suspend a portion of a sentence in pursuit of this objective, a judge may look to the past conduct of the offender. In the present case, the appellant had committed this offence whilst on bail and more significantly had committed the offending whilst under a bond. In the circumstances we find no error.

Failure to Backdate the Sentence

35. In terms of the final ground of appeal, the appellant submits that it is the practice in the vast majority of cases that a sentence will be backdated where an accused person has spent a period of time in pre-trial custody. It is said that prior to his sentencing hearing the appellant had been in custody solely in respect of the offences the subject of this appeal and that by reason of his inability to take up High Court bail he had missed the birth of one of his children. In this way, it is submitted that the period spent on remand in this case was particularly meaningful to him.
36. Reference is made to *The People (DPP) v Flaherty* [2015] IECA 161 in which it is stated that the departure from the practice of giving full credit for time spent in custody prior to the sentencing date is "exceptional." The appellant submits that the only reason offered by the sentencing judge for his departure from this practice was that the appellant was on bail when the offences were committed. It is the appellant's position that this reason does not place the present case into the "exceptional" category as identified in *Flaherty* and further that in light of the significant headline sentence the decision not to backdate potentially gives rise to a risk of double counting.

37. In response to the appellant's final ground of appeal, the respondent submits that it is always within the discretion of the sentencing judge to decline to backdate a sentence and further, in light of the fact that the offence occurred while the appellant was out on bail for another offence, the sentencing judge in the present case was quite entitled to decline to backdate the sentence.

Conclusion

38. Again, we feel able to address this in short order. The judge gave a clear reason as to why he did not feel able to backdate the sentence. He explained this was because the appellant had committed the offence while on bail. A judge has a discretion in this regard which must of course be carefully applied, and we are satisfied that he did so.