



THE COURT OF APPEAL

[3/2020]

**Birmingham P.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN

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

RESPONDENT

AND

ROY O'CALLAGHAN

APPELLANT

JUDGMENT of the Court delivered on the 26th day of June, 2020 by Ms. Justice Ní Raifeartaigh.

Introduction

1. This is an appeal against severity of sentence. The appellant, Mr. Roy O'Callaghan, pleaded guilty in respect of one count of robbery contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which was committed on 27th September, 2019 on Patrick Street in Cork.
2. On 20th December, 2019, the appellant was sentenced to four years imprisonment of which the final year was suspended on condition that he remain under the care of the probation service for two years and obey all their directions, including any direction in relation to in-patient treatment. This sentence was backdated to the date that the appellant was taken into custody on 27th September, 2019.

Factual background

3. At 7.45am on 27th September, 2019, Mr. Jonathon Hennessy, the injured party, was at a bus stop on Patrick Street in the city of Cork about to get the bus to work when he was approached by two males, one of them being the appellant. The appellant grabbed the phone out of Mr. Hennessy's hand telling him that he needed to make a phone call. When Mr. Hennessy pleaded with him to get it back, the appellant refused and then pushed Mr. Hennessy against the bus stop. He held him there, searched his pockets, and threatened him in the following manner: "Do you want me to slice you or splatter your face off the bus?" The appellant took approximately €4 worth of change and cigarettes from Mr. Hennessy's pockets. He then left the area with Mr. Hennessy's property.
4. Mr. Hennessy went to the Bridewell Garda Station where he reported the matter. Gardaí returned to the scene with Mr. Hennessy and he was able to point to the appellant within the bus terminal at Parnell Place. The appellant was arrested by Gardaí shortly after the incident and the property was found on his person. The incident was also captured on CCTV. There was therefore strong evidence against the appellant. Mr. O'Callaghan made

full admissions to the Gardaí and was sent forward on a signed a plea of guilty in respect of the offence.

The appellant's personal circumstances

5. The appellant's date of birth is 13th December, 1983; accordingly, he was thirty-seven years of age on the date of the offence in question. He is the father of one child and has been homeless, living in Cork city centre, for quite some time. He has no previous convictions for robbery but has a substantial history of offending totalling 283 previous convictions. These were for District Court matters, including 71 convictions for theft and fraud offences, , and many of them related to thefts of alcohol and offences contrary to s.4 of the Criminal Justice Public Order Act, 1994 for public drunkenness and public order related incidents around Cork city centre.
6. During cross-examination, Garda Barron told the sentencing judge that the appellant had expressed remorse to Gardaí; that he had been the victim of a serious assault when he was a teenager; and that his history of offending appears to be generally alcohol-related.
7. In mitigation it was stated that the appellant had struggled with alcoholism all of his adolescent and adult life, and that over the years, he had been in four treatment institutions of a residential nature including Coolmine (twice), Bruree (four times), Tabor Lodge (twice) and the Sisters of Mercy (twice). Unfortunately, he had not managed to overcome the battle with alcoholism. Counsel for the appellant urged to the sentencing judge to let him go to a residential institution.

The sentence

8. In assessing the aggravating circumstances, the sentencing judge referred to the behaviour in question as "an appalling crime". He referenced the time of day that the offending behaviour occurred and took particular note of the threats issued to Mr. Hennessy who was a man engaged in the simple business of going to work. The sentencing judge referenced the "phenomenal number" of previous convictions incurred by Mr. O'Callaghan and noted his previous attempts at rehabilitation.
9. The sentencing judge imposed a headline sentence of four years and suspended one year to take account of mitigation.

Submissions on appeal

Appellant's submissions

10. Counsel for the appellant submits that the headline sentence of four years is excessive and that not enough was discounted by the sentencing judge in light of the mitigating factors, which include Mr. O'Callaghan's alcoholism and his corresponding desire to seek help, his homelessness, his remorse and the fact that he signed a guilty plea at the earliest possible opportunity. Counsel submits that the appellant should have received a discount of one-third off his sentence as he proceeded on a signed plea and relies, in that regard, on the case of *DPP v. Cambridge* [2019] IECA 133 in which the Court, when re-sentencing the appellant (for separate reasons), made the following observation on the

significance of signed pleas (despite weighty evidence of the appellant's involvement in drug dealing) at paragraph 8:

"We again take this opportunity of emphasising the special weight which should be attached to signed pleas *whatever the state of the evidence*. We think in the circumstances that the appropriate reduction from the headline sentence, because of the signed plea, should be in or about a third, that is to say, two years."
(emphasis added)

11. Counsel for Mr. O'Callaghan also referred to the recent decision of *DPP v. Broe* [2020] IECA 140 in which the Court commented on the issues of suspended sentences, mitigation and rehabilitation.
12. Regarding the comparator cases on headline sentence for robbery relied on by the respondent (including *DPP v. Hanley* [2019] IECA 358, *DPP v. Barry* [2018] IECA 339, and *DPP v. Delaney* [2018] IECA 72), counsel for the appellant submits that each case is distinguishable on its facts in circumstances where physical injury was inflicted, a weapon was produced or it was not a first time robbery offence, none of which apply to the present case.
13. When asked by the Court for any up to date information, counsel for the appellant informed the Court that the forthcoming Governor's report would indicate that Mr. O'Callaghan has been engaging in education and availing of one-to-one counselling.

Respondent's submissions

14. Regarding the appellant's submission that the headline sentence is excessive, counsel for the respondent submits that it is not too high particularly in light of the fact that the case involved actual violence as well as a nasty threat of violence to a man who was simply standing at a bus stop and going to work. Counsel relies on a number of authorities on headline sentence in robbery cases in this regard.
15. Regarding the submission that the discount from the headline sentence was not proportionate to the mitigating factors present in this case, counsel for the respondent submits that all mitigating factors were taken into account. Counsel pointed out that the evidence against the appellant was very strong indeed and submitted that the "professed remorse" and "co-operation with Gardaí" were products of that same set of circumstances. There was another person involved in the assault albeit that he had not played any active role in it.

Decision

16. This was a nasty incident in which the appellant pushed, threatened, and stole from a man who was simply standing a bus stop waiting for a bus to go to work. We note that no weapon was involved and that no physical injury was suffered. However, there was another person present with the appellant, even if that person was not actively participating in the robbery, and the threat to the injured party was most unpleasant.

17. While the appellant has no previous convictions for robbery, a striking feature of this particular case is the significant number of other previous convictions he has (283 in total); many of which appear to be alcohol related thefts or public order offences in and around Cork city centre, and which are no doubt related to the significant problems with alcohol that the appellant has had for a long time.
18. Having regard to those circumstances, we are of the view that the sentence of four years was not unduly severe as a headline sentence prior to reduction for mitigating factors.
19. Regarding the reduction in sentence to three years on condition that the appellant obey any direction of the prison service in relation to in-patient treatment, it is our view that the circumstances of the accused, including his problems with alcohol addiction, were sufficiently taken into account in the manner in which the sentencing judge structured this sentence and the sentencing judge was well within the principles as set out by Edwards J. in *Broe*.
20. Nonetheless, there is one issue which raises a question for the Court and that is the question of the appropriate discount where an accused person signs a guilty plea at the earliest possible opportunity and is sent forward for sentence on that plea. It is true that the evidence against the appellant was strong; he was identified near the scene and in possession of the stolen property; and there was CCTV footage of the incident. In effect he was almost caught red-handed. However, there is no doubt that, from a policy perspective, the signing of a guilty plea is of considerable value to the system as a whole and is to be greatly encouraged. Having considered the submissions, the Court agrees with the approach in *Cambridge* that, in general, a one-third discount should be given no matter what the strength of the evidence in the case.
21. That being so, the Court will accede to the application insofar as it will vary the sentence to reflect a one-third discount for the signed plea instead of the one-quarter given by the sentencing judge. The sentence will therefore be quashed and a new sentence imposed of 4 years imprisonment with 16 months suspended upon the same conditions as those imposed by the sentencing judge. The sentence will be backdated in the same way as the sentence imposed at first instance, i.e. to the 27th September, 2019.
22. The appellant to enter into a bond before the prison Governor in the sum of €200.00 for a period of two years on the usual conditions and also on the condition that he comply with the directions of the Probation Service during that period including any directions as to in-patient treatment.
23. Liberty to apply should any difficulties arise concerning the bond.