THE COURT OF APPEAL

[220/17]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

APPLICANT

AND

JAMES MCDONAGH

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 5th day of November 2020 by Mr Justice McCarthy

1. This is an application by the Director of Public Prosecutions under s.2 of the Criminal Justice Act, 1993 to review a sentence imposed on the respondent on the basis that it was unduly lenient.

2. The respondent entered a plea of guilty on March 14th 2017 to a count of assault causing harm, contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997, and to a count of assault, contrary to section 2 of the same Act. The offences were committed on the 18th July 2015.The victims were Dafydd Hughes and his son Joe Hughes respectively. The respondent was sentenced in the Circuit Criminal Court on the 10th of July 2017 to eighteen months imprisonment fully suspended in respect of the count of assault causing harm and that of assault simpliciter was taken into consideration; a *nolle prosequi* was entered in relation to a count of production of a weapon, a glass bottle.

3. On the date of the offence, the 18th of July 2015, Mr. Hughes and his family, who lived in England, were here to enjoy a weekend in Dublin. His sister and her child had returned from Australia and met them here. At approximately 9.00 p.m that evening Mr Hughes and his family were waiting at a bus stop on O'Connell Street in order to board a tour bus. As they were standing at the bus stop, Mr Hughes was speaking to his sister and smiling when the respondent approached him and said, "When you've got one eye you won't be smiling". He was holding a glass bottle in his right hand. Mr Hughes didn't know what the respondent was going to do with the bottle so he pushed him away at which point the respondent punched Mr Hughes in the mouth. He swung the bottle at Mr Hughes on a number of occasions, connecting with Mr Hughes's head on one occasion. His son Joe Hughes came over to assist his father and the respondent punched him in the face. He threw a second punch and hit Joe Hughes on the hand. A security officer from a nearby business premises came and stood between the respondent and the injured parties. The

respondent then asked Joe Hughes for a 'one on one." After shouting some more, the respondent then left the scene. Mr Hughes bled from the head and face. As indicated, Mr Hughes was accompanied by his sister, who practices as a doctor in emergency medicine, and so she was able to tend to his head wound, which was described as a six-centimetre gash, and glued the wound closed. As a result, he did not require any other medical intervention. With commendable resilience he continued his tour but the following day his head and mouth were described as sore. The respondent was arrested a relatively short time afterwards and was found to be intoxicated; indeed, he asserted his memory of the incident is poor by virtue of that fact.

4. The respondent was 20 years of age at the time of the offence. He had, at the time of sentence, 31 previous convictions which were summarised at the sentencing hearing as being two convictions for possession of articles contrary to s.15 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, two convictions for criminal damage, one conviction for robbery, one conviction for an offence contrary to s.112 of the Road Traffic Act, 1961, one conviction for an offence contrary to s.9 (5) of the Firearms and Offensive Weapons Act, 1990, four convictions for handling stolen property, five convictions for public order offences and fifteen convictions relating to road traffic offences. We were told at the hearing that convictions had been entered up since he was sentenced but afforded little detail. We were told that none of these were for offences of violence but it appears that they pre-dated the imposition of sentence though they had not been disposed of at that time. There is a sense accordingly in which the trial court was not apprised of the true character of the respondent because not all of his criminal conduct was made known and this may have had a bearing on the trial judge's approach. Whilst there will undoubtedly be practical limits to doing so we think that it is desirable that every effort should be made to ensure that sentencing takes place on an informed basis; this will mean that if a multiplicity of charges are pending it may be appropriate to adjourn sentence on one until the conviction or acquittal on the others, and thereafter, in the event of conviction, sentence on all together. From time to time we have seen cases where a plea is made and sentence imposed but without any reference to the fact that charges are pending in respect of other offences, since, at the time of such a plea, such charges are merely allegations: it is possible for a picture to be painted to a sentencing judge quite different to the reality that the individual may be guilty of those offences and quite different in character to how he is presented. There is one reference in the Probation Report to a charge pending as of its date, July 7th 2017. In practical terms, the prosecution will be in the best position to know about charges pending at the time of a sentence hearing but there is a responsibility on the defence also to bring to the attention of the court that this is the case, if solicitor or counsel are aware of such charges. In effect, however, in the present case, the position of the prosecution was, before us, that there these convictions were not relevant to charges of the present type and hence we confine ourselves to saying that apart from the effect of the prior convictions given in evidence in the trial court the fact of their existence

5. Such information as is available about the respondent's personal circumstances derives primarily from the Probation Report. It appears that the respondent left school at an early

age and has what was described by the Probation Officer as "a long and entrenched history of drug and alcohol abuse" from his early teens and extending to cocaine use. He is one of eleven siblings and is apparently the only member of the family who has involvement with drug abuse. From February 2016 he had some contact with a so-called Pre-Entry Group to the Coolmine drug treatment organisation but this was apparently sporadic and the clear inference is that he was not seriously committed to it. However, some three weeks before the date of the Probation Report his attendance improved very markedly; the Probation Officer regards his change (including abstinence from drugs over that short period) as "a little too late" and she believes that "this sudden change may be more to do with his fears of a prison sentence rather than any serious attempt at rehabilitation". As matters presently stand, accordingly, there is no real evidence indicating he may be in a position to achieve some rehabilitation where drug abuse is concerned; in any event this is not a case where the offence was attributable to, say, a desperate attempt to obtain funds to fuel an addiction but is, rather, what we might describe as a freestanding act of aggression.

6. A sum of €5000 was offered in compensation to Mr Hughes which was accepted by him on the basis that it would be used in connection with his son Joe's third-level educational expenses. At an earlier stage of the proceedings the question of an offer of €500 in compensation was canvassed on behalf of the respondent. There is no evidence as to the origin of the sum of €5000. Counsel asserted on instructions that it was from the work of the respondent in the scrap metal business. Since the sentencing hearing at which the question of compensation was first mooted was on 28 April and the matter was finalised on 10 July if the sum in question was, to use counsel's phrase "saved and toiled" (for), the respondent's income from that business must have been substantial or he spent nothing in the intervening period. In fact of course the idea that he might have worked is utterly inconsistent with all of the other information in the case and especially the probation report which explicitly states that the respondent "has never been in any form of employment, although he says he has helped his brother in the odd casual job". No court can act except on evidence and the submissions or assertions of counsel are not a substitute for it. Payment of compensation is usually a mitigating factor and is so here. There are circumstances where the payment of a sum in compensation might be indicative of a real level of remorse especially where an individual in a very real way had made significant personal sacrifice and undergone hardship in order to compensate his victim; in such cases a payment may well carry greater weight as a mitigating factor than in the case where, say, the funds come from third parties. In the present case we do not regard such payment as being of more than modest significance.

7. At sentencing, the learned judge had this to say:-

> *"I consider the section 3 assault to which the accused has pleaded guilty to be a serious offence and one which I indicated on the previous occasion in the ordinary way would merit a sentence of two years of imprisonment. I also indicated on the last occasion, I think, that having regard to the mitigating features which have been identified, including his plea of guilty, his cooperation with the Gardaí in the*

investigation and his expression of remorse, that I would be disposed to give him credit for those mitigating matters and features and that I would reduce that two year sentence to one of 18 months imprisonment but it was urged upon me that I might stay my hand for the purpose of obtaining a probation report and also for the purpose of ascertaining what the victims' attitude to what was being then canvassed as a sum of €3,000 in compensation. And as Mr Spencer has recorded, I indicated that I would somewhat reluctantly and against my better instincts, perhaps, adjourn the case to today's date for the purpose of the probation report in particular.

Now, fortunately the injury suffered by the victim was not too serious and it wasn't so much the extent of injury which caused me to indicate that I felt €3,000 to be inadequate compensation but the undoubted -- the appalling effect that this assault would have had on the victim, Mr Hughes, and his family, who were over from the UK to enjoy a weekend in Dublin which, while he proceeded to get on the ghost tour bus after the assault and made as little as possible of the incident, undoubtedly it had a very adverse effect on them. I do note, having regard to the multiple previous convictions of the accused, who is only 22 years of age, that this assault is out of character in that other than a robbery which was taken into consideration on one previous occasion, he does not have a record of previous convictions for such violent behaviour. I note that from the probation report that it is only recently that Mr McDonagh has improved in his efforts towards rehabilitation and re-engaged, particularly over the last three weeks, and that he is noted to be drug free at the moment, but the Probation Service are somewhat sceptical about this and whether it is solely as a consequence of the imminence of this sentence hearing that that improvement occurred. But notwithstanding those doubts expressed by the Probation Service, it does appear that he is engaging with the Coolmine pre-entry group with a view to re-establishing his efforts to obtain entry in to a residential drug treatment programme. While it will be contrary to the views expressed by the Probation Service, I am going to somewhat reluctantly give him the benefit of the doubt as regards those recent efforts to rehabilitate himself and deal with his very serious drug problems, and I am going to do that in circumstances where the sum of €5,000.

…

Now, what I propose to do, therefore, is to suspend a sentence of 18 months on Mr McDonagh's entering a bond in the sum of €100 to keep the peace and to be of good behaviour for a period of two years from today's date and that he during that period go under the supervision of the probation services. Secondly, that he attend all drug and other counselling services offered or directed by the Probation Service for him to deal with his drug and the other problems which he has; that he remain drug free for that two year period; and should he breach any of those bonds and undertakings, the Probation Service will be at liberty to have the matter re-entered so that the sentence might be activated."

8. The grounds of appeal pleaded in Notice are extensive but the applicant's position was refined; it was not suggested that the headline sentence of two years identified by the trial judge was so lenient as to give rise to an error of principle but rather that the trial judge had fallen into error by suspending the entirety of the post mitigation or final sentence. This proposition was advanced by reference to the aggravating factors (which, it was suggested, were not given sufficient weight by the trial judge) namely, that the attack was unprovoked and initiated by the respondent, that the injuries were of significance and had been understated by the trial judge, that a weapon, a glass bottle, capable of causing serious injury was used, that the offences were committed upon guests in this country, and that the offence in respect of which Mr Dafydd Hughes was the victim was perpetrated in the presence of his children, aged 16 and 11. It is contended that while there were significant mitigating factors present, undue weight was given to them by the sentencing judge. The applicant also submits that the sentence imposed failed to include a sufficient element of deterrence both personal and general.

9. The respondent submits that Director has failed to identify any error in principle in support of the submission that the sentence imposed was unduly lenient. It is submitted that it does not meet the requirements, set down in the case law of this court, that must be met before this Court will review the sentence and impose a more severe one. The respondent submit that the sentencing judge adequately justified the decision to impose a sentence of 18 months fully suspended. The case cannot be divorced from its context and the trial judge had regard to the personal circumstances of this accused in gauging the appropriate sentence to be imposed, and importantly the accused's guilty plea, his family situation, and personal circumstances at the time of the commission of the offence. It is submitted that the accused's lack of a violent criminal history; his family life and his "early" efforts at rehabilitation from drugs and alcohol are factors that needed to be taken into account in reducing any custodial sentence. The court, it is said, took all matters including aggravating and mitigating factors into account. It was submitted that his guilty plea (albeit not an early plea but one that was of value and saved the injured parties having to travel to give evidence) his recent, albeit unfulfilled, efforts at tackling his drug and alcohol dependency, the fact that there were few offences of violence in his criminal history, the respondent's willingness to engage with the Probation Service , and the concrete expression of remorse shown (by which is meant the payment of €5000 in compensation), were all weighty factors that were considered by the court. The respondent had a difficult family situation and was someone who had limited education and was directly involved in the care of his sister's daughter. It is said that the respondent was intoxicated and unfit for interview upon arrest and only remembered flashes of the incident itself. While this factor does not excuse his behaviour in any way does serve to slightly dilute the mental element of the offence. The offence was not premeditated. Further, the respondent was, at the time of the incident, suffering from the emotional fallout experienced as a result of the loss of his brother. A death certificate was produced in this regard.

10. We sought to establish at the hearing what was the reason for the lapse of time between the date of sentence, July 10th 2017 and the date of the appeal. It appears that the

respondent absconded when granted bail on another charge and was returned to the state from the United Kingdom under a European Arrest Warrant some months ago. He is now in custody on that charge, namely, a charge of false imprisonment to which he has pleaded guilty and in respect of which sentence will apparently be imposed in the immediate future.

11. It seems to us that the incident giving rise to the present sentence (there were of course two offences) must be regarded as serious by any yardstick so far as offences contrary to section 3 of the 1997 Act are concerned. It occurred on a summers evening on the main street of the capital of this country when overseas visitors were about to join a tour bus. They had nothing whatever to do with the respondent but he approached them in a threatening manner and engaged in vulgar abuse. He was armed with a bottle and inflicted significant injury, being a laceration of some 6 cm – indeed such a weapon is capable of inflicting far more serious injury. Mr Hughes showed great resilience in continuing his holiday and was extremely fortunate that his sister was in a position to treat him. The episode was undoubtedly frightening for all concerned but especially so for the children present.

12. There is no doubt but that mitigating factors exist. The respondent pleaded guilty. Compensation was paid. He is of modest educational attainments and has what was described in the probation report as an entrenched drug and gambling problem (although the offence has nothing to do with drug use).He began drinking when he was some 12 years of age (and appears to have been intoxicated on the occasion in question here); his drug abuse commenced with the use of cannabis and ultimately developed to the point where he was using cocaine. At the time of sentence and for approximately three weeks beforehand he had had apparently been attending "Pre-Entry Group" for Coolmine. The Probation Report does not, however, paint an impressive picture of the respondent apart from any question of drug misuse. The probation officer refers to the failure of the respondent to apply himself to rehabilitation in that context in "any sustained and committed fashion" commenting to the effect that it may be opportunistic. Furthermore, it does not appear from the report that the respondent has a real understanding of the ill effects of his offending on the victims.

13. In all of the circumstances of the case we think that the trial judge fell into an error of principle in suspending sentence. We think that the headline sentence which the judge chose was very lenient and the judge also afforded an appropriate reduction from that headline sentence to take account of relevant mitigating factors. We think that the intrinsic seriousness of the offence, however, on any view, necessitated the service of a term of imprisonment of at least 18 months. The mitigating factors were modest and this class of offence is one where high priority must be given in sentencing to the principle of general deterrence. In the present instance, specific or personal deterrence is also necessary.

14. We therefore quash the suspended sentence. On re-sentence we impose a term of imprisonment of 18 months from the 30thof October 2020.