THE COURT OF APPEAL

Record No. 2020/ 259
Neutral Citation Number: [2021] IECA 129

The President

Woulfe J.

Edwards J.

BETWEEN/

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

RESPONDENT

-AND-

B.H.

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Woulfe on the 28th day of April 2021

1. This is an appeal against the severity of a sentence of life imprisonment (with a review after ten years) imposed by the Central Criminal Court on the 16th December, 2020. The appellant, who is a minor, pleaded guilty to murder on the 7th September, 2020. It is accepted by the

respondent that the plea was entered by the appellant at an early stage of the proceedings, without the taking of a trial date and in advance of any disclosure being sought.

2. The appellant appeals against the severity of the sentence imposed on the grounds that the sentencing judge gave excessive weight to the aggravating factors in the case, and either failed to have regard to certain mitigating factors which were not referred to, or gave inadequate weight to certain mitigating factors which were referred to.

Background

3. It may be useful to outline a chronology of the events that led to the sentence. The incident in question occurred at a flats complex in Dublin City in April 2020, and the offence involved the killing of the appellant's friend (hereinafter "the deceased"). The appellant at the time of the murder was sixteen years of age and the deceased was twenty years of age. The two were good friends and had been taking a lot of drugs in the days leading up to the murder. The two had a falling out two days prior to the murder. The windows of the deceased's family home were smashed by third parties aggrieved by a drugs transaction which had gone sour, and the deceased believed that the appellant had "ratted" the deceased out to these persons, by identifying his home to them.

4. There was evidence of communications via internet messages that the appellant had been labelled "a rat" by the deceased. The appellant received a text message from his father which indicated his father's belief that he was after "ratting" on the deceased, and this message caused him significant distress. The mother of the deceased told Gardaí that, during the course of a Facebook call she received from the appellant about an hour before the incident, the appellant said about the deceased, "He's going around calling me a rat. Wait till you see what I'm going to do to him, just wait and see. I swear on my sister's life."

5. On the evening of the 15th April, 2020 the appellant made his way down to the flats complex on the northside of Dublin City. He encountered the deceased as he entered the complex. There was an initial altercation, which was in a dark area not captured by CCTV, where it appears the deceased gained the upper hand in the dispute. After a brief separation of the two the fight resumed further out into the pathway of the complex, where it was then visible on CCTV footage. It was at this point that the appellant retrieved a knife from a bag which he had brought to the location, before stabbing the deceased a single time in the chest area which resulted in his death shortly afterwards.

6. The appellant gave a voluntary cautioned statement later that same night in Mountjoy Garda Station. He admitted his involvement in the fight and it is agreed that while he initially sought to suggest that the deceased had an implement, and then claimed that the weapon which he had brandished was a piece of glass, by the end of the interviews he had accepted his role fully, including that he had used the knife in question. The following day, the 16th April, 2020 the appellant was arrested, detained, further interviewed and subsequently charged with murder. On the 17th April, 2020 he was brought before the District Court where evidence of the arrest, charge and caution was given. He was remanded in custody and on the 3rd July, 2020 he was sent forward for trial to the Central Criminal Court. The appellant's case first appeared before the Central Criminal Court on the 27th July, 2020. Rather than fixing a trial date, the case was adjourned until later in the week and then until September 2020 for mention. On the 7th September, 2020 the appellant who was then seventeen pleaded guilty to murder. Sentencing was adjourned and the trial judge directed the preparation of a probation report. On the 5th October, 2020 the judge heard further facts and submissions, including the detailed Victim Impact Statements, along with a letter of apology from the appellant, a number of letters dealing with the difficult background of the appellant and the Probation Report prepared for the assistance of the Court. The Court adjourned sentence and directed a psychological report from the director of Oberstown Children Detention Campus.

Remarks of the sentencing judge

7. The sentencing hearing resumed on the 16th December, 2020, and the judge gave what both parties agreed was a very detailed ruling. He began by noting that he was in receipt of a number of detailed reports, including a probation report, a clinical psychology report and a substance misuse initial assessment report. He referred also to receipt of a number of testimonials which outlined the personal circumstances of the appellant, and which indicated that there had been very great difficulties over the years as he grew up.

8. He then recounted the facts of the case in considerable detail. He noted how the appellant had brought with him a knife to the scene which was used in the killing. He referenced the regret and remorse expressed by the appellant, which he accepted as deep-rooted and sincere and stated that this attitude had been reflected in how he met the charge in this case. The sentencing judge then summarised the Victim Impact Reports. He again mentioned the manner in which the appellant had met the case, and described this as something which attracts significant mitigation.

9. The sentencing judge summarised the legal principle governing the sentencing of young offenders. He noted how the mandatory life sentence for murder does not apply to children, and how the young offender has to be sentenced in accordance with the principles set out in the Children's Act 2001, as amended. He noted how the sentencing judge may not impose either a fully or partly suspended sentence of detention on a child.

10. The sentencing judge then considered the aggravating and mitigating factors of this case. As regards aggravating features, he highlighted the fact that the appellant had armed himself with a knife before he went to confront the deceased. He referred to a number of significant mitigating factors, including the early plea of guilty, the sincere and genuine remorse expressed by the appellant, his age, the behavioural issues, the developmental issues and a

deficiency in judgment on his part. He noted from the reports furnished to him that the appellant appeared willing to engage with the support services available to him, having had something of a chaotic lifestyle as he grew up, and not having had engagement of any meaningful nature with support services at the time of the offence.

11. The sentencing judge then stated as follows:-

> "*He is a person who has pleaded guilty to murder, but as an offender who has struck the fatal blow with a knife, which he brought to the scene in anticipation of a confrontation with the deceased. And it seems to me that -- and I'm satisfied that the use of a knife on another human being in those circumstances, with fatal consequences, being an offence for which the law doesn't recognise different degrees, must indicate that the maximum penalty of detention for life in terms of the killer convicted in such a case is appropriate. But there are features of the case that remove it from the most egregious or vicious of murders, such as meticulously planned shootings or killings, the type of murder which this is not. And that allows the Court to consider a review of the sentence after a period which is well short of that maximum sentence. This attack had many of the hallmarks of immaturity and stupidity and an appalling lack of judgement and sense of proportionality. He was 16 at the time, in his mid-teens. He has to be distinguished from a person, a youngster who has committed an offence of this kind who might be just short of their 18th birthday at the time of the offence, or a youngster who is at the commencement of their teenage years. But it has to be treated as a most serious offence. The sentence -- the detention that he will face into inevitably means that he will have the difficult transition from detention to the -- to prison after a period. And after a significant period then, the case can be reviewed by this court. It seems to me that the appropriate sentence initially, a period of detention, is one of 10 years*

from the date arrest, which I'll be furnished with in a moment. And that after that period, the sentence should be reviewed."

12. The sentencing judge concluded his remarks by directing that reports on the appellant's progress during his period of detention should be filed with the Court registrar at two yearly intervals, so that the reviewing Court would be in a position to consider the progress made at the review in a methodical way.

Submissions of the Parties

13. The appellant appeals against the severity of the sentence imposed by the trial judge on the following two grounds, that the trial judge gave excessive weight to the aggravating factors in the case and failed to have regard to a number of mitigating factors or gave inadequate weight to certain other mitigating factors.

14. As regard aggravating factors, the appellant cites the following observations made by the sentencing judge in relation to the circumstances of the killing:

> *"...there are features of the case that remove it from the most egregious or vicious of murders, such as meticulously planned shootings or killings, the type of murder which this is not. And that allows the Court to consider a review of the sentence after a period which is well short of that maximum sentence. This attack had many of the hallmarks of immaturity and stupidity and an appalling lack of judgement and sense of proportionality.*"

It was accepted that the conduct of the appellant in bringing a knife to the scene and using it to kill the deceased was clearly an aggravating factor in an appalling crime, however it was submitted that this conduct could be contrasted with cold-blooded attacks and attacks by more mature people. While reference was made by the sentencing judge to this distinction, it was

submitted that in the light of this distinction excessive weight was given to this aggravating factor.

15. As regards mitigating factors, the appellant submitted that the sentencing judge failed to have regard to a number of additional mitigating factors as follows:

    1. The appellant had no previous convictions;
    2. The appellant made lengthy admissions in the Garda interviews;
    3. The appellant had made a decision to attend the Garda station on the evening of the attack to hand himself in;
    4. The appellant had demonstrated, during his detention in Oberstown Children's Detention Campus, a capacity to rehabilitate;
    5. There were no requests for disclosure from the prosecution.

    The appellant also submitted that the sentencing judge gave inadequate weight to certain mitigating factors which were referred to by him, namely the expressions of remorse, the developmental deficits of the appellant and his chaotic family background.

16. The appellant relied on *The People (DPP) v D.G.* [2005] IECCA 75 as a relevant comparator. In *D.G.* the appellant, who was aged 15 years at the time of the murder, lured a 14-year-old boy to a river bank and hit him on the head with a hammer seven times. The sentencing Court found that the attack was unprovoked and that there was no remorse shown, and could find no mitigating factors other than age. *D.G.* was sentenced to detention for life to be reviewed by the Court approximately ten and a half years later and this was upheld by the Court of Criminal Appeal. The appellant submitted that this case is a radically different case in which the circumstances of the killing are entirely different and there are a large number of mitigating factors.

17. The respondent submitted in reply that, in relation to the proportionality of sentencing, the principle is well established in *The People (DPP) v. McCormack* [2000] 4 IR 356 where the Court of Criminal Appeal (Barron J.) stated at (359):-

"The appropriate sentence depends not only on its own facts but also upon the personal circumstances of the accused. 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."

18. The respondent further submitted that whilst the passage quoted from Barron J.'s judgment points to the importance of the Court considering the personal circumstances of the accused, the fundamental principle is also re-stated therein that the sentence must be imposed in light of the particular crime which has been committed. It was submitted that in this case the seriousness of the offending behaviour and the impact on the victims was considered and weighed appropriately by the sentencing judge in considering the evidence before him. It was submitted that the sentencing judge was entitled to find the bringing of the knife to the scene as a significant aggravating factor on the evidence before him.

19. As regards reference to mitigating factors, the respondent relied on *DPP -v- Ouachek* [2015] IECA 221 wherein Edwards J stated as follows:

> "*It is clear that from established jurisprudence that a sentencing judge is not required in a sentence ruling to slavishly refer to and describe in detail every piece of evidence relied upon as a mitigating factor. Clearly, the greater the weight that can be attached to a piece of evidence the greater the obligation to refer to it specifically. Equally, if the potential mitigating effect of a piece of evidence is adjudged to be slight or minimal a judge ought not to be obliged to specifically refer to it, although he or she must take it into account. It is not at all uncommon in sentence rulings for judges to state on a roll up basis that they are taking into account all of the potentially mitigating factors urged upon the Court, and then to refer only to those to which significant weight manifestly attaches, and there is nothing wrong with that. A judge who proceeds in that way commits no error of principle.*"

Decision

20. The Court takes the view that there was no error of principle by the sentencing judge in the present case. In our view, this case involved a very serious offence where the sentencing judge was entitled to find that the bringing of the knife to the scene was a significant aggravating factor on the evidence before him, which meant that this was offending of such seriousness that it had to be met with a significant custodial sentence.

21. The appellant argues that the sentencing judge failed to have regard to a number of mitigating factors, including the admissions made in the interviews, the decision of the appellant to present himself at the Garda station, his decision not to seek disclosure, the absence of previous convictions and the prospects for rehabilitation demonstrated by him. As regards the first three of these factors, these can all be seen as factors relating to the manner in which the appellant approached and dealt with the offence from the earliest moments of the investigation. The Court is satisfied that significant credit was given to the appellant for the manner in which he met the case from the outset. The sentencing judge stated clearly as follows:-

> "The manner in which he has met the case is one which is, as I'll address later, which attracts significant mitigation, it is a significant thing for a person to do, to admit their wrongdoing and to demonstrate a sincerity of remorse, particularly at such a young age by doing do and he has done so at the first available opportunity, without hesitation. There was some difficulty at the early stages when the matter was under investigation which was quickly set aside by him and he told the gardaí what he had done and ultimately assisted them in their inquiries."

22. As regards the absence of previous convictions, while the sentencing judge did not specifically reference this mitigating factor, the Court accepts the respondent's submission

that the sentencing judge was clearly dealing with the appellant on the basis of him being a child without previous convictions, and on the basis that he was not at the upper end of young persons who might come before him charged with such an offence. It is well established, as *per* the *Ouachek* case, that it is not required that each mitigating factor be traversed individually and specifically by the sentencing judge.

23. As regards the appellant's capacity to rehabilitate, which he had demonstrated during his detention in Oberstown, it is clear from the transcript that the sentencing judge gave careful consideration to the contents of all the reports before the Court and was most anxious to build rehabilitation into the sentencing regime, as per his statement as follows:-

> "I also have to take into account the extensive work which is envisaged in the reports with him over the next number of years, and which is required in a number of areas as he matures to adulthood. That report has been outlined in very great detail, and it has to be – and it is recommended that he be subject of a plan formulated between the relevant professionals, in which he can engage."

24. The appellant also submits that the sentencing judge gave inadequate weight to certain mitigating factors in the case which were referred to by him, i.e. the expressions of remorse, the developmental deficits of the appellant and his chaotic family background. The Court is satisfied that the sentencing judge took into sufficient account each of these relevant mitigating factors.

25. The appellant relies strongly on the comparator case of *D.G.* where an almost identical sentence was imposed. It is submitted that the circumstances of the killing were more egregious in *D.G.* and that there are a large number of mitigating factors in the present case, unlike in *D.G.*.

26. While this Court accepts that the *D.G.* case is a relevant comparator, and that consistency of sentence is of course a desirable objective, the Court is of the view that the outcome of one comparator case cannot necessarily be decisive in a later case. The Court is of the view that

the sentence imposed in the present case, taking account of all the material factors, was within the range of sentence available to the sentencing judge, given the serious offending involved. The fact that a different Court might have imposed a slightly earlier review date does not provide a basis for intervention by this Court. Indeed, even if it were the case that this Court or individual members might have considered a different sentence, that would still not lead this Court to intervene. It would be necessary for the sentence imposed to fall outside the available range, which is not the case here.

27. In a recent *ex tempore* judgment of this Court in *The People (DPP) v. T.D.*, delivered on the 4th March, 2021, Edwards J. referred to the approach of the Sentencing Council for England and Wales who have published a Definitive Guideline on the Sentencing of Children and Young People, which recommends, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence for those aged 15 to 17. While the approach in England and Wales cannot be determinative in this jurisdiction, as pointed out by Edwards J. in *T.D.*, nonetheless it is a useful comparative approach and the Court notes that the sentence imposed in the present case is consistent with that recommended approach.

28. We therefore dismiss the appeal.