



THE COURT OF APPEAL

Record No.: 88/2020

**Birmingham P.
McCarthy J.
Donnelly J.**

BETWEEN/

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

RESPONDENT

-AND-

TREVOR ORMOND

APPELLANT

**JUDGMENT of the Court delivered (*ex tempore*) on the 12th day of October, 2021 by
Ms. Justice Donnelly**

1. This is an appeal against severity of sentence brought by the appellant in respect of a single count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The appellant first appeared before the Dublin Circuit Criminal Court on the 31st May, 2019 and he pleaded guilty on his trial date on the 9th December, 2019. The appellant was sentenced on the 29th April, 2020 to 6.5 years' imprisonment with 18 months suspended on the condition that he undergoes 12 months' probation supervision and that he abide by all the conditions imposed by his probation officer.

Background

2. The evidence was heard on the 14th February, 2020. The incident occurred on the 5th October, 2018. The victim was walking down the quays in Dublin with his friend at 12:30am when he took his phone out to book a taxi. The victim had his phone out for a short time when he was approached by the appellant and another male. One of the males said "howya buddy", which made the victim look up from his phone. The appellant, in front of the victim at this stage, grabbed the victim's phone from his hand and the victim held on to it. The victim grabbed the phone with his other hand and a struggle ensued. Both parties fell to the ground while gripping the phone. The appellant then shouted at his friend "stab him Paddy stab him". The victim confirmed that he believed at this point that the other male had a knife. The victim's friend tried to help but the appellant had got the phone out of his hand and the appellant and his accomplice ran in the direction of O'Connell street. The victim immediately reported the incident to the gardaí and CCTV footage confirmed that it was the appellant who was outside Londis Shop on O'Connell street after the incident.

3. The appellant was subsequently arrested on the 26th November, 2018 for the single count of robbery and nothing of probative evidential value emerged in the interviews. The appellant has 30 previous convictions dating from 1994 to 2019. These convictions range from drug offences, a theft offence, a public order offence and twenty road traffic offences. At the time the offence the subject of this appeal was committed, the appellant was on station bail for a drugs offence which occurred on the 10th July, 2018. He obtained station bail for that offence on the 13th September, 2018. He had been in custody since the 11th February, 2019, but was also serving a sentence of seven months during the period which was imposed on the 12th April, 2019.
4. A victim impact statement was put before the sentencing court evidencing both financial loss and psychological distress suffered by the victim. His phone was never recovered and he is now much more wary of taking his phone out when in public. It was a frightening experience for him.
5. After hearing the evidence, the sentencing judge put the matter back to the 29th April, 2020 to obtain a probation report, a prison governor's report and urinalysis. The report referred to various infractions committed by the appellant while in custody – the most recent being on the 26th April, 2020. The reports obtained from the Prison Governor disclosed that he had 5 such P19 infractions. These concerned destruction of prison property, attempted assault of the Governor, refusing an order and seeking to retrieve contraband twice. The Probation Report indicated that he was in the high risk category for re-offending, that for reasons set out in the report it was difficult to assess the genuineness of the remorse he expressed and questioned whether he was motivated to change his life style given his frequent rule-breaking of a serious character while in prison.
6. The plea of mitigation on behalf of the appellant referred to the fact that he had previously set up a roofing and contracting business upon his last release from prison thereby showing that he could be productive and of assistance to his family. He had been living in the family home and making an important contribution to family life. After over 10 years of a crime free life he had lapsed back into addiction in terms of cocaine and tablets. The appellant was the father of two children aged eighteen and eight. He has struggled with addiction issues and at the date of the sentence hearing, he was on 70ml of methadone.
7. The appellant pleaded guilty to the offence at the trial date although he had indicated before the trial date that he would be pleading guilty.

Grounds of Appeal

8. The appellant advanced two grounds of appeal. They are as follows:-
 - (i) The sentencing judge erred in law in setting the headline sentence at 7.5 years; and
 - (ii) The sentencing judge erred in law and in fact in imposing a disproportionate and overly punitive sentence in all the circumstances.

The Sentencing Remarks

9. In arriving at the headline sentence, the trial judge stated:-

"In any event the aggravating factor in the case is the fact that there was violence used in the accused's efforts to get hold of the phone and also the threat or the exhortation that was made by the accused to his associate and also an item of some considerable value was stolen. Therefore, in terms of where the offence lies for a robbery offence, I'm placing it in the mid-range for a robbery offence and I'm setting a headline sentence of seven and a half years."

10. In sentencing the appellant, the sentencing judge addressed the appellant's background and his struggle with addiction as follows:-

"He is a 41-year-old man with 30 previous convictions. A large number of those are road traffic offences and the root of his offending generally is an addiction to drugs which has plagued him throughout his adult life. There is some evidence that in the past when he stabilised on methadone that he was capable of sticking with a regime and he was in fact not offending for a sustained period lasting 10 years at one point in the past."

11. The mitigating factors were considered by the sentencing judge:-

"I'm going to give Mr Ormond credit for the plea of guilty which undoubtedly is useful and would have come as a relief to the injured party in the case. I also take into account the fact that his addiction and his need for money to finance his addiction is at the root of his offending on this occasion and in the past. I also take into account in particular the efforts that Mr Ormond has made in the past and the fact that he is somebody who is capable of living a law-abiding life when he is not in the throes of addiction. I also take into account the stabilising influence of his relationship and his personal circumstances and in particular his desire to have a relationship with his two children. And I also take into account that the prison regime is a particularly difficult regime at the present time and that is a factor to which I believe I am entitled to have some regard. And lastly I take into account the recommendation of the probation report and the clear need for the Court to incorporate a regime for Mr Ormond following his release."

The Parties' Submissions

The headline sentence

12. The appellant submits that the sentencing judge erred in setting the headline sentence at 7.5 years' imprisonment. He accepts that this sentence was in the midrange of offending but submits that the headline sentence indicated by the sentencing judge, falls within the mid to upper range of the scale and is disproportionately high in the circumstances. The appellant submits that it should have been set at the lower end of the mid-range of sentences. The appellant relies on O'Malley, *Sentencing Law and Practice* (3rd Edn., Round Hall, 2016) at para. 15-36 wherein he states:-

"Use of a knife or other weapon, including an imitation firearm, will usually bring a robbery into the mid-range or higher. This will certainly be true where any appreciable level of violence was inflicted on a victim, whether with a knife or weapon

or otherwise, irrespective of the value of the property taken. Given that offences in this mid-range are likely to attract prison sentences extending from two or three years up to 10 years, they vary considerably in nature. Towards the higher end of this range are carefully planned robberies, often involving several participants who either used or were clearly prepared to use serious violence to accomplish their goal and who stole a considerable amount of money or other property.”

13. The appellant accepts there was a struggle resulting in both parties falling to the ground and a threat made to the victim but that this was at the lower end of a robbery offence given that all robbery offences require violence. While the threat was, as submitted by the appellant, a frightening experience for the victim, there was no knife produced and the threat was not carried out. The appellant relies on O'Malley's discussion in *Sentencing Law and Practice* on headline sentencing in the mid-range of robbery offences:-

“Towards the lower end of this scale might be a case where the offender brandished, but did not use, a knife or imitation firearm, who did not steal property of any great value and whose actions did not have a lasting or severe impact on the victim.”

14. The appellant also relies on *The People (DPP) v. Leon Byrne* [2018] IECA 120 which clarified headline sentences for robbery offences:-

“On the basis that a life sentence is likely to be reserved for only the very worst and most egregious offences of this type, the practical reality is that the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. An effective fifteen-year range allows for a low range of zero to five years, a mid-range of six to ten years and a higher range of eleven to fifteen years.”

15. The appellant referred to a number of cases as comparator cases including *The People (DPP) v. Grey* [2014] IECA 9, a case where that appellant received a sentence of five years' imprisonment for attempted robbery where a gun was put to the head of a cashier. The appellant in that case had 31 previous convictions including three for robbery. While the appellant submits that it was unclear what headline sentence the sentencing judge handed down in that case, this Court found that there was no error in principle with the sentence handed down to the appellant. The appellant distinguishes this case from *The People (DPP) v. Grey* where the appellant in the latter case had previous convictions for robbery whereas this appellant does not and this factor should have been given more weight by the sentencing judge in terms of the scale of gravity in which the headline sentence fell.

16. The appellant also relies on *The People (DPP) v. O'Dwyer* [2019] IECA 101 where the appellant appealed a sentence of seven years' imprisonment with the final three years' suspended on the grounds that the sentencing judge failed to follow best practice with respect to the methodology and failed to semi-structure the sentence in a reasoned approach. In that case, the appellant entered a shop with a hoodie pulled over his head and a hat pulled down. He ordered a shop member to “open the fucking till” and threatened that he had a gun in his pocket, that he would shoot the shop assistant and slit her throat.

The sentencing judge in that case held that the sentence fell within the top end of the middle range and gave a headline of seven years due to the fact that serious crime in the area in question had grown in recent years. The appellant in that case had 21 previous convictions. On appeal, this Court upheld the sentence. The appellant submits that there were significantly more threats in *The People (DPP) v. O'Dwyer* case than in the present case yet the headline in the present case was higher.

17. The respondent submits that the headline sentence was well within the parameters indicated in *People (DPP) v. Byrne*. The respondent points to distinguishing features in the comparator cases relied upon by the appellant and submits that the factual differences demonstrated that there could not be a complete similarity in the sentences imposed and there had to be a discretion left to a trial judge to cater for distinctions. In some of the cases such as *The People (DPP) v. O'Dwyer*, the respondent rejected the suggestion that this robbery was less serious than the robbery carried out in this case. Counsel submitted that hearing a single exhortation to an accomplice with whom the victim is struggling on the ground "to stab" the victim is not necessarily any less terrifying than a victim being warned that he or she will be shot or that their throat will be slit when positioned behind a till in a shop. The respondent highlighted that the trial judge in *The People (DPP) v. O'Dwyer* noted that the early guilty plea "must have been a comfort" to the victim, having made full admissions to the gardaí and had taken steps to rehabilitate and had the prospect of further work in the construction trade."
18. The respondent also relies on *The People (DPP) v. Leon Byrne* as being a case which provides considerable guidance on sentencing for robbery offences. The respondent also draws assistance from *The People (DPP) v. O'Sullivan* [2020] IECA 331, a case where the victim was robbed while walking home by three men who demanded money and his phone. The victim was punched and kicked with the accused laughing while carrying out the attack. The victim had swelling to his head and a broken nose. The headline sentence nominated by the sentencing judge was 14 years. This Court at paras. 38 to 40 held:-

"[38] We are satisfied that while this was a serious instance of robbery, involving significant culpability and the causing of appreciable harm to the primary victim, it was not one in which the headline sentence fell to be located in the high indicative range as identified in the Byrne decision, namely as attracting a custodial sentence of between 10 and 15 years. We have no hesitation in concluding that the nomination of a headline sentence of 14 years in this case was excessive and disproportionate to the actual gravity of the appellant's offending conduct, serious though it was.

[39] The intrinsic moral culpability of the appellant's offending, taking into account relevant aggravating factors and the harm done, would have placed it in the upper half of the mid-range in our view. In theory mitigating factors bearing on culpability (if any) could also be relevant but we are satisfied that there were none here. In that regard we did consider if the appellant's addiction could have been a mitigating factor bearing on culpability. Addiction is certainly capable of mitigating culpability where a person acts under chemical compulsion, but we do not believe that the evidence

establishes that that was the case here. Rather, we are satisfied that it was a case of self-induced intoxication which certainly does not mitigate culpability.

[40] *We accept that there were multiple aggravating factors, but they would not all have required to be afforded equal weight. Moreover, in making that observation we acknowledge that the Byrne decision offers little guidance as to what weight is generally to be afforded to different aggravating factors. Suffice it to say that we consider that, in the context of this case, the most significant of these was joining with others in the attack, the use of actual violence by punching and kicking leading to the causing of actual harm, as opposed to merely threatening violence and causing apprehension of harm, and the focus during the attack on the victim's head. While relevant previous convictions were also an aggravating factor, as was the unprovoked nature of the attack, these factors would attract more modest weight viewed in the overall circumstances of the case than those just mentioned."*

Ground Two: Disproportionate and Overly Punitive Sentence in all the Circumstances

19. The appellant notes that the sentencing judge in the present case accounted for the appellant's mitigating circumstances but she found that "there are very particular mitigating factors absent in this case." Counsel for the appellant concedes that the reports showing the appellant's difficulties in terms of disciplinary issues in the prison environment were a cause for concern for the Court, however, the appellant submits that the court did not give enough consideration to the efforts made by the appellant to live a productive life and to support his children with whom he has a good relationship.
20. The appellant submits that the majority of his previous convictions date back to 2004 to 2006 when he was heavily addicted to heroin. The appellant submits that for a period of ten years he was productive and did not come to garda attention apart from minor road traffic offences in 2009. Twenty out of the thirty previous convictions relate to road traffic offences. The appellant relies on *The People (DPP) v. McNamara* [2018] IECA 140 where the appellant's sentence of five years' imprisonment with the final year suspended was upheld on appeal. The appellant draws on the fact that in that case there was cash and a mobile phone taken from a victim who was subjected to an assault. The Court of Appeal held that in considering his previous convictions which included a previous suspended sentence for robbery and theft, there was no error in principle in the sentence handed down in respect of the robbery offence. The appellant submits that the sentencing judge in *The People (DPP) v. McNamara* failed to place the offence on a scale of offending whereas in the present case, the headline sentence was 7.5 years pre-mitigation and on the facts, the appellant's case should have been considered on the same scale as *The People (DPP) v. McNamara*.
21. The respondent reiterates the aggravating factors present in this case, such as the fact that it occurred in the evening in a public place while the appellant was on his way home, the resulting struggle with the victim with his phone being pulled from him, the explicit threat made by the appellant to his accomplice to stab the victim, the significant value of the item taken, the fact that the offence was committed while the appellant was on bail and that the appellant has 30 previous convictions.

Analysis and Decision

22. As noted in other cases, there is much assistance to be had from the ranges identified by this Court in the case of *The People (DPP) v. Leon Byrne*. We are satisfied that the fact that two people carried out this street robbery involving the actual violence of a struggle for the victim's phone which was then exacerbated by this appellant's exhortation to his accomplice to stab the victim meant that this was a mid-range offence. Naturally the victim found this robbery frightening and it had an impact on his behaviour in public on an ongoing basis. There was financial and personal loss for the victim through the theft of his phone.
23. While the appellant has referred to a number of comparator cases, there is a limit to the use to which those cases, at an individual level, can be put in an appeal. In general, the cases may indicate trends but each case must turn on its facts. We refer to what this Court said in *The People (DPP) v. S.C.* [2019] IECA 348 at para. 58:-

"[w]hilst broad guidance may be provided by this Court as to the range of sentences which may be appropriate for certain offences, nothing more than broad guidance may be provided as there is no question of a standard tariff for any given offence given the broad range of aggravating and mitigating factors which may be present. While the courts attempt to maintain consistency in sentencing, it is generally impossible to directly compare cases."

24. The sentencing judge correctly identified this as a robbery within the mid-range. The appellant's argument that the sentencing judge made an error in principle in failing to have placed this in the lower end, instead of the middle, of the mid-range, cannot be accepted. On the facts of this case, no error in principle in the exercise of her discretion as to where on such a scale this might be placed has been identified. This was "a nasty incident of robbery" as identified by the sentencing judge and she was within her discretion to place it in the centre of the mid-range. Moreover, as the sentencing judge indicated this offence was aggravated (to a mild extent she said) by the fact that it was carried out while the appellant was on bail. We are satisfied therefore that there was no error in principle in the finding of the sentencing judge that the circumstances of this particular robbery merited a headline sentence of seven and a half years.
25. We are also satisfied that the sentencing judge took into account all appropriate mitigating factors in the case. The appellant is most concerned with what he submits is a failure on the part of the sentencing judge to give him credit for the 10 years in which he was crime free. The sentencing judge made a reference to that situation and to the current stabilising influence of his relationship. These were factors to be identified but they cannot have the primacy that the appellant seeks to accord to it when compared with the totality of the factors that the sentencing judge had to take into account.
26. The sentencing judge was dealing with a situation where a headline sentence of seven and a half years was the starting point from which she had to approach the mitigation. She correctly noted that there were very particular mitigating factors absent. The sentencing judge gave him credit for his plea but that could not be as extensive as it might have been if this had been an early plea. He was not a person of previous good character and could

not rely on that in mitigation. Nonetheless the sentencing judge did take into account the fact that he had managed to live a crime free life for some time. In particular, despite the fact that she was faced with a situation where the objective and recent reports on this appellant painted a picture of a person who had not yet recommitted himself to working towards that crime free life, the sentencing judge stated: "...in view of the efforts that he's made in the past and his capacity to change which he has demonstrated in the past I'm prepared to leave some light at the end of the tunnel for [the appellant] in terms of a partial suspension of his sentence." There was no evidence that he was addressing his addiction in a serious way even while in custody; the opposite was the case as evidenced by his P19s in particular.

27. Contrary to the appellant's submission that this was a disproportionate and overly punitive sentence, the sentencing judge made significant reductions on the headline sentence she had indicated. She reduced that headline sentence first by one year. She also reduced it by a further 18 months by way of a suspended sentence to give him light at the end of the tunnel. This had the effect that this appellant was to serve in custody 5 years and then be released on a suspended sentence under probation supervision.
28. We are satisfied that this was a fair and proportionate sentence in terms of the offence committed taking into account the circumstances of this appellant.

Conclusion

29. For the reasons set out above, we are satisfied that the sentencing judge did not err in identifying a headline sentence of seven and a half years in respect of this robbery. We are also satisfied that the sentence she imposed was a fair and proportionate sentence in all the circumstances.
30. We therefore dismiss this appeal.