



THE COURT OF APPEAL

[230/20]

**The President
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARIAN LINGURAR JNR

APPELLANT

**JUDGMENT (*ex tempore*) of the Court delivered on the 8th day of April 2022 by
Birmingham P.**

Introduction

- 1.** On 8th May 2019, having earlier been convicted of the offence of manslaughter following a contested trial, the appellant was sentenced to a term of nine years imprisonment and has now appealed to this Court against the severity of that sentence. The procedural background to the trial and sentence in the Circuit Court in Galway, and indeed, to this appeal, is quite a complex one.
- 2.** The trial related to events that had occurred on 25th September 2011 at Kenny's Bar, Main Street, Oughterard, Galway. The late Mr. John Kenny, a schoolteacher and part-time publican, lost his life following a burglary/robbery. Following the incident, a number of people emerged as suspects/persons of interest and charges were proffered against a number of individuals. One of those against whom charges were proffered was Mr. Floran Fitzpatrick, a long-time barman at the licensed premises in Oughterard. He received a five-year sentence in respect of the offence of withholding information. Also charged arising out of the events was the appellant's father, Mr. Marian Linguarar Snr. Ultimately, he, too, entered a plea of guilty to an offence of withholding information, a plea that was accepted by the DPP and he was dealt with on that basis.
- 3.** So far as the appellant was concerned, he was initially arrested and charged with manslaughter on 2nd February 2012. Initially, he was remanded in custody, but was released on High Court bail on 14th February 2012. On 22nd April 2012, despite bail conditions which prohibited him from doing so, the appellant applied to the Romanian Embassy for travel documents and he left Ireland on or about 27th April 2012.
- 4.** The appellant's case was listed for trial on 4th June 2013 in Galway Circuit Court, but on that occasion, the appellant, and indeed, his father, failed to attend and a bench warrant issued for his arrest. A European Arrest Warrant issued in respect of the appellant, but in the event, what happened was that the appellant returned to this jurisdiction under a different identity. He was

arrested in Cork on 30th April 2018 while attempting to claim social welfare using false documents. Initially, he denied being Marian Linguarar Jnr until identified by a member of the Oughterard investigation team. He was remanded in custody and his trial came on for hearing and ran from 15th January to 31st January 2019, at which stage he was convicted by a unanimous jury verdict. No appeal was lodged within the time prescribed. Subsequently, the appellant sought to extend time for appealing against conviction and sentence. The application was grounded on an affidavit of his solicitor sworn on 20th November 2020. This Court, in a ruling delivered on 1st July 2021, refused leave to appeal against conviction, but permitted a late appeal against severity of sentence. In the course of our judgment, we commented as follows:

“It appears from the papers that in the present case, the appellant will wish to argue that the sentence imposed was unduly severe, having regard to his youth at the time of the offence and that, according to the prosecution, it was committed at a time when he was in the company of a number of adult members of his ethnic community, including his father. We express no view on the likelihood of that argument or arguments along those lines ultimately carrying the day, but we are prepared to go so far as to say that it seems to us that a point of some substance has been identified. The appellant was a juvenile at the time of the commission of the offence and the sentence imposed was a substantial one. That a substantial sentence would be imposed is not at all surprising, particularly in a situation where the substantial mitigation that a plea of guilty would be provided was not available.”

5. Three grounds of appeal are raised. In summary, these are as follows:

- (i) The judge assessed the headline sentence at an impermissibly high level. The judge had identified a headline sentence of ten years.
- (ii) The judge erred in treating the fact that the appellant had absconded as an aggravating factor. In opening the oral appeal hearing, counsel on behalf of the appellant made clear that he accepted that this was the least substantial of his three points.
- (iii) The judge paid insufficient attention to the age of the appellant at the time the offence was committed. At the time of the offence, the appellant was aged 16 years and nine months and had limited formal education. In opening the case, counsel on behalf of the appellant made it clear that he saw this ground as being at the heart of the appeal and it was the ground on which most reliance was placed.

Background

6. Before dealing with the grounds of appeal, it is appropriate to refer in more detail to the facts surrounding the offence, and also to consider in more detail the judge’s approach to his task.

7. The victim in this case, the late Mr. Kenny, was a 53-year-old secondary schoolteacher whose practice it was to open his old family pub on Saturday nights. The pub drew a large clientele, mainly of young people. On Saturday 17th September 2011, he hired the appellant,

Marian Linguarar Jnr (Date of Birth 5th December 1994) to act as a doorman, checking identities and being generally useful. It appears that the appellant was introduced to the late Mr. Kenny by Mr. Fitzpatrick, to whom there has already been reference. The appellant was due to work for the second time on the night of Saturday 24th September 2011. In advance of that date, a plot or conspiracy involving a number of parties was in place to commit a burglary/robbery at the premises.

8. On the evening of 24th September 2011, the licensed premises was busy and, in his role as doorman, the accused, now appellant, greeted two individuals, Mr. VM and Mr. R, who entered the pub. These two men would become persons of interest in the subsequent investigation. On the evening, both men were conspicuous, mainly on account of their age. The men had been given a lift to Oughterard by the appellant's father and had entered the premises at different times; Mr. R, last, when the pub had been cleared, and he was ushered inside the door by the appellant and the door was bolted. On the evening, the late Mr. Kenny had drunk to excess, at one point, he could not stand, and his blood level, as recorded at the autopsy, was 354mg. The relevance of this is that, thereafter, he was in a very vulnerable state. The pub was apparently cleared by the accused at about 12.40am, somewhat earlier than would have been the norm. The accused later told Gardaí, when interviewed, that the deceased had thanked him, paid him and had bolted the door behind him. This would appear to be quite untrue. In interview, the accused also stated that he was driven by his father back to Galway, and from there, home. In fact, CCTV footage indicates the car left Oughterard around 1.20am, or 40 minutes after the public house was cleared, and there was significant CCTV and phone evidence which tracked the accused and his phone thereafter and had him returning to Oughterard at 2.15am in his father's car. Over that journey, there was constant communication between the accused's phone and that of Mr. M. These communications stopped at 2.38am. The accused would seem to have finally left Oughterard at 2.59am. It would emerge that during the course of the incident, the deceased was trussed with wire, beaten very severely and left to die in the toilets where his body was discovered by his wife and daughter.

9. By reference to this summary of events, the prosecution say that the accused played a very significant, indeed, vital part in this crime, by first, admitting the two men to the public house, and secondly, allowing them to remain there for a nefarious purpose and then returning later, along with his father, to collect the two men. Reference is also made to the fact of the false account that the deceased had let him out of the premises. This is categorised as a gross breach of trust and a callous disregard of the position of the victim. The Director distinguishes what occurred here, where he said five people had come together with a view to robbing the deceased, and to give effect to that intention, had assaulted him very seriously and left him to expire from a situation such as where injuries are sustained in a street brawl.

10. For his part, the appellant points out that while he may have been party to an agreement to carry out an unlawful act, he was not a direct participant in the actual beating and restraint of Mr. Kenny, and to that extent, had a limited role in his death. It is said that the unlawful act to which he had signed up was not one which would normally be expected to result in death.

The Sentence

11. The judge dealt with the question of sentencing in these terms:

“The accused was convicted by the jury of manslaughter and the first thing to be noted, that manslaughter is an offence that carries a maximum sentence of life imprisonment, and that, in principle, is therefore the starting point for any consideration of where a proper sentence lies. His victim in this case, John Kenny, was a part-time publican, a fulltime teacher. He was badly beaten and left to die in his pub, in Oughterard, in the early hours in what appears to be a carefully planned robbery with violence. He was found dead the following afternoon by his wife and daughter. He died from the injuries he received, the impairment of his ability to breathe, described as positional asphyxia. His hands had been tied behind his back. His coat had been tied around his head and he was left lying face down in the toilet of the premises. He had consumed alcohol, was vulnerable, defenceless and was left to die. The accused was a participant in a joint enterprise, with others, to carry out this robbery. There is no evidence that he actually participated directly in the assault or restraint of the deceased. The evidence which the jury appear to have accepted was that he was a knowing participant in the plan to rob the deceased, was present at the pub at various times, before, during and after this violent, and ultimately, deadly robbery. I note that he fled the jurisdiction while on bail in 2013, a short time before his trial was scheduled. He took careful steps to avoid being apprehended thereafter, but was finally located and this was as a result of effective Garda investigation and the Gardaí are to be commended for their tenacity and diligence in pursuing the perpetrators of this cruel, vicious, heartless and ultimately fatal robbery. The accused is the only person who has been convicted of the manslaughter of the deceased man. He was – this, as I have indicated – was a clearly premeditated plan to rob a vulnerable victim and to exploit the trust that Mr. Kenny had placed in him.

Now, I am told about a conviction that the accused has, but I disregard it from the point of this sentence hearing because it occurred after this offence. I am mindful to that, on the evidence, the relative culpability of the accused has to be viewed in the context of his age, his limited education and the likely impact of this on his level of maturity, and it is submitted that he may have acted, or is likely to have acted, under the influence of his father. I take account of his limited role in the actual death of the accused man and the impact on his victim. I expressly take these into account in fixing the headline sentence. The offence stems, to my mind, in terms of his culpability, at the mid – between the mid and high point on the scale of gravity. His conduct – breaching his bail terms, absconding, taking complex steps to avoid being brought to trial for the offence, aggregate the gravity of his wrongdoing because it had an obvious and recognisable impact on the family of his victim. The headline sentence is ten years imprisonment. Had the evidence placed the accused as a direct participant in the actual beating and restraint of Mr. Kenny, the starting point, in terms of headline sentence, would have been significantly higher. The impact of the beating of Mr. Kenny and his death on his family and friends has been simply and thoughtfully set out by his wife. It speaks eloquently of the type of man that he was and the gap that his death has left on his family and friends.

Now, the only readily identifiable factors that mitigate the gravity of this offence are his age and relative culpability or involvement in the crime and I have already taken those into account in assessing where the headline sentence stands on the scale of gravity. Now, it is generally recognised that imprisonment for a foreign national carries additional hardship and this is a factor that I accept in respect of the accused and I credit him with a 10% deduction from the headline sentence. The proper sentence is therefore nine years imprisonment. There is no scope for any other structure to be placed on the sentence in terms of perhaps alternative to custody or suspended sentences because the Probation Service – he has told the Probation Service that he does not accept the verdict of the jury. While he says that he is sorry for what happened to Mr. Kenny, he does not accept that he took any part in it. So he is not entitled to any credit in that regard, and I think that it would not be in the interests of justice that anything by way of a suspension would be part of the sentence. In conclusion, I wish to extend, for what it is worth at this remove, my sympathies to Mr. Kenny’s family and friends for this.”

The Appeal

12. In dealing with the three arguments advanced, we will deal, first, with the point that the judge was in error in regarding the fact of the appellant having absconded as an aggravating factor. We do so in the full knowledge that counsel on behalf of the appellant has said that it is the ground on which he places least reliance. We think counsel’s approach to this issue has been very realistic. While it is more usual to deal with a breach of bail, or absconding, as a matter that results in a reduction of mitigation, in the circumstances of this case, we do not think there was any significant error on the judge’s part, dealing with the matter as he did. It is clear that this crime has had a very grave impact on the members of the Kenny family and that their difficulties in coping with the situation were compounded to a significant extent by the delays that have bedevilled this case, delays and difficulties created in no small measure by the actions of the appellant in absconding. It seems to us that this was a matter that the judge was entitled to have regard to, and whether one applies the label of aggravating or reduction of mitigation matters little in practice.

13. In these circumstances, we turn to the two other issues in the case, the question of the headline sentence and the manner in which the judge dealt with the age of the accused. It seems to us that these issues are closely interlinked and can be dealt with together. In doing so, we would draw specific attention to some observations made by the judge. He had said:

“There is no evidence that he actually participated directly in the assault or restraint of the deceased . . . I am mindful that, on the evidence, the relative culpability of the accused has to be viewed in the context of his age, his limited education and the likely impact of this on his level of maturity and it is submitted that he may have acted, or is likely to have acted, under the influence of his father. I take account of his limited role in the actual death of the deceased and the impact on his victim. I expressly take these into account in fixing the headline sentence . . . the headline sentence is ten years imprisonment. Had the evidence placed the accused as a direct participant in the actual beating and restraint of

Mr. Kenny, the starting point, in terms of headline sentence, would have been significantly higher.”

14. Addressing the question of the headline sentence, the appellant has done so in terms of how the headline sentence might have been assessed had the offence been committed by an individual of full age whose role was that of the appellant *i.e.* by considering what the position would have been if an adult had played the role that the appellant had, but had not been directly implicated in the infliction of violence. Reference is made to *DPP v. Mahon* [2019] IESC 24, where Charleton J. had referred to four bands: worst cases, high culpability, medium culpability and lower culpability, and suggests that the worst cases category and lower culpability are not really in issue. The appellant goes further and says that while acknowledging that there was nothing that would justify placing the offence at the lower end of the medium culpability band, there was equally no justification in placing it at the very top of the medium culpability band which would result in a headline sentence of the order of seven and a half years or so. For her part, the Director says that the sentence was correctly placed in the high culpability band. Instead, the appellant says that an appropriate headline sentence would be one in or about the middle of the medium culpability band, representing a headline sentence of in or about seven and a half years. In making that observation, the Director points to the fact that the appellant was present in Oughterard for a period after the pub closed and also present for a period upon his late night return. No effort was made, even by way of an anonymous phone call, to seek medical assistance for Mr. Kenny. So far as the relevance of the appellant’s age is concerned, counsel for the appellant places emphasis on the fact that the appellant was not only very young, but was acting in the company of a number of individuals from his ethnic community, and most significantly, in the company of his father. The Director says that had the appellant stood trial in 2013, there might have been scope to make points about his youth, but his actions in avoiding trial until 2019 resulted in the benefits that he might otherwise have had being substantially diminished.

15. We have already drawn attention to certain quotations from the judge’s sentencing remarks to show that he was fully alive to the fact that it had not been established that the appellant was a party to the actual violence, and if that had been the position, the headline sentence would have been higher. There was also the specific reference by the judge to the age of the accused and his limited education and to the arguments made that he was likely to have acted under the influence of his father.

16. For our part, we have considered the approach suggested by the appellant in terms of considering what headline sentence might have been had there been a participant playing the role established as having been played by the appellant, who was an adult. It seems to us that a headline sentence of the order of 12 years would have been fully justified, a significantly higher sentence for those involved in the administration of the extreme violence could have been expected.

17. The really significant issue from a sentencing point of view is how to deal with the youth of the appellant at the time of the commission of the offence. We agree with the Director’s observations that the appellant had done himself no favours by absconding. We also note that while he had limited education, on the other side of the coin, he was physically mature beyond his years, which was no doubt a factor which secured him the part-time employment that he obtained.

It seems to us significant that this was not just a question of considering an offence committed by any juvenile and considering how that was to be differentiated from a similar offence committed by an adult. In this case, the Court was not dealing with typical juvenile offending, but with a very serious offence committed in the company of and in concert with a number of men from his own ethnic community and in the presence of his father. It does seem to us that the fact that he was in the company of older adults, and that one of those was his father, serves to significantly reduce the moral culpability that would otherwise be assessed, while still leaving it at a very high level.

Decision

18. We believe that these factors would justify a reduction of the headline sentence that would have been applied to an adult to one of nine years. The judge felt there was little present by way of mitigation and we are bound to say we agree with him in that regard. The judge felt that the only matter that arose was the fact that the appellant was a non-national and might be expected to find custody more difficult for that reason. For such factors as were present by mitigation, the judge applied a reduction of 12 months from his starting point. We will do likewise, and so we will reduce our starting, headline or pre-mitigation of nine years to one of eight years, being of the view that the judge, while clearly conscious of the fact that the offence had been committed by a young offender, did not attach sufficient significance to this.

Resentencing

19. We will quash the sentence imposed in the Circuit Court and substitute for that the sentence we have indicated – one of eight years. The sentence will date from the same date as in the Circuit Court, and as in that Court, credit will be given for time spent in custody by reference to this offence.

20. We have often made the point that before we will intervene and quash the sentence, whether on grounds of severity or undue leniency, it is necessary that there be something in the nature of an error in principle. We do not intervene merely because had we been called on as a Court to sentence at first instance, we might have imposed a somewhat different sentence to the one actually imposed, still less, would we intervene because one or more individual members might have been minded to do so. Instead, our approach is to ask whether the sentence actually imposed fell within an available range, acknowledging that sentencing is not an exercise of mathematical precision, and that in any given case, it is likely that there will be no one correct sentence, but rather, a range within which the sentence might be expected to fall. We have asked ourselves whether the sentence that we are disposed to substitute justifies intervention. We have concluded that an intervention is justified and that it is the case that a headline sentence of ten years for a 16-year-old involved in the circumstances outlined in the course of this judgment falls outside of the range. We are of the view that the sentence that we are minded to impose would fall within the available range, though not at the lowest possible point in that range. It is in those circumstances that we have decided to quash the sentence imposed in the Circuit Court and substitute the sentence indicated.