[2019] IECA 250

THE COURT OF APPEAL

[153/18]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARK O'SULLIVAN

APPELLANT

JUDGMENT of the Court delivered on the 11th day of October 2019 by Birmingham P.

1. On 26th April 2018, the appellant was sentenced in the Circuit Court sitting in Bray, County Wicklow to a term of seven years imprisonment, with the final two and a half years suspended, in respect of an offence of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences against the Person Act. The case arose from an incident that had occurred on 15th January 2017 in which one Mr. David Kirwan was the injured party.

2. On the occasion in question, the appellant, who was aged twenty-seven years, had been socialising with his wife in Bray, moving between various licensed premises. They went home. It appears there was some degree of tension between them and the appellant decided to go out for a walk and came upon the injured party, Mr. Kirwan. It seems the appellant had noticed him while socialising earlier, they had overlapped in school for a period. There was a suggestion that the injured party may have made a remark at some stage,

but that suggestion was never really firmed up on. When the appellant was asked to give an account of the incident by Gardaí, he commented "and then he said something and I hit him". The assault involved a single blow with the fist to the back of the head. The injured party felt that the blow that he received was such a heavy one that it must have been with an object, but the evidence does not really provide support that proposition. The injured party began to bleed heavily. To the credit of the appellant, he rang an ambulance and stayed with the injured party until help arrived, putting him into the recovery position.

3. The assault has had catastrophic consequences for the injured party. He suffered serious and extensive head injuries, there was intracranial bleeding, there was bruising and a fractured skull. Following this assault on the injured party, who was attacked as he was walking home listening to music, he was removed to Beaumont Hospital in Dublin and there he was put into a medically-induced coma from 15th to 26th January 2017. According to a victim impact statement prepared by the injured party, he suffered significant brain damage, had experienced regular seizures since the incident, and because of these seizures will never be able to work again. Furthermore, he had lost the hearing in his left ear and had also experienced anxiety and depression.

4. In terms of the background and personal circumstances of the appellant, he was twenty-seven years of age at the time of the incident. He was married, and had been married for some two and a half years at this time, and was the father of two young children. He was also centrally involved in the care of his elderly mother who was in ill-health. The Court heard that he had good work record involving spells with SuperValu, Dunnes Stores, and a paving business. He was also active in his community assisting with the work of the Little Bray Community Centre for many years. He had no previous convictions and a number of positive testimonials in relation to him were put before the Court. There was a probation report which said that he was at low risk of reoffending. The investigating Garda, when

asked by prosecution counsel whether he would agree that it would seem unlikely that the appellant would be before the courts again, responded "I very much believe that's correct". Earlier, the investigating Garda had commented that he believed that the anxiety had consumed the appellant over the last couple of times that he had met with him and that it did seem to the Garda that the appellant was particularly remorseful.

The Judge's Sentencing Remarks

5. The Judge referred to the attack on the injured party as a completely unprovoked attack, a cowardly attack and one that was vicious and violent. He referred to the consumption of alcohol to an excessive extent and commented that, properly, it was not being put forward as an excusing factor, but he nonetheless felt that alcohol had a substantial influence on Mr. O'Sullivan's behaviour on the night in question. In reviewing the surrounding circumstances, he referred to the fact that after the punch was thrown, that Mr. O'Sullivan did everything that he could to offer assistance. He also noted that admissions were made not only during Mr. O'Sullivan's interview with the Gardaí but also at the actual crime scene itself. He referred to the substantial injuries inflicted, describing them as catastrophic, but said that he had to balance that with the fact that it was a one-punch assault. The Judge said he had to decide where the offence lay in relation to the maximum sentence and said that he was satisfied that it would be in the middle range. He then reviewed the personal circumstances of Mr. O'Sullivan, referencing some of the testimonials and reports that have been put before him, including a report from a Special Needs teacher who had taught him in primary school. At that stage, the Judge said that he was satisfied that the appropriate headline sentence was one of seven and a half years imprisonment, and taking into account the mitigating and personal circumstances and totality of matters, that he proposed to suspend the last two and a half years. This left a net sentence of five years.

6. At this stage, there were two slightly unusual interventions from defence counsel. These were put by him in the context that counsel was anxious to avoid being criticised in the Court of Appeal for not raising matters with the Trial Judge. Counsel suggested that one stage in the sentencing process had not taken place, in that he suggested it would have been appropriate for the Judge to identify a headline sentence, and then reduce it to take account of the mitigating factors present and then to go on to consider suspending an element of the sentence. In the course of his plea in mitigation, counsel had urged the Judge, that if he did not feel it possible to deal with the case by way of an entirely non-custodial disposal, to consider part-suspension. The Judge's response to this first intervention was to say that the headline sentence was seven and a half years and that then, allowing and giving credit for the mitigation and having regard to the personal circumstances of the appellant, he was suspending two and a half years. There followed a further intervention by counsel. On this occasion, counsel indicated that the Court of Appeal guidelines in what he referred to in error as the *DPP v. O'Donoghue* case, this was in fact a reference to *DPP* v. Adam *Fitzgibbon* [2014] 2 ILRM 116, would suggest that the top sentence for a mid-range offence was seven years. In fact, counsel was in error in that regard. At para. 8.10 of the judgment in *DPP v. Adam Fitzgibbon*, Clarke J. had made the following observation:

> "8.10 However, in the absence of such unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between 4 and 7½ years would also seem appropriate. In the light of the authorities to which counsel referred, and which have been analysed in the course of this judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of 7½ to 12½ years. It must, in addition, be acknowledged that there may be cases which, because of their exceptional nature,

would warrant, without mitigation, a sentence above 12½ years up to and including, in wholly exceptional cases, the maximum sentence of life imprisonment."

7. The paragraph before that quoted is also of some significance. Paragraph 8.9 stated:

> "8.9 In attempting to give some guidance in respect of offences at the lower end of the range, it should be acknowledged that the authorities to which counsel referred this Court concerned, for obvious reasons, by and large offences towards the upper end of the range. Any guidance given in respect of the lower end of the range must, therefore, be somewhat tentative and will, necessarily, be open to review as further experience and materials become available."

8. In the almost five years since the decision in *DPP v. Fitzgibbon*, quite a number of cases of s. 4 assaults have come before the Courts, whether by way of appeals against severity or applications to review on grounds of undue leniency. The experience of the Court is that the upper end of the suggested range for mid-range and upper-range offences impose excessive constraints on Sentencing Judges. The experience of the courts operating under *Fitzgibbon* is that an upper limit of seven and a half years for a mid-range is too low and a figure of ten years would be more appropriate. Likewise, we are inclined to the view that a figure of twelve and a half years as a pre-mitigation for high-end offences is too low and should be increased to fifteen years with exceptional cases higher again. We stress, and it is our impression that this is not always fully appreciated, that the guidance was offered in respect of pre-mitigation sentences. In many cases, there will of course be factors present by way of mitigation so that the ultimate sentence imposed will be less than the sentence identified as a headline or starting pre-mitigation sentence. In some cases, there may be very powerful mitigation present in which case the ultimate sentence imposed will, in all

likelihood, diverge very considerably indeed from the starting pre-mitigation headline sentence.

9. In the present case, counsel on behalf of the appellant is critical of the Trial Judge's approach to the imposition of sentence. He says that whether one approaches the case by focusing heavily on the facts of the case, a one-punch assault, or whether one focuses on the process followed by the Sentencing Judge that the sentence imposed was excessive and excessive to such an extent as to amount to a clear error in principle.

10. In this case, the appellant delivered supplemental written submissions dealing with the case of *DPP v. David Smith* a decision of this Court of 14th January 2019 in the context of an application by the DPP seeking a review on grounds of undue leniency.

11. On a number of occasions recently, this Court has commented that decisions given in the context of a review on grounds of undue leniency will often be of little assistance when invoked in the course of appeals against severity of sentence. In *DPP v. Smith*, what was in issue was a stabbing. The injured party and the respondent to the undue leniency review had been drinking in each other's company. A disagreement developed and the injured party struck the respondent. Matters appeared to quieten, but the respondent went downstairs, picked up a knife and returned and stabbed the injured party twice, inflicting life-threatening injuries. Fortunately, the injured party did not in fact die, but rather, went on to make a full recovery. The incident happened thirteen days after the respondent's eighteenth birthday. In that case, the Sentencing Judge identified a headline sentence of five years imprisonment, reduced this to three years, and then proceeded to suspend the sentence entirely. It was the decision to suspend the sentence in its entirety which gave rise to the application to review on grounds of undue leniency.

12. Counsel for the appellant in this case has made the point that the identification of five years as a starting or headline sentence was not challenged by the Director in *DPP v. Smith*

and he says that the headline sentence selected in the present case of seven years is completely at odds with the approach taken in *DPP v. Smith.* In that case, this Court referred to the sentence imposed as a very lenient one. We pointed out that the case had taken some three years or thereabouts to come to Court and that during that period, the respondent had not got into further trouble. As we pointed out, all of the evidence before the Sentencing Judge suggested that he had taken control of his life and was determined not to reoffend. By the time the case came before the Court of Appeal, he was in a stable personal relationship and had become a father. He also was in good employment and was the sole breadwinner for the family unit. It seems to us that the factors that were present in *DPP v. Smith* mean that we can derive very little assistance from it at this stage.

13. Notwithstanding our view that the guidance offered by *DPP v. Fitzgibbon* requires some refinement at this stage, we think it reasonable to address this appeal by reference to the *Fitzgibbon* guidelines which were those that were applicable when sentence was imposed. We are in no doubt that this was indeed a mid-range offence and not an offence at the lower end of the mid-range. Gravity is assessed by reference to moral culpability and harm done. In this case, the harm done was very grave indeed and the moral culpability, while not at the very highest point in the scale, was very significant. It was a one-punch assault, but it was a punch delivered to the back of the head of someone who was not expecting it and was wholly unprepared for it. It is to be distinguished from a punch thrown in the course of an argument or a skirmish where, frequently, it would be parried and even if the punch was landed, the likelihood would not be of significant injury being caused. If one were to take the mid-range of the band suggested in *Fitzgibbon* for mid-level offences, that would suggest a starting point or headline sentence of the order of five and a half years to five years and nine months.

14. In this case, there were significant factors present in favour of the appellant. There was, first of all, his behaviour after the assault, calling assistance, staying at the scene, and

offering assistance. This was followed up by making admissions to Gardaí when they arrived and subsequent more formal admissions when interviewed by Gardaí.

15. In addition, it is the case that the offence was committed without prior record, by somebody in a long-term, stable family relationship, with a very good work record, and a record of service to the community. In those circumstances, one would expect to see some reduction from the pre-mitigation headline sentence. While there undoubtedly are cases where the factors present by way of mitigation can be properly and fully addressed by way of part-suspension, see *DPP v. Walsh* [2015] IESC DET 26 and *DPP v. Lee* [2017] IECA 152, we are of the view that the factors that were present here would lead one to expect an actual reduction from the headline sentence. The question would then arise as to whether there is a case for part-suspending. In a situation where there was widespread confidence that Mr. O'Sullivan was unlikely to reoffend and unlikely to find himself back in Court, but also where excessive alcohol consumption had played a part in this offence, there might well be an argument for providing for a structured release back into the community through the suspension of a limited portion of the sentence.

16. In this case, we were asked not to proceed to resentence if we concluded that the sentence imposed was too severe, but rather to allow the appellant an opportunity to put a psychologist's report before the Court at a formal resentencing stage. The Court of its own motion indicated that if the case was going back for a further listing, that it would afford the prosecution an opportunity to update the Court on how the injured party has fared, whether by means of a further medical report or an updated victim impact report. It seems significant difficulties were encountered in obtaining a psychologist's report and the matter was put back on a number of occasions. Thus, the resentencing process has become somewhat protracted.

17. Having concluded that the sentence was unduly severe in the circumstances of the case, we are now obliged to resentence. In doing so, we will identify a headline or pre-

mitigation sentence of five and a half years, a sentence close to the midpoint range for midrange offences identified in *DPP v. Fitzgibbon*. There are factors present by way of mitigation which require a reduction in the headline or pre-mitigation sentence, the absence of previous convictions, the stable domestic situation, the good work record and the history of service to the community, to mention but a few. The appellant's actions post-throwing the punch are to his credit, ringing the ambulance, staying with the injured party and putting him in the recovery position.

18. Accordingly, we will reduce the starting or headline figure to one of three and a half years to incentivise rehabilitation and to provide for structured reintegration into society upon his release from custody we will suspend the final fifteen months of that sentence on his entering into a bond to keep the peace and be of good behaviour. We will hear counsel as to any additional conditions that should be imposed, with particular reference to the contents of the psychologist's report.

No reduction required

George Birmingham
11th Oct 2019