THE COURT OF APPEAL

UNAPPROVED.

FOR ELECTRONIC DELIVERY

Neutral Citation Number: [2020] IECA 149

[72/19]

The President
Edwards J
McCarthy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

D McD

APPELLANT

JUDGMENT of the Court delivered on the 9th day of June 2020 by Birmingham P

1. This is an appeal against severity of sentence. The sentence under appeal is one of four years' detention imposed in the Dublin Circuit Criminal Court on 12th April 2019. The appellant had appeared for sentence in respect of three counts of false imprisonment, three counts of robbery and two counts of s. 3 assault. The judge dealt with the matter by imposing sentence in respect of one of the counts of false imprisonment and taking the other matters into consideration. It should be noted that all of the counts on the indictment arose out of the same incident.

Factual Background

2. This case emerged from events that occurred on the evening of 27th June 2018. The three injured parties, three boys each 15 years old, were socialising in Crescent Park in Dublin when they were approached by a group of eight or nine people. Most were adolescents in their mid/late teens, but one was an older man, in the narrative he is described as "the old fellow", but in fact, it seems he was 32 or 33 years of age. The appellant was one of that group and it is not in dispute that he played a prominent, indeed, a leading role in the events that occurred thereafter.

3. The injured parties were told to walk out of Crescent Park. One of the injured parties, KGB, was held by the appellant around the shoulder. The appellant said to the injured parties "come with us now or you are going to get fucking stabbed". They were brought to Fairview Park where they were told to hand over their phones and their money. They were required to reset their phones, deleting personal information. The injured parties were told that if they made noise or started to scream for help, they were going to "get battered". The group of assailants and injured parties made their way to Tesco Express in Fairview. There, an attempt was made to make purchases using a credit card taken from one of the injured parties. From there, the group made their way to the Tech 4U on Philipsburgh Avenue. The injured parties indicate that it was mainly the appellant and the older man who were making threats. At Tolka Park, the appellant kicked and punched the injured party, KGB, while other members of the group assaulted other injured parties. The injured parties ran up the road, but when, at one stage, they stopped running, they were kicked and punched again. The injured party, KGB, was punched into the right eye. In all, the incident lasted between somewhere in the region of an hour and a half or perhaps slightly less.

The Sentencing Hearing

The Appellant's Personal History

4. In terms of the appellant's background and personal circumstances, the sentencing judge heard that he was born on 24th April 2001. On 14th November 2019, he was arrested and detained and made certain admissions. He had 18 previous convictions recorded. These include the fact that he had received a two-year sentence in the Dublin Circuit Criminal Court on 1st March 2019 in respect of an offence of robbery and false imprisonment, committed on 22nd August 2018. The appellant's other convictions were in the Children's Court. However, at the time of the sentence hearing, he had pleaded guilty to three counts of robbery and one count of attempted robbery, committed on Christmas Eve 2018, but this matter had not been processed to a conclusion. In the course of the oral hearing of the appeal, which was conducted remotely, it was indicated that these counts all related to a single incident. The sentence hearing heard that the appellant had "started dabbling very heavily" in cannabis and cocaine between mid-May and December 2018.

5. In the course of the sentencing remarks, the judge indicated that he saw the headline sentence as being in the region of seven years. The judge addressed the terms of s. 151 of the Children's Act 2001 with its concept of a Detention and Supervision Order. The appellant says that the failure to invoke and make use of s. 151 meant that the sentence actually imposed was overly severe. It is said that this is particularly so if regard is had to the sentences imposed on other co-accused. The adult involved received a sentence of seven years imprisonment with the final 18 months suspended. That sentence not only covered the incident the subject matter of the present appeal, but also the theft on different occasions of a number of bicycles. Another participant, who was dealt with as an adult, but who had been a juvenile at the time of the offence, received a sentence of three years imprisonment with the final 20 months suspended. While there was reference to s. 151 of the Children's Act which provides for detention and supervision orders which results in half of the specified period of detention being served in detention, and the remaining half being spent in the community

under supervision, there was no real detailed analysis of the relevance or applicability of the section. We are aware from other cases that we are dealing with at present that there is a divergence of view as to whether the section has any relevance in a situation where the person before the Court would be turning 18 years old during the period of actual detention. This would be of considerable significance in the context of the present case because the sentence hearing took place within a fortnight of the appellant's 18th birthday.

Impact on the Victims

6. Each of the injured parties was significantly affected by this incident. Victim impact reports were put before the Court from two of the victims, though, in the case of the third victim, he decided not to do that as he did not want to relive the incident by writing a report. In his case, his mother told the Gardaí that in the aftermath of the incident, her son had been very traumatised, had become very withdrawn from friends, did not enjoy socialising and became very nervous when out in public. In the case of KGB, all of those matters are present, but in his case, it is noteworthy that he gave up playing sport, having up to this point played hurling at a high level, and he did not return to school during that school year. He has been left with a scar on the side of his eye which will be a permanent scar. In the case of the third injured party, again, he became very withdrawn, and again, it had a very significant impact on many aspects of his life.

The Judge's Approach to Sentencing

7. Some of the exchanges that took place with the sentencing judge before the imposition of sentence, as well as his remarks when actually imposing sentence, merit consideration. In pleading for leniency, counsel on behalf of the now appellant referred to the fact that her client was then serving a two-year sentence and she indicated that she was asking the judge to consider not adding to it greatly. She referred to the views of the Probation Service that a period of supervision in the community might form part of any sentence

handed down and might be of benefit to the accused. She drew attention to the fact that the Probation Service had referred to the provisions of s. 151 of the Children's Act 2001, which provided for Detention and Supervision Orders. As she did so, the judge interjected to ask "what happens when the defendant reaches 18?" Counsel responded that it was her understanding that Oberstown would keep a detainee until they were 18 and a half years *i.e.* for six months after they had attained 18, and that her understanding was that thereafter, the individual was transferred to Wheatfield Prison where there were structures in place so that any educational courses that had commenced in Oberstown could be continued and built on. The judge asked

> "Does the provision of s. 151 follow past 18?
>
> Counsel for the appellant: "Yes, I think once the accused is a child when he is being sentenced.
>
> Judge: I see.
>
> Counsel: It is to allow a structure, so that…'subject to s. 4, half of the period for which a detention and supervision order is in force shall be spent by the child in detention in a children's detention centre and half under supervision in the community'."

Counsel observed that the section made reference to the fact that it is either a children's detention centre or if he attains the relevant age. She said that she was asking the Court to consider not adding to the sentence that he was currently serving, but she was asking the Court to perhaps have a period of supervision at the end that would give her client the tools that he required to ensure that he did not come back before the Court again.

8. Counsel submitted that it was clear from the Garda evidence that in 2018, her client had totally gone off the rails. The position was that he had been in custody since January 2019, and she said it was clear from the Oberstown report that he was making efforts. The

report from Oberstown spoke of him being engaged with them and in acceptance of the custodial sentence. It noted that he was slow to settle, but he was not somebody who was causing a management issue and that he was polite and mannerly. She suggested that indicated that he was somebody who, it appeared, was willing to engage with the authorities in Obserstown and willing to deal with the issues that were at the root of his offending behaviour. She said that there were a number of protective factors highlighted by the Probation Services, they were the engagement with services, that he had a protective family concerned about his welfare, and that there was evidence of victim empathy. She acknowledged that the report flagged victim empathy issues, but she submitted that one of the things that shows victim empathy more than anything else, is an early guilty plea and the saving of any necessity for the victims to come to Court and give evidence. She concluded by saying:

> "I am asking the Court to consider being as lenient as possible and to bear in mind that [Mr. McD] is somebody who is still a child, and obviously, there is a period of custodial sentence, there is no getting away from that and he knows that. But I am asking the Court to consider assisting him to some extent in giving him a light at the end of the tunnel where he can prove to the Court that the skills that he is making efforts to learn in custody can be put into practice on his release, and he can prove to the Court that he has turned his life around by taking every benefit that is available to him while he was in custody."

9. The judge began his sentencing remarks by outlining the facts of the incident, including making reference to the impact on the victims, and observing that it went without saying that these were serious crimes. The judge then turned to the mitigating factors present, referring, *inter alia,* to the plea, cooperation, the making of some admissions, the expression of remorse, and the fact that he was doing reasonably well in Oberstown. The judge described

the probation officer's report as guarded enough, but as providing some grounds for optimism. At that point, the judge turned to the relevance of the Children's Act. He commented:

> "[t]he Children's Act indicates that…a judge, in sentencing, should have regard to the rehabilitation of the young person. That's one of the prime objectives of the Children's Act, and obviously, in deciding what to do about Mr. McD, I must take that into account. I have been asked by his counsel, Ms. Murphy, not to extend his stay in prison. He is serving a period of detention by reason of a previous crime, something similar to this type of crime, or something similar to these types of crimes, but these are much worse…certainly, these are much more serious crimes. Now, what to do about [Mr. McD]? It is very difficult to know. But I cannot accede to one of the principal submissions or applications made by Ms. Murphy that I should not extend his stay in detention. I think that is unrealistic. I do accept that he has a good family. I remember the evidence of his father on the last occasion, and I was very impressed with the evidence of his father, who is a very, very good man and has contributed greatly to his own…community in Ballymun. I remember he is a boxing coach and a prime mover in the boxing club in the area, so I was impressed by him. Obviously, he is very disappointed and worried about his son and it's evidenced by his presence with his brother here today, and I am impressed by that. But I think how the Court deals with young people is…constrained now by Children's Act legislation."

10. At that stage, somewhat unusually, the judge addressed counsel directly and invited a response from them. He said:

> "[m]y intention was, Ms. Murphy, to give him four years detention with…two years [post-supervision], the Probation Service should deal with him while in

custody, and they should also deal with him for a period of 18 months post-release; can that be accomplished in the statutory framework as set out in the Children's Act? That is the question. Or does it offend in any way that framework? Can I just say, I am going to impose a four-year period of detention? The Probation Service is to supervise him while in detention and for a period of 18 months post-release? Does that offend[?] [C]an I make those orders?"

Counsel for the appellant responded:

"I do not know is the honest answer…I am not sure. I do not know if the Children's Act allows for that. I wonder if the Court might let it stand and I can –

Judge: Can I do it out of the inherent jurisdiction of the Court? Can I just make these orders…to the Probation Service?

Counsel: […] but, if he does not engage with the Probation Services –

Judge: Post-release.

Counsel: Post-release, it seems that nothing happens [that] there is nothing the Probation Service can do to enforce his engagement, but I think the Court can certainly make the order.

Judge: Yes. What I intend then is to impose upon him a period of detention of four years on the basis of one of the counts […]"

Prosecution counsel then intervened, saying that the only concern that she would express at that point, and she knew that the Court had asked for the views of counsel, something that the judge confirmed, was that, in her view, the Court had two options; a detention order *simpliciter,* or a detention order and supervision order envisaged by s. 151, and counsel said that her only concern was that under subsection (3), the judge intervened "if I order supervision, does that basically mean that it is essentially only a two-year detention order and two years in the community. That is not what I wish for at all". The judge confirmed that his

principal order in the case was one of four years' detention. He indicated that the help that he would receive afterwards is a matter that he was interested, but sought assistance as to how that could be accomplished? The judge said "can I ask the Probation Service to supervise him for those four years?" Defence counsel said she thought he probably could. He most certainly could while he was detained. The judge indicated that, therefore, it was a four-year detention period and he was directing the Probation Service to supervise Mr. McD while in custody. The judge confirmed that was his only order in the case, as post-event supervision could not be enforced. He accepted that, and so would not make that order. Counsel for the appellant then asked if the Court would consider backdating the matter to 19th January when Mr. McD had gone into custody. The judge acceded to this request. In follow-up remarks, the judge indicated that but for the now appellant's youth, the sentence would have been considerably longer in the case, and that if he was asked to nominate a headline sentence, it would be in the region of seven years for a matter such as this.

The Appellant's Position

11. In prosecuting this appeal, counsel has said that the error in the Circuit Court was that there was no adequate or appropriate regard to the mitigating factors present. The seriousness of the offending is acknowledged, though it is pointed out that the appellant was in the company of an older individual. However, serious as the offences were, there had been a very early guilty plea, there had been an expression of remorse, and indeed, the guilty plea evidenced remorse. The probation report showed some positive steps taken by the appellant but that the sentence actually imposed provided no incentive for rehabilitation, that the existence of s. 151 actually seemed to work against him. Counsel was very clear that it was accepted that this was an offence that merited detention, she was emphatically not suggesting that it was a case for no detention, but she says that there was an error in principle by not

imposing a sentence involving a level of supervision, that there was an error in principle not to build on such indications that rehabilitation was underway as were present.

Discussion

12. The sentencing judge found himself in a situation where the normal route of considering part-suspension was not an option (see the decision of this Court in *DPP v. AS* [2017] IECA 310). The sentence hearing proceeded on the basis that s. 151 was available, although submissions advanced on behalf of the Director in other cases casts some significant doubt on this, but in any event, the judge did not regard that as a realistic option. For our part, we can understand fully why the judge, dealing with offences of this seriousness, would not have regarded a sentence of two years to be spent in a detention centre and two years' supervision in the community to be adequate, more particularly, when the now appellant was, at the time he appeared before the Circuit Court, already serving a sentence of two years' detention. Counsel on behalf of the appellant, says that in those circumstances, the trial judge could and should have deferred finalising sentence until the appellant had reached adulthood, so that the option of partly-suspending the sentence would become available. In exchanges with counsel, members of the Court canvassed with her the fact that in other circumstances, if a judge chose not to finalise matters, when that would be the expected course of action in order to have recourse to the range of options available for sentencing an adult, that one might expect his or her action to be the subject of a challenge by way of an application for judicial review. However, counsel says that, whatever might be the situation in other cases, that would not have arisen in this case. Counsel says that if this Court is prepared to intervene, it would have the range of sentencing options available as of today's date.

13. The Court has not found this an easy case to deal with. The fact that the appellant was coming before the sentencing court as a minor, though within a fortnight or so of attaining his adulthood, meant that the judge was significantly constrained. It is, of course, the situation that in many cases, indeed, most cases, a young offender will be advantaged by having his sentence dealt with before he achieves his majority. Deferring finalisation of sentence would have had some potential advantages for the appellant, in that it would have opened up the prospect of a sentence that was partly-suspended, but there would also have been certain disadvantages, for example, he would have lost his entitlement to anonymity.

14. This Court often makes a point of stating that before it will intervene, something in the nature of an error in principle must be established. The point is made that merely because members of the Court, still less, individual members of the Court, might have been minded to act differently, does not provide a basis for intervention. However often that principle is stated, the clear blue line is not always apparent, and there are cases where the Court has to wrestle with the question as to which side of the line a case falls and whether it is appropriate, or even permissible, to intervene. This is such a case. Given that the judge was so obviously and clearly anxious to be in a position to provide for the continuing involvement of the Probation Service following the appellant's release into the community, we have, not without considerable hesitation, concluded that the judge erred, at least to the extent of not specifically considering the option of deferring finalisation so as to open up the possibility of part-suspension. In that regard, we have been told that there have been instances of judges deferring finalisation of sentence in order to deal with the matter by way of suspended sentences.

15. Having come to that view, it seems to us that in those circumstances, we are required to readdress the question of sentence. In doing so, we take as our starting point that the incident giving rise to the sentence hearing was a very serious one indeed. We are in

complete agreement with the sentencing judge that any suggestion that the period in custody that the appellant was already serving should not be extended was unrealistic. It seems to us that the nature of the offence and the personal circumstances of the appellant required that his period in custody be significantly extended. Notwithstanding this fact, we do recognise that there would be real merit in providing for a structured release into the community and in providing an incentive to rehabilitate and a disincentive to reoffend upon release into the community. However, if the requirement for a significant extension of the period in custody is to be achieved, and yet, that there is to be a supported and structured release into the community, the scope for part-suspension is limited. For that reason, while we are prepared to intervene we will only do so to a very limited extent.

16. We will impose a sentence of four years. We will suspend the final eight months of that sentence. This period of suspension is conditional on the appellant entering in a bond to keep the peace and be of good behaviour during his period in custody and for a period of three years post-release. During the period of eight months post-release from custody, he will be under the supervision of the Probation Service and he will be required to comply with their directions.

17. In the current situation, where appeals are being conducted remotely, we will give liberty to apply to both sides if there are any issues in relation to the manner in which the bond is to be entered into, or as to the appropriate terms of the bond. We should clarify that in reaching the conclusion that we have, we have had regard to the up to date information that has been provided.

18. In deciding to intervene and suspend a limited part of the sentence, we have taken into account up to date mitigation material that has been provided. We can say that this material is very positive indeed, and by way of example, would quote from a document provided the Solas Project. It comments:

"Solas Project, through our Compass Prison In-Reach Programme, first met DMcD shortly after his arrival into Wheatfield Prison. Initially, D was reluctant to get involved in any of our programmes, but the invitation was left open to him. After a few months, based on his own initiative, he signed up to our Podcast programme. Over the last year, he has completed a Law Society certified Street Law Programme, 10-week Podcast programme, looking at the experiences of prison life for younger prisoners, a Deloitte certified Work Place Readiness Programme, as well as engaging in sports programmes and some fundraising initiatives. During this period, he has been an absolute standout participant who demonstrates a real eagerness to learn and discover and is unrecognisable as the same person we first encountered. He is thoughtful and respectful towards our staff and volunteers, but most remarkably, it is his commitment to do better for himself that is his main strength. He has openly spoken about, for the first time in his life, trying to consider what a brighter future might look like for himself. He is actively seeking out supports and opportunities within the prison system to help him achieve this. Solas Project will continue to work with D while he is in Wheatfield Prison and will also offer him key working support upon his return to the community for a period of three years."

19. Accordingly, we will allow the appeal and quash the sentence imposed in the court below, substituting it for one of four years' imprisonment with the final eight months suspended on the conditions which have been outlined above.