THE COURT OF APPEAL

Record Number: 121/19

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

MARIUS PURCIL

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 6th day of October 2020 by Ms. Justice Kennedy

1. This is an appeal against sentence. On the 28th March 2019, the appellant pleaded guilty in Dublin Circuit Criminal Court to a count of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 and a count of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990. He received an aggregate sentence of eight years' imprisonment with the final two years suspended on terms.

Background

2. On the afternoon of the 21st January 2017, the appellant entered the premises of a Chinese holistic therapy centre on Mary St, Dublin. The complainant was working as a receptionist in the centre at the time and only she and the cleaner were present in the premises. When the appellant arrived he asked for a massage, the complainant explained that she was the receptionist and that there was nobody able to give him a massage on that day. The appellant asked if he could pay her money in exchange for sexual services. The complainant refused and the appellant asked a number of times before becoming aggressive.

3. The appellant then proceeded to hit her around the face and upper body area. He struck her with his fist on the right side of her neck, and then landed a second blow again with his fist to the left of her forehead before grabbing her by the face and pulling her forward and head-butting her. She was then punched in the eye and the assault continued. The appellant then produced a swiss knife which he held to her neck and he instructed her to take off her clothes. The appellant grabbed her by the throat and pushed her against the

wall, he choked her causing her to lose consciousness. When she regained consciousness, he was still over her, choking her. She lost consciousness for a second time and when she regained consciousness, a man from the business below had come to her assistance and the appellant had left.

4. The complainant's leggings and underwear had cuts to them which forensic examination confirmed were caused by a knife as opposed to tearing. The complainant went to the Mater Hospital where she was assessed as having numerous injuries to her face and upper body. Following her discharge from hospital, the complainant was examined at the Sexual Assault Treatment Unit and in addition to the injuries on her face and upper body, the examiner found a laceration on her labia minora which was consistent with the damage to her clothing.

5. As part of the garda investigation CCTV footage was viewed from outside the premises and in the surrounding streets. The perpetrator and the clothing he was wearing could be identified. Following enquiries, the appellant was then identified as a suspect, his dwelling was searched and he was arrested on the 25th of April 2017. During the course of the search clothing was found which matched the clothing worn by the man on the CCTV footage and a knife matching the complainant's description was also recovered.

6. The appellant was initially charged with assault only, which he denied. The charge of sexual assault was then added to the indictment. A jury was sworn on the 27th March 2019 and the appellant then pleaded guilty to both counts on the 28th March 2019.

The sentence

7. In terms of aggravating factors, the sentencing judge noted the appellant's record of conviction which included a conviction for rape in Romania for which he received a five-year term of imprisonment. He stated that he believed the appellant's culpability was high, involving as it did offensive and reprehensible acts which would have a long-term effect on the victim and therefore it was important to construct a sentence that would reflect the appellant's wrongdoing.

8. The judge referred to the following mitigation: the pleas of guilty, the remorse shown by the appellant and his personal history as outlined in the psychological report.

9. In relation to the section 3 assault the sentencing judge imposed a sentence of three years. In relation to the sexual assault the judge imposed a sentence of five years consecutive to the three years imposed on the s. 3 offence. Taking into account the mitigation present, the final two years of the sentence was suspended on terms, leaving an aggregate sentence of six years' imprisonment.

Personal circumstances of the appellant

10. The appellant is originally from Romania and at the time of sentencing he was 39 years of age. He came to Ireland in 2015 or 2016, having previously travelled between Ireland and the UK whilst running a construction business. He has one conviction in Ireland for no insurance and seven convictions in other jurisdictions. These include racially aggravated common assault on 13th December 2015 from the South West London

Magistrates Court in the UK which was dealt with by way of a fine and conditions. On 14th November 2007, he was sentenced to five years by the Bistrita Court in Romania for rape of a juvenile boy. The remaining convictions were all for theft offences imposed in the District Court, Bistrita, Romania.

11. A psychological report was submitted on behalf of the appellant and this outlined his personal history including that from the age of about 16 he was detained in a juvenile prison where he said that he did not receive any counselling or other assistance. He had outlined that, whilst he was in juvenile detention, he was the victim of an attack when he was 17 years of age and was also bullied and abused whilst in prison around that time. The report also outlined the role played by the appellant's past on his subsequent offending including 'copying behaviour', describing his as a "*complex case because of the diverse sexual interests that are in his past offending"* and noting that his behaviour suggested a conduct disorder by the age of 15.

Grounds of appeal

12. The appellant puts forward the following five grounds of appeal:-

    (i) imposing the said sentence which in all the circumstances was disproportionate

    (ii) imposing consecutive sentences in respect of counts arising from the same incident

    (iii) not adequately weighing the mitigating factors

    (iv) adopting a headline sentence that was too severe for the offences in question

    (v) it is pleaded that the totality of the sentence which was imposed amounts to an error in principle, is disproportionate and in all the circumstances should be reduced by this Honourable Court

13. Although the appellant puts forward five grounds of appeal, it appears that the gravamen of the appellant's submissions is that the trial judge erred in principle in imposing a consecutive sentence for the sexual assault, despite the fact that the assault and sexual assault arose from the same set of circumstances or one single event.

Submissions of the appellant

14. The appellant submits that this was a case for concurrent sentencing as it involved a single factual event that did not extend over a significant period of time and did not involve multiple separate instances of offending over time and only one complainant was involved. While the potential for consecutive sentences for offences contained in the same indictment has been recognised in the case law, these cases usually involve systematic offending over a significant period of time.

15. The appellant refers extensively to the dicta of Charleton J. in *The People (DPP) v. FE* [2019] IESC 85 on the issue of consecutive sentencing. One factor which comes into play is the duration of the crime and in considering the duration of crimes generally, Charleton J. differentiates between spontaneous crimes and premeditated crimes. The appellant submits that in the instant case there was no evidence of premeditation.

16. In terms of consecutive sentencing, Charleton J. makes a number of key observations at para 31:-

> "In many instances, but even still sensibly looked at, a criminal event may consist of several different offences. The accused could be a male burglar who breaks into a house in order to steal. In doing so he will be carrying housebreaking implements, he will criminally damage doors and windows to enter and make good his escape, he will steal, he may threaten to kill the householder if confronted, he may tie her up, thus assaulting and falsely imprisoning her. That may take half an hour. It is still one event. While separate charges may be sensible in case the jury are inclined to reject part of the narrative, such as the threat to kill, each crime informs the seriousness of the others in the set. It would be wrong in principle for a sentencing court faced with four convictions out of the same events to split these up for tariff purposes and make each term consecutive to the other. That would be to act artificially. The event of the crime was clearly very bad and deserves an appropriate sentence. It is not appropriate to treat the events as separate and requiring consecutive sentences."

Charleton J. goes on to state that part of a decision in regarding a consecutive sentence as opposed to making all sentences concurrent will be the existence of a gap in time.

17. It is submitted that applying the principles outlined above, the offending in the appellant's case should be seen as one single instance of offending and treated as one transaction. The assault and sexual assault occurred together at the same time or immediately following each other, there was no 'gap in offending' where an offender might take stock and deserve further punishment for not having corrected his conduct after the first offence. It is submitted that by imposing consecutive offences the sentencing judge erred in law and in fact and additionally breached the principle of totality.

18. It is submitted that if the sentencing judge was minded that the sexual assault was the primary matter, he should have imposed a sentence thereon aggravated by the accompanying physical assault, then deduct appropriately for mitigation including the early plea.

19. The appellant refers to a number of cases where the courts assessed the appropriateness of imposing consecutive sentences in the circumstances. The first of these is *The People (DPP) v. Keneally* [2018] IECA 274. Here the Court held that the imposition of consecutive sentences was appropriate but the trial judge ought to have stepped back and addressed the sentence that he had arrived at by reference to the totality principle. The appellant submits that in the instant case the sentencing judge did not step back and apply the totality principle.

20. Likewise, in *The People (DPP) v. Michael Farrell* [2010] IECCA 68, the trial judge imposed a total sentence of 20 years which included, 8 years in respect of the separate rape charges to run consecutively to each other, two year sentences in respect of each count of indecent assault in respect of the same complainants to run concurrently and then

imposed a sentence of four years in respect of indecent assault on the third complainant, that sentence to run consecutively to the second rape sentence. On appeal the Court did not take issue with the overall sentence imposed but rather with the way it was structured as the sentence of four years' imprisonment for one of the indecent assault offences was out of kilter with the other convictions for indecent assault. The Court commented that consecutive sentences were not imposed as a matter of course in respect of multiple offences as it would lead to a sentence which was too severe in light of the accused person's culpability, and indeed would ignore the reality of the offence.

21. *The People (DPP) v. McKenna (No 2)* [2002] 2 IR 345 concerned another case of multiple sexual offences over time and the Court noted that it would be an injustice to the public not to impose consecutive sentences in that case, taking into account a period of resumed offending after an opportunity for reflection and the particularly depraved nature of the offences but the Court noted that there had been decisions which indicated that the imposition of consecutive sentences should be the exception rather than the rule.

22. The appellant refers to *The People (DPP) v. Conroy* [2014] IECA 13 and *The People (DPP) v. Jones* [2019] IECA 51 where the Court held that the nexus between the offences involved was so close that concurrent sentences rather than consecutive sentences were appropriate.

23. The appellant also refers to *The People (DPP) v. PP (No 2)* [2015] IECA 316 where the appellant appealed from an effective sentence of 15 years that had been imposed in respect of a conviction for rape and four counts of sexual assault. The trial judge had imposed three consecutive sentences as between the rape and two counts of sexual assault where the offences had been committed over a 12-month period and were perpetrated against the appellant's daughter. The Court allowed the appeal and reduced the overall sentence by three years. The appellant submits that it is notable that the Court preferred to impose concurrent rather than consecutive sentences and preferred to deal with the most serious offence by imposing the greater sentence and making all other sentences concurrent.

Submissions of the respondent.

24. The first point made by the respondent is that it was entirely within the discretion of the sentencing judge to impose consecutive sentences. This is particularly so when the assault and sexual assault were completely separate and distinct offences and the appellant took advantage of the consequences of the first offence, which rendered the complainant unconscious, to carry out the second offence.

25. The respondent accepts that there is generally a one-transaction rule in relation to imposing consecutive sentences but this is not a definitive rule. The respondent refers to the following passage from O'Malley on *Sentencing Law and Practice* (3rd Ed. 2016) at para. 5-27:-

> "In the absence of any particular statutory rule or restriction, a court usually has considerable discretion as to the sequence in which multiple custodial sentences

should be ordered to run. Many defendants are simultaneously convicted of several offences, while others may already be serving custodial sentences for unrelated offences. In so far as there is any guiding common law principle, it is that concurrent offences should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents. But this, it should be stressed, is no more than a broad guiding principle. A court's fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct, while making due allowance for personal mitigation and other relevant factors."

26. The respondent refers to two English authorities which, it is submitted, provide guidance on the principles surrounding consecutive sentencing. The first of these is *R v. Ralphs* [2009] EWCA Crim 2555 where the Court said as follows:-

> "…there is sometimes a difficulty in deciding whether criminality under consideration may or may not be regarded as a single incident. The fact that offences are committed simultaneously is not necessarily conclusive…
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> A further principle, identified by Dr David Thomas in his monumental work, Current Sentencing Practice, Vol 1 at A5-J is that a court "may impose consecutive sentences for offences committed on the same occasion when there are exceptional circumstances which justify a departure from the usual practice.""

27. The respondent further refers to *R v. Fletcher* [2002] EWCA Crim 834 where the English Court of Appeal upheld the imposition of a consecutive sentence (whilst adjusting the length) in relation to offences of indecent assault and a threat to kill arising from the same attack on the injured party. The Court noted that most of the leading cases in this area are concerned with driving offences but there was one particularly apposite case: *Ragusa* (1993) 14 Cr.App.R.(S.) 118, which was similar to *Fletcher*. The Court considered *Ragusa* as follows :-

> "[The appellant] had been convicted on counts of indecent assault and false imprisonment and was sentenced to the maximum of 10 years for the indecent assault and 12 years concurrent for the false imprisonment. Counsel for the appellant in that case submitted that obliquely the sentencing judge had improperly surmounted the maximum sentence of ten years for an indecent assault by imposing the 12-year sentence for false imprisonment. He combined that submission with one that, where the two offences were part and parcel of one course of conduct, the judge should not have gone beyond the period of 10 years. In response to those submissions Macpherson J., giving the judgment of this Court, said this at pages 119/120:
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> > 'Be that as it may, we must look at the sentence as it was imposed. The position is that we must look to see whether there is sufficient criminality to pass a sentence of this length, and we must consider whether the overall sentence was appropriate for this appellant and for these offences.

In our judgment 12 years was well and truly merited. Even if there is anything in Mr Murray's point, which we doubt, it is to be observed that the sentence of 12 years, or more indeed, could have been achieved perfectly properly in a number of different ways. There were two separate gross indecent assaults in this case, each of which carried a maximum of 10 years' imprisonment by way of sentence. Furthermore, if 10 years is correct, as Mr Murray accepts, as my Lord Turner J. indicated, what would be wrong in adding two years for the aggravation of the false imprisonment which was in itself gross and serious? In any event where false imprisonment is committed and things are done that were done by way of restraining this girl with the intention of what happened, 12 years would, in the judgment of this court, be merited for false imprisonment alone. By any of those routes 12 years could have been achieved.'

21. The only real difference in this case is that the second offence, other than indecent assault, was one of threats to kill, which carried a maximum sentence of 10 years, whereas in that case the second offence was that of false imprisonment, which carried a maximum sentence of more than 10 years. But, as Mr Davis has accepted, the principle which can be derived from Ragusa is that the Court is not fettered by the fact that two serious offences arise out of the same series of events on one occasion from doing justice to meet the total criminality of the offending. So in this case we think it is appropriate to reflect the gravamen of the indecent assault and the gravamen of the threats to kill and the total seriousness of this course of offending by consecutive sentences. After all, the gravamen of indecent assault is the indecency, even if it may be aggravated by violence or threats of violence; but the gravamen of threats to kill is the extreme terror which such threats engender, especially where, as here, they are backed up with the use of a weapon. Here the terror was extreme, and for good reason for the appellant indicated that he had nothing to lose and was, or verged on being, out of control. Moreover, the threats to kill were a separate prelude to the offending under the charge of indecent assault, even if those threats were the means by which the appellant subjected the victim to his will. In these circumstances we believe that the judge was in principle entitled to visit the offending here with consecutive sentences and would in fact have been entitled to do so if he had not made the sentence on the count of indecent assault a more than commensurate sentence."

28. Likewise, in the instant case, the trial judge was entitled both in principle and in law to visit the serious offending herein with a consecutive sentence. Although the physical assault appears to have been committed in close temporal proximity to the subsequent sexual assault, it was a separate and distinct offence of a completely different nature and similar to that observed in *Fletcher,* the physical assault was a separate prelude to the sexual assault even if it was the means by which the latter was committed.

29. It is further noted that the caselaw relied upon by the appellant to contend that a concurrent sentence would have been appropriate in the instant case is distinguishable on

the particular facts arising and indeed endorses the position that each case will turn on its own particular facts. Whilst the Supreme Court judgment in *DPP v. FE* [2019] IESC 85 provides useful guidance in relation to sentencing principles and practice, Charleton J.'s observations regarding consecutive sentencing were made against a completely different factual background.

Discussion

30. The essence of this appeal concerns the imposition of a consecutive sentence in circumstances where the offences arose from what is termed as a single event. Moreover, Mr Clarke SC on behalf of the appellant contends that the judge failed to properly apply the totality principle and that he approached the sentencing process in an unusual manner by indicating the headline sentence at the end of the process and by dealing with the sentence in a global manner.

31. Consecutive sentences may be imposed for a series of offending conduct, such being within the discretion of the court. Insofar as the imposition of a sentence is concerned, the overarching objective is that the sentence imposed must meet the extent of the offending conduct. In ordering sentences to run consecutively, a court must obviously take considerable care to ensure that consecutive sentences are not being imposed for conduct which has already been taken into account as an aggravating factor.

32. Mr Clarke places heavy reliance on the Supreme Court decision in *The People (DPP) v FE* [2019] IESC 85 and in particular paras. 31 – 33 thereof. Paragraph 31 states as follows:-

> "In many instances, but even still sensibly looked at, a criminal event may consist of several different offences. The accused could be a male burglar who breaks into a house in order to steal. In doing so he will be carrying housebreaking implements, he will criminally damage doors and windows to enter and make good his escape, he will steal, you may threaten to kill the householder if confronted, he may tie her up, thus assaulting and falsely imprisoning her. That may take half an hour. It is still one event. While separate charges may be sensible in case the jury are inclined to reject part of the narrative, such as a threat to kill, each crime informs the seriousness of the others in the set. It would be wrong in principle for a sentencing court faced with four convictions out of the same events to split these up for charity purposes and make each term consecutive to the other. That would be to act artificially. The event of the crime is clearly very bad and deserves an appropriate sentence. It is not appropriate to treat the events are separate and requiring consecutive sentences. The overall sentence, usually on the most serious of the offences, which would be the imprisonment aggravated by the threat to kill, must fit the event with other smaller sentences running concurrently."

33. In the present case while it is correct to say that the offences arose from one event, nonetheless the facts in this case are somewhat unusual. Mr McGinn SC on behalf of the respondent argues that these are entirely separate offences where the appellant's motivation in committing the first offence of assault was not a sexual one, whereas the appellant used the consequences of the first offence, that is rendering the victim

unconscious in order to commit the second offence. As a result, it is said that there was a gap in the offending thus justifying the use of consecutive sentences on the part of the sentencing judge.

34. It seems to this Court that in the unusual circumstances of the case where the appellant initially assaults the victim in such a serious manner so as to render her unconscious and then, whilst she was in that state, proceeded to take the opportunity to sexually assault her, this constituted two entirely separate offences. The motivation behind each offence was quite distinct, and in the circumstances the judge was wholly justified in exercising his discretion to impose sentences on a consecutive basis.

35. The point is made on behalf of the appellant that the sentencing judge failed to properly apply the totality principle. The respondent contends that in his concluding remarks, the judge had regard to the totality principle where in explaining his reasoning for imposing consecutive sentences the judge said: –

> "Now, it's unusual for this Court to impose consecutive sentences, it's not be normal sentencing practice, but my overall duty in these types of cases is to impose a punnet defendant a proportionate sentence taking into account all the facts."

36. Mr Clarke says that there is a distinction between proportionality and the totality principle. However, the fundamental rationale for the principle arises from the concept of proportionality. The totality principle ensures that the cumulative sentence imposed is proportionate to the gravity of the offending and the circumstances of the individual offender. In *Gilligan v. Ireland and ors*, [2014] 1 ILRM 153, MacMenamin J. delivering judgment, observed that totality is an aspect of the principle of proportionality:-

> "The totality concept is a form of check to ensure that, where proportionate sentences are chosen for each offence, the court may, when appropriate, adjust that overall sentence, or the last sentence imposed, in order to achieve proportionality and overall fairness."

37. It is readily apparent that the sentencing judge was fully cognisant of the sentencing principles. It is clear that his view was that the global headline sentence should be one of 8/9 years. Whilst it is true to say that he informed the parties of this in the concluding stages of sentence rather than at the outset, nonetheless this does not amount to an error in principle.

38. In *The People (DPP) v. Casey and Casey* [2018] IECA 121, Birmingham J. (as he then was), outlined two approaches which the court may take in applying the totality principle. The first approach involves a determination of the appropriate sentence in the instance of each offence in the usual way, then applying a reduction of appropriate for mitigation and then a consideration of the totality principle with an adjustment to the sentences if necessary. However, Birmingham J. then addressed the second approach as follows: –

> "It is open to a sentencing court, where it is sentencing for multiple offences, before considering what actual sentences should be imposed in respect of individual offences, and whether and to what extent individual sentences should be concurrent or consecutive inter se, to determine in the first instance a global pre-mitigation sentence reflective of the overall gravity of the offending conduct. Clearly, in making such a determination, any global figure selected by the sentencing court is required to be proportionate to the gravity of the totality of the offending conduct, but no more than that."

39. The overarching principle is that the sentence imposed should be proportionate to the offending and the personal circumstances of the offender.

Conclusion

40. In the view of this Court these were very serious offences indeed. It cannot be overlooked in the context of the sexual assault offence that the appellant has a previous conviction for the rape of a juvenile thus aggravating the offence. We are entirely satisfied that if the sentencing judge had approached sentence on a concurrent basis, that the sentence ultimately imposed for the sexual assault offence would certainly be in the region of six years' imprisonment. The question must be asked whether the sentence imposed was a proportionate one for the offences and the circumstances of the offender and in our view whatever the route taken, the sentence was indeed a proportionate one. The fact that the judge determined to impose sentences on a consecutive basis was, in the view of this Court, a wholly justified exercise of his discretion in the particular circumstances of the case.

41. Finally, Mr Clarke expressed a concern that inadequate consideration was afforded by the sentencing judge to the fact that the appellant entered a plea of guilty to the offences and in particular to the sexual assault offence. However this particular submission does not withstand scrutiny of the transcript in that the sentencing judge specifically referred to the plea of guilty and in observing that the plea was entered at a later stage, acknowledged that the sexual assault count was added to the indictment at a later stage and therefore the plea in in the instance of that offence could be viewed in a better light than that entered on foot of the assault offence.

42. In the circumstances, the Court is not persuaded that the sentence imposed was disproportionate or that the use of consecutive sentences amounts to an error in principle and consequently the appeal is dismissed.