THE COURT OF APPEAL

Record Number: 27/20

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

TONY DELANEY

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 2nd day of February 2021 by Ms. Justice Kennedy.

1. This is an appeal against sentence. The appellant pleaded guilty to four counts comprising of two counts of assaulting a peace officer acting in the execution of her duty contrary to section 19(1)(a) of the Criminal Justice (Public Order) Act, 1994; a count of production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act, 1990 and a count of criminal damage contrary to section 2 of the Criminal Damage Act, 1991. On the 11th February 2020 the appellant received a sentence of three years' imprisonment.

Background

2. On the 8th February 2019, at approximately 4 pm gardaí observed a vehicle at the entrance to Spring Lane halting site. On approaching the vehicle they observed the appellant exit the driver's seat and run from the vehicle. On checking the vehicle the gardaí noted that it did not have valid documentation and the intention was to seize the vehicle. Two gardaí, Garda Conway and Garda O'Shea, were waiting for a tow wagon. As they were waiting the appellant returned. He was highly intoxicated and aggressive towards the gardaí. He jumped into the driver's seat and used his car keys to start the vehicle. Garda Conway went to the driver's side and attempted to take the keys from the ignition. She was punched a number of times along the arm, elbow and shoulder. Garda O'Shea came to her assistance and she was punched several times on the upper body. They managed to remove the appellant from the vehicle and he left but returned with a four-foot iron bar. Gardai Conway and O'Shea, fearing for their safety, got into the patrol car. The appellant proceeded to hit the patrol car with the iron bar several times, causing damage to the passenger windows, the passenger side panels and the windscreen.

Assistance eventually arrived and the appellant fled the scene. The appellant was arrested on the 21st March 2019.

Personal circumstances of the appellant

3. At the time of sentencing the appellant was 24 years of age with a partner and two children. He is a man with 51 previous convictions. Of those convictions, five concern Circuit Court convictions from November 2015, which include three convictions for robbery, one for attempted robbery and one for unlawful seizure of a vehicle. For this the appellant received a sentence of four years with eighteen months suspended.

4. The appellant has been in custody since October 4th 2019, there was a serious incident while he was in custody resulting in the appellant being placed on life support for a period of time.

The sentence

5. The judge characterised the appellant's actions as outrageous behaviour with little regard for the law and observed that the previous sentence which was suspended did not have the desired effect. Taking into account that the appellant had been in custody since October 2019 the judge imposed sentences of two years' imprisonment in respect of the counts of assault, three years in respect of the count of criminal damage and three years in respect of the production of the iron bar, concurrent.

Submissions of the appellant

6. In oral submissions, Ms. McCarthy BL neatly summaries the issues; firstly, the failure to backdate the sentence and, secondly, where the judge did not backdate, she says that he ought to have suspended a portion of the sentence.

7. Ms McCarthy acknowledges that the judge has a discretion whether or not to backdate a sentence but contends that in light of the mitigating factors, he ought to have done so. She argues that in not doing so, the judge did not give effect to the totality principle and the prospect of rehabilitation. Reference is placed on *The People (DPP) v. Flaherty* [2015] IECA 161 where the Court stated as follows:-

> "While it is generally the practice, when arriving at the appropriate sentence for a particular offence and a particular offender, to allow full credit for time spent in custody prior to the sentencing date, it is not mandatory that this be done, and indeed in some instances which might be described as exceptional, it would not be appropriate to so do. Sentencing judges should have a discretion to decline to give any credit, or alternatively to give limited credit, for time spent in custody in appropriate cases, and with due regard to the totality principle."

8. It is submitted that this case does not fall into the exceptional category identified in *Flaherty*.

9. It is said that where the judge did not backdate the sentence, when one takes account of the mitigating factors and his desire to address his addiction issues, the sentence ought to have been suspended in part to incentivise rehabilitation.

10. In this regard reference is made to *The People (DPP) v. O'Rourke* [2016] IECA 299 where the Court suspended the appellant's sentence primarily on the basis of his genuine remorse, plea of guilty and to incentivise rehabilitation.

11. The appellant further refers to *The People (DPP) v. M* [1994] 3 IR 306. where Egan J. emphasised the importance of rehabilitation.

Submissions of the respondent

12. In response, Mr Boland BL says that the judge was aware the appellant had been in custody, moreover, that he could have imposed a longer sentence and backdated that sentence. Such was within his discretion. In terms of the failure to backdate the sentence, the respondent refers to the remarks of Edwards J. in *The People (DPP) v. Byrne* [2015] IECA 235:-

> "The court finds no error of principle in circumstances where the judge specifically alluded to the fact that time had been spent in custody and stated that he had taking it into account in arriving at his final sentence figure. The judge expressly stated that had he chosen to structure the sentence otherwise the appellant might well have faced a longer sentence. This Court considers that if the judge taken a different approach and sentenced the appellant to a higher aggregate sentence, for example to a term of six years, with an appropriate discount for the time served in custody while on remand, such a sentence would in all likelihood not have been interfered with."

13. The respondent submits that the sentencing judge clearly did not fail to take account of the period spent on remand in custody by the appellant. In delivering his sentencing remarks the sentencing judge states explicitly that he is aware of the time spent on remand in custody and is going to account for same in the period of imprisonment to be imposed rather than by backdating the sentence.

14. Insofar as a suspended portion is concerned, it is said that while it was accepted he was seeking assistance to deal with addiction difficulties, this was undocumented. Although it was clarified that the appellant was hospitalised for a period of his incarceration, and only returned to custody shortly before sentence, at which point he sought to engage with the services there.

15. Mr Boland argues that all factors were considered by the judge, he assessed the appellant's previous convictions and noted that when the appellant had sentences suspended, such did not have a beneficial effect. Therefore, he was justified in not suspending the sentence in part.

Discussion

16. The judge's sentencing remarks are focused and accurate in our opinion. This was certainly outrageous conduct on the part of the appellant, attacking members of an Garda Síochána in the course of their duty, departing only to return with a four-foot iron bar and then proceeding to strike the squad car while the gardaí were in the vehicle. The appellant has a long history of offending; 51 previous conviction in total, some of which

aggravate the offences the subject of this appeal and some of which operate to reduce mitigation. Moreover, he is a man who has previously had the benefit of suspended sentences.

17. While Ms McCarthy argues cogently on behalf of her client, we do not see force in either of the issues raised. The judge was fully entitled in the circumstances to exercise his discretion and impose a sentence as of the sentence date. No issue may be taken with this approach in circumstances where he was fully cognisant that the appellant had been in custody and expressly stated that he was taking that factor into account in imposing sentence.

18. In our opinion the judge did not err in the manner he structured the sentence so as not to suspend a portion of the sentence. He observed that such had not benefited the appellant in the past. In those circumstances, the judge operated entirely within his discretion and we are not persuaded that he erred in the sentence imposed.

19. The appeal is dismissed.