



# THE COURT OF APPEAL

Record No. 2020/22  
Neutral Citation Number: [2021] IECA 73

**Birmingham P.**

**Woulfe J.**

**McCarthy J.**

**BETWEEN/**

**THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC  
PROSECUTIONS)**

**RESPONDENT**

**-AND-**

**KEITH O'DONOGHUE**

**APPELLANT**

**JUDGMENT of the Court delivered by Mr. Justice Woulfe on the 16<sup>th</sup> day of March 2021**

1. This is an appeal against the severity of a sentence of four years' imprisonment imposed by the Circuit Court on the 4<sup>th</sup> February, 2020. The appellant was convicted of two offences which took place on the 21<sup>st</sup> October, 2016. The sentence of four years' imprisonment was imposed in respect of the first count of robbery, a sentence of two years' imprisonment was imposed in respect of the second count of unlawfully taking possession of or using a mechanically

propelled vehicle without the consent of the owner thereof or of other lawful authority. Both sentences were concurrent. The Court also ordered on the second count that the appellant be disqualified for a period of seven years, and directed that details of the conviction and disqualification be endorsed on the appellant's driving licence.

2. The appellant appeals against the severity of the four year sentence on the grounds, inter alia, of the appellant's positive rehabilitation between the date of the offences in 2016 and the sentence hearing on the 29<sup>th</sup> March 2019, and his continued efforts at rehabilitation between then and the adjourned sentencing date of the 4<sup>th</sup> February, 2020 in circumstances where it is submitted that all signals and indications were that the sentencing judge would deal with the sentence in a lenient manner if the appellant were to continue going "in the right direction".

### **Background**

3. It may be useful to outline a chronology of the events that led to the sentence. The incident in question occurred at the Station Internet Café on Davis Street, Limerick on the 21<sup>st</sup> October, 2016. The injured party in this case was born in 1975. On the evening of the 21<sup>st</sup> October, 2016 he entered the Station Internet Café and he was assigned a computer station in the rear of the premises. On entering he observed there were four patrons present and two males attempted to engage him in some form of conversation, which he ignored, and he took up his assigned station.
4. The victim placed a number of items of property on his desk including his car keys relating to a Nissan Almera with a 2006 registration. During the course of the next 10 to 15 minutes, one of these males engaged the victim in what was described as an aggressive type of conversation. One of them began shouting at him and one of them accosted him by the arms and punched him in the face and, during the course of this attack, his car keys were stolen. The victim's assailant and his companion left the premises and went onto Davis Street and his Nissan Almera was stolen from Davis Street by the person who had robbed him of the car keys.

5. The appellant was arrested on the 27<sup>th</sup> October, 2016 and was interviewed in connection with the matter, and he made full admissions in relation to his involvement. He identified himself on the CCTV that had been recovered and also identified the stolen vehicle leaving Davis Street onto Parnell Street. The car was found burnt out and the appellant maintained that he abandoned the car in the Prospect area and he couldn't account for it after that. He did not acknowledge that he burnt out the car. He said he took it and he abandoned it and it was intact when he left, but he did say he left it with the engine running. It was late at night and dark in the area, so it is possible that someone else took it and burnt it out.
6. The victim here who owned the car was a gentleman with certain medical difficulties and there were numerous items of value taken that were in the car, primarily a variety of medications, sunglasses worth about €400, an unknown amount of money, various cards and so forth, and he was at the loss of his car. In terms of injuries, the victim received a scratch to his skin above his right cheek along with some slight bruising. He also suffered soft tissue damage to his nose which was relatively minor and he had a bruise on his right wrist and forearm, and his ribs were tender as a result of that. His physical injuries may have been superficial, but a further feature of the case was that this was a gentleman who was described by the trial judge as “a very bad candidate for an assault of this nature”, particularly as he was on medications for certain health difficulties.
7. The victim made a victim impact statement which was read out to the Court. As a result of this unprovoked and random attack, he was without a means of transport for several weeks. He was and still is afraid to walk the city streets in the dark and he was also placed on psychotropic medication. Also, a number of his valuables were transported in the car, glasses, sunglasses, medication, et cetera and no compensation had been forthcoming for any of these items. He hoped the defendant had some conception of the aforementioned and could sympathise with his situation.

8. It may be helpful to say something about the background and personal circumstances of the appellant. He was born on the 12<sup>th</sup> June 1988 and had 35 previous convictions prior to these two offences. He had convictions in respect of drugs offences, burglary, robbery, and handling stolen property. He also more recently had quite a number of convictions for road traffic offences. It was noted by the trial judge that the appellant had difficulty with alcohol and drugs over the years. Since this incident the appellant had left Limerick and was in a positive relationship and living in Waterford.

### **The Sentence Hearing (29<sup>th</sup> March 2019)**

9. Counsel for the appellant laid out several mitigating factors to the Court at the sentence hearing. This was not a pre-planned or pre-meditated escapade. It was something that developed out of an initial interaction in the internet café and it snowballed out of control. The accused accepted that he was entirely to blame. He made early admissions in custody as to his own involvement and the only evidence effectively linking him to this would have been the CCTV footage from the taxi base, and that would have been problematic in itself. Because of his own situation in life it would have been a particularly traumatic experience for the victim to have to come to Court and give evidence in the case, and therefore the value of the plea is significantly higher than would be usually the case in that regard. The accused was intoxicated which was not an excuse, but it did place things in context. He wished to express through counsel his abject apology to the victim, who did nothing to bring this upon himself.
10. Counsel for the appellant pointed out that since the 2016 incident the appellant had become involved in Waterford with a programme called the Saor Programme, which is funded by the Department of Social Protection, which involves a re-integrative approach to addiction recovery and is sponsored by the Waterford and South Tipperary Youth Service. It is focused on training and re-integration into society. He was also doing a work placement as a volunteer and also some education and training. He had started a health and fitness course and he was

also being supported with addiction counselling, relapse prevention, anger management support and group therapy. He had moved away from previous associates with whom he would have been involved in drug-taking and alcohol consumption, and was now living in Waterford where he was engaged in a structured rehabilitation programme which involved employment, albeit on a volunteer basis, together with education, training, counselling and support to assist him re-integrating. Counsel for the appellant handed in a letter to the trial judge from the appellant's doctor. It detailed certain medical issues which, for reasons of medical confidentiality, were not dealt with in open Court. Counsel stated that the appellant had long term issues that he would have to deal with going forward.

11. The hearing finished with the trial judge stating that he was not going to finish the case on that day and it is worth setting out part of the transcript of what was said next as it forms a critical part of this appeal:

“JUDGE: First of all, insofar as the victim is concerned, it would appear that the victim was a person that was not a candidate for this - not that anybody is a candidate - but was certainly not a candidate for this type of assault as such, and I'm concerned about the fact that there has been a loss there. Do you know whether the car was insured or whether it was of any value or anything like that, Sergeant O'Neill?

MR. McINERNEY: Yes, Judge. It was a '06 car. I can't say. More likely that it was, I would say.

SERGEANT O'NEILL: The car was insured but I don't think it was comprehensively insured, Judge, so the contents were lost.

MR McINERNEY: Yes, yes.

JUDGE: The contents.

MR McINERNEY: It is possibly what the sergeant is saying would be consistent that in general I think if one has the basic level of insurance in a car, it covers damage by theft and fire, but it may not cover the contents.

JUDGE: Very good.

MR McINERNEY: So, there's loss of the contents, I would say.

JUDGE: What I'm going to do is I'm going to put this back to the Michaelmas term. I'm going to remand it to then. Look, I'm actually going to canvass for [a] probation report. I'm sure Saor have a link up with the Probation Service in Waterford, but wherever the accused is residing, he'll have to be proactive to make sure that I have a probation report at that. I would also think that some compensation should be available. I'm leaving that open, as such, but it may be helpful to the overall equation at the end of the day.

MR McINERNEY: Yes, Judge.

JUDGE: However, Mr McInerney, I also am going to direct that if this accused is convicted of any offence between now and the Michaelmas sitting, then this matter is to be re-entered before me and I will deal with it as I see fit at that particular time.

MR McINERNEY: May it please the Court.

JUDGE: So, insofar as it's concerned, Dermot, would you suggest a date there now?

REGISTRAR: 17th of December?

JUDGE: I'll go to that date, the 17th of December.

MR McINERNEY: 17th of December.

JUDGE: In the Michaelmas term with liberty to re-enter it should the need arise. And I don't want any ifs and buts about the probation report. I expect that I will have the report which [sic] Mr O'Donoghue's cooperation--

MR McINERNEY: I know. He understands that, Judge.

JUDGE: --with the Probation Service.

MR McINERNEY: He understands that...

...

JUDGE: I see. I also take into consideration that this is an offence that goes back to October 2016.

MR McINERNEY: Yes, Judge.

JUDGE: And some time has passed and matters seem to be progressing in the right direction, but I'm keeping all my options open in that respect --

MR McINERNEY: All options open.

JUDGE:--in respect of matters.”

12. The case was then adjourned to the 17<sup>th</sup> December 2019, but the sentencing judge was not sitting on that date and the matter was remanded for his attention to the 4<sup>th</sup> February 2020.

#### **Resumed Sentence Hearing (4<sup>th</sup> February 2020)**

13. Over 10 months later the appellant came before the sentencing judge again for finalisation of the sentence. Counsel for the appellant referred back to the same mitigating factors as before, but added a report from the Probation Service in Waterford, an updated letter from Saor the rehabilitation programme which he had been working with, and he also informed the judge that the appellant, although of little means, had got together 1000 euro for the victim by way of compensation.
14. The judge had received the report from the Probation Service that he had requested at the original sentence hearing. It stated that the appellant appeared very remorseful for his actions. He had been attending a Special CE Scheme in Waterford aimed at people who had been involved in drugs in the past, and the co-ordinator of the scheme had spoken very highly of the appellant and described him as being like a mentor to the younger members of the group. The

co-ordinator hoped that the appellant could complete some educational programmes with them and go to university in September, 2020. The report concluded as follows:-

“Misusing substances since the age of seventeen, he has not taken any illegal drugs in a year. Using a risk assessment tool, Mr. O’Donoghue is currently moderate risk of re-offending in the next twelve months, this has come down from high risk when he was last assessed by the service. Mr. O’Donoghue appears to be a person who has turned his life around and is making great progress and leading a more pro-social life. This service would be happy to continue to work with him in the future.”

15. It may be useful to record at this stage how the sentencing Judge voiced his reasoning in coming to his decision that is now on appeal before this Court:

“JUDGE: ...the incident had a very serious impact on the victim's wellbeing. To use the detective's description, the victim was a very bad candidate for an assault of this nature. He has penned a short victim impact statement which has been read into evidence. He still is apprehensive about going out on his own at night time and he remains under medical supervision for a number of health issues at this time.

The accused was born on the 12<sup>th</sup> of June 1988. He has several previous convictions, mainly for Road Traffic Act, under the Road Traffic Act. He has nothing for unlawful taking. However, it appears that he was disqualified at the time of driving -- at the time of this offence. He has a conviction for robbery from the circuit court in 2014 where he received a short suspended sentence.

The Court has had the benefit of seeing the lengthy probation report and also has seen reports from the Waterford SAOR programme and together with a short medical report as such. I have also today seen the up to date report from the SAOR project.

While the offence was committed in October 2016, the accused has, in the main, been

out of trouble for some time. He has a road traffic conviction from 2017. He has moved to Waterford and has formed a stable relationship and seems to have matured somewhat.

Insofar as the aggravating factors are concerned, robbery is a serious offence. It can carry a maximum sentence of life imprisonment. The attack in this case was on a defenceless victim. There was physical injury caused and the Court must be of the view that there was a serious psychological fallout as a result of this unprovoked assault. Property was taken. The vehicle was set on fire. There was a loss of a number of personal items, including the victim's medication. The accused has a previous conviction, one in particular for robbery in the past, as well as a variety under the Road Traffic Act and in this case there is a high level of culpability.

Insofar as the mitigating circumstances are concerned, there is the early admissions made by the accused. There is the early plea of guilty in this matter which is of benefit to the victim in that he didn't have to come to court and face the rigors of a trial and any form of retraumatisation. It is suggested that this was not a premeditated but a series of events that just snowballed because of the level of intoxication of the accused on the night in question. There is the fact that the accused has expressed his remorse and an apology was tendered as such. There is the fact that this matter goes back to 2016 and the accused has now moved on, that he is more mature, that he is in a stable relationship and the Court does note the very positive probation report as such and his placement on the work schemes as such.

However, the Court is of a view that this was a very serious and frightening experience for the victim. The Court accepts that the accused has made substantial efforts to self-rehabilitate himself but the Court is of the view that given the nature of this robbery charge it must impose a custodial sentence. This was an unprovoked assault and robbery

on a vulnerable person who has suffered greatly because of the actions of the accused. As I said robbery is a serious matter which can carry a life sentence and having assessed this matter the Court is of the view that the headline sentence is one of five years and six months. Factoring in the aggravating and mitigating circumstances and giving credit for the delay in the finalisation of this matter, the Court is going to approach the matter in the following fashion; in respect of count No. 1 the Court is going to impose a sentence of four years' imprisonment and in respect of count No. 2, the unlawful taking of the motor vehicle, the Court is going to impose a sentence of two years to run concurrent. He is disqualified for a period of seven years.

COUNSEL FOR THE PROSECUTION: May it please the Court.

MR McINERNEY (Counsel for defence): Is the Court minded, having regard to the Probation Service report and the other matters, to suspend any portion of the sentence?

JUDGE: I am not prepared to do so. I have given credit for matters in the light of the fact of the headline sentence in the matter is one of five years and six months. Insofar as the compensation is concerned, I am going to direct that that would be paid to the injured party through the Gardaí and if the injured party doesn't require same then I would suggest that it would be paid to a charity of the injured party's choice.”

### **Submissions of the Parties**

16. The submissions on behalf of the appellant cited the case of *The People (Director of Public Prosecutions) v Drinkwater* [2008] 1 I.R. 527. In that case the Court of Criminal Appeal held that if a trial judge in the course of a sentencing process, having considered all the circumstances, expressed a definite view that a non-custodial sentence would be imposed if certain conditions were fulfilled, such as the availability of a satisfactory probation report, but proceeded ultimately to impose a custodial sentence, the offender's legitimate sense of grievance was a factor to be taken into account in determining whether the sentence imposed was excessive or wrong in principle. It was accepted by the appellant that the learned trial judge

did not explicitly state how he might deal with this case when adjourning the matter in March 2019. However, it was submitted that all signals and indications were that he would deal with the sentence in a lenient manner if the appellant were to continue going “in the right direction”.

It was submitted that these signals and indications depended upon the following:-

- (i) that the victim would receive some compensation.
- (ii) that the appellant would not re-offend in the interim, and
- (iii) that the appellant would engage with commitment with the Probation Services.

17. The appellant further submitted that in taking this course, the learned trial judge was swayed by the facts that the offences dated back a while, that the injured party deserved some token of compensation and that the appellant was making great efforts to rehabilitate. The appellant was undoubtedly disappointed with the sentence that was imposed and felt aggrieved that the efforts he made to deal with this case were not properly recognised. The evidence was clear that the appellant adhered to all the conditions set down by the learned trial judge.
18. In his submissions, counsel for the respondent stated that the sentencing judge had followed best practice as regards the structure of his sentence in terms of having identified a headline sentence, and then having had regard to the aggravating factors and mitigating factors before giving a discount from the headline sentence of five and a half years to four years. As regards the argument that the sentencing judge ought to have partly suspended the sentence, to reflect the appellant’s efforts to rehabilitate, counsel acknowledged that during the exchanges at the sentencing hearing on the 29<sup>th</sup> March, 2019 the sentencing judge was clearly influenced by the prospects of rehabilitation. He accepted also that the reference to “keeping all my options open” could be interpreted by an informed observer as the sentencing judge, while not making any promises, having been impressed by the appellant’s efforts at rehabilitation so far, and an objective observer might well take the view that any custodial disposition at a later date would be relatively benevolent if the appellant had not transgressed in any way in the meantime.

## **Decision**

- 19.** The Court took the view that there was an error of principle by the sentencing judge in the present case. He gave a clear indication to the appellant at the sentence hearing on the 29<sup>th</sup> March, 2019 that there would be a positive benefit to him if he continued to progress in the right direction, and also if some compensation were made available to the victim. During the intervening period of over ten months until the resumed hearing on the 4<sup>th</sup> February, 2020 the appellant did continue to make significant progress with rehabilitation, and he assembled a sum of €1,000 for the victim despite his limited means. The Court notes the very positive report of the Probation Service, and in particular the conclusion that the appellant appeared to be a person who had turned his life around and was making great progress in leading a more pro-social life. In the light of the above, it seems to this Court that the sentencing judge did not give any adequate benefit to the appellant for the significant progress made, and was wrong in not affording a greater degree of leniency, when it appeared that he had held out that prospect.
- 20.** It seems to us that the appropriate sentence in the particular circumstances of this case would be to suspend half of the four year sentence, and that is the sentence we will impose. Accordingly, we will quash the sentence of four years' imprisonment on the first count and substitute therefor a sentence of four years, with two years suspended on the conditions set out below. The rest of the sentence imposed by the Circuit Court stands unaffected by this decision.
- 21.** The Court would like the Probation Service to continue to work on rehabilitation with this young man. Taking all matters into careful consideration, the Court proposes to suspend the final two years of the sentence of four years, conditional upon the appellant entering a bond in the sum of €100 before the Governor of the Midlands Prison, the conditions being:-

  - (i) that he will keep the peace and be of good behaviour towards all the people of Ireland during his period of imprisonment and for the said period of two years from the date of his release;

- (ii) that he will comply with all requirements of the Probation Service as they may from time to time direct;
- (iii) that he will continue to engage with the Saor Programme; and
- (iv) that he will come up if called upon to do so at any time during the said period of two years to serve the portion of the sentence of the Court this day imposed, but suspended on his entering into the recognisance.