THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2020] IECA 254

[120/20]

Edwards J.
McCarthy J.
Ni Raifeartaigh J.

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

AND

KEVIN MOLLOY

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice McCarthy on the 25th day of September 2020

1. This is an appeal against sentence imposed on the 19th May, 2020 in respect of two offences of harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act, 1997, following pleas of guilty on the 4th February, 2020. The injured party in respect of the first of these was Mr. Joseph Byrne and the offence occurred between the 7th April, 2015 and the 9th August, 2015 and the second injured party was his daughter, Ms. Aisling Byrne, and in her case the offence occurred between the 25th April, 2015 and the 27th June, 2015. The appellant was sentenced to two and a half years imprisonment on the first count and the last twelve months thereof was suspended on certain conditions; the

second count was marked as being taken into consideration when sentencing In the present context one of those conditions only is relevant, namely, that which imposes an obligation on the appellant to refrain from engagement in the provision of debt collection services whether directly or indirectly for the period for which the sentence was so suspended, namely, seven years.

2. The charges have their origin in attempts by the appellant, who carried on the business of debt collection, to recover what he understood was due by one Ian Cunningham to one Padraig Geraghty. He was working on a so-called "no foal no fee" basis and was to be paid 30% of what he recovered. He asserted that he was personally sympathetic to Mr Geraghty who said that he had suffered a loss on an investment made by or with Mr Cunningham at Mr Cunningham's behest. This investment had been the subject of litigation (which, indeed, is said to be ongoing) in England and also of proceedings in this jurisdiction which it appears were compromised and pursuant to which money was to be paid to Mr Geraghty, which it was not. We are not told what may have occurred by way of compromise.

3. Mr. Molloy's co-accused Mr. Pearse O'Connor had been acquainted with him for a number of years and was effectively retained in the present context by the appellant as his assistant. The appellant sought to ascertain the whereabouts of Mr Cunningham, an effort which extended to the employment of a private investigator but he established that Ms. Byrne was Mr. Cunningham's partner and a daughter of Mr. Byrne. He therefore decided to pressurise them with a view to pressurising Mr. Cunningham, indirectly even though they had nothing whatever to do with the dealings between Mr. Cunningham and Mr. Geraghty.

4. So far as Mr. Byrne was concerned the appellant telephoned him (how he obtained his mobile phone number is not clear since they had not been acquainted) leaving a message and using a false name. When Mr. Byrne returned his call he was informed that the appellant was telephoning him about Mr. Cunningham, stated that he worked for a debt collection agency and was seeking to recover a debt due to Mr. Geraghty by Mr. Cunningham. He told Mr. Byrne that he had been to his shop but hadn't stated his business because he didn't want to embarrass members of the staff. Mr. Byrne was told that "the situation could get very ugly if not dealt with within 48 hours", that he had visited a number of equestrian centres looking for Mr. Cunningham but he was hard to get hold of and that when "they" did "they were going to bring him for a drive and kidnap him and sort him out". The appellant stated that he knew Ms. Byrne was Mr. Cunningham's partner and that he knew also where Mr. Byrne lived. Furthermore, the appellant told him not to contact the Gardaí. This first call occurred on the 7th April and later he received a call on the 10th April, 2015, which he missed but on the same day he received a text from the appellant in capital letters stating "MULLINGAR CANCELLED. TICK TOCK TICK TOCK. ONLY A MATTER OF TIME". Later he received texts from the appellant saying that he was being watched, that he was as big a fraud as Mr. Cunningham, that he did not love his daughter and that he would be as famous as the Aga Khan. Enquiry was further made of him as to whether or not he had paid for his daughter to stay in the Four Seasons Hotel when participating in the Dublin Horse Show in 2015.

5. Mr. Byrne was of course deeply upset and frightened. He was and is a substantial businessman in Longford. There was a sinister element, obviously, in the reference to the fact that the appellant knew where Mr. Byrne lived. He and his wife were of course greatly concerned for their daughter who herself was deeply upset. He was aware, and it

was obvious on the evidence, that he and his daughter were being watched. Defamatory posters were also posted at his business premises: we shall return to these below.

6. So far as Ms. Byrne is concerned she is a showjumper of considerable talent and reputation and also worked from time to time as a model. The first step taken against her appears to have been on the 25th April, 2015 when a number of posters were pasted on her truck and other vehicles in its vicinity at a horse show in County Louth. These pictured her with Mr. Cunningham and accused the latter of theft, embezzlement, insurance fraud and as the cause of a suicide. The posters also asserted that she had become involved with Mr. Cunningham and that such involvement was likely to extend to his alleged scams/fraudulent activities. Mr. O'Connor printed and distributed the posters at the appellant's behest. The posters were also exhibited and distributed at horse shows in Cavan, Galway and Mullingar and placed at shop fronts both in Mullingar and Longford, and in particular at Mr. Byrne's business premises. They were disseminated also, unsurprisingly, on social media. Whilst attending at Shelbourne Park Ms. Byrne received a text from the appellant saying "See you swanning around Shelbourne. Have you told your friends Ian is a thief. We're watching and waiting. Go 10 Ash" and in the middle of the night she received a text some two days later from the appellant containing the enquiry "How do you sleep at night". She was aware, it seems, of the fact that the appellant had referred to the fact that she had been staying on a given occasion at the Four Seasons Hotel.

7. Understandably, these events not only caused her reputational damage in show jumping circles but fear for her safety since it must follow that she was being watched. She was forced to give up horse breeding and cut back on her modelling career. Her income was severely affected. Prior to the appellant's crime she was an outgoing and

confident person but the events in question had a profound negative effect on her personality.

8. When the appellant was arrested in the course of the investigation of the offences he made a number of admissions which were of assistance. What he said extended, however, to an assertion that his activities were "a mild form of harassment, it wouldn't be the worst in the world". The appellant's debt recovery service was called "Ar Cairde Debt Recovery" and he was described as working nationwide. In his judgment the Circuit Judge referred to the fact that he had been conducting such a business for ten years. It is not clear whether or not that was until he was charged with the present offences (which was in 2015) or in the ten years preceding sentence. In any event the terms of his bail excluded him, to put the matter shortly, from resorting to the Midland area and this had an adverse effect on his business. It is accepted that at the time of the sentencing he was contrite and remorseful although it would appear from the evidence he gave that there is an extent to which he sought to sanitise his conduct, so to speak, by emphasising his concern for Mr. Geraghty as a significant reason for his involvement in the affair. He has a number of previous convictions, some 37 in all, and was born on the 22nd March, 1969 so his age is of no significance in the context of sentence, one way or another. He apologised in court and advanced the explanation that he would never have contacted Mr. Byrne (and presumably Ms. Byrne either) if Mr. Cunningham had agreed to meet him, effectively saying that Mr. Cunningham had evaded him.

9. The appellant's previous convictions were not given in evidence in precise detail. The first in point of date to which reference is made in the transcript was said to have dated from 1992. A list appears to have been provided to the circuit judge but not to us.. His most recent conviction apart from the present case was one on the 26th October, 2018 at

Dublin Circuit Criminal Court. The nature of that conviction is not precisely clear but it appears to relate to offences of forgery in relation to the purchase of a house with the assistance of a loan from a bank secured by mortgage obtained *inter alia* with the benefit of what might be shortly be described as a forged document. The transcript refers to such an offence as having been disposed of on the 4th November, 2010 at one point, but the latter date would appear to be in error. The matter was disposed of, in any event, by an order is that that the appellant undertake community service. Whether or not the circuit judge dealing with that case was aware that he had charges pending in respect of other serious offences and in effect was therefore unaware of his history of offending (since the present pleas were entered in 2019) must be open to doubt. However, the appellant seems to have had a history of offences of dishonesty. Although the transcript lacks the degree of specificity which we would like the appellant was described as having a number of convictions for "theft/ deception", burglary (in 2010 giving rise to a sentence of two months' imprisonment) and the use of false instruments: it is not clear whether or not such offence is the same as that contrary to s. 2 of the Forgery Act but is referred to as having occurred in 2003 ; in any event a suspended sentence of twelve months was imposed in respect of it. Furthermore, he has a significant number of convictions in respect of offences under the Road Traffic Acts and one for unlawful possession of firearms and ammunition for which, and one hereby infers that it must not have been an offence of particular seriousness of its class, he received the benefit of the Probation Act. It is not in dispute that harm was done to the appellant's standing and business as a result of the 2018 conviction. That occurred, of course, at a time when he had not been convicted of the present offences.

10. The appellant is described as his partner's carer and sole provider for her and her teenage son to whom he stands *in loco parentis*. She cannot work because of poor health

and limited mobility and receives social welfare payments because of her state of health. He drives him (who at the time of the appeal was entering his Leaving Certificate year) to and from school and his concern is that if and when he is imprisoned he would not be able to make repayments on the debt secured by mortgage. The appellant appears to have been a good family man and supported now adult children throughout their childhoods and in university education. The Probation Report obtained for the purpose of the sentencing process in Dublin Circuit Criminal Court in 2018 was available to the sentencing judge. A number of references were before the court from former customers of the appellant which were favourable to him in his dealings as a debt collector.

11. The learned circuit judge dealt with the matter in a very comprehensive manner in his judgment and we cannot quote from it *in extenso* here. We think however that it is appropriate to set out what we might describe as the operative part as follows:-

> *"Turning to the issue of sentence. Bearing in mind the court's obligation to balance the needs of society against the needs of the victims and the needs of the accused I am satisfied that the offending by Mr. Molloy, given the nature of it, the effect of it and the gravity of it, its motivation and duration, ranks at the upper mid-range for sentencing purposes and does, before mitigation, attract a sentence of four years imprisonment. Taking into account the mitigation I have outlined I am prepared to reduce the sentence to two years and six months. Accordingly I am imposing a sentence of two years and six months imprisonment on count number one. And in order to encourage and foster the continued rehabilitation of the accused I am suspending the final twelve months for a period of seven years on the following conditions:*

(1) the accused enter into a bond of €500 to keep the peace and be of good behaviour for a period of seven years post-release;

(2) that the accused submit himself to supervision by the Probation Service for a period of one year post-release and follow all directions given to him by the Probation Service in dealing with his offending behaviour;

(3) that the accused refrain from becoming involved in any debt collection service, either directly or indirectly, for the duration of the suspended sentence; and

(4) that the accused have no contact whatsoever, either directly or indirectly, with any of the victims or their families.

....

I am marking count two as proved, taking into consideration."

Grounds of Appeal

12. The grounds of appeal are as follows: -

(i) The learned trial judge erred in law in imposing a sentence on the appellant which was excessive in all the circumstances of the offences and the appellant.

(ii) The learned trial judge failed to recognise the exceptional circumstances in this case or failed giving sufficient or appropriate weight such as would lead him to suspend in its entirety the sentence imposed on the appellant.

(iii) The learned trial judge failed to give due consideration to the alternatives to a custodial sentence for the appellant and which would have been more appropriate and/or just in all the circumstances.

(iv) The sentence imposed fails to accurately reflect the particular circumstances of the case and was unduly severe and/or unjust in those circumstances.

13. In their written submissions counsel for the appellant **s**ubmit that the judge fell into error in characterising the offending behaviour as falling into the "upper mid-range" and thereafter identifying a headline figure of four years: they submit that the offences should not have been so positioned and the headline figure was too high. A number of cases were referred to by way of comparison; *DPP v Doherty (Court of Appeal, ex tempore, 31st of May 2019)* and *DPP v. Carraher (No.2)(Court of Appeal, 11th of June, 2018).* In the first of these cases the appellant had been sentenced to three years' imprisonment but had served some twenty months thereof when the appeal was determined by this Court which suspended the balance of the sentence which remained to be served; it was a case which was fully contested and where there was no remorse or apology; the accused was a member of an Garda Síochána who had carried out a campaign of harassment over eighteen months on a state solicitor. In *Carraher* the appellant had engaged in a campaign of harassment against a member of an Garda Síochána his family over a two year period, had pleaded not guilty and shown no remorse. Furthermore, it appears that he had been convicted of an offence of harassment previously (of his ex-wife) and this Court identified the offences as falling into the mid-range when the trial judge had described it as being "*well on the higher end of the scale*". This Court took the view that the custodial sentence of five years which was imposed was "not warranted" and the court substituted a sentence of three years with the last eighteen months suspended for a period of eighteen months. It was submitted that appellant's criminality here fell into a category significantly lower than that in *Doherty* and was less grave than in *Carraher*. It was stressed that these cases did not attract the mitigation referable to pleas of guilty. In written submissions, it was also asserted that the judge failed to give sufficient weight to the mitigating factors and, further,

it was submitted that greater consideration should have been given to an alternative penalty to custody, for example, community service. In argument, however, the main emphasis was placed upon the fact that the headline sentence was simply too high and of course it is undoubtedly the case that if the starting point was wrong, the conclusion might well be wrong: the initial error, if an error of principle, rendering it necessary to allow the appeal and resentence.

14. It seems to us, however, that on any view the trial judge was right in the view he took in identifying the offences as falling "at the upper mid-range". Each case must be decided on its own facts and hence the examples of sentencing for the present class of offences presented in *Doherty* and *Carraher* are just that and do not constitute a comprehensive elaboration on the appropriate levels of sentencing for the present class of case. We think that the learned trial judge was right in placing the offence in the upper mid- range and we think that accordingly the headline sentence of four years' imprisonment cannot be faulted when the maximum is seven. It is plain from the judgment that the most comprehensive consideration was given to all relevant factors either for the purpose of deciding the headline sentence or, thereafter, addressing the issue of mitigation. On any view, especially in a case where the most significant element in mitigation, namely a plea of guilty, was entered only at trial, the judge not only reduced the sentence by one year and six months (which we think was more than generous) and went on thereafter to suspend the last twelve months thereof for the purpose of encouraging rehabilitation. On any view, a sentence of one and a half years' actual imprisonment in a case where the appropriate headline sentence was four years is one which adequately reflects, and more than reflects, the factors available in mitigation. It must be emphasised too, in this context, that one is dealing with two offences which are quite separate and that the sentence in question

effectively is one punishing both when, indeed, in principle the judge might well have considered the imposition of consecutive sentences.

15. Scarcely less significant on the appeal, however, than the question of imprisonment is that condition of suspension preventing the appellant from working in debt collection services during the period of suspension of seven years. It was submitted in the written submissions and oral argument that this restriction was disproportionate. The factual basis upon which this proposition was advanced was that there was nothing nefarious or sinister about the appellant's business and that it was lawful to conduct it, as well as the fact that this was the only complaint ever made about his conduct of the business. It was submitted that effectively there was a requirement for the appellant to "disband" his business and that there was an undue interference with his constitutional right to work. In this regard reliance was placed in the recent judgment of this Court, *DPP v D.W (Court of Appeal, ex tempore, 2nd June 2020).*

16. In *D.W* ,a portion of the sentence of four years' imprisonment imposed upon the appellant for the offence of assault contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997 (and what for the present purpose we might term related offences) arising from the same incident) was suspended *inter alia* on condition that he was to:-

> "*stay away from [the injured party] for a period of thirty years [and] that you will not contact her yourself or cause anybody to contact her by any means whatsoever, that you will stay away from any property that [the injured party] resides [sic] or will reside"*

The appellant there had had a relationship with the injured party over a number of years and they had four children together. The issue in *D.W* as stated by Edwards J. was whether "*the law may place limits on the kind of conditions that may be placed on*

suspended sentences". The only issue on that appeal was the issue of the legitimacy of the imposition of the rather drastic term limiting the activity of the appellant for that 30 year period and it seems to us appropriate to refer to that passage in that judgment of the court which deals with the attachment of conditions which impinge on the subject person's constitutional rights in a non-distributive way ; this of course is such a case having regard to his right to earn a livelihood. The court, per Edwards J. addressed that aspect as follows:-

"*where that arises, the impingement is not just to do with how much punishment is deserved or appropriate in the case. Rather, the concern that has given rise to the condition may be based on some other perceived need such as protection of the public at large or of some class of persons or indeed of an individual; or a perceived need to incapacitate the offender in terms of his ability to commit to further crime in certain circumstances. In such circumstances, although the condition must have some punitive effect the legitimate aim to which the measure is addressed is not primarily penal. The words "punitive" and "penal" are used here to import aims consonant with retribution, deterrence and the promotion of reform and rehabilitation which represent the principle objectives of a punishment lawfully imposed in the course of sentencing in this jurisdiction. The issue in such circumstances is not solely whether that measure, to the extent that it has punitive effect, is deserved or appropriate as a lawful punishment … rather it may be whether that measure is lawful as a punishment at all and insofar as it is a measure addressed to another legitimate aim or aims such as individual or public protection or incapacitation in the public interest and which may override constitutionally protected rights in doing so, whether it is a proportionate measure in terms of the constitutional doctrine of proportionality. Such a condition might potentially impinge on the individual's constitutionally guaranteed right to freedom of expression, … or right to work, amongst*

other possibilities … it seems to us that in such a case it would be appropriate for the sentence or at first instance, or any appellate court asked to review the sentence, to subject the proposed condition to a proportionality test … to determine its lawfulness before proceeding to impose it or, in the appeal scenario, to uphold it."

17. The Law Reform Commission in its recent report (LRC 123) on the issue of suspended sentences addresses the principles governing the imposition of conditions of suspension and point out (see especially paras.4.67 to 4.78) that *D.W*:-

".. Established that the requirement that conditions of suspension be proportionate does not only mean that they be proportionate in the context of the overall quantum of the punishment (i.e. in the distributive sense) but also in the sense of infringing upon the offender's right to the least extent possible"

We therefore must address the issue of whether or not, on the totality of the evidence, the condition is disproportionate. This Court took the view in *D.W* that:-

"The condition is too far reaching in its temporal extent and in its implications it amounts to secondary punishment in our view. In is in our view disproportionate and arbitrary and ultimately excessive in the distributive sense having regard to its operative duration and the strictness and lack of flexibility in its terms. Because it has a disproportionally punitive effect it is condemnable on that ground alone."

The court went on to say, in addition, that the condition was:-

"arguably so far reaching in its terms as to amount to an unlawful punishment, not presently available under Irish law."

18. The learned Circuit Court judge here pointed out that there is no system whereby the occupation or business of debt collecting is regulated in this jurisdiction and no doubt if there were such a regulatory process the appellant might have been subject to administrative sanction, assuming such process was analogous to that which exists in many

walks of life regulated by statute. The appellant argued that the sentencing judge was unduly influenced by his negative views about the unregulated state of the such debt collection businesses. We think that in the light of the fact that these offences were committed in the course of his work of collecting a debt (if it was such) for Mr. Geraghty from Mr. Cunningham, in the absence of any other form of protection for the community, the public interest in ensuring that the law is observed when debts are sought to be collected and that those involved are of good character, the restriction was legitimate and in particular was proportionate to those aims. The position would be quite different if the offences in question were entirely unrelated to the appellant's work or did not touch on his integrity. It might or might not be appropriate in the event that there existed some regulatory system which might import of limitations or controls on the activities of individuals engaged on the assumption we have made as to such a regulatory system. We think that the fact of past criminality, including offences of dishonesty dealt with as recently as 2018, are of relevance also, although secondary factors.

19. We therefore dismiss this appeal.