THE COURT OF APPEAL

[26/18]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

EVE DOHERTY

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 2nd day of July 2019 by Birmingham P.

1. On 1st August 2017, the appellant was convicted following a contested trial of a single count of harassment contrary to s. 10 of the Non-Fatal Offences against the Person Act 1997. Subsequently, on 19th January 2018, she was sentenced to a term of three years imprisonment with that sentence being backdated to 27th October 2017. Ms. Doherty has appealed against both her conviction and sentence. This Court, differently constituted in part, on 31st May 2019, delivered a detailed judgment dismissing the appeal against conviction. In the course of that judgment, the background facts were set out in considerable detail, particularly between paras. 7 and 17 and there was also reference to the impact the appellant's behaviour had on her victim. The Court will not repeat that exercise at this stage.

2. The substantive sentence hearing took place in the Circuit Court on 27th October 2017. At the conclusion of that hearing, Judge Greally acceded to a request not to finalise matters at that stage, but to obtain a probation report. In doing so, she commented that there were two very significant elements of mitigation absent in the case, the first being the lack of a plea of guilty and the second the lack of any evident remorse for her actions. The Judge commented that in her view, a custodial sentence of some measure was an inevitability, but that she would remand Ms. Doherty in custody and would direct the preparation of a probation report.

3. On behalf of the appellant, the lack of a plea of guilty and the lack of an acknowledgement of wrongdoing or an expression of remorse is acknowledged. On that basis, it is accepted that mitigation which, in other circumstances, would be available and would be significant, is not available. However, it is said that the absence of a guilty plea

and the absence of any acknowledgement of wrongdoing does not set at naught the very significant other factors that were present by way of mitigation.

4. The Judge's approach to sentence was to say that she assessed the offence as lying within the mid-range for the offence of harassment and that she was therefore applying a headline sentence of four years. For context, it is worth noting that the maximum sentence for harassment is seven years. Judge Greally said then that she would give the accused credit for the following factors: her lack of previous criminal convictions; her impressive educational background; her accomplishments in her career as a Garda; her historic and ongoing psychological difficulties, as outlined in the report submitted; the character references which spoke to her kindness and qualities as a friend and neighbour; the recognised difficulty experienced by Gardaí when serving prison sentences; the consequences of this conviction for her career; and her stable and supportive relationship. The Judge said that she was also taking into account that there had been no recurring of the offending since her arrest and that she was at a low risk of reoffending. She then said that in all the circumstances, she was imposing a sentence of three years imprisonment which would be backdated to the date on which Ms. Doherty went into custody.

5. In the course of this appeal against severity of sentence, the trial Judge is criticised for identifying a headline sentence of four years. It is said that this was excessively high and it is said that insufficient credit was given for the significant factors, correctly identified by the trial Judge, that were present by way of mitigation. Counsel on behalf of the appellant goes so far as to say that the Trial Judge identified some dozen factors present by way of mitigation, but only discounted twelve months from the headline sentence or one month for each factor present.

6. The attention of the Court was drawn to the case of DPP v. Sean Carraher (No.2) [2018] where the Court dealt with an individual convicted of harassment of a serving Garda. In that case, the Circuit Court had assessed the offence being at the higher end of the scale and it had imposed a sentence of five years imprisonment. This is in contrast with the view taken by the Court of Appeal which, while referring to the gravity of the offence, had felt that the offence was more properly categorised as one in the mid-range of severity. The Court of Appeal felt that the appropriate sentence was one of three years imprisonment. However, allowing the appellant full credit for the efforts made by him to remove offending material from the Internet, the other mitigating factors that had been identified in the Circuit Court and the impressive reports from the prison which were available to the appeal Court, the final eighteen months of that three-year term was suspended. The appellant says that the offending in issue in DPP v. Sean Carraher was more serious than the offending under consideration in the present case. This is a contention which is rejected by the prosecution who point to the duration of the offending at issue here, the sustained nature of the campaign, that the campaign was pursued by several different routes, and the fact that the son of the complainant was dragged into the campaign.

7. In the Court's view, this is a statutory offence where it is unlikely that the facts of any two individual offences will be identical, or perhaps even particularly similar. In both cases, the trial was contested, which meant that the significant mitigation which would have been afforded by a plea of guilty was absent. Nonetheless, the Court would see both offences as very much mid-range, perhaps upper mid-range offences. In both cases, the trial was contested, but in the DPP v. Caraher case, what was present in his favour was the fact that he had, if belatedly, applied himself to attempting the removal of the offensive material from the Internet.

8. One of the factors identified during the course of the plea in mitigation in the Circuit Court as being relevant to the Judge's consideration was the fact that serving a custodial sentence would be particularly difficult for Ms. Doherty given her status as a member of An Garda Síochána. This was a matter that was expressly referenced by the trial Judge. The Court accepts that it is a point of substance, but on the other side of the coin, it must be said that there is something particularly reprehensible about a senior member of An Garda Síochána, from whom much better should be expected, engaging in such conduct. It is also the case that while the assumption might be that the motivation of embarking on the course of conduct was personal/domestic, it is the case that Ms. Doherty, as a member of An Garda Síochána, was impinging upon and undermining the important work of a senior public servant.

9. In the course of the appeal hearing, the point has been made that the concerns expressed that custody would prove difficult for the appellant have come to pass; the first twelve months of her period in custody having been particularly difficult. It is pointed out that the appellant has now spent twenty months in custody and it is said that it is a very significant period of incarceration for someone receiving a sentence as a first-time offender, aged fifty years. The point is made that Ms. Doherty, as a female offender, has served her sentence in a secure environment, whereas recent experience would suggest that a first time male offender of previous good character incarcerated for an offence falling outside the mainstream of the criminal calendar would be expected to serve a significant portion of the sentence in an open prison.

10. As the Judge in the Circuit Court correctly pointed out, it is a feature of the case that there has been no plea of guilty, no expression of remorse, and no apology. It is the situation that had those features been present, then one would expect that very considerable credit indeed would have been afforded to Ms. Doherty, perhaps resulting in a short custodial sentence, or conceivably a non-custodial disposal. In a situation where those factors were not present, a significant custodial sentence was inevitable.

11. In circumstances where the documentation that was available to the sentencing Court was not available to this Court when the sentence appeal was first listed, the appeal was put back to obtain the necessary documentation. We have now been provided with much, though it seems not all of the documentation that was before the Circuit Court, including character references, a psychologist's report, and a discharge summary from St. John of

God Hospital. Some of the documentation makes for disturbing reading. The extent of paranoia and irrationality revealed by the psychologist's report is very striking indeed.

12. The approach of the Judge in the Circuit Court when sentencing was to identify a headline or pre-mitigation sentence of four years. That figure is somewhat higher than this Court would have selected. It is said that the reduction allowed from the headline sentence was inadequate. The Court accepts that there were significant factors present by way of mitigation, including, but not limited, to the fact that this was a first-time offence, committed by someone of mature years and by someone who had a distinguished record of public service. There was also that fact that for the reasons referred to earlier in the judgment, incarceration was going to be particularly difficult.

13. It seems to the members of the Court that the combination of these factors made it desirable that the Judge, having identified the headline sentence, mitigated it to the extent that she did, would have considered an element of suspension. A sentence suspended in part would have provided an incentive not to engage in any repetition of the behaviour which had brought Ms. Doherty before the courts. In the Court's view, the absence of any suspended element and the imposition of a three-year sentence simpliciter in the circumstances of the case amounted to an error in principle. The Court is therefore minded to quash the sentence imposed in the Court below and must therefore proceed to resentencing. In a situation where Ms. Doherty has now spent twenty months in custody, the Court will deal with the issue by leaving the sentence of three years imprisonment imposed in the Circuit Court in place, but will suspend the unserved portion. The Court will hear counsel on what would be appropriate terms for the suspension, but is obviously anxious that there should be in place conditions which would prevent any contact or communication, direct or indirect, with the injured party in the case, and prevent any communications to third parties in relation to the injured party.