THE COURT OF APPEAL

Record Number: 244/19

Birmingham P.
Edwards J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

BRENDAN DOOLIN

APPELLANT

JUDGMENT of the Court (*Ex tempore*) delivered on the 21st day of July 2020 by Ms. Justice Kennedy.

1. This is an appeal against sentence. The appellant pleaded guilty to six counts of harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act, 1997. The appellant received a sentence of five years' imprisonment with the final two years suspended on terms.

Background

2. The offences in question concerned the online harassment of six women over a five-year period. The majority of the women in question are involved in journalism and all have public profiles with a social media presence. The harassment involved the sending of hundreds of emails over a prolonged period from various email accounts which did not permit the appellant to be identified. It also included sending tweets and posting commentary online. The messages continued despite repeated entreaties to stop. The campaign of harassment seemed to show that the appellant monitored the social media of the women in question and would often send them emails referring to tweets or articles they had written or simply sending them photos of themselves. The messages were often insulting and critical and led to the complainants feeling threatened and in fear.

Personal circumstances of the appellant

3. At the time of sentencing the appellant was 37 years old. He has no previous convictions. In the plea in mitigation the Court heard that the appellant was a recluse for much of his life and he seemed to struggle with a fear of social contact. During the sentence hearing

the appellant offered an apology to the injured parties in which he expressed remorse for his actions.

The sentence

4. In sentencing the appellant the sentencing judge highlighted the prolonged and threatening nature of the appellant's offending which involved targeted intimidation and taking advantage of weaknesses and causing considerable trauma to the individuals in question.

5. In terms of mitigation, the sentencing judge described what he considered as "good mitigation" including that the appellant pleaded guilty, he cooperated with the Gardaí and made admissions, he has no previous convictions, he expressed remorse for his actions and he was unlikely to reoffend to this degree in the future. The sentencing judge also referred to the appellant's background and personal circumstances, describing the appellant as "a sad case."

6. Given the multiplicity of victims and the prolonged nature of the offending which was described by the sentencing judge as "gravely reprehensible", a custodial sentence was deemed appropriate and the sentencing judge imposed a sentence of five years' imprisonment with the final two years suspended on terms in respect of each count, to run concurrently.

Submissions of the appellant

7. The appellant argues that the sentence of five years' imprisonment with the final two years suspended is excessive in circumstances where the maximum sentence is seven years' imprisonment. The appellant submits that the sentence imposed clearly does not take account of the mitigation present.

8. The appellant takes issue with the sentencing judge's failure to identify a headline sentence. Given the sentence imposed, the appellant submits that the sentencing judge erred in placing the offending at the upper end of the spectrum. Although the communication was persistent, even in the face of a clear plea by the injured parties to leave them alone, it is submitted that the content of the emails cannot be said to be towards the upper end of the scale of harassment, which can only be reserved for seriously threatening harassment that puts a person in fear of physical harm from another.

Submissions of the respondent

9. The respondent submits that the sentencing judge did not explicitly identify a headline sentence but it is submitted that the sentence of five years was a clear starting point. The respondent further submits that this Court has made it clear on numerous occasions that a failure to set an explicit headline sentence does not invalidate the sentence. The respondent argues that the rationale of the sentences imposed was clearly explained by the sentencing judge and he identified the aggravating and mitigating factors present before imposing the final sentence.

10. In terms of the appellant's argument that the offending was misplaced on the scale of severity, the respondent submits that this largely ignores the fact that some of the complainants were placed in fear of physical harm by the appellant's messages.

11. The respondent submits that given the paucity of judgments relating to harassment, and online harassment in particular, there is little assistance by way of precedent value to be drawn from earlier cases. However, the respondent refers to two judgments which, it is argued, can be of assistance. The first of these is *The People (DPP) v. Doherty* [2019] IECA 350. In *Doherty*, the Court found an error in principle in a sentence imposed for harassment. The appellant was a member of An Garda Síochána at the time. The appellant engaged in a series of communications relating to the injured party. The contents of these communications were defamatory and false. The communications were sent between September 2011 and March 2012. The appellant did not plead guilty and there was no expression of remorse. The offending was described by the trial judge as being within the mid-range and a headline sentence of four years was identified. This was reduced to three years to account for the mitigating factors. On appeal it was found that the failure to incentivise rehabilitation by the imposition of a three-year sentence amounted to an error in principle and accordingly the balance of the sentence was suspended, the accused having served 20 months in custody.

12. The second case referred to by the respondent is *The People (DPP) v. Carraher (No.2)* [2018] IECA 170. Here, the appellant was convicted of harassing a member of An Garda Síochána by placing between 10 and 12 telephone calls to him during the course of a month and posting 58 inaccurate and defamatory messages about him on three websites. The appellant denied guilt. The sentencing judge described the offending behaviour as being "well on the higher end of the scale" and imposed a sentence of five years' imprisonment. On appeal, the Court stated that the trial judge had erred in the assessment of gravity and identified the offending as being in the mid-range and identified the headline sentence as being one of three years, with the final 18 months suspended to reflect the mitigating factors.

13. The respondent submits that *Doherty* and *Carraher* can be distinguished from the instant case due to the cumulative nature of the offending in the present case. In this regard the respondent submits that the cumulative nature of the offending entitled the sentencing judge to impose a sentence at the higher end of the spectrum.

14. The respondent submits that the mitigation is clearly reflected in the suspension of the final two years of the sentence and the sentencing judge clearly referred to all available mitigating factors.

Discussion

15. This appeal centres on two issues; first, that the judge erred in placing the sentence at the upper end of the available range and, second, that the judge failed to sufficiently discount for mitigating factors. While it is said in written submissions that the judge failed to identify a headline sentence, it is accepted that a headline sentence of five years may be gleaned from the judge's sentencing remarks.

16. The relevant portion of section 10 of the Non-Fatal Offences Against the Person Act, 1997 provides as follows:-

> "(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
>
> (2) For the purposes of this section a person harasses another where—
>
> (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
>
> (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other."

17. The maximum sentence for an offence of harassment is seven years' imprisonment.

18. It is said on the part of the appellant that an effective headline or pre-mitigation sentence of five years is simply out of kilter with the existing jurisprudence and specifically with reference to *The People (DPP) v Doherty* and *The People (DPP) v. Carraher (No.2)* [2018] IECA 170.

19. In *Doherty* and *Carraher*, it is noteworthy that the person against whom the harassment was directed, was an individual against whom the appellant had an unjustified grievance. It appears to this Court in the present case that the victims were selected almost at random, albeit all had an online profile, and were in effect part of an identifiable group. Mr McGinn SC for the appellant says this makes the offences less serious. We find ourselves unable to agree; we consider the offending conduct to be of a very serious kind. The appellant targeted individuals who were, to a degree selected at random, but with the common thread of a social media profile and an involvement in the media industry and of course, his victims were all female. The fact that the appellant may not have had a specific grievance in respect of his victims does not, in our view lessen the seriousness of his conduct. The offending behaviour was of a particularly insidious kind, his conduct was nasty and vindictive, when he noted any vulnerabilities on the part of a victim, he took advantage of that, his comments were critical, insulting and damaging. All of which significantly intruded and eroded the peace of mind of each victim. The fact that there was no specific grievance on the part of the appellant must be of cold comfort to the victims in light of the continuous nature of the offending and despite repeated entreaties to desist.

20. In short, it cannot be gainsaid that each victim felt that they were the target of unwarranted, continuous harassment with the consequent and understandable severe impact on each of them.

21. Moreover, as Birmingham P. observed in *Doherty*:-

> "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."

22. The logic of this statement is borne out by the factual matrix of the present case, involving, as it does, six victims, selected on a somewhat random basis, who were subjected to a continuous bombardment of messages over a prolonged period. The appellant refused to desist, despite repeated requests to do so and, as a result frightened and intimidated his victims. The women rightly feared that they were being monitored by an unknown individual.

23. The circumstances are quite different from those in *Doherty and Carraher*. The very fact of six victims is one significant distinguishing feature. On that basis it was open to the judge to impose sentences on a consecutive basis, which he chose not to do. The fact of six victims is a factor which aggravates the offending conduct and to reflect that factor and the other aggravating factors, the judge considered the appropriate pre-mitigation sentence to be one of five years' imprisonment. We are entirely satisfied that this reflects the serious nature of the offending conduct, when one considers the appellant's moral culpability and the harm done as a result of his actions.

24. Mr McGinn contends that the judge did not give sufficient discount for the mitigating factors. In this respect, he argues that while a partially suspended sentence may reflect the mitigating factors in any given case, that in this case, the judge ought to have first reduced the sentence and then considered the question of suspending the sentence in whole or in part.

25. As Edwards J. observes in *The People (DPP) v. Broe* [2020] IECA 140, it is well established that a wholly suspended or a partially suspended sentence is still a sentence. Nonetheless, the mitigating factors may be reflected by the imposition of a sentence which is suspended in whole or in part.

26. Mr McGinn does not demur from this principle but argues that the period of five years' imprisonment ought first to have been reduced to take account of the mitigating factors.

27. We agree that there are many mitigating factors present; the pleas of guilty, while not at the first available opportunity, were valuable, the cooperation with the authorities, his remorse, and his expression of sincere apology. The fact that he is a person with no previous convictions and his own personal circumstances. The appellant certainly has his own personal difficulties; he has lived a reclusive life and suffers from social anxiety and episodes of low mood, which issues, it is said make a sentence of imprisonment difficult for him.

28. It is apparent from the transcript, that the judge carefully considered the evidence which he heard over a number of hours and adjourned sentence to enable him to do so. While his sentencing comments are succinct, this does not detract in any way from the fact that he properly identified the aggravating and mitigating factors. Indeed, it could be said that his remarks were very focused.

29. We are not persuaded that the judge erred in his approach; he clearly took account of the mitigating factors and suspended the final two years of the sentence to reflect those matters. The judge imposed conditions which took account of the nature of the appellant's offending conduct and which were clearly designed to incentivise his rehabilitation and assist him in reintegrating into society.

30. Accordingly, as we find no error of principle, the appeal is dismissed.