



THE COURT OF APPEAL

Record Number: 165/2019

**Birmingham P.
Whelan J.
Kennedy J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DECLAN CONWAY

APPELLANT

JUDGMENT of the Court delivered on the 20th day of December, 2019 by Ms. Justice Máire Whelan

Introduction

1. This is an appeal against severity of sentence. The appellant, Declan Conway, now aged thirty-seven years, a stonemason of Westport, County Mayo pleaded guilty to a single charge of assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. He was sentenced on the 12th July, 2019 by his Honour Judge Rory McCabe at Castlebar Circuit Criminal Court to a term of three years imprisonment with the final year of the said term suspended on condition that the appellant enter into a bond and further on condition that he perform 200 hours of community service within twelve months of the date of his release.

The circumstances of the assault

2. The injured party and the appellant did not appear to be acquainted. Shortly after 10.20pm on Friday evening the 26th August 2016, the appellant having completed a day's work and thereafter engaged in some socialising was dropped off at his home. A large contingent of about a dozen young males was outside on the driveway of the adjoining property. The group had been attending a birthday party in the adjoining house. They were waiting for taxis to convey them to a party. The appellant greeted them as he headed for his hall door. An individual within the group appears to have been argumentative and verbally abusive towards the appellant and spoke in a manner which caused Mr Conway to take offence. A verbal exchange took place. The injured party, Matthew White, who at the date of the assault was aged eighteen years and a leaving cert student from Newport, County Mayo, engaged in a verbal exchange with the appellant which escalated into an altercation between the two.
3. It appears that in subsequent investigations of the assault the Gardaí took statements from about twelve young men who had been at the premises. One eyewitness recalled looking up and seeing "Matthew leaning across the wall into Declan Conway's garden." Garda Barrett, the investigating Garda, recalled in her evidence that a statement from one eyewitness to the assault, Keith Fanning, stated that: -

"He saw Mr Conway attempt to push him back over.....I went over and told Matthew to go to the bottom of the road and wait for the taxi. Matthew kept trying to get over the wall to Declan. I went over and told Matthew to go ... to the bottom of the road and wait for the taxi."

This eyewitness also stated that "Declan hit the injured party with his right fist. Matthew fell right back."

Conduct of the appellant at the scene

4. It appears that the injured party fell badly banging his head on the ground, losing consciousness and sustaining a head injury. The appellant immediately got a chair and sat the injured party upon it. He put the injured party in the recovery position. The evidence before the sentencing judge was that it was the appellant that directed that an ambulance be called (12th July 2019 p.10 line 29). By the time the ambulance had arrived, the injured party had regained consciousness, he was bleeding from the left ear. On arrival at Mayo General Hospital his Glasgow Coma Scale was 15 over 15.

Injuries sustained

5. The injuries suffered by Matthew White were significant. Forty-eight hours after his admission to Mayo General Hospital, he was transferred to Beaumont Hospital for treatment of intracerebral haematomas which had increased in size. Thereafter, he was transferred to the National Rehabilitation Centre in Dun Laoghaire on the 26th September, 2016. He suffered temporary hearing loss to his left ear and temporal facial paralysis. He did not require neurosurgical intervention to address his injuries. By the 21st October, 2016, some eight weeks following the assault, the medical evidence indicates that the facial weakness had almost completely resolved and an audiogram of the said date noted his hearing had returned to normal. His residual problems were primarily loss of smell associated with alteration in taste and there was uncertainty as to the prognosis for his short and long-term memory in respect of which he had experienced difficulties post the assault. A medical report of Mr Stephen McNally, Consultant Neurosurgeon, dated the 5th January, 2017 being approximately four months post the assault states: -

"This gentleman does not have substantial loss or impairment of his mobility of his body. This gentleman's main problems are cognitive and it will take time to know if his ability to learn and his memory returns to normal."

6. The medical evidence included the report from Beaumont Hospital dated 26th April, 2017 which identified improvements in Mr White's memory: -

"He does not appear to be having any problems with short term memory in recent weeks. This gentleman has had no major cognitive changes and his mood is stable."

It appears that primary difficulties identified were anosmia, being a total loss of smell allied to a severe alteration in taste and in respect of which it would appear there had been no improvement since the injury occurred. The medical evidence indicates that it

can take up to two years for any smell to return but there is a possibility that Mr White will have no sense of smell in the long term.

The sentencing hearing of 12 July 2019

7. The appellants had previously entered a plea of guilty to the s. 3 charge.

Victim impact

8. Ms. White, the injured party's mother, read a victim impact statement into the record of the court. She outlined that arising from the assault, Matthew White had been absent from school for nearly four months during the most crucial year of his school life. He struggled to attend school and experienced a fear of group situations. She outlined to the court that Matthew suffered long-term memory loss and that since the assault he cannot smell and had difficulties with taste. She outlined that after the sentencing: -

"He can try to start building a different future for himself without the constant fear of this day and its outcome but one thing is for sure, Matthew's life will never be the same."

Approach of the sentencing judge

9. The judge characterised the events which led to the assault as follows: -

"... the background to this was a fairly innocuous situation. Words were exchanged between Mr Conway and a bunch of teenagers and Mr Conway punched Matthew. He fell to the ground and sustained a head injury. I have no doubt Mr Conway didn't intend inflicting injuries of the nature that were sustained when he punched Matthew, but the injuries were a direct result of being punched."

He noted that the injuries were very significant and accepted the statement of Ms White as being clear and stark. From a sentencing perspective he took the initial step of identifying the appropriate headline sentence, stating: -

"It has to reflect the nature of the offence, the impact on the victim and the antecedence of the defendant and to my mind this offence stands close to the top of the scale, bearing in particular the impact on the victim. The headline sentence, before I consider factors that mitigate the gravity, is four and a half years' imprisonment."

10. The sentencing judge then proceeded to identify the mitigating factors as follows: -

"... bearing in mind the plea of guilty, the concrete financial expression of remorse, allied to what I accept is genuine remorse, the low risk of reoffending that's been assessed by the Probation and Welfare Service and the fact that he is a married man with commitments and a history of employment and an impressive list of documents that have been submitted on his behalf, the appropriate sentence is three years' imprisonment."

11. The judge then imposed sentence on the following terms: -

"Because of the complicated nature of his own social obligations and occupational obligations, what I propose to do by further mitigation is to suspend the final year of the sentence on condition that he performs and he is suitable to perform it, that being the assessment of the Probation and Welfare Service, 200 hours of community service within twelve months of his release. I will suspend.....Twelve months suspended for a year."

In effect accordingly, the sentence imposed was a three year sentence with the final year suspended for twelve months. The appellant was to perform 200 hours of community service within twelve months of the date of his release from custody.

Grounds of appeal

12. The appellant appealed identifying three key grounds:

Ground 1: The sentencing judge erred in placing the offence close to the maximum level available thereby attracting a headline sentence of four and a half years imprisonment.

13. The appellant contends that the headline sentence was unduly severe. Further, that the sentencing judge failed to take account of the absence of aggravating factors in the circumstances of the relevant offence. The offence comprised a single punch assault and there were no elements of continued or aggravated violence. Particular emphasis was placed on the absence of the use of any weapon, the lack of premeditation together with the fact that the assault had resulted from an argument that developed spontaneously with a group of young persons who had congregated at the front of the adjacent house as the appellant was about to enter his home and was wholly unanticipated.

14. The appellant seeks to rely on the decision of Clarke J. (as he then was) in *DPP v Fitzgibbon* [2014] 2 ILRM 116 where he stated: -

"...it must be emphasised that the severity or viciousness of the assault by virtue of which a victim has suffered injury must always be a highly significant factor. Subject to the earlier commentary made in this regard, the injuries suffered must be taken into account. It does, of course, have to be acknowledged there is not always an exact correspondence between the severity of the attack and the degree of injury suffered."

15. The DPP asserts that relevant guidance is to be found in the decision of this court in *The People (DPP) v Gary Burke* [2015] IECA 186. That case reviewed the earlier judgment of the President in the case of *DPP v Coughlan* [2015] IECA 76 which considered the importance of the impact of an offence on the victim in determining the appropriate sentence: -

"It is not the crime committed as a general concept or as being of a particular class, but the actual offence that the person before the Court committed. This is the primary determinant of sentence. What is the gravity of the crime that the guilty person committed? Relevant to this first question is what kind of crime was committed, what the particular circumstances were, how badly were other people

affected, was lasting harm done, was there an antisocial element and any other matters that define severity of this class of offending. There may be features of the crime that make it more serious or less within this category of crime"

Comparators

16. The appellant's counsel advanced the decision of this court of *DPP v Smith* [2019] IECA 1 as an appropriate comparator. In that case the defendant pleaded guilty to assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person's Act, 1997 and received an entirely suspended three year sentence of imprisonment in the Circuit Court. The Court of Criminal Appeal refused to interfere with same on the DPP's appeal for undue leniency.
17. The appellant also seeks to rely on the decision in *DPP v Crilly* [2019] IECA 143 in which the DPP brought an appeal on grounds of undue leniency of a sentence where the respondent had been found guilty of one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997 and received a sentence of fourteen months' imprisonment in the Circuit Court which was wholly suspended on terms for a period of four years.
18. The DPP argues that while the use of comparators may be of assistance, their limitations must be appreciated since each case is unique and turns on its own specific facts. Further, that the sentencing judge had identified aggravating factors including loss of self-control, significant injuries and the ensuing impact on victim and his family.

Ground 2: The sentencing judge attached insufficient weight to the mitigating factors specific to the appellant.

19. It is contended that the sentencing judge failed to properly take account of mitigating factors of which there were many at a time when he imposed a custodial sentence which was in all the circumstances unduly severe. The mitigating factors deserving of weight include: -
 - (a) His previous good character.
 - (b) That he was a significant voluntary contributor to his community including his work over a period of fifteen years with Mayo Mountain Rescue.
 - (c) The appellant's timely plea of guilty.
 - (d) He had a long employment history and was an employer of up to nine individuals in various capacities in the business in Westport. Inevitably a custodial sentence of two years duration would adversely impact on the operation and continued success of the business into the future placing those jobs in jeopardy.
 - (e) The sentencing judge did not attach any or any adequate weight to the fact that nine families were reliant on the appellant and his business for their income.

- (f) Further, he had married a few weeks after the incident and was the sole provider in respect of the two children of his marriage both of whom had been born subsequent to the incident.
- (g) He had significant parenting obligations and commitments in relation to his teenage daughter who suffers severe health problems. He had responsibility for her care several nights per week. There was evidence before the sentencing judge that this child's primary carer struggled to maintain the care and medical regime for the child. In the circumstances, the court afforded inadequate weight to the respite care and support afforded by the appellant in respect of this child, it was contended.
- (h) The sentencing judge ought to have considered the appellant's conduct in the assault and its immediate aftermath as outlined above.
- (i) He made a voluntary cautioned statement to the Gardaí on the 29th August, 2016. That statement was honest and encompassed an acknowledgment that there had been a confrontation and records his worry and regret regarding his involvement in the altercation resulting in the serious injuries to Mr White.
- (j) The appellant had furnished an apology including in writing to the injured party.
- (k) He had undertaken significant personal commitments with regard to the payment of compensation to the injured party and had incurred debts and liabilities with a bank, a credit union and with his own relatives to enable him to raise and discharge €20,000 to the injured party as of the date of sentence with an intention to discharge a further sum based on further borrowings anticipated to be possible provided the initial loans were repaid.

Performance of these obligations was severely impeded by the imposition of a custodial sentence. The sentence imposed deprived the appellant of the capacity to discharge his liabilities and perform his agreement which was contingent upon him earning an income.

Ground 3: The sentencing judge erred in the imposition of an immediate custodial sanction in all of the circumstances of the case.

- 20. The appellant relies on the Probation Report which concluded that he had genuine remorse and displayed insight in terms of the consequences of his actions, had been assessed at a low risk of reoffending and was assessed as being suitable for community service.
- 21. The appellant contends in written submissions, that the trial judge erred in structuring the sentence by incorporating an element of a custodial sentence together with a community-based sanction by way of a community service order pursuant to the provisions of the Criminal Justice (Community Service) Act 1983, (as amended). It is argued that community service is to be imposed as an alternative to, not in addition to or in

conjunction with a custodial term and as such the sentence as imposed in its structure offends the statutory provisions of the Criminal Justice (Community Service) Act 1983, (as amended).

22. The DPP maintained that the sentencing judge acted entirely within his discretion in setting the headline sentence of four and a half years, imposing a sentence of three years and suspending the final 12 months of the sentence in both mitigation and to incentivise and structure the rehabilitation of the appellant. It is argued that this was well within the range of sentences available to the sentencing judge and was proportionate to the circumstances of the offence and the offender in this case.

Discussion

23. As was noted by Charleton J. in *DPP v Mahon* [2019] IESC 24 in the Supreme Court at para. 35: "It has always been a judicial ideal to achieve consistency in sentencing..."
24. In *The People (DPP) v Fitzgibbon* the Court of Criminal Appeal set out indicative bands in respect of assault causing serious harm and emphasised the role of the prosecution in offering assistance as to an appropriate sentence, as opposed to demanding a particular sentence. As was observed by Charleton J. in *Mahon* "In this regard precedent sentences are key, as are analyses of relevant bands within which it may be suggested a case might appropriately be placed."
25. Charleton J. in *Mahon* also observed that in *The People (DPP) v Ryan* [2014] IECCA 11: -
- "... Clarke J at paragraphs 3.1 and 3.2, the Court of Criminal Appeal offered the following guidance as to the proper approach of the parties at sentencing:
- '[A] sentencing judge, having assessed the gravity of the offence and the culpability of the accused, may seek to place the offence itself at an appropriate point on the spectrum of offences of that type. Offences can typically be divided into lower, middle and upper parts of the range ... [t]here is, of course, no necessary formula of words which must be used. It should also be emphasised ... that there may always be exceptional or unusual cases which do not readily fit into any such range or ranges and where the sentencing judge will have to engage in a somewhat novel analysis to come to an appropriate determination as to sentence. However, in most cases, an offence can, by reason of its gravity and the culpability of the accused, be placed somewhere along the appropriate range in the manner just identified. One possible means of converting such an analysis into an actual sentence involves, as a first step, the sentencing judge determining the appropriate sentence for the offence itself having regard to where the offence lies along that range. The sentencing judge is then required, in accordance with the established jurisprudence, to take into account the circumstances of the individual accused and make such adjustment (if any) as may be appropriate to reflect the individual circumstances of that accused. Where, for example, there are significant mitigating and other personal factors, then a specified

reduction in sentence and/or a suspension of sentence in whole or in part may be appropriate to meet those factors.”

Charleton J. continued at para. 38: -

“The general principles as to how to approach sentencing were set out by the Supreme Court in *The People (DPP) v M* [1994] 3 IR 306 through Denham J. She pointed out that the ‘nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing’. This approach she described as ‘the essence of the discretionary nature of sentencing’. Thereafter, at pages 316-318, the following are the principles to be taken into account:

‘Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence. ... However, sentences must also be proportionate to the personal circumstances of the appellant. ... the general impact on victims is a factor to be considered by the court in sentencing. ... Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed inter alia in a plea of guilty, which in principle reduce the sentence. ... In contemplating the sentences it is appropriate to consider the offences and their nature and their circumstances, but this is not done for the purpose of determining whether the appellant should be incarcerated for the future so as to prevent him committing further offences: he is sentenced solely for the offences before the court.’”

26. It is worth recalling that Charleton J. in *Mahon* observed regarding sentences in manslaughter cases where there is found to be lower culpability on the part of an accused: -

“Manslaughter cases which fall into this category generally result in the imposition of a sentence of up to four years’ imprisonment. The lowest sentences within this range tend to be handed down where culpability is not especially high, but where the accused is nonetheless at fault, although the case is one without the aggravating circumstances which may be found in cases falling into the higher ranges of culpability.”

Community service

27. The sentencing judge imposed a community-based sanction by way of community service order for a period of 200 hours and this was imposed as a condition for the suspension of the final twelve months of the three year sentence of imprisonment imposed and in lieu of service of that part of the custodial sentence only.

Prof. O'Malley in his text *Sentencing Law and Practice* (3rd edn., Round Hall, 2016) states: -

"Community service is available solely as an alternative to custody and must always indicate the term of imprisonment that it would otherwise deem appropriate."

28. It is noteworthy that in no sense did the appellant contend that the payment of compensation in and of itself should impact on the nature or extent of the sentence imposed. The court was informed that he had taken out a five year loan in respect of €10,000 and had sought to secure other monies by way of further loans. (p. 6, lines 14 to 17). In that regard it is noteworthy that his counsel unequivocally stated: -

"I want to be quite clear that nothing is ever going to replace the circumstances of the injury that was sustained by the defendant on the night in question but the defendant is doing his level best to offer a concrete and practical expression of his remorse, judge. Again it is acknowledged that the remorse has been expressed in a frank and honest way by the defendant to the probation officer."

Conclusions

29. S. 3 of the Non-Fatal Offences Against the Person Act 1997 at ss.2 provides: -

"A person guilty of an offence under this section shall be liable—

...(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or to both."

30. There was evidence available to the sentencing judge to suggest that this was not an unprovoked assault.
31. The sentencing judge expressly observed in relation to two offences disposed of 16 and 17 years previously in the District Court "I am discounting them" (p. 13, line 6). Thus the appellant was characterised by the sentencing judge as a person of good character without any relevant previous convictions and fell to be sentenced as such.
32. In assessing a section 3 assault for the purpose of identifying the appropriate sentence, the context of the assault, the surrounding circumstances and in particular the immediate proximate events which led to it, the severity and nature of the assault and the degree of injury suffered are all material factors. In the instant case, the sentencing judge expressly acknowledged that the appellant didn't intend inflicting injuries of the nature that were sustained, he noted at p.21 line 11/12: - "... but the injuries were a direct result of being punched."
33. The facts suggest that this was an unanticipated altercation between two strangers prompted by some provocativeness from one or more members of the group which involved a single punch being thrown which had very severe consequences for the injured party, Matthew White, by reason of the manner in which he fell banging his head off the

ground. There was no weapon involved. The evidence showed that the appellant immediately exhibited concern and went to the rescue of the injured party.

34. We are satisfied that the principles enunciated by Clarke J. (as he then was) in *DPP v Fitzgibbon* are particularly apposite in the context of the facts in the instant case where he stated: -

“... a relatively minor attack can have severe consequences. A single blow can, unfortunately, lead to serious injuries. While some regard must, nonetheless, be paid to the consequences of the assault, much greater weight will obviously attach to those consequences where they are such as might reasonably be expected to flow from the nature of the assault concerned or at least are not wholly disproportionate to that assault.”

35. The injuries to the complainant led the sentencing judge to identify the headline sentence as four and a half years imprisonment in advance of entering upon a consideration of any mitigation.
36. Given that the sentencing judge had expressly indicated that he was disregarding offences committed during the appellant's youth which had been disposed of years before in the District Court, it was appropriate to approach the process of identifying the headline sentence with due regard to the culpability of the appellant as well as the gravity of the offence.
37. Identification of the headline sentence requires consideration of the gravity of the offence which is assessed by reference to culpability and the harm done. In assessing an offender's moral culpability, aggravating and extenuating factors may be taken into account. Therefore, in assessing the gravity of the instant offence, factors in addition to the injuries suffered by a victim required consideration. While the sentencing judge had observed; “I have no doubt Mr Conway didn't intend inflicting injuries of the nature that were sustained when he punched Matthew, but the injuries were a direct result of being punched”, he failed to accord sufficient regard to the entire context and nature of the assault. The injuries arose from a single blow struck by the appellant which occurred in the course of an unforeseen encounter with a group of young persons as he was about to enter his own home and to attach sufficient weight to the fact and the absence of aggravating factors.
38. This error in principle resulted in the headline sentence imposed by the Circuit Court judge being unduly severe.

Mitigation

39. Mitigating factors included that the appellant was a person of good character who had at all material times been in gainful employment and created employment in a rural community. He was an individual who, it is clear from the testimonials, had made a positive contribution to his community by his role as a volunteer and further had honoured his personal and private obligations particularly towards his disabled daughter

and had assumed a caring role in connection with her welfare to afford respite to the child's primary carer.

40. Imposing a relatively lengthy custodial sentence placed on the hazard the employment prospects and security income for nine families quite apart from the appellant's own dependents being his spouse and two children of his marriage, together with his teenage daughter. Further, it significantly undermined his capacity to discharge his borrowings and liabilities incurred for the purposes of making restitution of a meaningful nature to the injured party, and clearly deprived him of the capacity to secure further borrowings to make good his commitment to discharge €40,000 over a sustained period of time.

The Sentence

41. In all the circumstances, we assess the gravity of the offence by nominating a headline sentence of three years imprisonment rather than four and a half years.
42. Having identified a headline sentence, it is necessary to have regard to the mitigating factors present. In doing so, the court re-sentences as of today's date.
43. Given the very significant mitigating factors of which there was a very large number, these warrant a reduction of the identified headline sentence of three years to two years imprisonment.
44. We have regard to the significant additional material put before us, including, in particular, testimonials from a large number of individuals and details of the impact of his imprisonment on his severely disabled child and the implications for her welfare and on her care.
45. In light of the new additional material furnished and referred to in the preceding paragraph we are satisfied to suspend the balance of that sentence in order to incentive rehabilitation.
46. It is noted that the appellant has been in custody since the sentencing hearing.
47. In all the circumstances, the justice of the case warrants that the sentence imposed by the Circuit Court ought to be quashed and in its place, a substituted sentence of two years imprisonment with the balance of the said sentence to be suspended forthwith provided the appellant enters into an immediate bond to keep the peace and be of good behaviour for a period of two years from this day.