



**THE COURT OF APPEAL**

**[29CJA/20]**

**Edwards J.  
McCarthy J.  
Donnelly J.**

**BETWEEN**

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

**APPLICANT**

**AND**

**DAVID MURPHY**

**RESPONDENT**

**JUDGMENT (*ex tempore*) of the Court delivered on the 22nd day of July 2020 by Mr Justice McCarthy**

1. This is an application by the Director of Public Prosecutions under s.2 of the Criminal Justice Act, 1993 on the basis that the sentence imposed on the respondent was unduly lenient. After entering a plea of guilty to assault contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1999, the respondent was sentenced on February 10th 2020 in the Circuit Criminal Court to three years and six months imprisonment. The final two years and nine months of that sentence was suspended on conditions.
2. On the 21st of March 2015 at Slade Road, Saggart, County Dublin the injured party, Mr Kevin O'Brien, a taxi driver, was out working having started work the day before at 11.30p.m. On that the Saturday morning, the 21st of March 2015, he arrived at an address in Clondalkin to collect the passengers, one of whom was the respondent. He was sent there by the dispatcher from the taxi company for which he worked. He arrived at the address at approximately 4. 30a.m, when a young woman came out first and said: "Just wait there for one more." He then turned on the metre. The woman sat in the back behind the passenger seat, and then a male came out a few minutes later who had a bag of beer bottles and a can of beer in his hands. Mr O'Brien said to him: "Just watch the can," as normally he would not permit the consumption of alcohol in his taxi. Mr O'Brien described the male as getting into the front passenger seat. He described him as being in his late twenties, about six foot tall, with dark hair. Mr O'Brien was told to go to Citywest, so he began driving in that direction. He recalled that the female did call the person "David". He pulled into the Slade Road after a place called Garter's Lane at Saggart en route to the destination and asked for directions. The respondent said "Go on", and he did so. The respondent turned up the volume of the car radio and Mr O'Brien again asked where he should go. He drove a certain distance and he was told to turn around. When he turned back around, or just beforehand, the respondent grabbed the handbrake of the car

and pulled it up. Mr O'Brien had his foot on the brakes at that stage. All of a sudden the respondent bent down, took a beer bottle from the bag at his feet, turned and smashed the bottle over Mr O'Brien's head. He picked up a portion of the bottle, described as the handle of the bottle, and said to him: "Get out of the fucking car or I'll stab you". This was said three or four times. The taxi driver described the female in the back screaming and crying at this stage. The taxi driver was trying to calm him down and said: "Look, I'll bring you wherever you need to go." The woman was trying to get him out of the car and they did so. The taxi driver stated that he put the foot down on the car and drove straight out of there. After about ten minutes he saw another taxi driving towards him and he took the taxi plate's number so he could remember it. Until that point there was approximately €40.25 on the meter. Mr O'Brien went back to the cab office and he subsequently reported the incident at Tallaght Garda Station at 5.25 a.m.

3. Mr O'Brien didn't go to hospital that night mainly because he didn't want his partner to find out what had happened as she would be upset. The following day his head in pain and he had shooting pains in his left ear in the area where he had been struck. He had to take medication and while his headache abated, the area continued to be sore to touch. He also bled from the head. Mr O'Brien in his Victim Impact Report indicated that he was "paranoid about things" since the incident and anytime a car turns near his house he says he watches it, on the basis that the respondent might find out where he lives. He worries about his wife and family when he's working at night and indeed no longer works to the same extent at night. He was unable to work for some days and suffered financial loss to the extent of approximately €800 and it seems from the Victim Impact Report that he has suffered both physically and psychologically as a result of this incident. He also expressed fear about going court and seeing the respondent again. He found it necessary to replace his taxi with one which had a form of glass screen to protect himself. He is, to a degree, somewhat fearful of passengers.
4. The respondent was born on the 28th of August 1989 and has 41 previous convictions including convictions for offences of violence among which are one offence of assault causing harm, two for assault on Gardaí, five for violent behaviour in a Garda station, 20 for public order offences, seven for offences under the Theft Act, and three for criminal damage apparently associated with the latter. The respondent was awaiting sentence for another offence at the time of the present offence and committed this offence while on bail upon it. He was sentenced on that some six weeks after the present sentence was imposed and they should have been heard together to allow for the imposition of consecutive sentences. He accordingly does not come before the courts as a person of good character. A number of references by present or past employers were produce these pertaining to employment from June 2018. A number of reports have been furnished by an organisation entitled the "Community Addiction Response Programme" in relation to the provision of supervised urine samples in respect of the presence of controlled drug on another dates commencing in December 2018 and ending in February 2020. They were negative for controlled drugs.

5. In addition, a report was produced from an organisation called "Forensic Psychological Services" which dealt with the appellant's history. That indicates that the appellant suffered "depressive symptoms and low self-esteem as an adolescent", causing the death of his father at a young age compounding such depression and, as the authors of the report put it "this caused him "to self-medication with excessive amounts of alcohol". He has apparently consumed alcohol from the age of seventeen (not perhaps exceptional) and later cannabis and cycle active substances such as ecstasy and cocaine. Apparently he was, until the time of the offence, we do not know whether or not he did so afterwards, he was "drinking and taking cocaine most weekends". He lived in homeless hostels having been ejected from his family home (he is a partner) but he has a work record since and 2016 and some qualifications. The apparently also told the authors that he had "struggled with anger when he was younger and that when he became intoxicated he would lose control and often behaved in ways that he later regretted". We need hardly stress that unfortunate though his difficulties with alcohol may be the extent to which there is a moral, moral and moral culpability for the present offence is not diminished there by. He is apparently remorseful. This partner is supportive of him. He is described as having limited or low cognitive functioning of what is described as social emotional adaptive functioning – a term which is not defined in the report. He is described as a "vulnerable man" in the context of so-called "maladaptive coping strategies" and it seems that the authors. Many people consume alcohol to an excessive degree over lengthy periods and we are, of course, not impressed by the fact that it is suggested that alcohol or cocaine fall into the category of self-medication or not a so-called "low threshold for frustration". The risk that he may be violent towards others in the future is described as moderate. It does appear, because he has ceased to consume alcohol and has sought assistance with respect to of controlled drugs, to be on the road to reform, so to speak, obviously in any case where his rehabilitation must be encouraged. We are prepared to accept what we have been told by counsel to the effect that the respondent has continued to make progress in prison. Three further documents have been furnished to the Court, namely confirmation that the respondent is engaging with an organisation which assists individuals with alcohol abuse, has been in contact with the respondent and that he will be afforded its assistance after release. The other two are medical reports in respect of the respondent's wife and child.

### **Grounds of Appeal**

6. The Director seeks the review of sentence on the ground that the sentencing judge erred in principle in imposing the said sentence on the respondent in that the said sentence was unduly lenient having regard to the nature, circumstances and gravity of the said offence and, in particular, the judge, when sentencing the respondent, erred in principle in:-
- (a) failing to have any, or any adequate regard to the gravity of the offence and in particular to the fact that the respondent committed this offence while on bail and awaiting sentence for another matter;

- (b) failing to have any, or any adequate regard to the gravity of the offence and in particular to the fact that the respondent committed further offences while on bail for the offence the subject of this appeal;
- (c) erred in principle by failing to give due and adequate weight to the report of the probation officer dated the 10th of February 2020 who expressed concerns that the respondent had not made sufficient efforts to make himself available to complete the required work of victim awareness with the Restorative Justice Unit and the respondent also failed to contact the probation officer to meet with them on various dates that were offered to him;
- (d) erred in principle by putting excessive weight upon the personal circumstances and mitigating factors raised on behalf of the respondent and inadequate weight to the aggravating factors;
- (e) failing to impose a sentence of imprisonment on the respondent which reflected the seriousness of the offence, and the circumstances in which the offence was committed;
- (f) failing to have any, or any adequate regard to the victim impact statement of the complainant and the impact that this offence had on him;
- (g) erred in principle in giving too much discount for the suspended portion of the said sentence which was set at three and a half years imprisonment with two years and nine months of the said sentence suspended which is a reduction of approximately 80% and the imposition of the said sentence is a clear divergence from the norm of sentences which could properly have been imposed upon the respondent having regard to the details of the offence and the maximum penalty available and the personal circumstances of the respondent and his previous convictions, and thereby justifies the intervention of this Court.

As the grounds of appeal are of a somewhat generic nature and were refined at the hearing they may be dealt with together.

7. We think that we should set out both the aggravating and mitigating factors. We turn first to those which aggravate the offence: the victim was a taxi driver who was performing a public service in that as such taxi driver not only was this so on a practical note but he had a legal obligation to pick up a fare, all else being equal. The victim was in a particularly vulnerable position, as with all taxi drivers, especially, in that he was working alone. The offence occurred in the middle of the night which was bound to mean that the victim would have had difficulty obtaining immediate assistance when attacked. The attack was unprovoked, and the respondent was drunk when he so attacked. Significant adverse effects were suffered by the victim financially and psychologically and, indeed, had a knock-on effect on his family. The offence was committed whilst the respondent was on bail, and he had a long history of violence.

8. The mitigating factors are as follows: – the respondent entered a plea of guilty, the apparent contrition for offence, the real attempts at reform and rehabilitation (the Probation Report is relatively favourable in this context).
9. We do not attach significance to the psychological difficulties which have been identified because we think that these do not bear on his moral culpability, even if the conclusions are well-founded. The plea of guilty was not entered until after the date fixed for trial (the trial had been adjourned from day to day from the date so fixed). It was sought to explain this by reference to the fact, effectively, that the evidence was weak prior to the service of certain additional statements in the week before the trial date. We are not at all sure that this is an adequate explanation for such a late plea. Clearly, if the plea had been entered at an earlier stage, based upon evidence which the defence characterised as inadequate, greater weight would be attached thereto. The strongest mitigating factors are, however the plea and what appears to be genuine contrition and attempts at reform.
10. The position advanced on behalf of the appellant at the hearing was a straightforward one. The appellant contends that the headline sentence was appropriate but that too much weight was given to mitigating factors such that the sentence ultimately imposed, and, in particular, the extent to which it was suspended gave rise to undue leniency. It appears that the mitigating factor to which most weight was attached was the attempts at reform and the hope of rehabilitation. Counsel for the respondent emphasised how much it is in the public interest that criminals are rehabilitated. We do not doubt this proposition.
11. The principles applicable in cases of this kind are well established. Suffice to say that the onus of proof lies on the Director to show that the sentence is unduly lenient; she must show rather than merely assert that the sentence was unduly lenient on the basis of specific submissions, whether of law or fact. An error of principle must be shown.
12. We are of the view that the learned trial judge fell into an error of principle not in the headline sentence nor, indeed, the sentence which was appropriate post mitigation, which was set at three and a half years, but in the extent to which such sentence was suspended. We think that to have suspended such a large portion of the sentence was unjustified on the evidence before her and represented an error. As result there was a significant departure from the norm leading to a sentence that was unduly lenient and accordingly we quash the sentence. We accordingly proceed to re-sentence.
13. We think it right to emphasise the importance not only of punishment or retribution for an offence as serious as the present but, also, the necessity for general deterrence in respect of offences of this kind and personal deterrence so far as the respondent is concerned (having regard to his previous convictions). The authorities are clear to the effect that when this Court is engaged in resentence after a successful application by the Director, it must have regard, to the fact that the accused may have had an expectation of release in accordance with the sentence originally imposed and, accordingly, does not impose the sentence which might well have been imposed at first instance. Having regard to this factor and the appellant's progress since his imprisonment, we think that the appropriate

headline sentence remains at four years but that the last two years thereof should be suspended on the same terms as those imposed in the Circuit Court, to facilitate rehabilitation. We wish to stress that a substantially higher term of imprisonment would be appropriate without the special factor which arises on applications by the Director.