



THE COURT OF APPEAL

233/2019

**Birmingham P.
McCarthy J.
Ní Raifeartaigh J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECTIONS

APPLICANT

AND

EDDIE FARNAN

RESPONDENT

JUDGMENT of the Court delivered on the 28th day of September, 2020 by Ms. Justice Ní Raifeartaigh

Introduction

1. This is an application brought by the DPP pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking to review a sentence of 33 months' imprisonment, wholly suspended, on the grounds of undue leniency. The sentence under appeal was imposed at Dublin Circuit Criminal Court on 18th October, 2019, for the following offences: (i) threatening to kill or cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997; (ii) assault causing harm contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997; and (iii) damage to property contrary to s. 2(1) of the Criminal Damage Act 1991. The respondent entered a plea of guilty in respect of the offence of threatening to kill or cause serious harm on 1st April, 2019 at an adjourned pre-trial hearing. Further pleas of guilty were entered in respect of the other two offences on 18th July, 2019.

Factual Background

2. The three offences in question were committed by the respondent against his former partner, Ms. Lisa Power, on 2nd June, 2017. The respondent and the injured party had previously been in a relationship and had one child together. At the time of the offences, they were living together in the injured party's home.
3. On 1st June, 2017, an argument broke out between the parties, arising out of the allegations that the injured party was seeing her ex-husband. The respondent then left the house and went to his mother's house.
4. The following morning, a car being driven by the respondent pulled up outside the home of the injured party at speed. The respondent then came through the front door and dropped a bag of unopened beer cans on the floor. The injured party turned to go up the stairs and the respondent grabbed her by the back of the head and dragged her through the sitting room and into the kitchen. The respondent then placed his hands around her

neck and held her up against the kitchen presses, demanding that she tell him "who owned" their daughter. The injured party answered that "he did" and begged him to let her go but he told her that she would not leave the house alive.

5. The respondent then swung the injured party across the kitchen floor, picked up a kitchen chair and threw it down on her but she was able to avoid it. She then crawled into the sitting room, at which point the respondent picked up a doll's pram and threw it at her back. He shouted at her to stand up and then threw her back down on the floor. She asked him to let her leave the house and that appeared to make him more annoyed as he punched the door of the sitting room. He then turned around and grabbed her by the hair, swinging her onto the couch.
6. The respondent proceeded to place his hands around the injured party's neck, and then covered her mouth, saying that "it would be much easier" and that "she would be dead in seconds". She was gasping for air, at which point he took his hands from her throat and they struggled on the couch. The respondent got up and grabbed her by the left arm, before dragging her around the floor. He said that it would be "easy for him to rip her arms off or to break them". She pleaded to be allowed to leave. He then smashed cups all over the kitchen, and started hitting himself in the face and off the doors. The injured party went towards the stairs, grabbed their child (who had been in the house during the course of the dispute) and ran out the door across the road to a neighbour's house. She took refuge there and saw through the window that the respondent was pulling off the handle to the boot of her car and the back door handle of her car.

The investigation

7. The injured party attended Tallaght Garda Station on 2nd June, 2017 to make a statement in respect of the described events. Gardaí attended the house and found the respondent asleep on the couch. They woke him up and arrested him for making threats to kill. He became verbally abusive and the Gardaí had to spray him with an "incapacitant spray". He was handcuffed and brought to the station, throughout which trip he appeared to very agitated and continued to be verbally abusive to Gardaí. He made threatening comments about the injured party which were noted in the Garda notebook. Upon arriving at the Garda station, the respondent was detained for investigation and made claims that tension had arisen between himself and the injured party because she had been "slagging him off over self-harming". At one point, he categorically denied using violence against her but accepted that he had been in a rage and had smashed things and punched a hole in the wall. That was the limit of admissions he made.

Injury sustained by the victim

8. The injured party attended her GP, Dr. Ní Bhroin, on 2nd June, 2017, and a report was furnished to the sentencing court. Dr. Ní Bhroin described finding evidence of fresh bruising on Ms Power's neck, upper arms and hands. She also noted a whiplash injury, that neck movement was "very reduced and stiff" and that the injured party had

described a headache. The victim was prescribed anti-inflammatories and muscle relaxants to help with muscle spasms and sleep.

9. The injured party was reviewed again by her GP on 7th June, 2017, when it was noted that she was still having nightmares and flashbacks. On 7th July, 2017, it was noted that the injured party continued to suffer from anxiety attacks. On 10th August, 2017, the injured party was again reviewed and it was noted that her sleep was very poor and that she struggled with self-care. It was noted in a report of 20th May, 2019, that the injured party was still suffering from daily headaches and neck pain.
10. A victim impact statement was handed into the sentencing court which recorded an economic loss of approximately €640 in damage to the injured party's car. Regarding psychological and psychiatric difficulties, the report noted that the injured party has not been able to have a full night's sleep since the incident. It noted that she suffers from panic attacks, is extremely nervous of men and has been prescribed citalopram for depression. A year after the incident, the injured party never left the house, rarely got dressed, is still having nightmares and is still receiving counselling. It noted that her three year old daughter is very jumpy in her sleep if she hears male voices. It also noted that she is now a lone parent trying to raise her child and relies on support from immediate family. The report went on to say that the incident has broken the injured party's confidence and traumatised her in every possible way; she has not been in a relationship since the incident and finds it hard to socialise. She would like to meet new people and become employed but still suffers symptoms of depression and hair loss. She has limited movement in her neck and cannot sit or lie down for long periods. Further, she is unable to lift her child any higher than waist height or play physical games with her. She had, for a time, contemplated suicide and is still receiving counselling in this regard.

The charges

11. The respondent was subsequently charged with six offences: (1) threatening to kill or cause serious harm contrary to s. 5 of the NFOAPA 1997; (2) criminal damage contrary to s. 2(1) of the Criminal Damage Act 1991; (3) production of an article capable of inflicting serious injury contrary to s. 11 of the Firearms & Offensive Weapons Act 1990; (4) resisting or obstructing a peace officer contrary to s. 19(3) of the Criminal Justice (Public Order) Act 1990; (5) assault contrary to s. 2 of the NFOAPA 1997; and (6) contravening a safety order contrary to s. 17(1) of the Domestic Violence Act 1996.
12. A *nolle prosequi* was entered in respect of the offences of production of an article capable of inflicting serious injury and contravening a safety order. The offence of resisting or obstructing a peace officer was taken into consideration when the respondent was being sentenced.

The Respondent's Personal Circumstances

13. A Probation Service Report was prepared by Ms. Claire McNamara which gave an insight into the respondent's personal circumstances. The applicant was, at the time of sentence, in his late 30s, and he had six previous convictions, although for relatively minor public

order type offences. His parents had separated when he was an infant and he had lived for a period of time in England. He had little contact with his father during his childhood and his father died in 2007. An older brother died in 1997 following a history of addiction and another brother was murdered in 2016. He had not engaged in bereavement counselling to address his compounded bereavement. The probation officer said that he had "further childhood trauma" for which he has not sought professional help but that he was open to doing so in the future. He has four children with four ex partners. He has a very poor education record and started working in construction at the age of sixteen. He has had an on/off relationship with employment.

14. The probation officer said that while he had shown "some insight into victim awareness", he would "benefit from intervention in this area". The probation officer applied the Spousal Assault Risk Assessment Guide (SARA) assessment tool and observed that the injured party had reported past physical assault which was a risk factor; that the respondent had a history of significant substance misuse which was a risk factor; and that the respondent himself had disclosed prior instances of assault of an acquaintance which was a risk factor. The probation officer said that he was assessed as posing a risk of perpetrating violence within an intimate relationship and that while he had commenced addressing some of the risk factors, he would benefit from "domestic violence focused intervention to mitigate and manage this risk".
15. An important area examined by the probation officer was that of substance misuse by the respondent. He had started drinking alcohol at the age of seven. In his early teens, he began to abuse cocaine and benzodiazepine tablets. He had a four-year period of abstinence in his late twenties but subsequently relapsed. The probation officer described his serious efforts to deal with this addiction issues since the offences in question. He engaged with an addiction counsellor for a period before attending a residential treatment 16-week programme in St. James's Camino Network in County Meath in October 2019, completing it in January 2019. He also completed a 6-month full-time after-care programme, without relapse.
16. According to himself, he suffered from depression for four years and had engaged in self-harm behaviours for approximately two years. However, he had also addressed this since the programme.
17. In view of the progress made by the appellant, the probation officer considered him to be suitable to undertake a community service order and also thought that he would benefit from probation supervision with certain conditions attached (these were the conditions ultimately incorporated into the judge's order, described below).
18. Mr. Holdaway, a counsellor with the Canal Communities Regional Addiction Service, also described the progress made by the respondent. He said that when the respondent began seeing him two years previous, he was 'a mess'; with alcohol, cocaine, bereavement, and self-harm issues. However, since then he had worked really hard; referring in particular to the residential programme.

The Sentence

19. In sentencing the respondent, the sentencing judge noted the facts of the offence and that the court had taken into account both the reports of Dr. Ní Bhroin and the victim impact statement. She outlined the aggravating factors as being: (i) the violation of the victim's home; (ii) the on-going profound impact on the victim of the violent and vicious assault to which she had been subjected; (iii) the presence of a young child at the time of the commission of the offences; (iv) the respondent's attitude to Gardaí; and (v) the respondent's six previous convictions.
20. The sentencing judge noted the following mitigating factors: (i) the plea of guilty (although entered at a late stage, a few weeks before the trial date) and the value in saving the victim from going through the trauma of a criminal trial; (ii) that his previous convictions related to matters of a different nature (summary convictions with no link to violence); (iii) the "enormous amount of rehabilitation" work that had been done by the respondent since the offending had taken place; (iv) the remorse shown by the respondent; (v) the chronic addiction and associated difficulties with which the respondent had struggled in the past; and (vi) the respondent's family circumstances, including the tragic loss of his two brothers and, in particular, the loss of one of his brothers as a result of murder.
21. In imposing the following sentence, the sentencing judge placed significant emphasis on the efforts made by the respondent (as described above) and the documentation provided by the Canal Communities Regional Addiction Service, the Bridge Project and the Camino Project, and the respondent's attendance at the Drug-Free Day Programme. The judge also stressed how "close [the respondent] came to getting a custodial sentence".
22. First, in respect of the threat to kill or cause serious harm contrary to s. 5 of the NFOAPA 1997, the sentencing judge identified a headline sentence of 3 years and 9 months and, in view of mitigating factors, reduced it to 2 years and 9 months. Second, in respect of the offence of assault causing harm contrary to s. 3 of the NFOAPA 1997, the sentencing judge identified a headline sentence of 3 years and 9 months and then reduced it to a headline sentence of 2 years and 9 months. Finally, in respect of the offence of damage to property contrary to s. 2(1) of the Criminal Damage Act 1991, the sentencing judge identified a headline sentence of 2 years and 6 months and then reduced it to 1 years and 6 months. The above sentences were wholly suspended for a period of 2 years and 9 months on the conditions that the respondent enter into his own bond of €100 to keep the peace and be of good behaviour for 2 years and 9 months, with the following additional conditions:
 - that he remain under the supervision of the Probation Service for a 2-year period;
 - that he refrain from taking any illicit substance during the course of the suspended element;
 - that he engage in offence- and victim-focused work within the Probation Service;

- that he attend for an assessment with domestic violence perpetrator programme;
- that he continue to engage with with relevant services to address his accommodation, anger management, and substance misuse difficulties;
- that he follow all directions given to him by his supervising probation officer;
- that he attends all appointments as directed; and
- that he inform the Probation Service of any changes to his contact details.

Submissions on Appeal

The appellant's submissions

23. As a preliminary matter, counsel for the DPP concedes that the sentence in respect of the assault charge was in excess of jurisdiction and would have to be reduced by the Court; this arose because the judge was under the misapprehension that the respondent had pleaded guilty to s.3 assault when in fact he had pleaded to a s.2 assault.
24. Notwithstanding this error, counsel for the DPP submits that the overall sentence imposed by the sentencing judge was unduly lenient in all the circumstances. This includes a submission that the headline sentence in reflect of count 1 (threatening to kill or cause serious harm) was too low and did not reflect the seriousness of the offences committed. Counsel drew the Court's attention to the following authorities when listing a number of aggravating factors which, counsel submits, were not given adequate weight: (i) it occurred in the victim's home (*DPP v. Coughlan* [2019] IECA 173, *DPP v. FB* [2018] IECA 256); (ii) it involved a sustained attack during which the victim's mouth was covered and her breathing was restricted; (iii) it took place in the presence of their young child (*DPP v. Kelly* [2019] IECA 11); and (iv) the victim was harmed substantially and left with psychological sequelae (*DPP v. TS* [2019] IECA 252). It is further submitted that the sentencing judge substantially departed from the norm in imposing a wholly suspended sentence, particularly in circumstances where the threats to kill occurred in the context of accompanying violence and the victim had to flee to escape the attack. In this regard, counsel placed significance reliance on the decision of this court in *DPP v. Kelly* [2019] IECA 11 which, it is submitted, bears striking similarities to the present case and 'effectively mandates' a custodial sentence.

The respondent's submissions

25. First, counsel for the respondent agrees that the sentence imposed in respect of the assault count must be reduced to reflect the fact that the charge in question was one of s.2 assault. Counsel also submits that the headline sentence for the offence of a threat to kill or cause serious harm placed it at the appropriate level on the scale of the seriousness of the offence. In reaching the figure that she did, counsel submits that the sentencing judge gave adequate weight to both the aggravating and the mitigating circumstances (outlined previously) and could not be said, it is submitted, to have departed substantially from what would be regarded as the appropriate headline sentence so as to justify the intervention of this court. Counsel drew the Court's attention to the decision of *DPP v. Friel* [2018] IECA 216 as a comparator case and further relies on passages from *The*

People (Director of Public Prosecutions) v. McCormack [2000] 4 IR 356 and *The People (Director of Public Prosecutions) v Byrne* [1995] ILRM 279 on the principles applicable in applications of the present kind. Counsel submits that in light of what the sentencing judge described as “an enormous amount of rehabilitation”, the respondent is deserving of intervention that involves “going the extra mile” and that the imposition of a custodial sentence some 20 months after he commenced his first residential treatment programme and while he continues to engage fully with all relevant services would involve a great hardship that the justice of this case does not require. A passage from the judgment of *DPP v. Coughlan* [2019] IECA 173 is relied on in this regard.

The Court’s view

26. Sentencing an offender is a complex exercise which requires the judge to take into account a number of general principles as well as a myriad of practical matters. These principles and factors may pull in different directions, and different outcomes in terms of sentence may be arrived at, depending on the weight attributed to the various considerations. A relatively easy case is a case where the offence is grave and the offender’s circumstances, attitude and past conduct provide little reason for mitigating sentence; in such a situation, all the factors point towards a severe sentence. Another relatively easy case, at the opposite end of the spectrum, is where the offence is minor and the offender’s circumstances, his or her past conduct and his or her efforts to rehabilitate since the offence all combine to provide much reason for leniency; in this situation, all the factors point towards a lenient sentence. Unfortunately, cases in the real world are rarely that simple; judges are usually presented with a set of facts where some factors point towards severity while others point towards leniency. Also, while there is much talk in the sentencing arena of holding a ‘balance’ between the different principles of sentencing in the case, sometimes the trial judge can face a genuine dilemma in deciding whether to emphasise one particular sentencing principle over another in a particular case, because they cannot both be completely accommodated.
27. The present case typifies the kind of difficult dilemma that can face a sentencing judge. On the one hand, there is the fact that an appallingly violent offence was committed by Mr. Farnan against a woman, the mother of his child, in her own home; on the other, since the offending, he has made serious and fruitful attempts on the to rehabilitate himself from a life-long problem of substance misuse, and the probation service are hopeful of assisting him with his other psychological problems outside the prison setting. If one were to focus heavily on the gravity of the offence itself and the principle of general deterrence, as well as the ‘punishment’ aspect of sentencing, in order to send out a strong message that such incidents of so-called ‘domestic violence’ against women will be heavily punished, that would lead to one result, undoubtedly a substantial custodial one. If one were to focus, instead, on considerations of individual deterrence and rehabilitation, one might arrive at a rather different conclusion. Indeed, one might take the view that all the substantial efforts that Mr. Farnan made to address his deep-seated problem behaviours might be undone if he were sent to prison, and that he might be more rather than less likely to re-offend in the future if that course of action were

adopted. General and individual deterrence do not always pull in the same direction. And there is no doubt that rehabilitation, in an appropriate case, is something that the criminal courts reward and encourage, not merely for the sake of the individual accused but also the protection of the public at large.

28. In the present case, the dilemma for the sentencing judge was a real one; the offence was grave, but the mitigation substantial. The sentencing judge did not seek to minimise the seriousness of the offence, but she decided to allow the self-rehabilitation efforts of Mr. Farnan to be given considerable weight; in this, she was guided among other things by a probation report which contained the professional opinion of an experienced probation officer that the offender had made substantial progress in self-rehabilitating despite some long-standing life challenges, some of which were indeed tragic, and the officer's view that the service could do further useful rehabilitation work with Mr. Farnan outside the prison setting. Further, the Court is now in the position where two years have elapsed since Mr. Farnan completed his residential training programme and must consider the potential impact upon him and his progress if he were sent to prison at this stage. The Court has carefully considered the prosecution submission that the case of *Kelly* [2019] IECA 11 renders the DPP's application almost unanswerable. It is true that *Kelly* presented many features similar to the present case, and that an undue leniency application succeeded, resulting in the conversion of a wholly suspended sentence into a partially custodial one. A striking feature of the present case, however, is not only the substantial steps towards rehabilitation that Mr. Farnan has taken, but the depth and complexity of the challenges he faced before he commenced the process of rehabilitation; ranging from matters which arose in his childhood, to substance addiction and bereavement (by murder) of one brother and the loss of another brother as a result of substance misuse. The word 'rehabilitation' is sometimes used somewhat generically to encompass a vast range of different circumstances. Sometimes an offender has no particular psychological or addiction difficulty, and the path to an offending-free future is relatively straightforward. In other cases, the offender may have substantial personal challenges which require considerable courage, determination and painful work to overcome. In some cases, the psychological low to which a person has sunk may be very low indeed; and the climb back out of it correspondingly difficult. The present case is one of those cases, and where the work done by Mr. Farnan involved him having to deal with very substantial and deep-rooted personal challenges.
29. The Court has not lost sight, either, of the fact that the case presents the unusual feature concerning the charge of assault described above, namely that what was charged was s.2 assault and not s.3 assault. Although the DPP submits that a more severe sentence can just as easily be constructed around one of the other counts on the indictment to which the respondent pleaded guilty, namely the threat to kill, the Court's view is that the main charge, in reality, was the assault charge, and that it is somewhat artificial to suggest otherwise. The core aspect of this appallingly violent and terrifying incident consisted of the respondent's many acts of physical force used against the victim. It is difficult to understand that the DPP chose only to charge a s.2 assault, but for present purposes and

more pertinently, it is difficult to reconcile that charging decision with a submission that the Court should view the case as one which "effectively mandated" a custodial sentence.

30. In all of those circumstances, the Court's view is that the sentence should not be interfered with. Because of the respondent's substantial progress in dealing with his serious psychological and addiction challenges, the Court takes the view that the trial judge was within her range of discretion in deciding that the mitigation was sufficiently exceptional to warrant an entirely non-custodial sentence notwithstanding the brutal nature of the offences, which would normally attract a custodial sentence.
31. There can be no doubt that a custodial sentence, and a substantial one at that, would be the normal consequence of an assault of this kind and severity, being as it was a vicious and cowardly attack upon the mother of the offender's child, in her own home, a situation often described in short-hand as one of "domestic violence". However, a sentencing court has a range of discretion and there may sometimes be exceptional cases which warrant a non-custodial approach and the sentencing judge clearly took the view that this was one of them. The Court, after some hesitation in view of the severity of the offence and its significant impact upon the victim, agrees that the trial was within the range of her discretion and that while the sentence was undoubtedly lenient, it did not trespass into the zone of undue leniency for the purpose of this application. The application is refused.