THE COURT OF APPEAL

Record No: 187/2019

Edwards J.
McCarthy J.
Donnelly J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT, 1993

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

V

SIDNEY SUTTON

RESPONDENT

JUDGMENT of the Court delivered on the 25th day of September, 2020 by Mr Justice Edwards.

Introduction

1. The respondent in this case came before the court on the 20th of June, 2017, charged with four counts of assault contrary to Section 2 of the Non-Fatal Offences against the Person Act, 1997, one count of assault contrary to Section 3 of the Non-Fatal Offences Against The Person Act, 1997, and one count of production of an article capable of inflicting serious injury, contrary to Section 11 of the Firearms and Offensive Weapons Act, 1990.

2. The respondent pleaded not guilty, and faced trial on the 31st of October, 2017. On the 2nd of November, 2017, the respondent was convicted on all counts by unanimous jury decision.

3. The sentencing judge imposed a sentence of four months' imprisonment on Counts 1 to 4, being assault contrary to Section 2 of the Non-Fatal Offences against the Person Act, 1997, and 2 years' imprisonment, the final year of which was suspended on Counts 5 and 6, being assault causing harm and production of an article capable of inflicting serious harm. All sentences were to run concurrently with credit to be given for the days the respondent had previously spent in custody.

4. The Director of Public Prosecutions now seeks a review of the sentence imposed on grounds of undue leniency.

Background to the matter

5. The court heard evidence from Garda Samantha Meehan, the investigating officer in the case. She confirmed that at the relevant time the respondent was in a relationship with the complainant, a Ms. Edele Aherne, with whom he shared a residence at 53 Brindley Park Square, Ashbourne, County Meath, together with their twin 5-year old sons. The children were staying elsewhere on the date of the offending.

6. On the 5th of February, 2016, the parties attended a wedding at the Conyngham Arms Hotel, the reception having commenced mid-afternoon and the celebrations continuing into the early hours of the morning. Over this time, the complainant consumed approximately 4 glasses of Prosecco and 8-9 gin and tonics, whilst the respondent had approximately 10-12 pints of Peroni beer.

7. The complainant described the respondent as beginning to get "*a bit messy*", and they both left by taxi at approximately 1 a.m. on the 6th of February, 2016.

8. In the course of the taxi journey, the respondent became aggressive and assaulted the complainant by shoving her head with his hands. This constitutes count number 1 on the Indictment. The court heard evidence from the taxi driver, a Mr O'Brien, who attested to this.

9. Mr O'Brien recounted how the respondent insisted on ending the journey pre-emptively before they reached their place of residence. The respondent had desired to go to the bathroom. He asked the taxi to pull over for this purpose. After exiting the taxi, the respondent was, in the words of the injured party, "*effing and blinding*" and calling her various names such as "*the C word*". He then shoved the head of the complainant against a wall and hit her forehead with his hands. This constitutes count number 2 on the Indictment. The respondent continued to verbally abuse the complainant. The complainant initially hid behind a parked van but ultimately became sufficiently embarrassed that she returned to her front door.

10. After leaving the scene, the taxi driver subsequently reported the incident to the gardaí.

11. Upon entering the home, the complainant was punched in or about the face by the respondent. She retreated into the bathroom and was followed by the respondent, who continued to punch and kick her, at one point dragging her to the floor and stamping on her foot and kicking her legs. The complainant pleaded with him to stop, and made explicit reference to her children.

12. The respondent left the bathroom. The complainant described blood streaming down her face and splattered about the bathroom. She took a shower, attempting to wash away the blood. The respondent then returned to the bathroom, now armed with a knife. The complainant begged the respondent to stop as she sat on the side of the bath, but was stabbed in the right leg. The injured party made an attempt to ring the gardaí, but was intercepted by the respondent taking the phone from her. There was a further struggle, during which the respondent stabbed her or "*got*" her on the shoulder. She persisted in

trying to push him away, and the respondent dropped the phone. She picked it up and hit the redial button and was able to communicate that she needed help and provide them with her address before the phone was again taken by the respondent. The injured party then described feeling cold and had difficulty remembering what happened between then and the arrival of the gardaí.

13. What occurred inside the parties' home gave rise to counts 3, 4, and 5 on the Indictment, the stabbing in the bathroom providing the basis for the sole count of assault causing harm, namely count no 5. The circumstances giving rise to the final count on the Indictment, namely count no 6 involving production of an article capable of inflicting serious injury (being the knife which was subsequently used to stab the complainant) are self-evident.

14. The gardaí initially attended the general area on the basis of the call from the taxi driver, but were unable to locate the exact house due the respondent's insistence that the taxi stop before reaching the house. After a few minutes in the area, they were informed by the dispatcher of the call from the injured party and were given the address. Garda Meehan described the reluctance of the respondent to open the door, and was trying to dissuade them through a glass window, maintaining that everything was normal and that they were not needed. He tried a number of times to dissuade the gardaí from entering, but they persisted.

15. Upon entering the premises, the gardaí observed extensive bloodstaining on the clothes, and slight grazing on the knuckles, of the respondent, and blood splattered on the hallway walls and up the stairs. The gardaí found the complainant in a distressed state, frantically attempting to clean the blood from the walls of the bathroom. She had several immediately visible injuries including a laceration to her right eye, a black eye, a deep laceration to her right calf and a number of puncture type wounds on her legs and arms.

16. The complainant was taken by ambulance to James Connolly Memorial Hospital where she was noted to have an entry and exit wound on the lateral aspect of her knee. In addition, bruising was noted about her face and right lower back and lacerations were noted to her right shoulder and over her right eye. The injury to her right knee was explored under general anaesthetic and she was thereafter discharged.

17. The respondent did not give evidence in the course of the trial. Evidence was called on his behalf from his two sisters, Ms Aisling Sutton and Ms Elaine Mulhern, who described attending the hospital the following day to visit the injured party. They claimed that the injured party blamed herself for saying something to provoke the respondent, and said "*I'm sorry, I'm sorry*". Their accounts also reference the injured party saying: "*look what he did to me*".

18. Garda Meehan informed the court that the respondent had subsequently reported to the gardaí that the injured party had in fact assaulted him, but there was insufficient evidence to prosecute, and no charges were brought against the injured party.

Impact on Victim

19. The Court received a Victim Impact Report dated 15th of February, 2018. In it, the complainant describes living in constant apprehension of possible retaliation inflicted by the respondent onto her and her children. She states that the respondent refused to return irreplaceable personal effects. She describes ongoing stress caused by the respondent's denial of any wrongdoing, and ongoing harassment via false complaints made on behalf of the respondent to the gardaí and TUSLA. She believes the respondent is interfering with the ability of her and her children to move on from the incident. In the course of her victim impact statement the complainant refers several times to "*the assault*", by which she clearly means the entire incident giving rise to the six counts on the indictment. However, while the victim impact statement suggests a prior history of emotional and psychological abuse of the complainant by the respondent, it does not suggest any history of prior physical abuse.

Personal Circumstances of the respondent

20. The respondent was born on the 29th of July, 1977, is a self-employed accountant, and had never come to the adverse attention of the gardaí prior to this incident.

21. The respondent submitted on his own behalf that he was a committed and dedicated father and was of good character. He retains the support of his mother and his three sisters. His father passed away from brain cancer about a month prior to his sentencing, and the respondent cares for his elderly mother who has her own medical issues.

22. The respondent maintains his innocence, and claimed at his trial that the complainant had assaulted him and thereafter self-harmed. This account was, however, rejected by the jury. In that regard, the respondent also has an extant appeal against his conviction, but this review has come on for hearing ahead of the hearing of that appeal in circumstances where, to date, the respondent has not taken the necessary steps to enable it to be listed.

Remarks of the sentencing judge

23. After dealing with issues relating to the respondents' self-representation, and his unwillingness to accept the assignment of a defence legal team facilitated by the court, or to make arrangements in that regard himself, the sentencing judge recited the evidence adduced before her concerning the evidence that had in turn been given at the respondent's trial which had been presided over by a different Circuit Court judge who had subsequently retired, and concerning the respondent's personal circumstances, before making the following remarks:

> *"JUDGE: … . It is an appalling case of domestic assault and, as I said, Mr Sidney Sutton maintains that the injured party was not only a liar but she self-harmed.*
>
> *[Interjection by MR SUTTON]*
>
> *JUDGE: All matters the jury rejected in the face of the overwhelming evidence. The injured party described being stabbed a number of times inside her family home and remained at the controlled crime scene when the gardaí arrived and it was then designated for three days a crime scene and photographs were taken. Mr*

Sutton, as he is interrupting me, has indicated the DNA, all matters he can address at the Court of Appeal. He challenged the gardaí in respect of their recollection of events upon their arrival at the scene and in relation to the DNA and the forensic analysis. As I said he also maintained that he was injured and was assaulted and he then queried from Garda Meehan why the file was never prosecuted in terms of his complaints. I was advised that there was insufficient evidence for consideration in that regard in respect of warranting a prosecution against Ms Ahern in respect of any reported assault by her against Mr Sutton.

He is a man with no previous convictions and this case is rooted in his temper and his viciousness and aggression on the date in question which caused his partner to sustain so many injuries. I'm told their twin boys are now eight years of age and there are substantial maintenance arrears as I've been told on the last occasion. He's had an explanation in terms of his own business as he is a self-employed accountant, but he has also had unsupervised access over the past three years and that is encouraging in terms of being a good parent. In terms of the maintenance arrears he indicated that he had some difficulties with employment during the recession. He is now 41 years of age and has the support of his own family who, as I said, he called upon in defence of his position at trial and the jury rejected their evidence. I am told his father is recently deceased and it is a difficult time for his family and I completely understand that in terms of the sympathy that I can extend.

But I am obliged to deal with matters pertaining to these offences that were committed in a horrible way on the night in question. So in term of nominating the headline sentence I'm going to identify the aggravating factors in the global sense as there are a number of counts reflective of the protracted period of time that Ms Ahern was assaulted. Each and every one of the counts of themselves are aggravating in their commission. So I'll identify the circumstances in which these offences occurred, from the incident in the taxi to the time they stopped at the front door to the manner in which Ms Ahern approached the front door following their being left at the location by the taxi man. I note that the taxi man didn't stop and let passengers disembark outside their home and he was in a position then, as he gave evidence at trial of how he observed Ms Ahern and a white van and she was trying to avoid her aggressive partner, her aggressive then partner. The seriousness of these unprovoked assaults, her security in her own home was violated. It's fortunate that the twins weren't home that night because of the extent of the injuries and the assault that was perpetrated on her. She retreated to the safety of the bathroom in the hope of locking the door, but in terms of the photographs and the injuries sustained they're quite obvious it was a traumatising, protracted period of time within which he assaulted her.

I'm also having serious regard to the suggestion maintained at trial and the times thereafter by Mr Sutton that she self-harmed for this period and taking into account the photographs and the credible evidence that she gave at the trial by virtue of

reading the transcript and noting how the jury convicted I am rejecting all suggestions of that on his part.

Now, in that regard I'm nominating a headline sentence pertaining to count 5 on the indictment, which is the substantive count bearing in mind that is the section 3 assault and count 6 which is the production of an article, namely the knife, as she sustained a serious knife injury, I'm nominating a headline sentence of three years' imprisonment.

[Interjection by MR SUTTON]

JUDGE: Now, I nominate the headline sentence of three years' imprisonment and thereafter I've got to look at the mitigation that's present. He has lost mitigation with respect to his conviction as it wasn't a guilty plea, but he was entitled to defend the case and I won't penalise him in that regard. He is a man who has reached the age of 41 years of age with no previous convictions whatsoever. He is a self-employed accountant who has had his difficulties over the years he tells me in terms of the recession. He is a committed father to his two young boys and despite the appalling assault perpetrated upon the mother of his children he has had unsupervised access regularly because there's no fear in that regard. He has had no adverse criminal behaviour since and I note the fact he suffered a close bereavement in the past number of months with the recent passing of his father.

I'm entitled to have regard to the fact that he doesn't accept the jury verdict and is appealing that matter and all records and transcripts and photographs are contained within the file which will be forwarded to the Court of Appeal. But I am also obliged to have regard to the fact that he has not been in prison, save for the occasion in June when I perceived him to be continually to perpetrate a nuisance and wasting court time in constantly seeking the adjournments. This delay is of his making and has served no purpose except to delay matters and this has been hanging over Ms Ahern and I've also had regard to her victim impact statement, which is articulate and impressive.

Thereafter, having regard to all of the matters that I've identified and unfortunately having to remand him in custody while I finalise sentence, the sentence I impose in respect of counts 4 which the counts 5 and 6 on the indictment in respect of the section 3 assault on Ms Ahern and in relation to the production of an article, it's to be a sentence of two years' imprisonment with the final 12 months suspended in respect of count 5 on the indictment and similarly in respect of count 6 on the indictment, suspended on terms that he keep the peace and be of good behaviour in that regard. Taking into account counts 1 through to 4 being section 2 assaults and having regard to them in terms of the overall sentencing process, the headline sentence in respect of all counts on the indictment pertaining to the section 2 assaults will be one of four months' imprisonment and thereafter, in respect of the actual sentence to be imposed, would be one of four months' imprisonment. So counts 1 through 4 are four months' imprisonment, count 5 is a sentence of two

years' imprisonment with 12 months suspended and in count 6 a sentence of two years' imprisonment with 12 months suspended."

Grounds of Appeal

24. The applicant rests her appeal on the following grounds:

a. The sentencing judge erred in principle in imposing the said sentence in circumstances where same was unduly lenient having regard to the nature of the offence, the circumstances surroundings the commission of same, the gravity of the offence, more particularly as set out below.

i. In nominating a headline sentence, the sentencing judge erred in law and in fact in failing to have sufficient regard to the aggravating features of the case and in particular:
ii. The unprovoked and prolonged nature of the assault and the level of violence.
iii. The nature of the prior relationship between the parties and the breach of trust.
iv. That the assault occurred within domestic relationship and in the complainant's family home.
v. That assault resulted in the complainant having to leave her family home.
vi. The injuries caused and the impact of the offence on the complainant.
vii. The use of a weapon.
viii. The conduct of the trial and defence advanced.
ix. The absence of remorse.

b. The sentencing judge erred in law and in fact in failing to place the offences appropriately on a range of seriousness for offences of this nature, in failing to have appropriate regard to the maximum sentence available and in nominating a headline sentence which was too lenient in all the circumstances.

c. Having nominated the headline sentence, the sentencing judge placed disproportionate weight upon and gave an excessive discount for the mitigating features.

d. The sentencing judge attached too much weight to the mitigating factors generally, the respondent's prior character and his personal circumstances.

e. The sentencing judge erred in principle in failing to attach any, or any sufficient, weight to the principle of general deterrence, both in respect of the respondent and of other offenders in the future.

f. In summary, it is submitted that both the initial headline sentence and discount applied thereto were unduly lenient.

Submissions

25. Written submissions have been filed by both sides, for which we are grateful. Both sides' submissions make reference to the by now very well-established jurisprudence concerning

the principles applicable to undue leniency reviews conducted pursuant to s. 2 of the Criminal Justice Act, 1993, and there is no controversy in that regard.

26. It is common case that the law is as set out in *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279 and subsequent cases, and that a convenient summary of the applicable principles is provided in in a judgment of the Court of Criminal Appeal in the *DPP v. Derrick Stronge* [2011] 5 JIC 2301, where McKechnie J. stated that: -

> *"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are: -*
>
> *(i) The onus of proving undue leniency is on the D.P.P.;*
>
> *(ii) To establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;*
>
> *(iii) In the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;*
>
> *(iv) This task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*
>
> *(v) The fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;*
>
> *(vi) It is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified and finally;*
>
> *(vii) Due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."*

27. It is accepted by the applicant that the threshold to be met by her is a high one and only arises where there is "*a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.*"

Case advanced on behalf of the applicant

28. The applicant maintains that the sentencing judgment in the court below involved the following errors in principle.

Headline Sentence:

29. It was submitted that the sentencing judge failed to nominate an appropriate headline sentence having regard to the aggravating features present and the headline sentence nominated was unduly lenient. In that regard we were referred to the remarks of the President in the recently decided case of *The People (Director of Public Prosecutions) v McGrath, Dolan & Brazil* [2020] IECA 50, at paragraphs 23 and 24 of the Court's judgment, where he stated:

> *"23. In each case, the headline sentence identified is criticised by the DPP as inadequate to meet the gravity of the offending conduct measured with reference to the offender's culpability and the harm done. This Court would observe that it may be that judges have been too reluctant to consider placing the starting or pre-mitigation sentence at the maximum of five years imprisonment. For high ends. 3 assaults, a 5-year headline pre-mitigation sentence is not excluded. The Court would observe that the selection of a starting or pre-mitigation sentence in the case of a s. 3 offence has to be seen in the context of the overall architecture of assault-type offences provided for by the Non-Fatal Offences Against the Person Act 1997. As is known, the basic or entry level assault is provided for ins. 2 of the Act, which creates a summary offence. Then comes s. 3 assault, the offence of assault causing harm, and then there is s. 4, recklessly or intentionally causing serious harm. This offence is often referred to in shorthand as "s. 4 assault", but in fact, the word 'assault' appears nowhere in the section.*
>
> *24. It is in the nature of things that there may be cases where the decision to charge with s. 3 or with s. 4, or to accept a plea to s. 3 if s. 4 has been charged, will be finely balanced. There will be other cases which will be identified as borderline s. 3 or s. 4. In such cases, a starting point or pre-mitigation sentence of five years may be appropriate. Certainly, judges should not operate on the basis that a starting point of five years is not generally available and that it should only be considered, if it be ever considered, in exceptional circumstances."*

30. It was accepted on behalf of the Director that the headline sentence should have been somewhat less than five years, but it was submitted that such was the harm done and the subjective culpability of the respondent the headline sentence should have been between four and five years.

31. In support of this submission we were referred to *The People (Director of Public Prosecutions) v. Maguire* [2018] IECA 71, a headline sentence of four years was described as potentially very lenient despite no issue having been taken with same by the Director of Public Prosecution. In Maguire the accused pleaded guilty to the assault and false

imprisonment of his partner in their home; ultimately, a sentence of four years' imprisonment, the final twelve months suspended, was imposed.

32. Similarly in *The People (Director of Public Prosecutions) v. Jesenak* [2017] IECA 263 a headline sentence of four years was nominated on a count of threatening to kill and the assault of his the accused partner was described as very lenient. Apart from the two factors noted below the facts of the assault in Jesenak are very similar to the index offence, although the absence of a weapon therein is to be noted.

Nature and duration of the assault:

33. The applicant stresses that the complainant was subjected to a protracted assault which commenced in the taxi on her way home and culminated in the complainant being stabbed following her retreat to the bathroom. It cannot be said on the respondent's behalf that the incident was the result of an explosive outburst of rage or the loss of self-control as there was clearly a number of potential "cooling off" periods present; after the initial assault in the taxi, following the assault outside the taxi, when the complainant hid, the initial retreat by the complainant to the bathroom and the period between the first and second assaults in the bathroom. What in fact occurred was an escalation in the level of violence used by the respondent on the complainant.

Violation of the complainant's home:

34. The point is further made that the assault occurred in the complainant's home.

35. Thereafter, she had to leave her home and was unable to retrieve some of her belongings. It is submitted that this is a particularly aggravating feature of the case, as cases of domestic violence are often accompanied by almost immediate expressions of remorse; however, in this case the respondent compounded the impact of the offence by refusing to allow the complainant to retrieve personal effects.

Impact on the complainant/Victim:

36. The physical injuries sustained by the complainant in this case were serious, involving a laceration to her eye area and a puncture injury to her leg and, furthermore, the offence caused a significant and on-going physiological impact.

37. The significance of both the impact and potential impact of the offence on the victim was noted in *DPP v. Crilly* [2019] IECA 143, wherein Kennedy J. opined at paragraph 17 as follows:

> *"As this court has repeatedly observed, the gravity of an offence is assessed with reference to the harm caused or risked and the subjective culpability of the offender."*

38. In the index case, both the harm risked and the subjective culpability of the offender, tend to increase the gravity of the offence as a knife was used in the final phase of the

assault and an incomplete defence, such as self-defence or circumstances which might lessen the subjective culpability of the offender, such as provocation, are absent.

Breach of Trust:

39. It was submitted that the complainant was entitled to feel safe with her partner, travelling home from a social function. It is therefore submitted that the breach of trust involved in the assault is an aggravating feature.

Use of a Weapon:

40. The point is also made that the respondent left the bathroom following the first assault therein and armed himself with a kitchen knife before returning to assault the complainant on a second occasion. In those circumstances the use of a weapon, which is always considered an aggravating factor, was not spontaneous but premeditated. This was not the case of somebody reaching for a weapon in the course of a fight, such as a bar stool or glass, but one in which the respondent deliberately armed himself.

Excessive Allowance for Mitigating Features

41. The principal mitigating features ordinarily associated for assaults, namely an early guilty plea and expression of remorse, are notably absent in this case.

42. It is submitted that the absence of remorse was compounded by the behaviour of the respondent subsequent to the trial, the suggestion that the prosecution was as a result of a fabrication on the part of the complainant, and his subsequent attempts to frustrate the sentencing process.

43. The sole mitigation present was the respondent's previous good character and his role as a father.

44. The relevance of an accused role as father in the context of domestic violence incidents was addressed in *DPP v. Maughan* [2016] IECA 127 wherein Mahon J. stated as follows:

> *"12. One of the submissions made by counsel for the appellant was that the sentencing judge did not sufficiently take account of the adverse effect that the prolonged long absence of the appellant while in prison would have on his young children. Undoubtedly, the absence of a parent for prolonged period can, and does, adversely affect children, especially young children. It also imposes on the other parent a host of additional practical problems in dealing with young children. However, while it is properly a factor to be taken into account when considering a custodial sentence, and the length of such a sentence, in relation to the parent of a young child, it should not, save in exceptional circumstances, result in the imposition of a non-custodial sentence, or indeed a reduced custodial sentence, in circumstances where a significant custodial sentence is otherwise appropriate with due regard to the seriousness of the offence concerned, and, of course, the personal circumstances of the personal being sentenced.*

13. In a recent decision of this court, in the case of DPP v. Counihan [2015] IECA 76, the following was stated:

> *" The Court holds that the suspended sentence cannot be justified in this case by reason only of the impact that imprisonment would have on the respondent's family, although the Court does not in any way wish to underestimate those effects. The fact is, however difficult it may be to cope without the respondent, many other families of imprisoned people have to face major disruption and problems in coping with children and dependent adults”.”*

45. The sentencing judge herein reduced the headline sentence nominated to one of two years and thereafter suspended the final twelve months.

46. Whereas the suspension of a portion of a sentence is often used as a mechanism to encourage rehabilitation, it was submitted that it ought not be so deployed in the absence of any evidential basis.

47. It was submitted that both the suspension of the final twelve months of the sentence and the reduction of one year from the headline sentence were without evidential foundation or justification and in isolation ought to be considered unduly lenient. The combination of both renders the sentence manifestly so.

Summary

48. In summary, therefore, the applicant’s case is that the respondent was convicted of a serious and prolonged assault on his partner culminating in the use of a knife.

49. Thereafter, the respondent asserted that the complainant fabricated the allegations and inflicted the injuries upon herself and showed no remorse.

50. In those circumstances it was submitted that the headline sentence of three years nominated was unduly lenient and the ultimate sentence imposed, being one year’s imprisonment to be served, was particularly so.

Case advanced on behalf of the respondent

51. In reply, counsel for the respondent contended in oral submissions before us that the sentence imposed was humane and sensible. The sentencing judge would have been entitled to take into account the background that the incident had occurred in the small hours after a wedding, and in circumstances where both parties had had a great deal to drink. Although she does not explicitly mention it in her sentencing remarks, she would also have had to bear in mind that there had been two sides to the story. The respondent had complained in the court below of having also been caused injury and there had been some independent confirmation of that. Without impugning the verdict in any way, this was potentially relevant to the respondent’s subjective culpability and the sentencing judge would have been entitled to look at the entire situation. In fixing the headline sentence at three years, and affording a substantial discount from that, the sentencing

judge had, in the circumstances of the case, acted within the margin of appreciation available to her and the ultimate sentence could not therefore be said to be outside the norm.

52. It was further submitted that the sentencing judge had displayed wisdom and insight insofar as the suspension of part of the sentence was concerned, and it is said that it had indeed the effect the court presumably intended in as much as the respondent did not breach his bond post release.

53. It was submitted that the sentencing judge took great care to ensure the respondent remained on bail while he sought to secure fresh legal representation for his sentence hearing. In that period, he was of good behaviour and committed no offences.

54. The court was acutely aware of the relationship between the respondent, the complainant and their two sons.

55. The respondent says that any suggestion that the denial of allegations by an accused amounts to an aggravating factor is rejected. The absence of remorse is a fact as the respondent continues to deny his guilt and has appealed his convictions. A convicted person has a right to appeal and should not be punished for failing to show a feigned remorse in these circumstances.

Time between date of sentencing and events giving rise to charges

56. The events occurred on the 6th of February, 2016, and the trial took place in November, 2017. Sentencing was finalised on the 12th of February, 2019. The point is made in the respondent's written submissions that this was a substantial period of time during which the respondent showed himself to be of good behaviour and law abiding.

57. The passage of time is similar, but not as great as that in the case of *DPP v Foley* [2009] IECCA 47. In that case the defendant pleaded guilty on the day of trial. He had however previous convictions. He had caused a serious injury to the injured party (biting off an ear lobe) but nonetheless had been given a fully suspended sentence. The Court of Appeal varied that to a sentence of 2 years imprisonment suspending the final 18 moths thereof.

58. This respondent served a sentence of one year in prison.

59. Following a trial for a serious assault involving the use of a bar stool the Court of Appeal held in the case of *DPP v Crilly* [2019] IECA that a headline sentence of two years was although light, appropriate. The victim had also been kicked while on the ground.

60. It was submitted that while punishing the respondent the sentencing judge endeavoured insofar as was appropriate to aid his rehabilitation while at the same time imposing on him, a first time offender, a sentence of imprisonment which carried with it a traumatic experience for him and the total loss of his freedom, employment, family life with his sons and his own family relations.

Case law relied on by the respondent

61. We were referred in the respondent's written submissions to several cases in support of his contention that the sentence imposed was not unduly lenient. These included *DPP v O'Driscoll and O'Driscoll*, Court of Criminal Appeal, (1972) Frewen, Vol. 1 at 351.

62. In the *O'Driscolls'* cases, the Court was dealing with young offenders who had been convicted of robbery with aggravation and given substantial sentences of penal servitude. They appealed and in dealing with the appeal, at page 359, it was stated:

> *"The objects of passing sentences are not merely to deter the particular criminal from committing a crime again but to induce him insofar as possible to turn from a criminal into an honest life, and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case, having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal. The sentences in the present case may have a very deterring effect on other people but are not such as to induce these young men to turn from a criminal to an honest life. Regard must also be had to the fact that this is the first crime of violence of which either of them has ever been convicted".*

63. It was submitted that the sentence imposed on the respondent was sufficient to meet the difficult requirements set by the court in the *O'Driscoll* decision. The sentence punished and induced the respondent as recommended.

64. We were also referred to *The People (Director of Public Prosecutions) v Thomas McCormack* [2000] 4 I.R. 356. That appeal dealt with offences of a very different character to those involving this respondent. In dealing with those it was held:

(1) A custodial sentence is never mandatory in the absence of a statutory direction to that effect; and

(2) Each case must depend on its own special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.

65. It was submitted that the absence of previous convictions and the social and domestic circumstances of the respondent, taken in conjunction with the facts of the crime, were fully reflected in, and justified, the sentences imposed.

66. We were also referred to *DPP v. John Jennings*, (Unreported, Court of Criminal Appeal, 15th February, 1999). Here the Court of Criminal Appeal was dealing with a man caught up in the then prevalent review of sentence mechanism. In dealing with this issue the Court stated at page 2 of the Judgement as follows:-

> *"This young man has had a troubled background and he had not taken his hope in the past. But there comes a time in everyone's life, and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this, his last chance perhaps, he will hopefully take it, rehabilitate himself, get employment and become a useful member of the community".*

67. That Court went on to ameliorate the sentence being served by John Jennings. Unlike John Jennings this respondent has no previous convictions, had worked and had two sons. Any relationship with the injured party was long over and it was said the respondent is well equipped to re-launch is career as an Accountant. He seeks and needs to put this matter behind him and his year in prison, it is submitted, had adequately punished him.

68. We were also referred to *The People (Director of Public Prosecutions) v Aoife Maguire*, [2015] I.E.C.A. 350. In the *Maguire* case the court was dealing with a first time offender who following a long trial had been convicted of a number of offences involving conspiracy to conceal a number of bank accounts connected in one way or another to a senior figure within the bank from the Revenue Commissioners. That offence carried a maximum sentence of five years.

69. Aoife Maguire had an excellent work record in the bank and was the mother of a child who she reared alone. She gave up her job to look after her mother and was unemployed by her sentence date.

70. The Court of Appeal, while noting the lesser responsibility of Ms. Maguire compared to her co-accused, stated that the offence was nonetheless a serious one. At paragraph 17 of the court's judgment it noted that the trial judge had to consider a custodial sentence in a situation where the case had been fully contested. It noted that the fact of having contested her trial was not something for which Ms. Maguire was to be punished but it did note she forfeited the mitigation of a plea of guilty.

71. At paragraph 19 the Court of Appeal observed that where a sentence of imprisonment would not or could not be avoided the sentencing judge should have been mindful that he was being called on to sentence someone without previous convictions and of good character caring for her mother.

72. At paragraph 20 the Court went on to refer to the case of *The People (Director of Public Prosecutions v Doherty* (Unreported, Court of Criminal Appeal, 29th April 2003). It quoted from that decision:

> *"We also bear in mind the factors which were recited on several occasions yesterday and acknowledge in the case of DPP and Egan that is to say that in dealing with a person without previous convictions and indeed of positive good character, if the court considers as we do, that a custodial sentence is required in the public interest, such a sentence need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principle effect".*

73. The *Egan* case had referred to the case of *R. V Sergeant* [1975] 60 Crim. App., where Lawton L.J. commented:-

> *"For men of good character the very fact that the prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time".*

74. It was submitted that the mere closing of the gates on the respondent herein has been a significant punishment in and of itself, and that the fact that he received a custodial sentence was a matter of more importance than the duration or length of that sentence.

75. It was further submitted in oral argument that the present case is readily distinguishable from the case of *The People (Director of Public Prosecutions) v McGrath, Dolan & Brazil* relied on by the applicant.

Discussion and Decision

76. We find ourselves in agreement with the submission on behalf of the applicant that the headline sentences for the s. 3 offence, and also for the s. 11 offence, in this case could not reasonably have been less than four years, given the egregious nature of the assault causing harm, involving as it did the stabbing of the injured party twice (in the leg and in the shoulder) with a knife, in circumstances where the respondent had broken off his earlier attack in the bathroom so as to go and arm himself with the knife in question, and given that this was the culmination of a prolonged incident involving extreme domestic violence. To stab one's life partner with a kitchen knife brought to the scene in the course of a domestic violence incident is by any yardstick extreme violence.

77. We have listened to the submission by counsel for the respondent to the effect that the sentencing judge should have in some way regarded the respondent's offending as being less subjectively culpable because both parties had a great deal of drink taken, that what occurred was in the aftermath of a wedding, and because it is claimed there were possibly two sides to the story. We reject any suggestion that an assault such as this one, committed in the context of domestic violence, and committed by one life partner against another, could ever be rendered less culpable due to inhibitions being reduced as a result of the consumption of drink; and we are further satisfied that to the extent that evidence exists in this case of some perceived provocation it could not possibly have justified, nor serve to reduce, the respondent's culpability for such a savage assault. For the avoidance of doubt, the message must go out that assaults such as this one committed in the context of domestic violence and within the family home are every bit as serious as, and are arguably more serious than, assaults on strangers and outside of the family home. The existence of a relationship between an offender and his victim does not serve to reduce the offender's culpability.

78. In the circumstances we are satisfied that the sentencing judge was in error in fixing the headline sentences at just three years. We would regard that in itself as having been substantially outside the norm leading to an unduly lenient sentence.

79. However, we regard that error as having been compounded by the extent to which there was, in our view, excessive discounting for mitigation. We do not gainsay that the respondent was entitled to a significant allowance for the fact that he was a first-time offender, for his employment record and on account of his good relationship with his children. While that might have justified the straight discounts of one year's imprisonment applied in this case, for the sentencing judge to have gone on to suspend a further year of the sentences, in the absence of any cogent evidential basis for doing so, was in our view unjustified and a further error.

80. Overall then, we are satisfied that the sentences imposed for the s. 3 offence and for the s. 11 offence, respectively, were unduly lenient and that they must be quashed as being such. We will proceed now to a re-sentencing.

81. We have listened carefully to an eloquent plea in mitigation from Mr O'Higgins SC which, in addition to again proffering the matters ventilated in that context before the court below, has placed particular emphasis on the extent to which his client has fallen from grace, admittedly through his own actions. He characterised him as having paid a desperate price and as having collapsed metaphorically "*into a pile of rubble*".

82. We accept that he is a professional man whose reputation is severely damaged and whose business has been, and will continue to be, badly affected in consequence of the penalties that have had to be applied to him, and that this represents an element of inevitable additional hardship that he must endure. We have been apprised of his bleak financial situation and of the fact that, at least for the moment, he no longer has access to his children. We have also been told that he found prison difficult, and that he is anxious and apprehensive at the prospect of having to return to prison and we are prepared to take that into account.

83. In the circumstances we will nominate a headline sentence of four years' imprisonment. Further, to reflect the mitigating circumstances in the case and to make some allowance for what has sometimes been characterised as "the disappointment factor" in a case such as this, where the respondent having served the sentence imposed upon him at first instance now has to return to prison, we will discount a period of one year and eight months from the headline sentence, leaving a net custodial sentence of two years and four months. The appellant should of course receive credit for the time that he has already served, namely one year of that period, and the overall sentence is to date from the same date as the sentence imposed in the court below.

84. The warrant of committal is to issue from this Court, but we will defer execution of that committal warrant until 12 noon on Friday the 16th of October, 2020, at which time the respondent is expected to surrender to the custody of An Garda Siochána at Ballymun Garda station, for the purpose of being conveyed from there to the appropriate prison. To facilitate that, the committal warrant should be taken up and provided to the appropriate member of An Garda Siochána at Ballymun Garda Station. Further, lest the respondent should fail to turn up and surrender at the appointed time and place, this Court further directs that upon such circumstances being notified to the Registrar of this Court by the

said member of An Garda Siochána a warrant is then to issue for the arrest of the respondent; and further, that upon execution of that arrest warrant he is to be brought before this Court as soon as practicable thereafter.