



THE COURT OF APPEAL

Court of Appeal Record No. 248-249CJA/20

**Birmingham P.
McCarthy J.
Murray J.**

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

DYLAN FOGARTY

RESPONDENT

JUDGMENT (ex tempore) of the Court delivered on the 12th day of November 2021 by Mr. Justice McCarthy

1. This is an application pursuant to section 2 of the Criminal Justice Act 1993 for a review on grounds of undue leniency of the sentences imposed on charges the subject of two indictments (Bill Nos: DU946/20, and DU614/20) which were dealt with together by Dublin Circuit Court on the 16th of November 2020. All sentences were to run concurrently, and an effective sentence of three years was imposed.
2. The facts of the case can now be briefly summarised. Bill No. DU946/20 deals with the offences first in time. The respondent pleaded guilty to one count of assault contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997. This offence occurred on the 15th of October 2017 at Dame Street in the early hours of the morning and there was one injured party namely Ciaran Cussen. The precipitating event which caused the respondent to become enraged, was that the injured party accidentally lightly brushed against the respondent's partner Danielle Powell as he passed her on a crowded street. The assault seems to have occurred at roughly 3:30am. On any view the response by the respondent was utterly unjustified. The respondent caused significant injury to Mr. Cussen having given him many severe blows and amongst this he had also bitten the injured party in the neck and the arm. The bite to the neck was the more serious of the two.

3. A medical report from a Dr Waldron outlined Mr. Cussen's injuries. Mr. Cussen was not immediately aware of the seriousness of his injuries until he went home. On examination, Mr. Cussen had bruising over his left eye and left temporal region and a deformity of his nasal bridge. He has had a wound to the anterior neck caused by the bite, and as we know, another wound from a second bite on his arm. An X-ray of his facial bones showed a deviation of the nasal bones consistent with an acute nasal bone fracture also caused in the course of the assault. A CT scan of his brain also showed nasal bone fractures. He was admitted to St James's Hospital. He underwent a debridement and primary closure of his neck wound under general anaesthetic. His nasal bone fractures were treated with nasal splinting and prophylactic antibiotics and he was discharged on the 17th of October. He is left with permanent scarring because of the bite to the arm and the bite to his neck which was towards the front.
4. The evidence was strong. There were numerous witnesses. The respondent was recognised from CCTV and DNA extracted from the victim's blood was found on the respondent's runners matched the injured party's DNA. The victim impact statement was read by the sentencing judge. It said that he had permanent scarring on his arms and neck, that he felt embarrassed and ashamed of what had happened and that the assault had changed his life and him as a person especially in the context of socialising in the Dublin City Centre.
5. In relation to Bill No. DU614/20 where the offences second in time were charged, there were six counts on indictment which can be listed as follows: -
 - (1) Assault contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997. [on a date unknown between 1st and 25th of April 2019].
 - (2) Assault contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997. [on a date unknown between 15th and 30th June 2019].
 - (3) Criminal Damage contrary to section 2(1) of the Criminal Damage Act 1991. [on the 14th of June 2019, of a wall in Ms. Powell's home].
 - (4) Intimidation of a potential witness contrary to section 41(1) and (5) of the Criminal Justice Act 1999. [on 25th of November 2019 at Ms Powell's home].
 - (5) Harassment contrary to section 10(1) and (6) of the Non-Fatal Offences Against the Person Act 1997. [between 1st April and 23rd November 2019].
 - (6) Criminal Damage contrary to section 3 of the Criminal Damage Act 1991. [on the 26th November 2019].
6. The respondent plead guilty to the single count of assault on the first indictment as well as to counts 1, 3 and 5 on the second indictment with evidence being given on a full facts' basis. The two indictments came before the sentencing court and sentencing was given together on the 16th of November 2020. It is accepted by the prosecution that these were early pleas.

7. A number of the offences were in relation to the respondent's then partner Ms. Powell and then a number occurred after the relationship had ceased. The court heard of a relationship between them that was one with a controlling and abusive nature emanating through the respondent to Ms Powell. Sergeant Pearse O'Sullivan gave evidence that Ms Powell met Mr Fogarty in or about October of 2016 and she moved in with him and his mother and around that time. From this point onwards, there was a strong indication of control in the relationship with the respondent which including *"making demands of money from her. He would take her bank card and he would not let her talk to certain people who included her family and close friends. He would take her phone off her and go through her messages and then he started to get physical with her as well."* The abuse started within the first year of the relationship with Christmas time illustrating initial violence. The respondent had hit Ms Powell during this period and she went to her mother's for Christmas without him. She was advised by her mother to stay away from the respondent, but she failed to take heed of this advice and instead relations broke down between Ms Powell and her mother for the next two years. During this time, Ms Powell had also issued with the respondent's family. It was this point that made Ms Powell particularly vulnerable as she ended up homeless with nowhere to go and was staying in a hostel in Smithfield coming up to Christmas of 2018. However, owing to her falling pregnant she went back to the respondent's family and stayed there as she had nowhere else to go. From this point, the incidents pertaining to the indictment began to occur.
8. The first count pertaining to her related to an incident in the early hours of the morning between the 1st and 25th of April 2019 when the respondent bit her face and flung her to the ground. He left her at the sight of blood and Ms Powell was warned if she contacted the guards she would be kicked out of the home by the respondent's mother. Thereafter she contacted a friend of hers, a Ms Clarke, and Ms Clarke brought her to a women's refuge a few days later.
9. Sometime after this, she returned to the respondent where again the abusive situation resumed and on the 14th of June 2019 he punched a hole in her home in accordance with the third count on the indictment.
10. Thereafter and between the 15th and 30th of June 2019, the respondent, despite the fact his partner was heavily pregnant, grabbed her by the arm and threw her onto the wall beside the kitchen table and after she gathered herself and sat down, he came over, picked up a lighter off the table and threw it at her stomach. These events were marked as the second count on the indictment.
11. The abuse continued throughout this period up until the trial and it was also noted that Ms Powell received 10 calls of a distressing nature between the April to November period as pertained to in count 5 on the indictment.
12. With respect to counts 4 and 6 occurring on the 25th and 26th of November 2019 respectively, these matters served as the culmination of the respondent's abuse as both related to incidents where he tried to intimidate Ms Powell who was a witness in another case where the respondent was before the District Court. The respondent tried to intimidate

the injured party by threatening that she had no reason to come to court as he had nothing left to live for and essentially on her head so be it if she was to decide to testify. On the day after, the respondent made threats that he would burn down home of Ms Powell's mother and her aunt. Ms Powell warned her mother and aunt about this and they left the house and saw the respondent making his way towards their home. The very serious impact of the offending on Ms Powell's mental and physical well-being is obvious and she describes herself as now living in fear.

Grounds of Appeal

13. The Director's grounds of appeal in respect of both indictments are as follows: -

- (a) *That while the offence was placed in the "higher range" no headline sentence was identified.*
- (b) *Too little weight was given to the aggravating factors.*
- (c) *Too much weight was given to the mitigating factors.*
- (d) *The totality of the sentence was too low.*

Having regard to the considerable overlap amongst the grounds of appeal, we will deal with them all together. The fact that no headline sentence was nominated does not cause a difficulty in this case and accordingly we pass over that factor.

14. In relation to the aggravating factors, counsel for the DPP refer to *DPP v McGrath, Dolan and Brazil* [2020] IECA 50, where this Court dealt with three unconnected undue leniency appeals, all of which involved section 3 assaults. The following factors going to the question of aggravation of such offences were identified: -

- (a) Significant injury/permanent scaring
- (b) Use of a weapon
- (c) More than one assailant
- (d) Extreme violence
- (e) Relevant previous
- (f) Impact of victim
- (g) Premeditation

as this Court observed there: -

"...it might 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 end s.3 assaults, a 5-year pre-mitigation sentence is not excluded."

15. Counsel for the DPP rightly said that these aggravating factors were not an exhaustive list of factors and we again point out that each case must depend on its own facts. We think that these assaults both on Mr. Cussan and on Ms. Powell fall at or near the five year maximum so far as the headline sentences are concerned. We do not downgrade the other offences which occurred. We refer below to the aggravating factors as outlined by counsel for the DPP with whom we agree: -

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- a. *Three of the seven aggravating factors identified in McGrath were present*
- i. *Significant injury/permanent scarring – the injured party suffered a broken nose and had part of his neck bitten away requiring surgery under general anesthetic. There is a permanent scar in his neck.*
 - ii. *Extreme violence – the savagery of biting another person cannot be underestimated, in addition, the punches caused a broken nose*
 - iii. *Impact on victim – it is clear from the victim impact statement that it had and continues to have a very serious physical and psychological affect.*
- b. *There are other aggravating factors present*
- i. *The attack was unprovoked.*
 - ii. *It happened late at night and in a public place.*
 - iii. *It was committed when the Respondent was self – intoxicated.*

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- c. *Three of the seven aggravating factors identified in McGrath were present*
- i. *Significant injury – the injured party suffered a bite to her face that drew blood.*
 - ii. *Extreme violence – it involved a bite and throwing the injured party across the room.*
 - iii. *Impact on victim – it is clear from the victim impact statement that it had and continues to have a very serious psychological affect.*
- d. *There are other aggravating factors*
- i. *It was unprovoked*
 - ii. *It involved a second incident of biting on the face, drawing blood – showing a propensity to bite*
 - iii. *The Respondent and injured party were in an intimate relationship*
 - iv. *It happened in the injured party's then home*
 - v. *It occurred in the context of a controlling and violent relationship*
 - vi. *She was pregnant with their child at the time*

vii. There was voluntary intoxication

viii. As the pleas were accepted on a full fact basis, the surrounding circumstances further aggravated the situation.

16. On the other hand, the mitigating factors at the time of the sentence hearing and subject to one additional factor to which we will refer below are as follows: -
- (a) A long history from the age 14 of drug and alcohol abuse and he is now aged 26.
 - (b) He pleaded guilty at the earliest opportunity.
 - (c) He expressed remorse.
 - (d) Prior to the sentencing hearing, he engaged with the Tower Programme which extended to addressing anger management and he further engaged with Alcoholics Anonymous. The programme with that organisation extended to undertaking a Fás course. In effect, the organisation is one which seeks to deal with addiction issues and deal with recidivism.
17. So far as Mr. Cussen was concerned, an innocent citizen enjoying a night out was the subject of a vicious and unprovoked assault giving rise to long-term and permanent sequelae to do so. So far as Ms. Powell is concerned, she was the victim of sustained domestic abuse – again with long-term adverse sequelae, compounded by fear. The courts cannot countenance offences of these kind and both general and personal deterrence are highly relevant as sentencing factors. Given that we regard the assault offences as lying at or near the top of the scale, we think that the learned trial judge fell into error, we accordingly quash the sentence imposed in the Circuit Court and proceed to resentence.
18. We identify the headline sentences for these assault offences at 4 years and 6 months. However, since he went into custody, the respondent has received a certificate in relation to his anger management on foot of a six-week course with the Alternatives to Violence Project. Furthermore, a CASP Community Prison Links representative provided an impressive report stating that the respondent has made strong efforts to address his addiction.
19. Because of the mitigating factors, we have decided to suspend the last eighteen months of these sentences for two years. This is primarily because of his significant further efforts to rehabilitate, which indeed have met with some success. We are also influenced by the fact that this is his first custodial sentence. We think also that it is appropriate by means of a suspended sentence to facilitate continued rehabilitation and re-entry into the community. Furthermore we believe that a suspended sentence will have a deterrent effect. We do not propose to interfere with the sentence imposed on the remaining offences. We will do so on terms about which we will hear counsel.