



**THE COURT OF APPEAL**

**Court of Appeal Record No. 155/2018**

**Birmingham P  
McCarthy J  
Donnelly J**

**BETWEEN/**

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

**RESPONDENT**

**-AND-**

**SLAWOMIR GIERLOWSKI**

**APPELLANT**

**JUDGMENT of the Court delivered by Mr Justice McCarthy on the 31st day of May 2022**

1. On the 27th of July 2021 we dismissed this appeal so far as it related to sentence, indicating that we would give our reasons later, which we now do. That dismissal followed the dismissal of the appellant's appeal against conviction. There were three separate incidents, involving three unrelated injured parties, occurring on the 11th of September 2011, the 3rd of September 2015 and the 16th of May 2016 respectively. We refer to the judgment of this court addressing the issue of conviction (*DPP v Gierlowski* [2021] IECA 13) in which greater detail as to the facts and circumstances of the offences appear and which should be read with this judgment. The emphasis in this judgment is on facts immediately relevant to sentence. The offences were not charged in the indictment in the order in which they occurred.
2. The appellant was sentenced on the 17th of May 2018 on Bill No: DUDP1055/2016. In practical terms, because there were consecutive elements involved, the total period of imprisonment was set at 22½ years with the final four years suspended upon conditions. The following are the offences and the sentences imposed thereon. These are set out in the order in which they were committed: -

**Offences of the 11th of September 2011**

- Count 7 (false imprisonment) – a sentence of five years’ imprisonment, with the final four years suspended, to commence on the legal termination of the sentence of Count 4;
- Count 8 (sexual assault) – a sentence of five years’ imprisonment, with the final four years suspended, to commence on the legal termination of the sentence of Count 4;
- Count 9 (assault causing harm) – a sentence of 4½ years’ imprisonment, with the final 3½ years suspended, to commence on the legal termination of the sentence of Count 4;

**Offences of the 3rd of September 2015**

- Count 4 (false imprisonment) – a sentence of 9½ years’ imprisonment to commence on the legal termination of the sentence of Count 1;
- Count 5 (sexual assault) – a sentence of 9 years’ imprisonment to commence on the legal termination of the sentence of Count 1;
- Count 6 (assault causing serious harm) – a sentence of 4½ years’ imprisonment to commence on the legal termination of the sentence of Count 1;

**Offences of the 16th of May 2016**

- Count 1 (false imprisonment) – a sentence of eight years’ imprisonment;
- Count 2 (assault causing harm) – a sentence of 4½ years’ imprisonment;
- Count 3 (possession of an article intended to cause injury, incapacitate or intimidate) – a sentence of 4½ years’ imprisonment.

3. That suspension was subject to a number of conditions as follows: -

- a. That he would keep the peace and be of good behaviour;
- b. That he would submit to any psychological or psychiatric assessment as and when directed by the Probation Service or treatment provider, as and when directed by the Probation Service; and
- c. The accused while in custody and post-release shall remain under and abide by all directions of the Probation Service.

4. A further condition was imposed in relation to Count 8 (sexual assault): -

- a. The accused be screened for, attend, actively participate in and complete the sex offender programme run by the prison, probation and psychology services, or such equivalent programme to the satisfaction of the Probation Service and treatment provider, and [*sic*] be completed as and when directed by the Probation Service.

5. In relation to Count 8, the court also made an order pursuant to Part 5 of the Sex Offenders Act 2001 for post-release supervision for a period of nine years. The terms of the supervision were: -

- a. The accused shall submit to any psychiatric or psychological assessment as directed by the Probation Service;
- b. That he should follow all directions of the Probation Service;
- c. The accused abide by any curfew imposed by the Probation Service;
- d. The accused shall keep a travel log outlining the journeys he makes daily, routes, start time, end time, the purpose of the journey, the means of transport and the name or names of persons accompanying him, if any, which log shall be made available to the Probation Service and/or An Garda Síochána immediately upon request by them;
- e. The accused shall notify the Probation Service and An Garda Síochána of his place of employment, his address, telephone numbers and immediately notify them of any change of address.

### **The Offences and their Effects on the Victims**

#### ***Offences of the 11th September 2011***

6. The earliest of the offences involved an attack on A (also referred to as "*the first complainant*") who on the 11th of September 2011, was returning to her home from a night out at approximately 3am when she was attacked by a man in the Clondalkin area who transpired to be the appellant. The man brought her to the ground, placing one hand on her mouth and the other on her genital area under her skirt but outside her underwear, for approximately three to five seconds. She managed to stand but was brought to the ground again. She managed to bite and scrape the man's face. She was punched a number of times to her face before she was released and managed to get inside her home. The appellant was convicted of offences of false imprisonment, sexual assault and assault causing harm (Counts 7, 8 and 9 on the indictment).
7. Following the attack, the victim attended the emergency department of Tallaght Hospital where she was found to have significant swelling and bruising around her right eye as well as to her nose with a fracture thereof also. In due course she made a full physical recovery. However, the offences left her experiencing shock and trauma, difficulty sleeping for months and she did not wish to see her own garden or the driveway of her home. She also was unable to work while she was inflicted with visible injuries directly after the attack. The victim has continuing fears of walking on her own and no longer does so at night time.

#### ***Offences of the 3rd of September 2015***

8. The offences committed second in time involved B (also referred to as "*the second complainant*") who, on the 3rd of September, 2015, was returning home from a night out at approximately 1am when, again in the same road in Clondalkin, a man who transpired to be the appellant attacked her; she was restrained from behind by what felt like a thick leather belt around her neck – effectively with a ligature. She was brought to the ground where tape was wrapped around her head and hands and whereupon she was sexually assaulted in the course of which the appellant ejaculated – semen was found in her perianal area and on her underwear. The appellant threatened to kill her and the victim believed

that she was going to die – indeed at one point, she thought that she was actually dying because she had the sense of becoming lightheaded (no doubt, it seems proper to infer, because of the use of the ligature or tape). When disturbed, the appellant left her lying on the ground with the belt around her neck and tied with the tape whereby she had difficulty breathing – he had pulled off her clothes and she was naked from the waist down. In the course of the attack, he had dragged her behind the car and stopped merely because he was disturbed by third parties who assisted her. She suffered great physical and psychological harm. In respect of the former she sustained a burst blood vessel to the right eye, bruising and swelling to the lower lip, a gash to the right cheek, cuts and abrasions to the arm, shoulder and left wrist as well as scrapes to the right wrist and right knee. She also had extensive bruising to her legs, thighs and at the back of her head.

9. The victim suffers from extreme anxiety since the attack and this has become progressively worse leading to isolation and an adverse interference with her familial and social relationships. She has suffered sleep disturbance and every aspect of daily life has been adversely affected. It has left the victim "*feeling that home was tainted and I didn't feel safe there*" and "*there will always be that association now*". In her victim impact statement, she referred to the fact that the trial process caused her to relive the trauma. Further, she felt violated having to face her attacker in court and as a direct consequence she required counselling after the trial.

**Offences of the 16th of May 2016**

10. The final date of offences of the present series involved C (also referred to as "*the third complainant*"); she gave evidence that she left her home at approximately 6:40am to walk to the Red Cow Luas stop to go to work – in other words, within the area which the other attacks had taken place; in Clondalkin. The victim stated in evidence that as she was walking two arms came from behind her and soared over either side of her. She saw a cloth in the left hand and a knife in the right hand of the appellant. The knife was raised to her right cheek and motioned down towards her neck. She grabbed the knife with her left hand, pulled it down, screamed and turned around, at which point the appellant ran back towards the entrance to the laneway in which the attack took place. She ran in the opposite direction and was aided by passers-by who contacted emergency services. The third complainant was taken to hospital and she suffered significant tendon injuries to her left middle, ring and little fingers. She was discharged on the 18th of May 2016. The tendons ruptured while she was performing hand exercises and had to be repaired subsequently on the 31st of May 2016. She is expected to suffer long-term mobility issues.
11. The victim believed that when the appellant moved the serrated knife to her neck/throat area that her throat was going to be slit. In addition to the physical injuries, she suffered psychologically in view of the physical restrictions to her everyday life, hobbies and inter-familial relationships. She had to change her living arrangements and suffered significant financial loss. Further, she suffered flashbacks for nearly a month after the attack and passing the area of the attack precipitated ongoing flashbacks after this period which necessitated counselling. The victim's sleep pattern was adversely affected, and her physical and mental competence was directly impaired. She was very limited in the use of

her hand when dealing with her young grandchildren in her everyday household tasks. Her relationship with her partner terminated.

### **The Personal Circumstances of the Appellant**

#### ***Mitigating Factors***

12. The appellant was aged 33 at the date of sentencing and in his late twenties to early thirties at the time of the offences herein. He is originally from Poland and has lived in Ireland since 2008. Up to the date of his arrest, he lived with his partner and two young children. He had a good work record as a tradesman. He established his own business in 2013 and worked also in Germany and the Netherlands.
  
13. A psychological report was furnished by a Dr Kevin Lambe, Consultant Clinical Psychologist. The appellant expressly repeated to him that he was not guilty of the offences. The appellant was raised as the eldest of seven children and appears to have had a broadly normal childhood. The appellant told Dr Lambe that he was diagnosed with ADHD at the age of 9 or 10 but did not receive counselling or medication in relation to it – there is no suggestion that it has ever been a significant issue in his life and is irrelevant. The appellant gave a history of alcohol consumption and drug use, primarily amphetamines; his consumption of the former would appear to have been significant on occasion but only on occasion; the use of amphetamines, it appears, was sometimes weekly or less frequently. The report speculated that the diagnosis of ADHD, characterised by Dr Lambe as being a “*disorder of impulse*”, combined with drug abuse and possible feelings of inadequacy could act as what he called an “*explanatory framework*” for the offending – a point which, again, we think not relevant to this appeal. The report noted that criminal defendants, especially those who commit crimes with sexual intent, will frequently deny that they committed the crime – this is true in our experience. A governor’s report confirmed that the appellant had no disciplinary issues and was an enhanced privilege prisoner. Testimonials were submitted from a number of people close to the appellant, including his partner, each of whom were aware of the crimes and each of whom offered, for what it is worth, positive views in relation to the appellant’s character although this is of little significance.

#### ***Probation Report***

14. Two Probation Reports were prepared for sentence by the probation officer who also gave evidence. A concern was raised in relation to the probation officer’s assessment that the risk of re-offending was assessed as moderate. She explained that the assessment had regard to the fact that the accused had no previous convictions, that this was his first sentencing appearance, and that the offences were aggravated by the fact that the victims were strangers. The judge was not bound to accept this assessment and it seems that she did not do.

#### **The Sentencing Judge’s Remarks**

15. The sentencing judge began her carefully structured sentencing by noting that the sentence must be proportionate to the offences and the personal circumstances and character of the accused. She took account of all the material that had been placed before her. She correctly said that she had to address the gravity of the offences by reference to the culpability of the appellant and the harm done to each victim and that the totality principle must guide

sentencing where multiple offending is at issue. She also noted that the main technique for achieving this was to make the sentence totally or partially concurrent.

16. The judge correctly addressed the mitigating factors as follows: -

*"Firstly, that the accused has no previous convictions. Secondly, he has now suffered the loss of his previous good name and reputation. Thirdly, he has the support of partner and family, and that's evidenced by the letter provided to the Court by his partner, Ms Lesniak, and I've considered the contents thereof.*

*The Court has considered the contents of the report of Doctor Lambe. The Court has had sight of a letter from the governor of the Midlands Prison and he has received no disciplinary record and is an enhanced privilege level as a prisoner.*

*[...]*

*I take into account the fact that the accused has a partner and is the father of two young children. It's apparent from the letters that have been furnished to the Court by various family friends, that the accused is a good father. He's also a hardworking man and that's quite clear from the testimonials. His young son has already been adversely affected by the separation from his father and his personal circumstances, his relationship with his young children and partner will be adversely impacted. The accused, it is apparent from the report of Doctor Lambe, has a history of alcohol and drug abuse issues, and he clearly has certain vulnerabilities in that regard, and I take that into account in terms of his personal circumstances. He's also a non-national rendering prison experience more difficult. The accused is acquired no disciplinary records in prison and is on enhanced privilege level."*

17. The judge pointed out that as to culpability that the appellant engaged in intentional and deliberate violence upon women in random attacks which within the timespan illustrated an escalating level of violence in each of the attacks. She also noted the lack of proposals for rehabilitation and said the violence although of short duration *"was brutal and primal in nature"*.
18. In relation to the totality principle she referred to the fact that a sentencing judge has a discretion regarding the imposition of concurrent or consecutive sentences and that discretion to impose consecutive sentences should be used sparingly – although the latter point is perhaps an oversimplification. The court must ensure, she considered, that the overall sentence is just and fair. The judge's approach was to fix a sentence for each separate offence, apply the aggravating and mitigating factors in each and aggregate them before applying the totality principle to determine how the sentences are to be structured – this is the correct approach. She concluded that an approach which would make all sentences concurrent would not reflect the overall gravity of the offending conduct or the escalating nature of it - otherwise the total sentence would fail to reflect the total criminality of the three sets of crimes. This was particularly so where there were three distinct and discrete acts of criminality and they cannot be regarded as part of a single episode of

criminality. She said that not alone must the harm done to the women be marked but society must be protected. The principle of totality should not be seen to allow criminal offenders to avoid effective punishment and these were particularly serious crimes requiring that a serious sentence be imposed.

19. She was of the view that the use of the hunting knife and the permanent nature of the injuries to C's hand could be measured or compared against the particularly degrading treatment of B but the use of the belt and duct tape and then a knife propelled these offences into a higher category of offending than the first set of offences. She accepted that the impact on each woman varied and that each must be dealt with separately.
20. The sentencing judge reduced each individual sentence to take account of the totality principle and then by dealing with the third consecutive sentence by way of a period of suspension and supervision. She noted that the Building Better Lives sex offender programme had been suggested by the probation officer and that was to ensure that society was protected by way of a lengthy period of post-release supervision. As that could only be done in respect of the sexual assault convictions in respect of A and B, she said that she intended to impose consecutive sentences in the order that appears on the indictment (which, taken numerically, went from last victim to first). The judge said that in view of the repetitive and protracted nature of the attacks, the refusal to engage with the offending conduct or to acknowledge the requirement for rehabilitation, she had difficulty in accepting the assessment of the probation officer but said that even if she is incorrect and the accused is at medium risk of offending, in view of the impact of that risk should it be realised, the court must protect women and society.
21. On Count 1 (the false imprisonment of C on the 16th of May 2016), the sentencing judge noted that it was apparent that the appellant was "casing" the Clondalkin area for some weeks. There was an escalation from the previous offence in the use of a weapon and she said only due to the exceptional courage, physical and mental strength of C, she was able to resist the appellant at great expense to her physical and mental welfare. The judge found the aggravating factors to be the random nature of the attack, the use of a weapon and a rag, the fear of the victim that her throat would be cut, her injuries and psychological adverse effects, the premeditation and the escalating scale of the attacks (she made reference also to lack of any indication of rehabilitation but only for the purpose of highlighting the threat posed by the appellant to society). She identified a headline sentence of 11 years' imprisonment reduced to 10 years' imprisonment on the basis of mitigation and again to eight years when giving effect to the totality principle.
22. On Counts 2 and 3 (assault causing harm and possession of an article intended to cause injury, incapacitate or intimidate on the same occasion) the judge identified headline sentences of five years' imprisonment in each case reduced to 4½ years' imprisonment on the basis of mitigation and imposed concurrently to the sentence on Count 1 – accordingly in practice, they did not give rise to additional periods in custody.
23. In relation to Count 4, (false imprisonment of B on the 3rd September 2015) the judge remarked that the conduct of the appellant represented a particularly gross attack on the

human dignity and bodily integrity of B representing the most serious violation of her human and constitutional rights. The appellant used a belt as a ligature to commence his assault on her and then proceeded to duct-tape her head, hands and to sexually assault her. He also threatened to kill her where she believed she was going to die. This demonstrated a desire to dominate and seek sexual gratification. The judge referred in detail to the physical and psychological harm done to B. She said in terms of the false imprisonment, this was an escalation of the violence used and was more premeditated than the earlier offences committed on the 11th of September 2011. The use of the ligature was particularly terrifying, and she said the offence was compounded by his lack of remorse. Here the judge identified a headline sentence of 12 years' imprisonment, reduced to 11 years' imprisonment on the basis of mitigation and again to 9½ years' imprisonment when giving effect to the principle of totality. In relation to Count 5 (the sexual assault on the same occasion), the judge identified a headline sentence of 10 years' imprisonment which she reduced to nine years' imprisonment on the basis of mitigation. On Count 6 (assault causing harm on the same occasion), the judge identified a headline sentence of five years' imprisonment, reduced to 4½ years' imprisonment on the basis of mitigation. Each of the sentences in Counts 4, 5 and 6 were imposed concurrently with each other and consecutively to the sentence imposed on Count 1.

24. In relation to Counts 7 and 8 (false imprisonment and sexual assault on the 11th of September 2011), the judge identified a headline sentence of six years' imprisonment on each, reduced to five years' imprisonment on the basis of mitigation. The final four years of the sentence were suspended when giving effect to the totality principle. On Count 9 (assault causing harm on the 11th of September 2011), the judge identified a headline sentence of five years' imprisonment, reduced to 4½ years' imprisonment on the basis of mitigation, and the final 3½ years were suspended. Each of the sentences in Counts 7, 8, and 9 were imposed concurrently with each other and consecutively to the sentence imposed on Count 4.

### **Grounds of Appeal**

25. The grounds of appeal relied upon are as follows: -

- i. The Learned Trial Judge erred in law and in fact in fixing headline sentences which were excessive and unduly severe.*
- ii. The Learned Trial Judge erred in law and in fact in failing to have sufficient regard for the mitigating circumstances in the case.*
- iii. The Learned Trial Judge erred in law and in fact in failing to have regard for the conduct of the Appellant at trial and in particular that the cross-examination of each of the complainants was conducted sensitively.*
- iv. The Learned Trial Judge erred in law and in fact in failing to have any or sufficient regard for the risk assessment of the Probation Services in relation to the Appellant.*



- v. *The Learned Trial Judge erred in law and in fact in failing to have sufficient regard for the totality principle.*
- vi. *The Learned Trial Judge erred in law and in fact in imposing consecutive sentences in respect of counts 4, 5, 6, 7, 8 and 9.*

Having regard to the oral submissions of the appellant in the course of which all but grounds one and two were abandoned, we shall deal with them together.

- 26. From the outset, the appellant's position as to sentencing was that the overall or final sentence was excessive. The appellant further submitted that the judge treated the lack of remorse as an aggravating factor rather than merely pointing out that this mitigating factor did not exist. Counsel quoted extracts from the sentencing judge's remarks pertaining to remorse. Counsel recognised that there was no remorse and the appellant pleaded not guilty to all counts but submitted that the judge effectively "*double counted*" the absence of a guilty plea, treating lack of remorse as an aggravating factor in the calculation of the appropriate headline sentence relating to eight of the nine counts. On this premise the appellant submitted that the sentencing judge erred in principle in sentencing on the offences herein. Counsel, however, did acknowledge that this may have occurred unwittingly in circumstances where the judge was repeatedly reciting the aggravating factors with respect to each of three separate incidents.
- 27. We think that on viewing the judgment as a whole no such error was made; to us it is plain she referenced the guilty plea, the absence of remorse and any proposal for rehabilitation not as aggravating but rather as relevant to deciding on the sentences as a whole.
- 28. The crux of the appellant's argument, however, goes to the identification of the headline sentence identified on Count 1 (false imprisonment occurring in the third incident on the 16th of May 2016). Counsel referred to the offence as follows: -

*"Now, first and foremost, Judges, this was an assault which was aggravated by the use of a knife. It was an assault simpliciter, not a sexual assault, but its outstanding feature was that it was aggravated by the use of a knife. A knife that was held up to this lady's face and neck and it was a very serious assault indeed.*

*But a sine qua non of the assault was the false imprisonment in my respectful submission. While false imprisonment was the offence which carried the most severe theoretical penalty of the three offences charged for that incident, as a matter of fact it was in my respectful submission, Judges, ancillary to the assault which was a very bad assault because it was aggravated by the use of a knife."*

- 29. Counsel argued that false imprisonment for Count 1 was excessive and unduly severe in comparison to the same offence (Count 4) committed in the course of the second incident which occurred on 3rd of September 2015. Counsel contended that Count 1 is missing some of the vital aggravating ingredients for such a headline sentence of 11 years both in general

and compared to such second incident where the headline identified was 12 years. In general terms, counsel refers to the event charged by Count 1 as being brief, to the lack of previous convictions, and to the fact, for example, that a firearm was not used (by implication, a reference to the fact that in many serious false imprisonment cases this has been the case). Further, it is argued that the fact that the offence was committed by a single person and outside of the family home is relevant to the headline sentence. Counsel contends the "*miniscule difference*", as he put it, in headline sentences (11 years against 12 years) is unfair considering the absence in Count 1 of such aggravating factors (pertaining to Count 4) such as the tying up of the victim with duct tape, which they argue was substantially more degrading and debilitating. Counsel did not, however, advance any argument in reference to Count 7 (false imprisonment) citing practical reasons given that four years thereof was suspended due to the totality principle. It was further argued that all of the counts of false imprisonment should have been treated as aggravating factors to the assault charges deriving from the same incidents respectively rather than considered as freestanding. Therefore, counsel for the appellant proposes that the use of the sentencing powers on false imprisonment (a maximum of life) was indicative of error.

30. We do not think that the judge fell into any error of principle. We have already pointed out that we reject the proposition that she relied upon the absence of remorse or a plea of guilty (either related fact that there was no suggestion of rehabilitation or any proposal in relation thereto). Nor do we think that the false imprisonment in any of the cases should be considered merely to aggravate the other offences committed at the same time. False imprisonment is an offence of the utmost seriousness and notwithstanding what might be characterised as the brevity of the imprisonment, it was in fact inseparable from the other serious offences; the judge was entitled in sentencing to exercise her powers to the full. As to the comparison between the approaches taken in respect of Counts 1 and 4 respectively, it seems to us that a perfectly rational approach was adopted by the judge in arriving at each of the respective sentences both pre- and post-mitigation and if anything, the judge might have gone further on Count 4. Certainly, on a freestanding basis, each of those sentences was justified and the discrepancy between them is not indicative of any error.
31. Counsel for the appellant also submitted that insufficient weight was afforded to the mitigating factors – we need not repeat them here as we have elaborated upon them sufficiently above. In the course of argument, counsel characterised the reduction from the headline sentence afforded by virtue of such factors as "*a little bit mean*"; we do not accept this characterisation. On any view the judge had regard to these factors and if anything afforded the utmost benefit to the appellant in relation to them. In our view, it is irrelevant that there was no conviction actually rendered in respect of the first incident when the second took place and, similarly, it is irrelevant that when the court was addressing the third incident that no convictions had been rendered in respect of the first two. The second incident was aggravated by the fact that the first had occurred and the third by virtue of the fact that it was just that, a third similar offence.
32. The totality of the circumstances of each offence must be addressed by the judge in sentencing and here that is what she did. We might add there have been many cases of

false imprisonment over lengthy periods or where firearms have been used (to take the two examples) but that does not detract from the seriousness of the present such offences – it is equally possible that by virtue of their circumstances (as here) such offences may properly attract headline sentences into double figures. Brevity of offending (for example) is one factor only in a range of factors. Each of the sentences here is perfectly appropriate.

33. When suspending the sentence on Count 8 (sexual assault on the 11th of September 2011) the judge imposed an additional condition, viz: -

*"that the accused be screened for, attend, actively participate in and complete the sex offender programme run by the prison, probation and psychology services, or such equivalent programme to the satisfaction of the Probation Service and treatment provider and[sic] be completed as and when directed by the probation service"*

We do not think that this condition can have any purpose or can be policed or legitimately be imposed in the present case since the accused maintains his denial of guilt. Accordingly, we discharge it as condition of suspension. All other orders remain in force, including, of course, the post-release supervision for a period of nine years ordered under the Sex Offenders Act 2001.