



THE COURT OF APPEAL

Neutral Citation No. [2022] IECA 201
Court of Appeal Record No. 29CJA/2021

**Edwards J
McCarthy J
Kennedy 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)**

PROSECUTOR/APPLICANT

-AND-

NATHAN DOHERTY

ACCUSED/RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 24th day of June 2022 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 overall sentence imposed by Longford Circuit Criminal Court, the subject of one indictment (Bill No: LDDP0012/2019), on the 20th of January 2021. The respondent pleaded guilty to two counts on the indictment, namely; one count of assault causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997 (Count 4), this offence carries a maximum sentence of up to life imprisonment; one count of production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act 1990 (Count 5), this offence carries a maximum sentence of up to five years, and; there was a further charge on the indictment for criminal damage to a motor vehicle contrary to the provisions of section 2 of the Criminal Damage Act 1991 (Count 6) but this was to only be taken into consideration. The respondent was ultimately sentenced on the basis of Count 4 with the other charges taken into consideration and an effective sentence of six years imprisonment was imposed with the final three years of the sentence suspended on certain conditions including that the respondent undertake to pay by way of compensation the sum of €30,000

to the victim and enter a bond to keep the peace and to be of good behaviour for ten years subsequent to the date of sentencing.

2. The facts can briefly be outlined. On Saturday evening, the 2nd of June 2018, one Janet Freeman and Sharon Doherty, the mother of the respondent, went on a night out together in the Chamber Bar in Mount Street, Mullingar, Co. Westmeath. Both females were dropped into the Chamber Bar by Derek Doherty who is the father of the respondent, the wife of Sharon Doherty and the co-accused in this matter. It had been arranged that a cousin of Derek Doherty would bring them home later that night. Sharon Doherty knew the victim, one Derek Murphy, for approximately six weeks beforehand and they had arranged to meet on the night in question in the Chamber Bar. The victim understood that Sharon Doherty had obtained a barring order against her husband some years prior and their marriage was inconsequential to her life since then.
3. Later that evening the victim and Sharon Doherty, together with Janet Freeman and another man by the name of Ambrose Maguire, went to purchase a takeaway. Ambrose Maguire then took all of the party in his car to Janet Freeman's house at Lisnacreeva, Colehill, County Longford.. When Mr Maguire got to Janet Freeman's house he brought the babysitter who had been looking after Ms Freeman's children back to her home and then returned back to the house.
4. In the meantime, Sharon Doherty had made contact with her family and advised them by text message that she was staying with Ms Freeman for the night. At this point, her husband and the respondent were in Mitchell's public house in town playing cards. They became suspicious as to why Mrs Doherty was not coming home and as to what she was doing and thus they decided to go to Janet Freeman's house to examine the matter for themselves. When they arrived at the house, they saw Ambrose Maguire's car. The respondent upon looking through a window of the house, he saw his mother in a bedroom in bed with the victim, Derek Murphy.
5. The respondent and his father, now extremely agitated, approached the door of Ms Freeman's house and once Ms Freeman opened the door, they barged in. Ms Freeman in an attempt to avoid trouble shouted "*it's me that's with him*" but to no avail. The father and son went into the bedroom where Sharon Doherty was intimately engaged with the victim. The respondent struck his mother. They proceeded to viscously and unyieldingly assault Mr Murphy. He describes the respondent as being behind him hitting him on the back while the co-accused was pulling his penis to the degree that he described the feeling that the accused's father was trying to pull his testicles off. Mr Murphy stated that the respondent's father kept goading and shouting to his son to "*do him, do the bastard*". Mr Murphy describes that he could not move and thought himself as fighting for his life. The respondent engaged in the most excruciatingly painful aspect of the attack wherein he removed a curtain pole from the bedroom, one in which, in fact he had previously installed, and proceeded to try to force it up Mr Murphy's anus. Mr Murphy described trying to hold back the accused but was unable to do so and thinking that as the stick was pushed into his anus that the accused was trying to finish him off. He further recounts that the accused,

having pushed the implement into his anus once, pulled it out and drove it in a second time. He left the curtain pole in situ after putting it in.

6. The victim is clear that both men were in the room when the respondent pushed the curtain pole up his anus and described both men assaulting him simultaneously. After the curtain pole was left in his anus, the two men walked around the room and Mr Murphy assumed that they were finished assaulting him when the respondent's father attempted to kick Mr Murphy in the face. In an effort to protect himself, Mr Murphy put his left arm up his left arm which took the full brunt of the kick. Sharon Doherty and Janet Freeman were in the room screaming hysterically during the assault. The respondent also kicked him in the face and left eye socket and causing a chipped a bone in the socket. He describes the pain as excruciating. He thought he was going to die. He was bleeding extensively. The Gardaí arrived, having received a call in the early hours of the morning of the 3rd of June 2018, at 3:04am. The victim had serious pain and cuts to his arms, back, shoulders, legs and head. He was brought to Mullingar Hospital and from there to the Mater Hospital in Dublin. The accused and his father had left the scene by the time the Gardaí arrived.
7. The accused was arrested later that day and interviewed on three occasions over the course of the 3rd of June 2018 and the following morning. After the incident, he had burnt the top that he was wearing because it was covered in blood but he provided the rest of his clothes to Gardaí for forensic examination. In a second interview he alleged that the victim had forced his mother into sexual relations but he resiled later from this proposition. The trial judge held that: -

"It is now accepted that there is absolutely no truth in this allegation. It is abundantly clear that the victim was totally innocent of any wrongdoing. It appears that the victim had understood when he became involved with Sharon Doherty, that she had been the victim of domestic abuse and was no longer living with her husband."
8. The injuries sustained by the victim were very serious as set out in the reports prepared by: Ms Barbara Hynes, Forensic Medical Examiner, Sexual Assault Treatment Unit Midland Regional Hospital Mullingar; Mr El Sheikh, Consultant in Accident and Emergency Medicine, Midland Regional Hospital Mullingar and; Jürgen Mulsow, Consultant Surgeon, Mater Hospital. We cannot here, perforce set them out in full.
9. Ms Barbara Hynes found bruising on the periorbital margin of the left lateral aspect of the left eye and a fracture. He had extensive additional abrasions, lacerations and hematomata over his body including injuries to the genital area. He was referred to the Mater Hospital for assessment and treatment of injuries to his anus and internally.
10. Mr Mulsow outlined multiple injuries, including a perforating injury to the rectum with perineal, scrotal and testicular injury in addition to what were described as remote soft tissues injuries. Mr Murphy was taken to an operating theatre for exploration of these injuries and underwent colostomy to divert the faecal stream away from the perineal [check term] injury and to allow healing. He also underwent scrotal exploration. The stoma remained in place for approximately eighteen months.

11. Mr Mulsoe prepared updated reports for the purpose of the sentencing hearing including reports dated the 20th of May 2020 and the 27th of May 2020. In a report dated the 27th of May 2020, dealt *inter alia* with the sequelae to the injuries in these terms: -

"Specifically, with respect to his bowel function and continence. While he is managing reasonably well, he undoubtedly has impaired control. He is at times incontinent or fatuous and at the time of passing a bowel motion, he has significant staining and soiling afterwards. It is our intention to leak him -- to link him with our pelvic floor services to evaluate further and to attempt to optimise his continence. I think it is unlikely that he will ever regain the control and continence that he had previously. But we would hope to improve his circumstances sufficiently to ensure that his day to day quality of life is not significantly compromised."

12. The victim provided a lengthy Victim Impact Statement which we cannot here set out in full but he described the effects of the attack which impacted all aspects of his life and specifically we refer to his concluding remarks where he states: -

"I now find myself a different man. I have lost the confidence that I had. I have a completely different social life. I will not engage with strangers; particularly female I don't know. I find myself afraid to make decisions. I hardly ever socialise at all. I've had no sexual activity since this incident and due to the injuries I suffered, I do not know how I will manage, if at all. I have attended counselling in an effort to deal with my anxiety and to help me try and restore my confidence. I do not sleep well anymore. I feel that I have lost a lot of opportunities in my life as a result of this assault."

13. In his judgment, the judge referred to the sentencing principles which he was applying: -

"the Court has to take into account all of the aggravating factors and the mitigating factors. In addition to this, the Court must look at the gravity of the offence and the culpability of the accused. The Court must ensure that the sentence imposed is both fair and proportionate. In addition to this, the Court must take into account the probation report, the forensic psychological report and all of the submissions made by counsel for the defence and counsel for the prosecution. Further to this, the Court has to take account of the victim impact statement. In determining sentence, the Court must be mindful of the five pillars of sentencing, namely protection of the public, punishment, deterrence, restitution and rehabilitation. Given the gravity of the offences and the nature and extent of the violence used and the perpetration of it, deterrence and punishment have to be significant factors in determining sentence."

14. He also referred to the principles in *People (DPP) v. McCormack* [2000] 4 IR 356 where Barron J stated that: -

"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the

appellant. 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 Appellant."

15. The judge correctly acknowledged that *"given the gravity of the offences and the nature and extent of the violence used and the perpetration of it, deterrence and punishment have to be significant factors in determining sentence"*.

16. The judge expressly identified a number of aggravating factors. He was cognisant as to the level of violence used that formed a seriously aggravating factor. Furthermore, the joint enterprise of the serious assault on the victim who was set upon while in a highly vulnerable and compromised position was an aggravating factor and the attack as well as the use of the curtain was particularly ferocious which he described as *"breath-taking in its viciousness"*. The judge also had to have regard of the effect of the assault on the victim and he recognised that: -

"the victim's life has changed utterly. His ability to work has been compromised. His wellbeing has been seriously undermined and his physical injuries were serious and are still with him. Those injuries are a constant reminder to the victim of the serious assault that he suffered. The fact that the victim will be left with a compromised bowel is hugely aggravating. In addition to this, the victim has sustained significant loss of income, and this is ongoing."

17. In terms of the mitigating factors the judge had regard to the respondent's early guilty plea as well as his level of co-operation with the investigation and admissions and assistance which aided the successful prosecution of the charge. The judge took further account of the fact that the respondent has no previous convictions and was otherwise of good standing with gainful employment and a Probation Report and Forensic Psychological Report put forward to the Court identified that the respondent was at a low risk of reoffending due to the protective factors in his life, namely, a stable environment, a network of family and friends, and no history of violent criminal behaviour, although some level of anger management issues were recognised. The judge also had regard to the respondent having suffered a psychological breakdown in 2016 and that the respondent had showed remorse as well as having before the Court illustrated steps undertaken in gathering compensation albeit he noted that *"no compensation will ever be able to put the victim back into the position he was in prior to the offence"*.

18. Having regard to the various factors before him, he therefore nominated a headline sentence of eight years which he reduced to six years on the basis of the mitigating factors and further to that he suspended part of the sentence giving his reasons as follows: -

"in order to foster and encourage and the rehabilitation of the accused and in order find -- in order to make some provision for recompense to the victim, I am prepared to suspend the final three years for a period of 10 years..."

The €5000 in compensation had been produced in Court and accepted by the victim in part compensation and one of the terms on which part of the sentence was suspended was that a further €25,000 be payable to the victim after his release from prison in €5000 annual payments to discharge the amount therein fixed.

Grounds of Appeal

19. The following are the applicants grounds of appeal: -

- I. *The Learned sentencing judge erred in fact, law, and in principle in suspending the final 3 years of the 6-year custodial sentence and arriving at a net custodial term of imprisonment of 3 years bearing in mind the intrinsic culpability of the Respondent and the aggravating factors identified by the learned sentencing Judge surrounding the commission of the offences including: -*
 - i. *The level of violence used in the perpetration of the offences;*
 - ii. *The ferocity and cruelty of the violence;*
 - iii. *The use of a broken curtain pole to penetrate the anus of the victim;*
 - iv. *The level of serious harm sustained by the victim;*
 - v. *The level of cruelty involved in the perpetration of the offences; and*
 - vi. *The effect of the assault on the victim.*
- II. *The Learned sentencing Judge erred in fact, law and in principle in suspending the final 3 years of the 6-year custodial sentence and arriving at a net custodial term of imprisonment of 3 years bearing in mind the need for deterrence, both in general terms and in this specific case and the need to impose a proportionate sentence.*
- III. *The Learned sentencing Judge erred in fact, law and in principle in suspending the final 3 years of the 6-year custodial sentence and arriving at a net custodial term of imprisonment of 3 years having regard to the offences' place on the spectrum of seriousness of offences of this kind, the injuries inflicted in an unprovoked attack on an extremely vulnerable victim and the effect of those injuries on the victim.*
- IV. *The Learned sentencing Judge erred in fact, law and principle, in suspending, in all the circumstances of the case, a disproportionate amount of the custodial sentence imposed which resulted in a net custodial sentence of 3 years which was unduly lenient.*
- V. *In all the circumstances, the learned sentencing Judge erred in law, fact and principle as the period suspended was excessive leading to the imposition of an unduly lenient sentence.*

We will deal with these together.

20. There was no complaint, rightly, by the Director that a headline sentence of eight years was inappropriate. Further no complaint, again rightly, was made by the judge when he identified a post-mitigation sentence of six years. In substance, the appeal is concerned

with the extent to which the judge suspended a portion of the sentence. The judge suspended 50% of the post-mitigation sentence for two stated reasons. He said:

“Accordingly, I am imposing a sentence of six years’ imprisonment. But in order to foster and encourage the rehabilitation of the accused and in order to make some provision for recompense to the victim, I am prepared to suspend the final three years for a period of 10 years on the following conditions: -

One, that the accused enter into a bond of €500 to keep the peace and be of good behaviour for a period of 10 years post-release;

Two, that the accused submit himself to supervision by the probation service for a period of one year post-release and follow directions given to him by the probation service in dealing with his mental health issues and offending behaviour;

And three, that the accused pay by way of compensation the sum of €30,000 to the victim by annual instalments of €5,000. The first instalment being the monies that have already been lodged in Cork leaving a balance of €25,000 which is to be paid by annual instalments of €5,000 on the first anniversary of the accused’s release from prison and on each subsequent anniversary of release from prison until the entire sum has been paid.”

21. It is contended that regardless of the route by which the judge arrived at his conclusion, ultimately requiring the respondent to serve three years only in custody, he failed to give appropriate weight to the necessity for general deterrence and that such a significant suspensory period was unjustified by the desideratum of incentivising rehabilitation or facilitating a degree of restitution. An incentive “to foster and encourage rehabilitation” at such a level was not required in circumstances where the respondent had been assessed as being at low risk of re-offending, and was a first-time offender.
22. While the objective of facilitating some restitution was an understandable one, it was not appropriate to promote it through the mechanism of a substantial part suspension of the sentence, in circumstances where doing so would result in a final custodial sentence to be served that was disproportionately low, especially when there is a separate statutory mechanism for the making of financial compensation orders contained in section 6 of the Criminal Procedure Act 1993. We suspect that the sentencing judge may have felt that the section 6 procedure to some extent lacks teeth, in that the section makes no provision for any further sanction or come back should there be wilful default or culpable neglect in complying with a compensation order, and he may have felt that this might be overcome by making the payment of compensation by instalments a condition of a suspended sentence, breach of which could lead to revocation of all or part of the suspension in the event of a re-entry pursuant to section 99 of the Criminal Justice Act 2006. If that was indeed his thinking, his concern was an understandable one, but it was not one that he could seek to allay at the cost of a sentence that was going to be disproportionately low in terms of the actual custodial period that the offender would be required to serve.

23. We therefore think that the judge indeed fell into error in failing to give appropriate weight to the necessity for general deterrence and in suspending an excessive period that could not be justified on the evidence before him by the desideratum of incentivising rehabilitation or facilitating a degree of restitution, and we accordingly quash the sentence. In that regard we place particular emphasis on the necessity for deterrence.
24. We should say that we think that it is inappropriate in any event to impose as a term of suspension of a sentence in whole or in part an obligation to pay sums of money. We reiterate an observation made at the sentencing hearing that in some circumstances the imposition of such a requirement might be optically uncomfortable. The practice is open to the objection, notwithstanding that the objective may be the worthy one of facilitating restitution, that the offender is being afforded the opportunity to buy his way out of all (or as in this case a substantial part) of a custodial term that he would otherwise be required to serve, and which a person in the same position as him, but without means, would have to serve. We think that the more appropriate course where the judge wishes to make provision for compensation is to make a compensation order within the meaning of section 6 of the Criminal Procedure Act 1993, as amended without specific linkage to the period of custody that a person may have to serve. A realistic expression of willingness to co-operate in providing restitution proffered by the accused in evidence, or by his legal representative in presenting a plea in mitigation, can always be taken account of as evidence of true remorse in any discounting for general mitigation.
25. We now proceed to resentence. That eight years was the appropriate headline sentence was not in issue. Neither was the appropriateness of the discount of two years for general mitigation which included what the trial judge referenced as "*the expression of remorse*". The willingness of the appellant to pay compensation "*as a practical measure and reflection of his remorse*" had been communicated by his counsel Mr Dockery as far back as the 4th of June 2020. We therefore think that a post-mitigation sentence of six years is appropriate having regard to the gravity of the offence as committed by this appellant, and having regard to his mitigation and personal circumstances. We are informed that the respondent's father and co-accused Derek Doherty pleaded guilty to the same offence on the date of trial, subsequent to the imposition of sentence here. A headline sentence of six years and eight months was nominated in his case, and the ultimate sentence imposed upon him was, we were told, five years and three months. We think that even though he may have been the instigator of the offence, the moral culpability of the respondent is broadly similar since in the course of the assault it was the respondent who chose to use the curtain pole to attack the victim in the course of the joint enterprise.
26. We think it right that a portion of the sentence ought to be suspended on terms, and propose that one year should be suspended for a period of two years, for the purpose of incentivising rehabilitation. This will be so suspended on the same terms as those fixed in the Circuit Court with the exception of those pertaining to payment of compensation. In regard to compensation, we will make a compensation order pursuant to section 6(1) of the Criminal Procedure Act 1993 in the amount of €25,000 to be paid in annual instalments of €5,000, the first of such instalment to be so paid twelve months from the date of the

respondent's release from custody, subsequent payments to be made on the anniversary of his release in each subsequent year until the full sum of €25,000 has been paid. We note that the sentence imposed in the Circuit Court was suspended for a period of ten years but we take the view that such a lengthy period of suspension is not necessary on the evidence before us pertaining to the character and the personal circumstances of the respondent.