



**THE COURT OF APPEAL**

**Record No.: 67/2021**

**Birmingham P.  
McCarthy J.  
Donnelly J.**

**BETWEEN/**

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

**APPLICANT**

**-and-**

**K F**

**RESPONDENT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 27th day of January, 2022 by  
Ms. Justice Donnelly**

1. This is an undue leniency appeal brought by the Director of Public Prosecutions (“the DPP”) against the respondent to this appeal in respect of offences arising out of a single incident on the 18th September, 2019. The respondent entered a plea of guilty on the 25th January, 2021 on a without prejudice basis for assault causing harm against the respondent’s infant daughter, contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997 before the Dublin Circuit Criminal Court. This offence together with an offence of criminal damage, and an offence of cruelty to a child contrary to s. 246(1) of the Children Act, 2001 were taken into consideration in circumstances where the sentencing judge imposed a maximum sentence of 6 months for a s. 2 assault on the respondent’s ex-partner on the same date. The respondent had intentionally assaulted his partner while she was holding their child and we will address the facts in slightly more detail later.
2. It is noteworthy that the respondent was also sentenced with respect to a separate incident, the sentence of which is not the subject of this present appeal. The respondent was sentenced to two years’ imprisonment for a s. 3 assault against the respondent’s ex-partner and an offence of child neglect in respect of his infant daughter (this related to the child witnessing the assault on her mother). Those offences were committed on the 12th June, 2020.
3. There are two unusual issues to which this Court must turn. The first was a preliminary point taken to the jurisdiction of this Court to entertain an application by the DDP to review a sentence for undue leniency where the offence at issue was taken into consideration with other offences. The second aspect is that the DPP accepts that this application is being

made on a point of principle only, the DPP did not apply in respect of the sentence imposed in the second indictment. She accepts that if this Court was to find that the trial judge erred in principle there was no question of a consecutive sentence being imposed and that in all likelihood the appropriate sentence that this Court might impose would be 2 years or less and that therefore the liberty of this respondent would not be affected.

4. It is appropriate to deal with the preliminary issue first as it goes to the jurisdiction of the Court to hear this application.

**Preliminary Issue: The jurisdiction of the Court**

***The meaning of "sentence" for the purpose of review by the Court of Appeal***

5. Section 2 of the Criminal Justice Act, 1993 (hereinafter, "the Act of 1993") in so far as relevant, provides:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

(2) ...

(3) On such an application, the Court may either—

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

6. Section 1 of the Act of 1993 defines sentence as including "a sentence of imprisonment and any other order made by a court in dealing with a convicted person other than..." (Emphasis added). The exclusions are irrelevant to this application.

7. The respondent accepted that the phrase "any other order" was a widely drawn one. Indeed, based upon the clear wording of the section and the decision in *The People (DPP) v. Dreeling and Lawlor* (Unreported, Court of Criminal Appeal, delivered on the 27th February, 2001), he had to do so. In that case the sentencing judge, having heard submissions from counsel on either side took into account the relevant probation reports. The judge expressly stated that he would defer the sentence for one year on the terms that each of the respondents during the intervening period would abide by all directions of the probation service and remain drug free. Each had to undergo a monthly urinalysis and the results were to be sent to the appropriate garda member. Liberty was given to the prosecution to apply to re-enter the matter if there was any non-compliance with the conditions. The sentencing judge also stated that he was not holding out any promise that a prison sentence would not be imposed on the adjourned date whatever should transpire in the meantime. The DPP sought a review of that sentence on foot of the sentencing judge's order. The respondents in that case argued that the order did not constitute "sentence imposed" under s. 2(1) of the Act of 1993.

8. The Court of Criminal Appeal held however, that an order deferring sentence is plainly within the meaning of the definition provided in s. 1(1) of the Act of 1993 and s. 2 should be construed accordingly. Murray J. delivering judgment for the Court said at para. 42:-

*"...once the judge of the sentencing court referred to in Section 2 of the Act makes an order concerning the manner in which the convicted person is to be dealt with as a consequence of his or her conviction, the judge must be considered as having commenced the sentencing process. [...] Whatever option or order which the judge of the sentencing court chooses to make in dealing with the convicted person, it may in the eyes of the D.P.P. appear to be unduly lenient. The Oireachtas has conferred on the D.P.P. the right to apply for a review of an order dealing with a convicted person on the grounds of undue leniency."*

At para. 40 Murray J. said:-

*"According to this section "sentence" apart from a sentence of imprisonment, includes 'any other order made by a court in dealing with the convicted person' (emphasis added) other than certain exceptions. Subject to the specified exceptions, the definition could hardly have been drafted with a wider ambit. It refers to any other order and does not say that the order must be a final order."*

9. The respondent did not seek to make the argument, correctly it seems to us, that this Court would have no jurisdiction to hear an appeal where a sentence had been imposed without jurisdiction; agreeing that if a Court manifestly erroneously imposed a sentence not permitted by law *e.g.* a fixed sentence of X years imprisonment rather than the mandatory life sentence on conviction for murder then the Court would have jurisdiction to hear an undue leniency application brought by the DPP. Instead, the respondent focussed on a narrow point in the definition. Counsel submitted that by result of taking the offence into consideration this meant that there had been no conviction in his case.
10. Counsel relied on s. 8 of the Criminal Justice Act, 1951 (as amended by s. 9 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 which provides:-
- "(1) Where a person, on being convicted of an offence, admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the Court may, if the Director of Public Prosecutions consents, take it into consideration accordingly.
- (2) If the Court takes an offence into consideration, a note of that fact shall be made and filed with the record of the sentence, and the accused shall not be prosecuted for that offence, unless his conviction is reversed on appeal."
11. In the present case neither the consent of the respondent nor the consent of the DPP was given to taking the offence into consideration.
12. The respondent relies on para. 31-55 of O'Malley, Sentencing Law and Practice (3rd Edn., Round Hall, 2016) which discusses s. 8 as set out above:-

*"In all probability it was intended solely to allow defendants to ask for uncharged offences to be taken into account in order to forestall the possibility of a later prosecution for those offences. Yet, as noted in the previous paragraph, it is not uncommon for courts to take into account offences of which a defendant has actually been convicted. They impose a sentence for one offence and take the rest into consideration. Strictly speaking, a sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive."*

The respondent also relies on O'Malley's commentary that s. 2 implies that there is no conviction for the offence:-

*"From this it seems to follow that taking an offence into consideration is not to be equated with a conviction. Otherwise, further prosecution would be impermissible even where the conviction for the principal offence was later quashed. English courts have also held that taking into consideration does not amount to a formal conviction."*

13. The respondent relies on *The People (DPP) v. Higgins* [1985] IESC 8 where Finlay C.J. made the following observation in relation to the practice of imposing a sentence on one count and taking other related counts into consideration:-

*"Having regard to the possibility that always exists of a court of appeal setting aside on some technical or other ground the conviction on a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentence should, in my view, be imposed on all counts in respect of which an accused person is convicted by a jury."*

14. While the sentencing judge ought not to have taken these into consideration in a purported use of s. 8 of the Act of 1951 or otherwise, we do not accept that by purporting to do so he was setting aside the conviction of the respondent in this matter. The rule of court records that the conviction here was by plea of guilty. The sentencing judge gave no direction that the plea was to be vacated. Instead by using the phrase "take all remaining matters into account" (even if recorded in the rule of court that "the Court took into consideration Counts No.'s 2,3 and 4") the sentencing judge was indicating that he had taken account of the facts of those offences in reaching his decision in relation to the sentence imposed on the s. 2 assault. We are satisfied that the respondent was convicted of the offence by reason of his plea of guilty and remained at all times a convicted person.
15. We would take this opportunity to restate the importance of sentencing judges in imposing a sentence on all matters in respect of which the accused has been convicted either by a plea of guilty or after trial and is appearing before the Court for sentence on those matters.

### **Background**

16. The background to the offences the subject matter of this appeal is that on the 18th September, 2019, the respondent's ex-partner, Ms. H was at her home in Skerries when

the respondent called to her house at approximately 13:20 to 13:40 and attacked her outside her front door. Ms. H was holding the respondent's infant daughter in her arms at the time of the attack. His daughter's head hit the wall in the course of the struggle. The respondent's daughter was just under 4 months of age at the time of the attack. The respondent took his daughter out of Ms. H's arms and began to walk away with her. She then proceeded to follow the respondent and retrieved the child. The child sustained a significant bang together with a cut on the left hand side of her head and vomited after the incident. Since she sustained a head injury, the child was admitted to Temple Street Hospital and it was noted she had a 4 x 0.3cm linear mark on her left upper forehead and a 2 x 0.1cm lesion on her forehead. There was faint bruising on her forehead central area, which was tender. She was observed overnight and was discharged 24 hours later. Ms. H was punched in the head a number of times by the respondent and her thumb was bent backwards during the altercation. The respondent proceeded to smash the front living room window of Ms. H's home.

17. The respondent was arrested on the 19th September, 2019 but nothing of probative value emerged from the garda interview.

#### **Sentencing Remarks**

18. The sentencing judge heard evidence from the prosecution and defence. He also had sight of photographs of the injuries sustained on the child and Ms. H's victim impact statement was read into the Court. In it, she expressed a willingness that the respondent would "get help" and that "he won't get it himself" and she made reference to his tablet use. The statement also stated that she would "love for [the respondent] to have a relationship with [the child]" and that if he gets the help he needs then "hopefully we can all have a relationship going forward." A letter written by the respondent was referred to but not read out by the defence upon request of the respondent as it contained a lot of personal information. Counsel did highlight that the letter set out a deep expression of remorse and described his familial difficulties and addiction. It referred to his willingness to be there for his daughter and how he wants to prove himself to the Court. The letter expressed remorse and shame for what happened.
19. In a plea for mitigation, the sentencing judge was referred to the fact that the CT scan was normal and was advised that the respondent lost his mother at a young age, began using drugs in his teens, had worked as a forklift driver and had employment available to him in a public house. Urinalysis presented to the Court confirmed the respondent was drug free. Further, the sentencing judge heard evidence that the respondent had a good family and a place to reside when he is released from prison and that the respondent found prison difficult.
20. The sentencing judge also had regard to the respondent's 62 previous convictions which included 47 for road traffic matters, three for public order, five for theft, one for breach of bail, two for possession of an article with intent and four contrary to drugs legislation. The respondent was on temporary release when this offence was committed. The sentencing judge was advised that none of his previous convictions included violence.

21. The sentencing judge held:-

"Mr F comes before this Court in relation to two incidents of violence, it seems he was in a relationship with the injured party, Ms. H, it seems, they had a child called C, and obviously it seems difficulties arose. It seems that on the two particular days the defendant behaved with violence. I am satisfied that Mr K F never intended to harm the child. In relation to count 1 on bill 1022/20, I'm satisfied from what I've heard that he behaved with recklessness in relation to the child and he did not intend to harm the child. But nonetheless, it's pretty inexcusable what he did.

Now, in relation to Ms. H, it seems on these two occasions he did beat her and he beat her quite badly and obviously this was very difficult for this young lady, obviously she suffered pain and suffering and also she was humiliated by this man's behaviour.

Now, it seems he's got good points and there's mitigation in the case: he has pleaded guilty, I think he's genuinely remorseful, he has laboured on certain difficulties and burdens through his life, and the Court does take those into account. It seems he comes from a good family and it seems there's a place for him when he emerges from prison. Now, obviously, he's finding prison difficult at this present time and the Court, to some degree, does take that into account.

Now, it seems he has behaved very badly, particularly towards his former partner, Ms. H, he attacked her and beat her on two occasions. Now, in relation to the child and the occasion when the guards had to take the child from the house, obviously he was behaving irrationally on the date in question, but as indicated in my remarks, I don't believe Mr F, intended to harm the child on either occasion. But it seems to me in relation to -- what's the maximum sentence for section 2 of the offence against -- is it six months?

MR DWYER: I think it is.

MS DUFFY: Six months.

JUDGE: In relation to count 2 of 1022/20, I'm going to impose upon him a six month sentence on count no. 2, and I am going to take all remaining counts into account."

22. The sentencing judge then indicated that he was imposing a two year term of imprisonment on count no. 1 on the other bill before him with those sentences to run concurrently and took the other matters on that bill into account. He then said "So, the effective sentence is a two year term of imprisonment, and that's to be backdated to when he went into custody...the 12th June. Obviously there is mitigation in the case and if I was to indicate a headline sentence from these matters, globally, I'd say about 4 years, and by reason of the mitigation I have reduced it to that degree. Obviously this man needs some form of treatment to deal with his anger, it seems that he has a problem, and obviously hopefully he can deal with those matters before he emerges from prison."

### **The Appeal**

23. The nub of the DPP's appeal is that the sentencing judge erred in failing to specifically address the respondent's culpability for the more serious s. 3 assault and erred in failing to impose a separate sentence for the s. 3 assault. In the present circumstances, the s. 3 assault on the child, even though the *mens rea* was one of recklessness was a far more egregious offence and there was a clear error in principle by the sentencing judge in limiting himself to sentencing on the s. 2 assault only.
24. The DPP also accepts that while this offence, as the more serious offence, ought to have been punished by a sentence in significant excess of the sentence of 6 months imposed on the s.2 assault, the DPP accepts that, as she has not appealed the other offences which were subsequent in time to these offences, no question of consecutive sentence arises. In those circumstances, the DPP accepts that even if successful in saying that there was an error in principle any resentencing would likely not result in this respondent serving any further sentence. The respondent is now at liberty and will, on the DPPs submission, remain so even if the Court were to resentence for the s.3 offence.
25. Counsel for the respondent did not take issue with the principle that an offence of recklessness may well be more serious than an offence where intent was the issue. The respondent submits that there is no rule that states a sentencing judge must apportion the higher sentence to the offence which carries the greater maximum penalty. The respondent submits that the Courts often take matters into consideration which could be considered serious and that the central consideration must be whether the overall sentence arrived at is just. The respondent submitted that the trial judge had considered matters and had proceeded on the basis that the s. 2 was the more serious offence.

### **Discussion and Decision of the Court**

26. We have no doubt in this case that the sentencing judge made a clear error in principle in not imposing a sentence in respect of the s. 3 offence in the circumstances of this case. There may be cases where an offence which carries a higher sentence is not in fact the most serious offence committed by the respondent, that is because the gravity of the offending is fact specific in relation to each offence. This is not to say that an incident should not be looked at as a whole, to isolate the facts and to attempt to pigeon hole them into each offence could result in the imposition of a sentence that was not appropriate to reflect the gravity of the overall offending.
27. In the present case however, what brought this offending into a higher level of offending was the fact that the respondent's intentional assault on his former partner was carried out while she was holding their infant child in her arms. That of course made the intentional assault on the mother more serious but it also, in the present case, amounted to an offence of recklessly assaulting the infant child. In terms of his blameworthiness he carried out the assault on the child where it can be said he adverted to the risk of harming his child yet proceeded to engage in the conduct resulting in the assault. His moral blameworthiness in this case was extremely high. It is difficult to see how the risk to the child in these circumstances could have been anything other than an enormous risk. Moreover, the harm actually caused to the child was significant enough for the infant child to sustain a significant

bang against the wall with a cut to the left side of her face and bruising on her forehead, making the child vomit and having to be admitted to hospital for observation for 24 hours. Thankfully the child appears to have recovered well.

28. In the particular circumstances of this case, the assault causing harm against the infant child, although a reckless one was an offence of considerably greater seriousness than the s. 2 assault against the child's mother both on the facts and on the law. It was a clear error in principle by the sentencing judge not to have imposed any sentence at all on this offence and thereby to restrict his sentencing powers to the limit of 6 months imprisonment by virtue of the provisions of s. 2 of the Act of 1997. There is a clear divergence from the norm by the sentencing judge. A significant sentence ought to have been imposed in respect of the s.3 offence.
29. A further question arises however. This is whether in the circumstances of this case we ought to proceed to quash the sentence and in its place impose such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerns or refuse the application. These are the powers available to the Court under the provisions of s. 2 of the Act of 1993.
30. Section 2 of the Act of 1993 empowers but does not compel the DPP to bring an appeal in relation to a sentence which she considered to be unduly lenient. We do not doubt that the DPP fairly and conscientiously considers in this case whether she should exercise her power to apply for a review of sentence on the grounds of undue leniency. Indeed, from the findings above, the view of the DPP that the sentence was unduly lenient has been vindicated. That is not the only matter however as we consider that the DPP may also have a role in considering issues such as the burden placed on the courts in dealing with matters where "principle" only is at stake, where for example, there is no question of a respondent being required to serve any longer time in custody than that which he is already serving. There may be occasions where the point of principle requires the application to be made as there is a danger that an incorrect precedent may be set. There may also be situations where the respondent's circumstances have changed so much after the application is made that the DPP wishes to proceed with the application even though it is accepted that the changed circumstances mean that the respondent would not be required to serve another sentence even if the Court were to find the original sentence unduly lenient.
31. We would say that if the situation arises that the DPP wishes to appeal only on a point of principle but that there will not be a request for any additional sentence in excess of that which was imposed on the respondent on the same day then the DPP ought to give that indication at the outset of an application. This is an exceptional jurisdiction which does cause an additional stress to a respondent and the DPP's position ought to be clear from the outset.
32. In the present case, we consider that it is appropriate to refuse this application. We do so for a number of reasons. The appeal is entirely academic. There was no application to make this a consecutive sentence. Any new sentence that might be imposed would not extend beyond the two years imposed on this respondent on the same day. It is of



importance that the respondent was sentenced on the same day in respect of a number of offences arising out of two separate incidences. In each case the victims were his partner and young child. The trial judge in one sense dealt with all these matters globally and imposed an overall sentence to reflect the overall culpability of this respondent. There is no practical consequence of now imposing a sentence which would not extend beyond that sentence of 2 years and may indeed be less in respect of his child.

33. We refuse the application.