



**THE COURT OF APPEAL**

**Record Number: 150 CJA/21**

**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**

**APPLICANT**

**- AND -**

**SCOTT O'CONNOR**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 5th day of April 2022 by Ms. Justice Kennedy.**

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the 28th June 2021. The respondent pleaded guilty to two counts on the indictment, namely Count 2; violent disorder and Count 3; production of an article capable of inflicting serious injury contrary to section 15 of the Criminal Justice (Public Order) Act 1994 and section 11 of the Firearms and Offensive Weapons Act 1990, respectively. The respondent was sentenced to five years' imprisonment on Count 2 with the final three years suspended and two years' imprisonment on Count 3, to be served concurrently.

**Factual Background**

2. On the 16th January 2020 a group of students were having a "pre-drinks party" at their rented accommodation on Bandon Road in Cork City when at approximately 7:00 pm, a homeless man banged on the door looking for an individual whom he called Barry and

was told that the person was not there and asked to leave. The door was closed but the latch was damaged so he was able to push the door open again. One of the students came out and pushed the man and told him to go away, at which point he fell to the ground.

3. Three youths, including the respondent, who were watching these proceedings remonstrated with the student who had refused entry to the man. In an effort to diffuse the situation, a young man who was in attendance at the party, namely Cameron Blair, invited the three youths, the respondent, Mr B and Mr C in to the party.
4. At some point in the evening, one of the attendees at the party approached the respondent and asked him if he could buy some cannabis for him. The respondent made a phone call to another man and told the attendee that he could get three grams for him for €50.
5. Shortly after this, the persons whom the respondent had contacted arrived at the house and were given the €50 in order to purchase the cannabis. At this point, Mr B left the party with a student to buy alcohol and one of the students who rented the house became concerned that the three young men were not known by others at the party and were somewhat "out of place."
6. It was decided that they should be asked to leave and it was suggested to the other students at the party that they should pretend to leave and that they should go outside and indicate to the respondent and the two other young men accompanying him that the party was over. The plan was that once the three young men had left, the students would then return to the house and the party would resume. Unbeknownst to the students, during the course of the evening, the respondent, Mr B and Mr C had gone into the kitchen of the house and had armed themselves with knives.
7. At this point, a minor dispute arose between the person who had gone to buy the cannabis and the attendee who asked for it, to the effect that he was not given the three grams that he had paid for. The respondent and a group of students from the party were now outside on the footpath in front of the house. Mr Blair was standing at the door of the house, tasked with preventing anybody else from entering. The respondent with Mr B and Mr C began walking away from the house when one of the witnesses, a Mr Quinn remarked that: "They better not come back."
8. It was at this point, the respondent started walking back towards this witness and Mr Blair stood between them. The respondent asked the witness what he had said and became aggressive. The respondent then said: "Yeah but don't be saying that. They're my buds." Mr C also came back to the door and tried to regain entry to the house. Mr C remonstrated with those who were still inside the house saying that he had left a charger in there. In an effort to appease Mr C, one of the students gave him a lead for a mobile phone belonging to his girlfriend. The respondent then turned from the door pulled up his top and looked at his waistband and Mr C was heard saying: "Give it to me, I'll shank one of them." The respondent started swinging punches at Mr Quinn and others, and Mr Quinn

was hit by one of the punches. At this time, Mr Blair intervened and tried to break things up. A few seconds later, Mr Quinn saw the respondent with a large kitchen knife with a white handle.

9. The respondent was seen swinging the knife over Mr Blair trying to get at Mr Quinn. Mr Quinn was so shocked that he ran out the back of the house and jumped over a wall into the next garden. The respondent was said to have been holding the knife high around his head and pointing it backwards and forwards. Either the respondent or Mr C were heard shouting: "Ye'll get cut. I'll cut ye" to which Mr Blair replied: "There is no need to be talking about cutting us." Students ran out the back door of the house and another group took refuge in the back bedroom. A number of calls were made to the Gardaí. A CCTV camera on the wall of the post office a few doors away captured the scenes at the front door of the house and the respondent was distinctly identifiable throughout due to the reflective strip on the tracksuit pants he was wearing.
10. At 9:16 pm, a young woman known to the respondent emerged from the house in an attempt to calm things down. She was pushed by Mr C and he punched her in the eye with his closed fist at 9:19 pm. The respondent remonstrated with Mr C because he knew the woman concerned. At 9:17 pm, Mr B could be seen standing on the footpath outside the house, repeatedly tapping a large knife against the back of his leg. At 9:21 pm Mr B is shown coming from the edge of the footpath towards the front door and making a sudden downward lunge with the knife, striking Mr Blair in the neck and fatally wounding him.
11. After Mr B's fatal attack of Mr Blair, Mr B and the respondent took off running. A short distance from the house, the respondent threw the knife he had been carrying over the garden wall of another house. The ambulance arrived at the house and paramedics attended to Mr Blair but due to the gravity of his injury, his life could not be saved.

#### **The sentence imposed**

12. In imposing sentence, the judge identified as aggravating factors that the respondent deliberately armed himself with a knife and deliberately threatened others therewith, that the respondent threatened to use unlawful violence, the public and protracted nature of the offending and the deliberate instillation of fear in a large number of people. The judge further identified the common purpose of the respondent and his accomplices in threatening and intimidating the occupants of the relevant house as a further aggravating factor. However, the judge accepted that the respondent did not intend to kill or seriously injure any person there present and did not, in fact, use the knife beyond brandishing it.

The judge also noted that, rather than remain at the scene to offer assistance to the innocent victim of the stabbing perpetrated by his accomplice, the respondent made good his escape and discarded the knife which he had been carrying.

13. The judge placed the respondent's offending at the low-end of the upper range and set a headline sentence of 7 years. In identifying the headline sentence, the judge observed that the range of sanctions available for the offence of violent disorder commences at a non-custodial sentence and culminates with a sentence of 10 years' imprisonment.

14. In terms of mitigation, the judge noted the respondent's early plea of guilty, his cooperation with the investigation and his previous good character. The judge also had regard to a Probation Service Report which recorded the respondent pleading guilty and taking full responsibility for his involvement but also seeking to minimise his role in the offending (the account given by the respondent in the Report differs from the account of events established by the evidence in that in it the respondent is adamant that he was not waving the knife around or showing it off.)
15. The Report also records the respondent's genuine remorse for the death of Cameron Blair and that he wishes to offer his sincere apologies to Mr Blair's family.
16. Having regard to the mitigating circumstances, the judge reduced the headline sentence of 7 years for the offence of violent disorder to one of five years. Bearing in mind the recommendation of the Probation Service, the judge further suspended the final three years of that sentence pursuant to s. 99 of the Criminal Justice Act 2006 on conditions.
17. For the separate offence of production of an article capable of inflicting serious injury, the judge set a headline sentence of 3 years' imprisonment by reference to the aggravating factors as identified. The judge then reduced this sentence to one of 2 years' imprisonment by reference to the mitigating factors.

#### **Grounds of appeal**

18. Whilst the applicant filed four grounds of application, it transpired at oral hearing that the only issue concerns the suspended component of the sentence.
19. Ms Rowland SC for the Director relies on a number of factors, including that the respondent armed himself with a large kitchen knife while a guest at a party, that he secreted the knife on his person until he left the house, having been requested to do so and that the respondent acted aggressively at the front door of the house. CCTV footage was shown to the Court where several persons could be seen at the door of the house. This conduct at the door of the house continued for a period of some five minutes until the unfortunate Mr Blair was stabbed and killed by one of the respondent's co-accused.
20. Moreover, the Director relies on the manner the respondent wielded the knife, brandishing it above his head, swinging it backwards and forwards and over Mr Blair's shoulder towards another student. At no point was the respondent under any threat, nor was he the subject of any aggressive conduct on the part of the occupants of the house. She says that those present in the house were absolutely terrified, urgently calling the emergency services and some leaping over the back wall of the house to escape. It is said that the respondent was instrumental in creating an atmosphere of abject terror leading to the fatal stabbing of Mr Blair.
21. As stated, no issue is now taken with the nominate pre-mitigation sentence of 7 years. Nor is any issue taken with the reduction afforded for mitigating factors, leaving the net issue of the suspended element of the sentence for consideration. Therefore, much of the written submissions on behalf of the Director and in consequence those of the respondent

do not require to be addressed. For the sake of completeness and reference some of those submissions are set out hereunder.

**Submissions of the applicant**

22. The applicant accepts that the respondent did not inflict serious injury upon any person nor the fatal injury, it is submitted that the culpability of the respondent was high for the reasons stated above. It is further submitted by the applicant that the judge failed to have adequate regard to the fact that the respondent and his co-accused did not impulsively grab weapons which just happened to be close to hand in the heat of the moment but, rather, consciously and deliberately conspired to arm themselves and retain these weapons for use at a later time.
23. It is submitted that the judge, while referencing the "febrile atmosphere" contributed to by the respondent, in sentencing the respondent to an effective sentence of 2 years' imprisonment, failed to adequately reflect the actual terror instilled in the party-goers and the gravity of the offence.
24. While the applicant accepts that the respondent did not inflict the fatal wound nor, indeed, did he wound any person there present with the knife he was wielding, it is clear, as was noted by the judge, that his presence, actions, conscious arming of himself, production of a weapon, threats, intimidation and action in common purpose with his accomplices contributed to the "febrile atmosphere" in which Cameron Blair was murdered by the respondent's co-accused Mr B.
25. Reference is made to *The People (DPP) v Connor* [2020] IECA 255 where this Court considered the issue of domestic violence as set out in *The People (DPP) v Farnan* [2020] IECA 256 and stated, "...as we said in the judgment in *DPP v Farnan* offences of this nature may normally expect to attract a sentence with a custodial component, in order to mark society's strong condemnation of such behaviour and send out a clear message of general deterrence: and it would only be in exceptional cases that the mitigation might be such as to warrant a fully suspended sentence..."
26. This Court in the *Connor* case ultimately substituted a sentence of two and a half years with the last year suspended. It is submitted that the judge in the present case should have marked "society's strong condemnation" of knife crime by imposing a higher net sentence.
27. While it is acknowledged that the respondent in the instant case did not receive a fully suspended sentence, there are aggravating circumstances present which were not present in the *Connor* case such as the premeditation which was implicit in the respondent and his co-accused arming themselves well in advance of any dispute, and the fatal stabbing that arose from the violent disorder.
28. The applicant submits that the respondent, just fifteen months before the time of the offences contained herein, had assaulted a young man causing him harm, which offence he had admitted to and in respect of which he had received a caution under the Diversion

Programme. It is also pointed out that in the Probation Service Report the respondent minimised his role in the events on the night, denying that he had ever taken the knife out of his pocket other than when he discarded it on the street after he left the party. Furthermore, he described that “over the course of the evening there were a number of arguments in the house” which was not borne out by the evidence.

29. The applicant states that it is generally accepted that the indicia of an accused’s remorse include an acceptance of his role in an offence and, in the absence of same, it is submitted that there is no entitlement to the credit which might otherwise be granted for this powerful mitigating factor. Quotation is made from O’Malley at para 6.37, “additional mitigation may however be granted where the offender took steps immediately after the offence to assist the victim or to alleviate the harm caused” which is not available to this respondent.
30. The applicant points out that the judge identified a headline sentence of 7 years’ imprisonment and proceeded to reduce it to 5 years in light of the mitigating factors and then after having reduced the headline sentence by approximately 28.5%, the judge suspended the final 3 years of the 5 year sentence. This resulted in an effective sentence of 2 years’ imprisonment being imposed on the respondent in respect of a violent disorder which resulted in the death of an innocent victim.
31. While it is accepted that the respondent was a young person, who pleaded guilty at an early stage and who had no previous convictions, if one is to discount the caution the respondent accepted in respect of an assault committed as a juvenile, it is submitted that there are limited, if any, offence-related mitigating factors associated with the respondent’s offending and, it is further submitted that excessive regard was had by the judge to the personal mitigation.
32. In these circumstances, the applicant submits that the court erred in reducing the sentence from a headline sentence of 7 years to 2 years’ imprisonment with 3 years suspended.
33. Finally, in all the circumstances, it is said that the sentence is unduly lenient.

#### **Submissions of the respondent**

34. As a preliminary submission, the respondent submits that the applicant has neither applied the criteria for undue leniency nor demonstrated that they are met. In support of this contention, quotation is made from *The People (DPP) v Stronge* [2011] IECCA 79.
35. The respondent notes that as per *The People (DPP) v Redmond* [2001] 3 IR 390 the onus on the applicant is to demonstrate that the sentence imposed is clearly and significantly less than the sentence that would normally be expected in similar circumstances.
36. It is submitted that this appeal is based on a mere assertion of undue leniency and that the applicant not only failed to claim that there was a gross departure from the norm such that the threshold for undue leniency has been passed, it has failed to demonstrate any such departure from the norm. Further, it is submitted that the submissions of the

applicant do not demonstrate that the approach of the judge was anything other than meticulous in relation to ensuring all relevant factors taken into account and the proper sentencing principles applied.

37. Quotation is also made from the *DPP v McGinty* [2019] IECA 27;

“The question is not whether a more severe penalty would have been an appropriate option but whether the course of action decided upon by the Sentencing Judge fell outside the range. The Sentencing Judge must be afforded a margin of appreciation and only when the margin has been exceeded should the Appellate Court intervene...”

38. The respondent also notes that two cases (*DPP v Dent* [2015] IECA 169 and *DPP v Murray* [2019] IECA 187) which deal with the sentencing principles on violent disorder were not addressed in any extensive way in the applicant’s submissions. It is submitted that the sentences imposed in *Dent* and *Murray* would form part of the debate in this appeal of the “sentencing norm” in these types of cases. The respondent contends that no attempt to show the “norm” let alone a departure from it, is contained in the applicant’s submissions. However, once the nature of the appeal came into focus, it was accepted that neither *Murray* or *Dent* have any real application to the issue of a wholly or partially suspended sentence.

39. The respondent submits that the judge adequately took into account the relevant factors as outlined by the applicant in their grounds of appeal and that this can be observed from the transcript where the judge enunciates each and every aggravating factor clearly. The respondent points out that there is no duty on a sentencing judge to mention in his or her judgment every single fact mentioned in evidence by the prosecution, but rather to identify the relevant aggravating and mitigating factors, and then apply the proper principles in imposing sentence. It is submitted that this was manifestly done.

40. The respondent cites the *DPP v McDonnell* [2009] 4 IR 105 and *The People (Attorney General) v O’Callaghan* [1966] IR 501 to emphasise that a sentencing court has to be careful in dealing with allegation of potentially criminal conduct, in this case, the respondent striking a person, where such conduct was not the subject matter of criminal charges. It is submitted that the judge was alive to this.

41. The respondent submits that there were a numeracy of mitigating factors in the present case and that the suspension of the respondent’s 5 year sentence was clearly directed towards the public interest in rehabilitation and took place in the context of a low risk of reoffending.

42. The respondent cites *DPP v DW* [2018] IECA 143 demonstrating the duality of the suspended sentence. It is said that the prison sentence expresses a “degree of censure and societal deprecation of the crime” while the suspended element “spares unnecessary expense to the state and unnecessary damage to the low-risk offender and his or her loved ones.” It is submitted that to sever the respondent from his societal supports for an

extended period of time, would risk jeopardising the rehabilitation that had occurred to date.

43. Furthermore, the respondent lists the "pointed" conditions imposed by the judge in relation to the suspension of the sentence and submits that the judge, in imposing such a structured sentence, clearly had regard to both aspects of deterrence in giving credit for the mitigating circumstances advanced.
44. The relevant mitigating factors are reiterated in support of the respondent's contention that the judge did not err by reducing the sentence from a headline sentence of 7 years to one of 5 years imprisonment with the final 3 years suspended on terms.
45. In addressing the applicant's final ground of appeal the respondent submits that the judge had sufficient regard to the aggravating and mitigating factors and applied appropriate principles and that there was no error of principle nor undue leniency.
46. It is concluded that the sentence, while it might be arguably lenient, was appropriately structured in that it had a significant suspended element, and in no way could be considered to be unduly lenient. It is said that the sentence imposed was within the discretion of the judge in the context in which he was dealing with an offender with no previous convictions who was just 18 years of age at the time of the crime, and for whom even a short prison sentence would be significant punishment.

#### **Discussion and Decision**

47. Whilst four grounds of appeal have been filed, the final ground encompasses the gravamen of this appeal; that the judge had insufficient regard to the numerous aggravating factors and gave undue credit for the mitigating factors and in so doing imposed a sentence which was unduly lenient.
48. This is undoubtedly very serious offending with many aggravating factors, we agree with the Director that the respondent's moral culpability was high. The respondent armed himself with a knife which he then secreted on his person until he then used the knife in the manner described, brandishing it and in doing so encouraging a situation of violence to develop.
49. The judge was perfectly correct to remark that the respondent was instrumental in creating and indeed in ensuring the continuation of a "febrile atmosphere." We observe that the occupants must have experienced pure terror in the face of such violence.
50. This was not a situation of impulsivity on the part of a young man, the conduct was that of a person who had armed himself with and retained a weapon which he later brandished. The people present in the house were terrified and passers by were also alarmed by the behaviour. It is also noted that the respondent was not under any threat. These factors alone mean that his culpability is high.
51. It is clear that the unfortunate deceased had no part in any violence, he simply tried to monitor the front door, and the judge properly described his conduct as "steadfastly



openhearted, courteous." That the events of the night led to his death is shocking and tragic.

52. We acknowledge that the respondent did not inflict any injury with the weapon but limited himself to brandishing it about.
53. The need for general deterrence arises in such offending, however, that was addressed by the nomination of an appropriate headline sentence of which nomination is not in issue and, we are in any event satisfied that the headline sentence of 7 years' imprisonment was appropriate. This kind of conduct must, in most circumstances, be marked by a custodial component to a sentence as was done in the present case.
54. Whilst again no issue arises regarding the reduction afforded for mitigation, we now look to the mitigating factors present, including that the respondent is a young man, that he entered pleas of guilty and the other factors identified. The fact that he fled the scene and failed to render any assistance deprives him of those factors in mitigation.
55. We observe that whilst he sought to minimise his role when with the Probation Officer, this appears to relate to his youth and difficulty in accepting responsibility. At a later stage in the same report, the Probation Officer states that he is deeply remorseful for his involvement in the incident.
56. In light of the mitigating factors, the nominated sentence was reduced to one of 5 years and again we do not consider this to be a departure from the norm. The issue is whether the judge was justified in suspending 3 years of that sentence on terms.
57. The jurisprudence regarding reviews of this nature is well settled, this Court will not intervene unless the applicant can demonstrate that the sentence constitutes a substantial departure from the norm.
58. The main focus of the applicant's complaint as stated was really having discounted by 2 years or in excess of 25% of the pre-mitigation sentence for mitigation, the judge then suspended a further 3 years of the post-mitigation sentence, in order to incentivise the respondent's continued rehabilitation.
59. We have taken account of the Probation Report, as did the trial judge, and the factors identified therein. The respondent is placed at a low risk of re-offending and it is stated that he would benefit from ongoing probation supervision with the necessity to address his stress and anxiety issues and avoidance of alcohol and anti-social peer groups.
60. However, it is clear from the report that the respondent denies issues with drugs or alcohol. While he experienced stress and anxiety flowing from the offending and related to the court hearing, this is of course unexceptional and is in fact to be expected.
61. It was in light of the recommendation of the Probation Service that the judge decided to suspend the final 3 years of the 5 year sentence leaving a net sentence of 2 years. Similar to deterrence, the sentencing desideratum of rehabilitation is directed towards

incentivising an offender to refrain from further criminal activity. There must of course be evidence of a desire to rehabilitate and this Court has depreciated sentences where excessive portions of the sentence are suspended without such evidence.

62. However, in the present case, there *is* evidence of rehabilitation; the respondent engaged with the Probation Services, and the Probation Officer considered that he would benefit from continuing probation intervention, notwithstanding that he is placed at low risk of re-offending. According to the report, he has made considerable efforts to distance himself from anti-social peers, has a supportive family and no current substance issues.
63. This is a finely balanced case, however, and we consider that the judge erred in suspending such a significant portion of the 5 year sentence, resulting in an actual prison term of 2 years.
64. Conduct of this nature, as stated, may require a custodial element to a sentence and we are entirely satisfied that the respondent's conduct required such censure, but to a greater extent than that envisaged by the sentencing judge. A proportionate sentence must be imposed, that sentence must be proportionate to the seriousness of the offending conduct and the personal circumstances of the offender. In order to achieve a proportionate sentence, the right balance must be struck between the penal objective of punishment for wrongdoing by the offender and the competing desistance objective of rehabilitation of the offender.
65. In our view, the correct balance was not achieved in the present case with too much weight placed on the rehabilitation by the respondent in circumstances where only modest intervention was required of the Probation Services and which did not justify such a substantial portion of the sentence being suspended.
66. We do not believe that the ultimate sentence imposed achieves the necessary balance and, accordingly, we find an error of principle and so we will quash the sentence and proceed to re-sentence the respondent.

#### **Re-Sentence**

67. We understand the respondent is doing well while in custody and we have received a report from the Educational Service to the prison which confirms that he has been a student in Mountjoy Education Centre since October 2021. He is availing of all the educational opportunities available to him and is to be commended and encouraged in this regard.
68. This Court was minded to suspend 18 months of the post mitigation sentence of 5 years, however, we are acutely conscious of the need to encourage rehabilitation and in light of the material before us which is indicative that the respondent is continuing with his rehabilitative efforts, we will limit our intervention to suspending the final two years of the sentence.

69. Accordingly, we quash the sentence imposed on Count 2 and re-sentence the respondent to a sentence of 5 years' imprisonment with the final 2 years suspended on the same terms as in the court below.