



THE COURT OF APPEAL

[67CJA/23]

The President
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 (DPP)

APPLICANT

AND

HUGHIE PAUL DONOGHUE

RESPONDENT

JUDGMENT of the Court delivered on the 14th day of November 2023 by Birmingham P
Introduction

1. Before the Court is an application brought by the Director pursuant to s. 2 of the Criminal Justice Act 1993, seeking a review of sentence on grounds of undue leniency. At the outset, it may be said that there was no real dispute between the parties on the hearing of this appeal about the principles which are applicable when the Court is dealing with an application to review sentences on grounds of undue leniency. Indeed, it is the case that those principles have not really been in dispute since the first such case of *DPP v. Byrne* [1995] 1 ILRM 279.

2. The sentences sought to be reviewed were imposed in Roscommon Circuit Court on 22nd February 2023. On that date, sentences were imposed in respect of five offences which had appeared on an indictment to which pleas had been entered. In respect of count one on the indictment, a count of s. 2 assault, contrary to the Non-Fatal Offences Against the Person Act 1997 ("the 1997 Act"), as amended, a sentence of two months imprisonment was imposed. In respect of count two, a s. 3 assault, assault causing harm, contrary to the 1997 Act, a sentence of 12 months imprisonment was imposed. Count three was also a s. 3 assault and, again, a sentence of 12 months imprisonment was imposed. Count four was a s. 2 assault in respect of which a sentence of two months imprisonment was imposed. Count five on the indictment, a s. 3 assault, saw a sentence of two years and two months imprisonment imposed, with the final 12 months of the sentence suspended. Each of the sentences imposed were ordered to run concurrently, but the sentences were consecutive to a sentence of seven years imprisonment, with the final two years

suspended for a period of five years, which had been imposed in the Circuit Court in Mullingar on a date in November 2022, in respect of an offence of aggravated burglary which had been committed on 11th March 2022. The judge directed that credit should be given to the then accused for time spent in custody in relation to this matter, between 28th October 2022 and the date of sentence, 22nd February 2023. There is an issue about how the credit for time spent in custody was calculated, and indeed, a more fundamental issue now arises as to whether there was in fact any time spent in custody, which referred exclusively to the offences the subject of this application to review.

Background

3. The offending the Court was concerned with occurred between 31st October 2021 and 24th November 2021. Each case involved the same injured party, one Ms. KM. It appears the respondent and Ms. M had been in an intimate relationship for about four years until 2019. The respondent renewed contact with her in September 2021. The offences with which the Court was concerned all occurred at the home of the injured party.

4. So far as count one is concerned, which occurred on 31st October 2021, the respondent had been drinking and he and the injured party had an argument. The injured party retreated to her bedroom but was followed by the respondent who punched her a number of times in her face and back.

5. Count two occurred on 14th November 2021, when the injured party was leaving the house. After an exchange of words, the respondent followed the injured party out and punched her on the right side of her face causing bruising to the right eye.

6. Count three occurred on a date between 15th and 21st November 2021, when, following an argument, the injured party ran to leave the house, but the respondent caught her, punched her in the stomach, winded her and then dragged her to the bedroom where he punched her a number of times in her shoulder and back causing bruising.

7. Count four occurred on 23rd November. The respondent and injured party had been visiting neighbours. The injured party asked the respondent to leave the home and she attempted to go home alone, but the respondent took the key. He then hit her in the ribs and head. On returning home, the injured party called the Gardaí who arrived on the scene, and the respondent agreed to leave, having been asked to do so by Gardaí.

8. Count five, which was by some distance the most serious count on the indictment, occurred in the early hours of 24th November 2021. Following the incident, which was the subject matter of count four, the injured party had locked the house, but the respondent returned to an open window at the back. According to the Director's submissions, he confronted her in relation to calling the Gardaí. She ran out the front door, but she was caught and dragged back into the house by the respondent. He then punched her on the right side of her face, causing her to bleed, and causing a tooth to be loosened. She ran out again, but was knocked to the ground, at which point the respondent was involved in kicking and hitting her a number of times. A neighbour tried to intervene, but unsuccessfully. The respondent only stopped on seeing approaching car lights which the respondent believed to be the lights of a Garda car. Gardaí did arrive at the scene. The injured party was reluctant to make a statement; apparently, her concern was that social workers

might become aware of the incident and that this would be detrimental to her having contact with her two children who had been taken into care and her ability to secure custody of them again. With reluctance, the injured party agreed to an ambulance being called, she was taken to hospital, initially in Sligo and then in Derry where surgery was performed. Her injuries included fractures to both jaws in three places.

9. The investigating Garda in respect of this incident, Garda Sinead Higgins, became aware on 13th March 2022 that the accused was being detained in Athlone Garda station in relation to the aggravated burglary to which there has already been reference. The basis of his detention was changed so that he could be interviewed in relation to events of 23rd and 24th November 2021. During interview, the accused admitted to assaulting KM one or two times since moving in, but did not make admissions in relation to the offences of 23rd and 24th November 2021. It appears that on foot of the admissions in relation to earlier incidents, Garda Higgins went to the injured party and took a further statement from her.

Personal Circumstances of the Respondent

10. In terms of the respondent's background and personal circumstances, he was born in November 1996 and was 25 years of age at the time of these offences. He is the father of two children and the Court heard that there was a history of drug abuse centred on benzodiazepines and cocaine. The respondent had some 51 previous convictions recorded which related to 29 separate incidents relating to dates between July 2011 and 13th March 2022. Two of the previous convictions related to Circuit Court matters. Of note is that two convictions for assault contrary to s. 2 of the 1997 Act were recorded, and there were four convictions for assault causing harm, contrary to s. 3 of the 1997 Act. Other convictions of significance involved three for the possession of knives or other articles, contrary to s. 9 of the Firearms and Offensive Weapons Act 1990, as amended, two for endangerment contrary to s. 13 of the 1997 Act and two for making threats to kill or cause serious harm contrary to s. 5 of the 1997 Act.

The Sentence

11. The judge's approach to sentencing was to identify headline or pre-mitigation sentences in respect of each of the counts on the indictment. In respect of count five, the judge set a headline sentence of three years and three months. He then mitigated each of the headline sentences he had identified. In respect of count five, he mitigated the sentence down to a period of two years and two months. He said he was going to direct that all of the sentences would run concurrently, but, taking proportionality into consideration, because he was going to make the final sentence consecutive upon the finalisation of the aggravated burglary sentence, he was going to suspend the last 12 months of the sentences he was imposing, giving a net sentence of 14 months imprisonment.

The Appeal

12. In seeking a review of sentence, the Director has identified a number of grounds. She says the headline sentences did not reflect the gravity of the offending, and that the judge did not have sufficient regard to the aggravating factors present. She identified those factors as being that the

offending involved multiple incidents of domestic violence, that the offence in relation to count five resulted in fractures to the jaw of the injured party, and that there was insufficient regard to the fact that the accused had relevant previous convictions. The Director contends that too much weight was given to mitigating factors and she is also critical of the judge for paying excessive regard to the principle of totality when he decided to suspend the final 12 months of the sentence imposed in respect of count five. It is said that the judge was in error in giving the accused credit for time served to which he was not entitled. The Director says the sentences imposed failed to adequately reflect the principles of specific and/or general deterrence.

Discussion and Decision

13. We begin our consideration of this issue by making the obvious point that this was offending of very real seriousness. There were multiple aggravating factors present. This involved a series of incidents of serious domestic violence. By statute, the fact that the assaults occurred in the context of domestic violence has to be considered an aggravating feature; see, in that regard, s. 40 of the Domestic Violence Act 2018. Without diminishing the seriousness of the other offences on the indictment, by any standards, count five had to be seen as extremely serious indeed. Multiple injuries were recorded by the duty doctor at Sligo University Hospital who first saw the injured party. CT scans of the facial bones confirmed a fracture of the left mandible. There was a comminuted fracture of the right mandible entering a tooth socket, as well as a minimally displaced fracture of part of the skull base. So, we are looking at very significant injuries. Further aggravating features are to be found in the fact that all of these incidents occurred in the home of the injured party, which ought to have been a place of safety. Of particular concern is the fact that the incident on count five on the indictment was an assault which appeared to be a response to, or indeed in revenge for, the fact that the injured party had contacted Gardaí in relation to the assault dealt with at count four, which had occurred some hours before. This was very serious offending, and it was offending on the part of someone with a bad previous record; some 51 previous convictions were recorded, including a number of directly relevant previous convictions contrary to both ss. 2 and 3 of the 1997 Act, and, as referred to above, other previous convictions of note.

14. In the course of the judgment of *DPP v. McGrath, Dolan and Brazil* [2020] IECA 50, the Court observed that it may be the case that judges have been too reluctant to consider placing the starting or pre-mitigation sentence at the maximum of five years imprisonment, adding that for high-end s. 3 assaults, a five-year headline pre-mitigation sentence is not excluded. Later, in the judgment, at para. 24, we commented:

“... Certainly, judges should not operate on the basis that a starting point of five years is not generally available and that it should only be considered, if it be ever considered, in exceptional circumstances.”

15. It seems to us, given the many aggravating factors present, that a sentence of two years and two months, with the final 12 months of the sentence suspended, does not meet the gravity of the offending in issue. While it is clear that the judge in the Circuit Court approached the task of sentencing with great care, we are driven to the conclusion that the sentence imposed was definitely unduly lenient. This requires that we resentence and that we do so as of today's date.

Resentencing

16. The judge's approach to sentencing was to provide for concurrent sentences in respect of all the offences he was dealing with. While there might have been an argument for consecutive sentences, where the judge was dealing with a pattern of offending over a fairly condensed time period, where the last offence was clearly the most serious, we can see how the judge decided on concurrent sentences. We will do likewise. The judge felt that the sentences he was imposing had to be consecutive to the sentence imposed in respect of a count of aggravated burglary. We think the decision to make these sentences consecutive to the aggravated burglary sentence imposed in November 2022 is inevitable. If sentences were to be made concurrent with the Mullingar Circuit Court matter, then this would have meant that, in reality, no additional punishment was being imposed in respect of this sequence of serious assaults culminating in the assault on 24th November 2021. The sentences we are imposing today, while concurrent with each other, will be consecutive to the sentence on the aggravated burglary matter.

17. At the Circuit Court, the judge sought to give credit for time spent in custody by reference to these offences. Initially, it was suggested to us that the judge had fallen into error by giving credit for the period between 28th October 2022 and the sentence date, when the relevant period was that between 30th November 2022 and the sentence date of 22nd February 2023. Indeed, it was suggested that this error meant that the sentence imposed, which on its face appeared to be a net sentence of 14 months, was, in reality, even more lenient. However, in the course of the appeal hearing, it was indicated that further enquiries indicated that, in fact, there was never a time when the accused was in custody solely by reference to the domestic violence offending. If we have correctly understood what we have been told, and if that is in fact the position, the question of giving credit for time in custody does not arise at this stage.

18. In our view, for the reasons we have set out earlier in this judgment, the offending in issue, in particular the offending dealt with at count five on the indictment, was so serious that a headline or pre-mitigation sentence for that offence of five years is fully merited. We do accept that there are certain factors present by way of mitigation – in particular, the early plea. It is also the case that the accused made admissions in respect of the earlier offending, which resulted in charges being laid which would probably not otherwise have been laid. The value of those admissions is somewhat undermined by the fact that, when interviewed, the accused did not admit the offending relating to 23rd and 24th November. We are also conscious that the sentencing Court heard that his background was a difficult and troubled one. To reflect all these matters – and clearly, the most significant individual factor is the plea – we will reduce the headline sentence from five years to a sentence of three years and nine months, that sentence, as we have already indicated, being made consecutive to the aggravated burglary.

19. This requires that we stand back and address the question of totality. The respondent is a young man who has already spent much time in custody, both as a juvenile and as an adult. The respondent is required to serve a significant sentence in respect of the Mullingar Circuit Court matter, and his time in custody will now be lengthened to a significant extent. We will address the question of totality by reducing the sentence of 45 months by a further 15 months. So, the net effect of the sentence in respect of the matters, the subject of the undue leniency review will be a

sentence of two and a half years to be served consecutive to the sentence imposed at the Circuit Court in Mullingar on a date in November 2022. As in the Circuit Court, we will impose sentences in respect of counts one to four, which we will make concurrent with the sentence imposed in respect of count five. However, to mark the seriousness of the pattern of offending behaviour, we will impose sentences of five months on counts one and four, rather than the two months imposed in the Circuit Court, and in respect of counts two and three, we will impose sentences of 24 months on each, rather than the 12 months imposed in the Circuit Court.