



**THE COURT OF APPEAL**

**Record Number: CJ 2/2024**

**Bill Number: WDDP 54/2021**

**Birmingham P.**

**Kennedy J.**

**Ní Raifeartaigh J.**

**BETWEEN/**

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

**APPLICANT**

**-AND-**

**PAUL DUNDON**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 13th day of May 2024 by Ms. Justice Ní Raifeartaigh**

- 1.** This is an appeal brought by the Director of Public Prosecutions on the ground that the sentence imposed on the Respondent was unduly lenient within the meaning of s.2 of the Criminal Justice Act 1993.
- 2.** The respondent pleaded guilty of one count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997. He received a sentence of 3 years and 3 months suspended in its entirety for a period of 4 years.

**Background**

- 3.** The incident to which this offence related occurred in the early hours of the 17<sup>th</sup> June 2018. The injured party was out socialising at a nightclub in Waterford. Some dispute appears to have

arisen between the injured party and the brother of the respondent about money allegedly due to the former. The respondent involved himself in this dispute. Somewhat bizarrely, the security men brought the two men to a back alleyway area where beer kegs were stored and which was a closed off area with no immediate exits. The security men then proceeded to watch, as a fight developed between the two men, during which the respondent bit off a piece of the injured party's ear. There was some CCTV footage which captured the beginning of the incident but not the later part of it during which the respondent engaged in the biting. The Court has seen the footage and one can clearly see the respondent taking a swipe at the injured party just before they are put outside, and the fight beginning to start just after they are outside.

**4.** Gardaí later identified the respondent from the CCTV footage, and the respondent met the Gardaí by arrangement. He replied 'no comment' to the questions asked in interview, and it was submitted on his behalf that he did so following legal advice. All of this appears to have taken place some two years after the incident.

**5.** A medical report read to the sentencing court documented the injury to the right ear. A part of the right external ear was bitten off and surgical intervention received. Graphic photographs were presented to the sentencing court (and this Court) showing the injury at the time and the permanent disfigurement with which the victim has been left.

**6.** The case was given a trial date of 28<sup>th</sup> January 2023 and the respondent pleaded guilty to s.3 assault causing harm. This was not an early plea but the Detective Garda accepted that it was a plea of value.

**7.** There was a sentence hearing in the Circuit Criminal Court on the 13<sup>th</sup> of December 2023. Detective Garda Cawley gave evidence as to the offences. There was a letter of apology from the respondent expressing remorse, a short probation report which placed him at a low risk of reoffending, and letters of support from his partner and her mother who were present at the hearing.

**8.** The injured party initially made a statement of complaint on the 22<sup>nd</sup> June 2018 and although he did not subsequently cooperate with Gardaí to make further statements or provide updated medical reports, he did give consent for up-to-date photos of his ear to be taken on 28<sup>th</sup> January 2023. He declined to make a victim impact statement at the sentencing hearing.

**9.** The respondent had a number of previous convictions for public order and road traffic offences. There was one conviction for criminal damage relating to events which took place on 27<sup>th</sup> June 2018 and for which he received a 4 month suspended sentence. He had a conviction for a further public order offence in relation to events in August 2018. Detective Garda Cawley gave evidence that he had not come to any adverse Garda attention since the assault date other than those incidents.

**10.** The personal history and circumstances of the respondent were set out to a limited degree in the probation report and further elaborated on by counsel for the respondent's plea in

mitigation. The respondent comes from a large family and grew up in Limerick. There were some adverse factors in his background. The respondent told the probation officer that he sometimes has 'an issue with his anger' and the probation services indicated a willingness to work with him on this. (Unfortunately a letter from a psychotherapist concerning counselling in this regard was unsigned. For that reason it was not accepted by the sentencing judge).

**11.** At the time of the sentencing hearing the respondent was living with his partner and their young child, and he had access to his other children from a previous relationship. He left school without a Leaving Certificate but he had a good working record of being employed since leaving school, and at the time of sentencing he had been working in an off-license for two years. The respondent also told the probation officer that he used to engage in MMA fighting.

### **Sentencing judge's remarks**

**12.** The sentencing judge delivered sentence on the same day as the hearing, and made the following remarks:

*"There's no doubt that Paul Dundon has pleaded guilty to a very vicious and nasty assault on his victim, behaving effectively like an animal and biting off portion of the victim's ear. It's aggravated by the fact that significant harm was done, which increases its gravity, but also by the fact that this is a man who seems to have practiced this form of fighting called MMA and therefore, he is a trained fighter. So, instead of he being responsible and recognising that what might be acceptable in some quarters isn't acceptable when he's out in public... He has no relevant previous convictions, although he has public order convictions from some months after this offence.*

*I place the offending at the upper end of the section three assault and the appropriate headline sentence is four years imprisonment. For whatever reason, it has taken a very long time for this matter to get finalised, and it has been finalised on a guilty plea and there is evidence of remorse -- there is an apology. There is various letters pleading for him. This incident goes back to June of 2018 and since that time, I hear that he has not come to any adverse notice from the gardaí and indeed he seems to have a good work history and has been working for the past two years in an off-license. Had he entered his guilty plea in a timely manner, he would have got greater credit for it. I will reduce the sentence by nine months to leave a net sentence of three years and three months. And it is an unusual case because it is so long after the incident and he has, since his offending of August of 2018, he has behaved himself and he has undertaken counselling with Reassure and the probation service are anxious to have an involvement with him despite finding that he's at low risk of further offending. They are anxious that they would deal or have an opportunity to deal with his anger management issue that he raised with them. I think he should be particularly grateful that Detective Garda Cawley has taken a somewhat benign approach to him.*

*I don't see any value to, at this current stage, of sending him immediately to prison. He has a young child, and he seems to have turned his attention towards ensuring that this never happens again. But as encouragement to ensure that his rehabilitation is genuine, I'm going to suspend that three years and three months for a period of four years, making him subject to probational supervision for the first 18 months of that period of time. But Ms Comfort, I hope you have an opportunity of telling your client that that is the one and only chance your client gets. If he comes back before me in the next four years convicted of anything, he will serve this three years and three months before I get to sentence him on whatever other matter brings him back before me."*

**13.** The sentencing judge thus placed the offending in the upper-range of seriousness for s.3 assaults and set a headline sentence of 4 years. The judge reduced this by 9 months for mitigation including the valuable guilty plea. The judge then suspended the 3 year and 3 month sentence in its entirety for a period of 4 years.

### **Submissions**

**14.** The Director's net point is that the sentencing judge erred in imposing a fully suspended sentence. The Director submits that the decision to suspend the sentence in its entirety amounted to an error in principle and a substantial departure from what could be considered an appropriate sentence in all the circumstances, and that the judge attached undue weight to the question of rehabilitation. The Director submits that the sentencing judge was correct in placing the offence in the upper end of gravity having regard to *The People (DPP) v Dolan, McGrath & Brazil* [2020] IECA 50. An entirely suspended sentence was not justified on the basis of the period of time between offence and sentence, especially where most of the 'delay' was directly attributable to the respondent, she says, in circumstances where he entered a guilty plea on the morning the trial was listed. Neither did the question of rehabilitation or the personal circumstances of the respondent justify the suspension in its entirety of the sentence where there was no ongoing need for suspension to incentivise rehabilitation. The Director submits that the circumstances of this offence and the offender were not so "wholly exceptional" as to justify an entirely suspended sentence.

**15.** The Director further submits that the judge erred in finding that the custody threshold had not been reached and cites *The People (DPP) v Tobin* [2020] IECA 11 and *The People (DPP) v Mathew Kelly* [2019] IECA 11 as suitable comparators.

**16.** The Director submits that the judge failed to have any or adequate regard to the need for there to have been a serious general and specific deterrent element in the sentence given the vicious nature of the assault, citing *The People (DPP) v James McDonagh* [2020] IECA 323.

**17.** The respondent notes that the Director must satisfy a high bar to establish that a sentence is unduly lenient, citing *The People (DPP) v McCormack* [2000] 4 IR 356 and *The People (DPP) v Petraiskas* [2018] IECA 399. The respondent submits that the Director has failed to establish this.

He submits that the sentencing judge acted within his jurisdiction and in contemplation of all the facts, and imposed a sentence that was reasonable and, more importantly, reflected the justice of the case.

**18.** The respondent submits that the sentencing judge did not err in suspending the entirety of the sentence imposed and did not attach undue weight to the question of rehabilitation and the personal circumstances of the respondent. The judge fully acknowledged the serious and vicious nature of the assault and set a headline sentence of 4 years. The judge imposed a period of suspension that was longer than the sentence in order to incentivise rehabilitation and placed the respondent under the supervision of the probation services for the first 18 months. The respondent does not accept that he is responsible for most of the delay between the date of the offence and the sentence hearing. The evidence of the respondent's good conduct since the offence was properly taken into consideration as a mitigating factor by the judge and was not the sole reason why the sentence was suspended or only mitigation in the case.

**19.** The respondent submits that *Tobin* and *Kelly* can be distinguished from the present case. Mr Tobin had 51 previous convictions, many of which were relevant to the offence of assault causing harm, whereas in this case the respondent did not have any relevant previous convictions at the time of sentencing and was assessed as being at a low risk of re-offending. The injured party in *Kelly* was under the protection of a Safety Order and the context of the assault was intimate partner violence in the presence of a very young child, whereas no such aggravating factors arise in the respondent's case. Both offences were committed in broad daylight in a context where people were otherwise going about their business, which may be contrasted with the context in the present case. Concerning the *McDonagh* case, the respondent points out that the accused there had 31 previous convictions including convictions involving weapons and robbery.

**20.** The respondent submits that where an offence is committed impulsively, as in the present case, a general deterrent element is often not considered appropriate. Nonetheless, the sentencing judge did consider of the need for there to be a general and specific deterrent element when he gave the respondent a direct warning not to commit any offence within the four year suspended period in strong terms.

### **This Court's decision**

**21.** The Court is of the view that while the sentence was lenient, and might not have been one that it would itself have imposed at first instance, it was not unduly lenient for the purpose of an application pursuant to s.2 of the 1993 Act.

**22.** It was of course a very serious assault involving a brutal and nasty aspect insofar as the respondent bit the ear of the injured party. However, that aspect was reflected in the choice of headline sentence, with which the Director takes no issue. The net point in the case is whether the sentencing judge erred in concluding that the mitigation factors and overall circumstances of

the case warranted not only a reduction but also a suspension in entirety of the ultimate prison sentence.

**23.** There were mitigating factors in the case, including in particular the guilty plea (albeit that it was a late plea); the respondent's work record; and his personal and family background and current circumstances, which included a stable family unit to which he is an important contributor. His criminal record was relevant of course, and while he did not have previous convictions for similar types of offence, he did not come to the court as a first time offender, and he also engaged in an offence of criminal damage some months after the s.3 assault (which came to court more quickly and for which he received a sentence before the present case was dealt with). Nonetheless, the fact remains that he did not have a record of previous similar offending, and of particular importance was the fact that in the substantial period of time between this offence and the date of sentencing, he had not come again to Garda attention. This weighed heavily with the sentencing judge (and incidentally continues to be the case as of today's appeal hearing, in a context where it is now 6 years after the offence in question).

**24.** This Court is mindful of the important role of sentencing judges in having a 'feel' for individual cases before them and the margin of appreciation that must be afforded to them in balancing elements of deterrence and rehabilitation. In this case, the sentencing judge appears to have placed considerable emphasis on the fact that a period of 5 ½ years had elapsed during which the respondent had not engaged in further offending (with the exception of the criminal damage, not long after the date of the assault, for which he received a four month suspended sentence). Sometimes it is a finely balanced decision as to whether sending a person to prison may ultimately cause more harm than good, even taking into account considerations of general deterrence. Having regard to all of the circumstances in the case, we are of the view that the sentencing judge did not overstep the mark in choosing to suspend the entirety of the sentence. This was a case in which there were different factors to be balanced and the appellant was of an age (now 39 years of age) and in a situation where the imposition of a custodial sentence may well have caused more harm than good for the public interest in the long run. As we have already said, the sentence was undoubtedly lenient and another judge might well have imposed a custodial sentence without it being considered unduly severe. However, we do not think that it reached the threshold of constituting an unduly lenient sentence and we will dismiss the appeal.