



THE COURT OF APPEAL

Record Number: 229/2023

**Kennedy J.
Ní Raifeartaigh J.
Burns J.**

BETWEEN/

JOHN KEOGH

APPELLANT

- AND -

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

RESPONDENT

**JUDGMENT of the Court delivered on the 30th day of January, 2024 by Ms. Justice
Tara Burns**

1. This is an appeal against severity of sentence. On 1 March 2023, after a jury had been sworn, the appellant entered a guilty plea on a full facts basis to count 2 on the indictment, namely assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. The indictment reflected two s. 3 assault causing harm charges; a s. 2 assault charge; and a false imprisonment charge, all of which were to be taken into consideration by the sentencing judge.
2. The sentence hearing took place on 19 July 2023. The appellant was sentenced to a 3 year term of imprisonment with the final 12 months suspended upon certain conditions being complied with for a 12 month period after his release from prison, including that he come under the care and supervision of the Probation Services; attend all courses offered to him by his assigned probation officer; remain alcohol free; and have no contact with the victim.

Background

3. The appellant and the victim were married at the time of the offences. They have two children together who at the time of the offences were 12 and 10.

4. In October 2018, the appellant assaulted the victim by kicking her in the back causing her to fall to the ground. The appellant kept the victim on the ground with his foot which resulted in her sustaining bruising to her arm and head.
5. On Christmas day 2018, an argument occurred at the family home between the appellant and the victim. The argument escalated resulting in the appellant dragging the victim to the front door of the house, against which she banged her head. The appellant threw the victim out of the open hall door where she tripped over a flowerpot, which broke, and fell against the bonnet of a car parked outside. The appellant then held the victim against the bonnet of the car before he was removed and restrained by his father and another friend who were present. The appellant then dragged the victim back inside the house, pulling her hair and bending her fingers. An ambulance was called to the scene whereupon the victim spent that night in hospital.
6. In February 2019, the appellant kicked the victim on the back of her legs and told her to get into the utility room. He lit a cigarette and flicked ash on her as well as blowing smoke into her face. The appellant said to her *"I'm going to physically and mentally destroy you until there is nothing left of you"*. This incident lasted for approximately 20 minutes.
7. Each of the incidents were witnessed by the couple's two children who came to their mother's assistance. In relation to the incident which occurred on Christmas day, they ran to a neighbour's house for help.
8. Following the incident in February 2019, the victim secured a Barring Order against the appellant and made an official complaint to An Garda Síochána. In September 2019, the appellant made indirect contact with the victim, through a text message sent to her mother which amounted to a breach of the Barring Order. The appellant was ordered to leave the county where the victim resided and has complied with this Order.
9. On 1 March 2023, after a jury had been sworn, the appellant was re-arraigned and entered a guilty plea in respect of the assault which occurred on Christmas day, which plea was acceptable to the respondent on the basis that the other two assaults and false imprisonment offences would also be considered at the sentencing hearing.

Grounds of Appeal

10. By notice of appeal dated 8 August 2023, the appellant appealed against his sentence and set out his grounds of appeal as follows:-

"(1) That the learned trial judge erred in principle and in law in placing the offence to which the Appellant pleaded at the upper end of the middle range of a Section 3 assault prosecution in circumstances where the injuries sustained to the victim occurred when

she fell to the ground and there was not a significant amount of violence involved in the offence;

(2) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant pleaded guilty saving the victim and her 2 young sons from having to give evidence;

(3) That the learned Trial Judge erred in principle and in Law in imposing a three year custodial sentence as being unduly harsh and not proportionate in the circumstances;

(4) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant had apologised and expressed his remorse for his action;

(5) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant had no previous convictions and had not come to the attention of the Gardai since incidents complained of in 2019;

(6) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant had an excellent work history and was in full time employment;

(7) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Probation Services report was positive and they were willing to supervise the Appellant in his rehabilitation;

(8) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant had commenced counselling to deal with his addiction problems;

(9) That the learned trial judge erred in principle and in law in failing to give adequate weight to the fact that the Appellant had engaged fully with the Probation Services and was awaiting commencement of an anger management course;

(10) That the learned trial judge erred in principle and in law in imposing a 3 year custodial sentence in all the circumstances of the case;

(11) That the learned trial judge erred in principle and in law in failing to have sufficient regard to the mitigating circumstances of the case;

(12) That the learned trial judge erred in principle and in law in imposing a sentence of such severity in all the circumstances of the case;

(13) That the learned Judge erred in principle and in law in imposing a custodial sentence which had the effect of depriving the Appellant's 2 teenage sons of maintenance for the period of his imprisonment;

(14) Such other and further grounds as may be advanced prior to or at the hearing of the Appeal."

Personal Circumstances

11. The appellant was 42 when sentenced. He has no previous convictions and a good history of work since teenage years. He had expressed his remorse and apologised for his behaviour. He was attempting to rebuild a relationship with his sons, particularly his older son. The appellant had also commenced addiction counselling on the advice of his probation officer and intended to commence a domestic violence course with "MOVE" (Men Overcoming Violent Emotions).

Sentencing Determination

12. On 19 July 2023, the sentencing judge pronounced judgment in the matter. He stated:-

"Mr Keogh, in considering the appropriate sentence, which I am now duty bound to impose upon you. I have listened carefully to what your counsel, Mr Byrne, has said, on your behalf and I've had regard to the victim impact evidence, given by [the victim], to the evidence outlined by Garda Walsh, to the content of the Probation and Welfare Service Report, and, to the letter from Ms Eva Maria Dunne, confirming that you have recently started to attend for counselling. I have also had regard to the principles enunciated by the Superior Courts, which I must consider, prior to passing sentence and which form part of our jurisprudence. As I have said in previous cases, Mr Keogh, the act of sentencing is not an act of vengeance, it is an act of justice. And therefore, a sentence must be proportionate to the crime. Whilst a sentence contains an element of punishment and deterrence, it must also contain an element of rehabilitation and it must reflect any credit due to a person, for the manner in which they have dealt with the issue before the Court, should same arise."

13. In dealing with the aggravating and mitigating factors in the case the judge stated:-

"Looking at the aggravating factors, as I view them in this case, the circumstances which were outlined to the Court on a full facts' basis, involving three incidents of what I view as serious domestic violence, involving injury to [the victim], as your primary victim and what could only have caused distress and trauma to what I regard as the secondary victims here, your two sons. The very fact there is never a good time for this sort of action or behaviour but the fact that one of these incidents in fact, occurred on Christmas Eve, with two small boys in the house and all the

excitement that is associated with Christmas Eve is just a revolting element of this offence, as far as I am concerned. The relationship between you and your primary victim,..., is a matter which by law by section 40 of the Domestic Violence Act 2018, I'm required to take into account. But quite apart from the law it's a matter which I would myself regard as an aggravating factor, in the circumstances. The fact that some of the injuries caused, on the full facts' basis, concerned injury to a victim's head is, in my view, an aggravating factor. Everybody in this room can be aware of the consequences of causing an injury to somebody's head.

In terms of mitigation, I accept that you have pleaded guilty, although it was not at the earliest opportunity. I accept that you have no prior convictions. Whilst you denied everything to An Garda Síochána, I was told. I accept that you have cooperated with the probation and welfare services, although they still would view you as being of moderate risk and having potentially limited insight in your wrongdoing. The fact that you have now started to undergo counselling, I view as a mitigating factor, although you couldn't be described as being proactive in that regard and it seems that your attendance for counselling is only as a consequence of your attending at the Probation and Welfare Services. I accept that your apology, that you have offered here in Court goes some way in mitigation and from listening to you, I would accept that certainly insofar as the relationship with your sons is concerned, it's a genuine apology and that you are anxious and keen to repair the relationship between you and your sons, if at all possible to do so. It's urged upon me that you have been paying maintenance in the sum of €50 per week per child since you left the home in March 2019. I don't view that as a mitigating factor, but had you not done so, I would have viewed it as an aggravating factor. You are obliged by law, in any event, to maintain your children."

14. Imposing sentence the judge stated the following:-

"Turning to the issue of sentence, having regard to everything I have said, and also having regard to the provisions of section 40 of the Domestic Violence Act 2018, I am of the view that a sentence of three years' imprisonment is warranted in this case. However, in light of the mitigating factors ... to which I have referred I am going to suspend the last 12 months of that three-year sentence for a period of 12 months [on certain conditions]."

Submissions of the Parties

15. The appellant's submission is that the sentencing judge erred in placing the appellant's offending at the upper end of the middle range of offending given the circumstances of the case; and in failing to afford sufficient weight to the mitigating factors present in the case, particularly his previous good record, excellent work history, expression of remorse and his engagement with the Probation Services. It was argued that the sentence imposed was

unduly harsh and disproportionate and deprives his children of maintenance for the period of his imprisonment.

16. The respondent's submission is that the sentence imposed while substantial and significant, was careful and reasoned and had full regard to all the matters advanced on the appellant's behalf. Further, it is submitted that the sentencing judge adequately reflected the gravity of the offending.

Victim Impact Statement

17. The victim gave a victim impact statement at the sentencing hearing. She outlined the mental, physical and financial suffering the assaults had caused, not only upon herself, but also on her children.

Domestic Violence Act 2018

18. Counsel for the respondent erred in submitting to the sentencing judge that s. 40 of the Domestic Violence Act 2018 was applicable when sentencing the appellant for the offence which he had pleaded guilty to. This section did not become operational until 1st January 2019 whereas the offence at issue occurred on 25 December 2018. This error was repeated in the written submissions made on behalf of the respondent, however it was corrected at the oral hearing before us.
19. While the sentencing judge referred to the section when pronouncing sentence, it is clear that he was of the opinion that an assault committed in a domestic setting was an aggravating factor in its own right and did not solely rely on s. 40 of the Domestic Violence Act, 2018, when treating the domestic aspect of the offence as an aggravating feature. Accordingly, an error in principle is not reflected in this regard.

Comparator Cases

20. A number of comparator cases were referred to by the appellant, to include, *The People (DPP) v. Kelly* [2019] IECA 11; *The People (DPP) v. Connor* [2020] IECA 255; and *The People (DPP) v. Sutton* [2020] IECA 280.
21. In *The People (DPP) v. Kelly* [2019] IECA 11, an undue leniency appeal, the Court of Appeal re-sentenced the appellant in relation to a s. 3 assault substituting a wholly suspended 2.5 years term of imprisonment with a headline sentence of 4 years imprisonment, which after mitigation was reduced to a sentence of 2.5 years imprisonment with the final 18 months suspended. The assault perpetrated on the victim had involved her being punched to the face and repeatedly punched in the head and body after she fell to the ground. The accused had handed himself into Gardaí, had no previous convictions and a good history of work.
22. *The People (DPP) v. Connor* [2020] IECA 255, again an undue leniency appeal, the Court of Appeal re-sentenced the appellant in respect of a s. 3 assault, false imprisonment and

production of a knife offence substituting a wholly suspended 2.5 years term of imprisonment to a sentence of 2.5 years imprisonment with the final year suspended. The victim had been subjected to a protracted assault involving being punched in the face and being cut on her face with a knife. The appellant entered an early guilty plea, had no relevant previous convictions and made admissions to Gardai.

23. *The People (DPP) v. Sutton* [2020] IECA 280, again an undue leniency appeal, the Court of Appeal resented the appellant in respect of a s. 3 assault substituting a 2 year term of imprisonment, with the final 12 months suspended to a sentence of 2 years and 4 months imprisonment simpliciter. The victim had been subjected to a protracted assault involving being punched, kicked, dragged to the ground and stabbed. The appellant, who had pleaded not guilty had no previous convictions, a good employment record and a good relationship with his children.
24. Counsel for the appellant submits that these comparator cases consider assaults of a more serious nature where sustained violence was perpetrated on the victims resulting in more significant injuries being sustained. Having regard to the more serious nature of the assaults in these cases, it is submitted that the sentence imposed in the instant case is excessive.
25. Counsel for the respondent submits that the instant case can be differentiated from the comparator cases in that while the assault perpetrated in the instant case was not as serious as the assaults in the comparator cases, the sentencing judge was considering continuing behaviour over an extended period of time.

Discussion and Determination

26. This Court has stated on many previous occasions that comparator cases can be of limited assistance, particularly when the comparator cases are undue leniency appeals, which is the case in the instant matter.
27. While the assaults perpetrated in the comparator cases were of a more serious nature, the sentencing judge in the instant case was sentencing in respect of quite a different situation, namely three assaults and a false imprisonment charge, occurring over a period of time from October 2018 to February 2019. Furthermore, this was in a familial situation of a family living together where the injured party was subjected to three assaults, in the family home, over a period of 4 months in the presence of her young sons. The assault in respect of which the appellant pleaded guilty occurred on Christmas day, which as the sentencing judge noted is a particularly special day for families with young children. The victim spent that night in hospital. Furthermore, that assault occurred in the presence of an in-law and a friend which portrays the level of degradation which the victim was subjected to. In addition, the appellant did not have the mitigating factors available to him which were present in two of the comparator cases, namely early co-operation with the guards and an early guilty plea.

28. Accordingly, while the assaults perpetrated on the victim were less serious than the single incident assault offences which were being considered in the comparator cases, the number of incidents involved, all of which occurred in the family home, the presence of the couple's children, and the lack of the same mitigating factors as present in most of the comparator cases differentiates this case from the comparator cases.
29. The Court notes that the appellant has an excellent work history and is attempting to rebuild a relationship with his sons, particularly his eldest son. Nonetheless, the three events which the sentencing judge was dealing with represented very significant offending and while there were mitigating factors present, the sentence imposed cannot be categorised as reflecting an error in principle and was within the sentencing judge's margin of appreciation.

Conclusion

30. The Court is of the opinion that an error in principle has not been established by the appellant in the sentence imposed upon him. Accordingly, his appeal against sentence is dismissed.