



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Mahon J.**

**302CJA/15**

**In the matter of section 2 of the Criminal Justice Act 1993**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**Mark Hayes**

**Appellant**

**Respondent**

**JUDGMENT of the Court (ex tempore) delivered on the 25th day of November 2016 by Mr. Justice Sheehan**

1. Mark Hayes pleaded guilty to assault causing harm at the Circuit Criminal Court in Ennis on the 17th February, 2015, and on the 26th November, 2015 received a sentence of three years imprisonment suspended for a period of three years on condition that he keep the peace and be of good behaviour for that period of time and refrain from alcohol and further that he remain under the supervision of the Probation and Welfare Service for a period of three years and comply with all their directions. A conviction for malicious damage was taken into consideration.
2. The Director of Public Prosecutions now applies to this Court for a review of that sentence pursuant to s. 2 of the Criminal Justice Act 1993, on grounds of undue leniency. The offence occurred sometime after 3.00 am in the morning in the bar area of The Oakwood Arms Hotel, Shannon, when the night porter was clearing the bar. The respondent and his brother had attended a birthday party earlier that evening and it was also the morning following Clare's victory in the all Ireland hurling final.
3. In the course of what the learned sentencing judge described as a classic barroom brawl the respondent assaulted the night porter, punching him a number of times in the head. His brother who was also charged and who also pleaded guilty appears to have initially intervened to restrain the respondent, but then got involved himself. Garda Colin Moriarty stated that when he got to the hotel, the injured party was bent over a chair and had blood coming from his head. He described the respondent as being irate and complaining that he had been assaulted.
4. While the injured party's prognosis was for a complete recovery, he nevertheless had to have three stitches inserted to his scalp laceration and urine analysis revealed a trace of blood in his kidneys consistent with being struck in that area by the respondent's brother.
5. In the course of the victim impact report the injured party stated that he had a lot of sleepless nights as a result of the injuries he received, that the incident had adversely impacted on his family life and further that he had become quiet and withdrawn.
6. The respondent is 27 years old. He was born in Birmingham, but he has lived all his life in Shannon. His parents separated when he was young and he was brought up by his grandparents. He has eighteen previous convictions including five for public order offences, one for assault causing harm in 2008, in respect of which he received a three year suspended sentence and a subsequent conviction for violent disorder, as a result of which he served two years in prison. At the time of the sentence hearing the respondent was in a relationship and his girlfriend was expecting their first child.
7. A senior probation officer who prepared a report for the court said that a common thread running through the respondent's previous convictions was his problem with alcohol. The probation officer noted that it was to the credit of the respondent that following this assault he acknowledged this problem and had taken steps to address it, avoiding high risk situations and disassociating from old friends who continued to be engaged in anti social behaviour.
8. He further reported that the respondent was open to taking part in an intensive one to one anger management programme and concluded that the respondent could benefit from being placed on formal supervision subject to three conditions: (i) that the respondent remain alcohol and drug free, (ii) that he does not re-offend and (iii) that he engages in an appropriate intensive programme of anger management as directed by the Probation service.
9. The injured party received €5,000 by way of compensation from the respondent and his brother.
10. Counsel for the Director submits that the sentencing judge fell into error by failing to attach appropriate weight to the aggravating factors and giving too much weight to mitigation resulting in a sentence that was not in the public interest. In the course of his submissions counsel maintains that at the very least some period of actual custody ought to have been imposed especially in light of the respondent's previous convictions. Finally counsel suggests that the sentencing judge might at the very least have required the respondent to perform community service in lieu of an actual sentence of imprisonment.
11. Counsel for the respondent while acknowledging that his client was fortunate to avoid an immediate custodial sentence, maintains nevertheless that the sentence imposed was one that was both just and proportionate.
12. In the course of detailed sentencing remarks the learned trial judge carefully considered all the circumstances in which this assault arose, the actual assault, and the effect of that assault on the victim. He correctly identified the aggravating and mitigating

factors. He marked the seriousness of the offending behaviour by imposing a headline sentence of three years imprisonment and went on to set out his reasons for fully suspending that sentence relying in particular on the probation report.

13. The principles governing the law in relation to undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993, were summarised in a judgment of the Court of Criminal Appeal in the *People at the Suit of the Director of Public Prosecutions v. Derrick Stronge* [2011] 5 JIC 2301, wherein it was stated that:-

"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are:-

(i) The onus of proving undue leniency is on the D.P.P.;

(ii) To establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) In the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) This task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) The fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) It is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified and finally;

(vii) Due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

The relevant cases are *The People (DPP) v. Byrne* [1995] 1 ILRM 279, *The People (DPP) v. McCormack* [2000] 4 I.R. 356 and *The People (DPP) v. Redmond* [2001] 3 I.R. 390."

14. In applying these principles to the present case, we note in particular what Prof. O'Malley says at para. 654, *Sentencing Law and Practice* (3rd Ed.) at p. 184:-

"Evidence that an offender has made genuine efforts to deal with an addiction or some other problem contributing to the commission of the crime may influence sentence perhaps to a significant degree. It may on occasion convince a court not to impose a custodial sentence even though the nature of the offence and the offender's record might seem to call for one. When leniency is extended in these circumstances, it is not so much as to reward offenders for their efforts although that may be a consideration, but rather as a recognition that society is better served if offenders are given an incentive to persevere with whatever steps they are taking to address their problems. The longer interval during which an offender has desisted from drugs, alcohol or whatever the apparent source of the problem may be the more inclined a court will be to avoid passing a custodial sentence unless the offence was so serious that custody cannot be avoided. Even then the custodial terms should be as short as possible."

15. It seems to us that this is precisely what the sentencing judge did. In addition to the usual terms of suspension, the respondent in this case is required to comply with the directions of the Probation Service which will obviously require his undergoing in the first instance an intensive six months anger management programme. This is a suspended sentence with teeth and in our view while clearly a lenient sentence, it is not one which could be properly called an unduly lenient sentence and therefore we dismiss the application.