



The President

Baker J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

MATHEW KELLY

APPLICANT

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered by on 15th day of January 2019 by Birmingham P.

1. This is an application brought by the DPP pursuant to s. 2 of the Criminal Justice Act 1993 seeking to review a sentence on grounds of undue leniency. The sentence sought to be reviewed is one of two and a half years imprisonment, suspended in full, that was imposed in respect of a s. 3 assault offence on 26th July 2018 in the Circuit Court in Wicklow.

2. The background to the case is to be found in events that occurred on 17th November 2017 at Roundwood in Wicklow. The incident involved an assault on the former partner of the respondent, Mathew Kelly, who is the mother of his child. On the occasion in question, the injured party was in the vicinity of a crèche which is located close to her home, along with her two-year old daughter whom she was picking her up from the crèche. Indeed, it appears it was the little girl's first day there. It appears that there may have been some tension as the little girl was dropped off at the crèche, but the real difficulty arose at the collection stage. At that point, an incident developed, and in the course of that incident, at a time when the respondent had his daughter in his arms, he put her down and then punched his ex-partner in the mouth with a closed fist. She fell against the window of the crèche and fell to the ground. The respondent then repeatedly punched his partner to the head and body while she was on the ground. The victim impact report also refers to kicking while on the ground. In the aftermath of the incident, the respondent went from the scene to the local Garda station and said there "you may lock me up". The Judge, in the course of his sentencing remarks, described the assault as cowardly, vicious and violent. It is of some considerable importance to note that the injured party had obtained a Safety Order from the District Court in Bray and that that order of the Court was in force at the time of this assault.

3. In terms of the respondent's background and personal circumstances, he was born in July 1992, and thus was aged 25 years and was just short of his 26th birthday at the time of the sentence hearing. He had no previous convictions and had a good and varied work record. This included a carpentry apprenticeship, qualifying as a barber, working in the hospitality industry, spending time in Australia for a period where he worked in several different capacities before returning to Ireland where he again worked in a number of different capacities and also explored opportunities to better himself by pursuing a course with an educational institute in Bray. Before the Court was a very supportive testimonial from his current employer with whom he had been working for some 18 months. The Court heard that he was suffering from depression and anxiety and that in the aftermath of the incident, he attended for counselling regularly. The Court, through a report furnished by his General Practitioner, heard about a significant incident that had occurred in May 2017 which was outlined to the Court.

4. For his part, it is accepted on behalf of the accused, now respondent in this appeal, that the sentence was lenient, but it said it was not so lenient as to be unduly lenient and so as to cross the threshold for intervention. It said that this was a suspended sentence with teeth, in that there was a requirement to attend a violence perpetrator programme as directed by the Probation Service. The phrase "suspended sentence with teeth" appears to be taken from the case of DPP v. Hayes, an earlier decision of this Court.

5. In the incident, the injured party suffered a deep laceration to the inside of her lip and swelling and bruising to the temple on the right side of the face, as well as bruising to the leg, thigh, arm and back of the neck. She was treated by her General Practitioner with painkillers and anti-inflammatories and she took some two weeks off work. However, the impact on her and on her lifestyle and her quality of life went beyond the physical injuries. She refers to a loss of confidence. She describes herself as "living in a box", as a "prisoner in her own home". It is the case that at the time of the sentence hearing, the injured party and the respondent and his family were living in the same small village and this was a source of stress and tension for her.

6. In the course of his sentencing remarks, the Judge described the assaults as cowardly, vicious and violent, adding that the offence was horrific and shocking, that it was committed by someone who, as a male, was stronger and in a dominant position. He pointed out, correctly, that the assault was entirely unprovoked. He then proceeded to categorise the offence as falling in the middle to higher range of s. 3 assaults, though apart from so categorising it, did not proceed to nominate a headline sentence. The Judge described the case as "an extremely marginal one". In doing so, he was indicating that the decision whether Mr. Kelly would be required to actually serve a period of time in custody or not was a very marginal one. The DPP, before this Court, says that this was not a marginal case, but was clearly a case that called for at least some element of custody. The Judge then proceeded to impose a sentence of two and a half years imprisonment, but suspended it, making it a condition, as we have seen of the suspension, that Mr. Kelly would attend and engage with the programme for perpetrators of domestic violence. The Director says if two and a half years is regarded as the sentence after credit for mitigation had been allowed, then no real issue could be taken with the assessment. If,

however, it was to be regarded as a starting point, or the pre-mitigation sentence, then it was too low. If the two and a half years took into account mitigation, the Director says, that the decision to suspend it in its entirety was an error and must necessarily have involved double discounting. The respondent says that the Director has failed to meet the high threshold for an intervention by this Court. It said that this is particularly so if regard is had to the fact that this was a suspended sentence with teeth.

7. The area of disagreement between the parties is a confined one, but nonetheless, a fundamental one. The Director does not take issue with the identification of two and a half years as an appropriate sentence, or indeed with the proposition that there would have been scope thereafter for partial suspension, but says that suspending the sentence in full was a step too far. She says that this was not a case that was extremely marginal as between custody and an entirely non-custodial disposition. On behalf of the respondent, the seriousness of the offence is acknowledged, as is the fact that another Judge on another day, or perhaps even the same Judge on another day, might have proceeded to impose an actual custodial sentence to be served, but it said that the sentence that was imposed, suspended in full, was one that was within the available range.

8. This Court regards this as a very serious offence. The nature of the assault, the location of the assault, the fact that it was committed in the presence of the school community and in the presence of his own child all are factors going to the seriousness of the offence. A very particular dimension of seriousness is provided by the fact that it was committed against someone who had invoked the protection of the Court by seeking and obtaining a Safety Order. On the other hand, the Court recognises that there were significant mitigating factors present here including the reaction of the respondent in making his way to the Garda station and there making admissions, thus obviating the need for arrest, detention and interview, following that up with an early plea, the absence of any previous convictions, indeed, the positive good character that was evident, the good work record of the respondent, and this to mention but some of the factors.

9. Serious and really unpleasant as this case was, were it not for one factor, the Court would not have quarrelled with the description of the case as extremely marginal as "one on the edge", to borrow a phrase that was used in the course of the appeal hearing. However, in our view, the fact that an assault of such a serious nature with so many aggravating factors was committed against someone who had invoked the protection of the Court and obtained a Safety Order moves the case out of that category of the extremely marginal or the cases on the edge and into a different category which required custody and where the total absence of a requirement to serve any period in custody amounted to an error.

10. The Court must, therefore, quash the sentence and does so and proceeds to resentence. In doing so, we take into account the fact that in the period since the sentence hearing, Mr. Kelly has cooperated fully with the Probation Service. We also note that he has engaged constructively with the MOVE organisation, the Men Overcoming Violent Emotions programme. That is to his credit. We also take into consideration and are conscious of the fact that having avoided custody in the Circuit Court, that he is now facing a period in custody and that will inevitably be the source of deep disappointment for him.

11. The Court will deal with the matter as follows. We will identify a headline or pre-mitigation sentence of four years and we will mitigate that in the first instance to one of two and a half years, at the same time indicating that there is, in our view, scope for further concession by way of partial suspension. In our view, suspending half of that sentence, or 15 months, would have been appropriate, and had we been sentencing at first instance, that is the sentence that we would have been minded to impose. However, in a situation where Mr. Kelly is being sentenced at this stage, having initially avoided custody altogether, we will go further and we will suspend all but the final 12 months.

12. In summary, we will quash the sentence of two and a half years that was suspended in full that was imposed in the Circuit Court and for that sentence substitute a sentence of two and a half years imprisonment with the final 18 months suspended, therefore, a net 12-month sentence.