

The President

Mr Justice Peart

Mr Justice Edwards

IN THE MATTER SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

ALAN KILMARTIN

RESPONDENT

JUDGMENT of the COURT (Ex tempore) delivered by The President on the 9th day of March 2015

1. This is an application by the Director of Public Prosecutions for the review of the sentence that was imposed on the respondent, Mr. Kilmartin, on 25th November 2013, and on that occasion, the judge imposed a sentence of three years imprisonment, suspended for five years on conditions which I will refer to in a moment.

2. The accused pleaded guilty in February 2013 to a series of crimes arising out of an offence that occurred some three years ago. It was, by any standards, and it is not in dispute, a serious assault. I should mention that the victim of the events of this night testified in the Circuit Court at the sentencing hearing as to the impact that this assault had on her and it is perfectly clear from that impressive testimony that this attack had very grave and long-term consequences on the victim. It is also her wish that her name would not be disclosed and I propose not to make any reference to her name, or indeed her general circumstances.

3. So what happened? The respondent, was employed as a security man in the area of the victim's residence. He called, on a night three years ago, to her home and he gave her information about possible interference with her car, all that would be normal, legitimate, to be expected of a security person. Then he came into her apartment, which surprised her, understandably, and he made a pretext enquiry about the water in her apartment and she went off to check that and returned and he then set about attacking her with a metal implement that he had brought with him for the purpose. He beat her about the head very severely, causing her head injuries, including lacerations. She also had protective injuries when she tried to protect her head from the blows. She suffered fractures of her fingers; one of those fractures was a fracture of the thumb which has resulted in severe restriction of movement of her thumb.

4. Her physical injuries, however, were only a part of the problem. The circumstances were also very threatening. As she cowered in terror and pleaded for him to stop, he told her to shut up and he told her to take off her clothes. So it is understandable that this assault would have long-term severe effects on the unfortunate victim and that has, indeed, proved to be the case. It has affected her physical wellbeing, as I have mentioned, and her psychological wellbeing very severely; her confidence; her employment prospects and in the multiplicity of ways in which this kind of event can have on somebody.

5. So, what was behind it all? Well, the accused, in fairness, pleaded guilty to the severe crimes and the matter came before the Circuit Court and obviously the learned trial judge or sentencing judge was concerned with what was behind all this.

6. First of all, it may be said that the accused man is in his early 30s; he had no previous convictions; he had been seen by a psychiatrist and had been detained in a psychiatric unit, voluntarily, after this episode. It was accepted that he had attempted to take his own life. He had acknowledged what he had done and undoubtedly was remorseful; there was no question about that. Was there a psychiatric explanation? In fairness to the accused man, the respondent and his advisers, they did not put forward a medical excuse to relieve him of culpability or responsibility for his actions, that was not done, but there was psychiatric evidence called. It was possible that the condition or the events might have been related to a sleep deprivation condition that had been considered, at least as a potential diagnosis, but it had not been possible to firm that up.

7. What was clear at the sentence hearing was that the respondent was suffering from a depressive illness, a psychiatric depressive illness. So, the hearing proceeded with the evidence of the Garda as to the circumstances of the crime and the evidence given by the victim of the impact on her and there was some discussion as to the psychiatric evidence and the judge adjourned the matter from July until November to consider sentence. He left open the opportunity of calling psychiatric evidence, and that is what happened and Dr. O'Mahony gave evidence. He was then the treating doctor and now the treating doctor and described the condition of depression that the respondent is suffering from.

8. So, in all the circumstances, the trial judge came to sentence, which he did in November, and he determined the sentence as follows. He said "I am going to impose a sentence of three years which I am going to suspend for a period of five years from today" on condition that he bound to the peace for the same period and so on, and on condition that the respondent comply with the requirements of Dr. O'Mahony, the psychiatrist.

9. The judge acknowledged that this was a serious matter and that the injured party had suffered very severe bruising to her head,

lacerations and fractures to her fingers. It was a very savage attack, he said. The evidence of the prosecution was quite coercive so that is mentioned bringing context on his plea, that there was a very strong case against him. So, in other words, the judge was acknowledging the value of a plea of guilty, which the courts have always recognised, but he was putting it in context that when there was a very strong case that it was less valuable than might otherwise be the case, but that is not to undervalue the basic value of plea to the Court, and more particularly, to the victim.

10. So, the injured party was very severely traumatised and the judge referred to the victim impact statement. He then went on to mitigation. He said that the appellant had made admissions; he had no other convictions at the age of 33, he had lost his job. This offending was very odd behaviour, it was very difficult to understand which is why he was very interested to get psychiatric evidence. He has been suffering from clinical depression, and in those circumstances the judge felt that that was the appropriate sentence.

11. This Court is satisfied that there was indeed mitigating material in the case, including the accused's plea of guilty and the fact that the accused was suffering from a psychiatric illness. Those are genuine, mitigating features. There was, of course, an obligation on the learned trial judge to assess the sentence by reference to very well-known principles and it is not a complicated process in theory, although it can be a difficult to practice.

12. The Court has to look at the crime and it has to look at the accused. In looking at the crime, it is the crime committed by that particular accused; the Court has to consider whereabouts on the scale of severity that crime lies. It has to consider at that stage the aggravating features of the crime and any mitigating features of the crime itself rather than of the accused, and in this case, there were certainly some very severe aggravating features. The assault itself was savage and brutal; there is no dispute about that. It was, to some degree at least, planned and premeditated because the perpetrator came armed with a weapon. It was a terrifying ordeal. It continued for some time during which he threatened her, told her to shut up and told her to take her clothes off. It left the victim with disfigurement and with disability and it had the other effects that I have mentioned. The judge had to consider that and then he had to consider such mitigating features as there were to arrive at his sentence.

13. The function of this Court is, of course, not to substitute its judgment for the judgment of the sentencing Court. The Court has to say did the judge err in principle? Did he make a mistake? Was his approach wrong? It is not sufficient for the Court to be satisfied that that the judge imposed a lenient sentence or even a very lenient sentence. It has to be satisfied that the sentence imposed by the judge was outside the zone of acceptability in a proper approach to sentencing.

14. In the circumstances of this case, this Court is satisfied that the judge did err in principle, that there was no basis on which the learned trial judge could properly have decided that this was a case for a wholly suspended sentence in view of the severity of the crime. Although there were mitigating features, there was no way that the judge was legitimately entitled to decide on a wholly suspended sentence.

15. So, the Court is satisfied that the application of the Director must succeed in this case, that the sentence was unduly lenient and the Court will proceed to impose, in due course, having heard what Mr. Sutton has to say on behalf of the accused man, will impose the appropriate sentence as of this date, which, as we understand it, is our function.

Approved: Ryan P.