THE COURT OF APPEAL

[276/17]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

SEAN JACKSON

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 4th day of April 2019 by Ms. Justice Kennedy

Introduction

1. This is an appeal against severity of sentence. The appellant was convicted of assault causing serious harm contrary to s.4 of the Non-Fatal Offences Against the Person Act, 1997 and on the 4th December 2017, a sentence of five years' imprisonment was imposed in Dublin Circuit Criminal Court.

Background
2. On the 23rd August 2014, following what appears to have been a minor interaction between the appellant and the injured party in the smoking area of a pub, the appellant left the area but returned shortly thereafter and bit off a large portion of the injured party's ear. A witness to the proceedings notified the Gardaí and identified the appellant as the assailant in this case. The appellant, who claimed to have no memory of the event, pleaded not guilty. The matter proceeded to trial and on the 6th November 2017, the appellant was found guilty.

Personal circumstances
3. The appellant has 24 previous convictions, the majority being for road traffic offences with 3 for possession of controlled drugs and 2 convictions under the Criminal Justice (Public Order) Act. At the time of sentencing, the appellant lived with his partner and her daughter and the Court was informed that the appellant's six-year-old daughter was residing with the appellant up to four nights a week because her mother was having housing difficulties. Two work related testimonials were handed into the Court, attesting to the appellant's work record.

The Sentence
4. In sentencing, the judge highlighted the serious nature of the assault and the grave consequences suffered by the injured party as a result of the appellant's actions. The judge noted that the appellant's attack on the injured party was unprovoked. He observed that the appellant was intoxicated at the time of the offence. He identified a pre mitigation sentence of seven years' imprisonment and having considering the mitigating factors he reduced the sentence to one of 5 years' imprisonment. He classified the mitigation as "moderate" and noted the appellant's work record, his remorse and the unlikelihood of reoffending in the same manner. The judge referred to the appellant's previous convictions and considered them to be largely irrelevant.

Ground of Appeal
5. The appellant seeks to appeal his sentence on the basis that the sentence imposed was unduly severe in all the circumstances.

Submissions of the appellant
6. Mr. Fitzgerald S.C. for the appellant submits that the headline sentence of seven years identified by the trial judge was too high and refers to *The People (DPP) v. Fitzgibbon* [2014] IECCA 12 where Clarke J. (as he then was) identified pre-mitigation sentences for offences of assault causing serious harm in the mid-range of between four to seven and a half years'. The appellant submits that the sentencing judge did not refer to such a range and did not place the offence on the scale.

7. Moreover, in written submissions it is submitted that the judge erred in considering the appellant's intoxication and the fact that the attack was unprovoked as being aggravating factors.

8. The appellant refers to *The People (DPP) v. Lyons* [2017] IECA 156 and *The People (DPP) v. Foley* [2009] IECCA 47. The former case involved a s.4 offence to which the appellant had pleaded guilty where the appellant punched the injured party, causing him to fall and hit his head, resulting in a serious brain injury. There was significant mitigation present in that the appellant called an ambulance and remained at the scene to assist, he apologised to the family the next day, he co-operated fully with the Gardaí and he made full admissions. He had no previous convictions and he expressed remorse. He also offered compensation notwithstanding limited means. The Court of Appeal held that the trial judge erred in holding that the lower end of the mid-range for the offence was a sentence of six years and substituted a sentence of four and a half years. The latter case involved an appeal against undue leniency where the appellant pleaded guilty to an offence contrary to s.3 of the 1997 Act, that of assault causing harm concerning an assault where the appellant bit off a part of the victim's ear, the sentence was increased to one of two years with eighteen months suspended. We observe that referring to cases of undue leniency in circumstances where the appeal is against severity of sentence as a comparator is of very limited assistance.

9. The appellant submits that the sentencing judge erred in failing to suspend a portion of the appellant's sentence, particularly where

the judge accepted that the appellant was unlikely to reoffend in the same manner.

Submissions of the respondent
10. The respondent submits that the imposition of a five-year sentence was not excessive in respect of the serious nature of the offence with the significant consequences suffered by the injured party and that the sentencing judge's assessment of a starting point of seven years was correct and would, per *DPP v. Fitzgibbon*, place the offence at the upper end of the mid-range.

11. The respondent argues that the appellant was afforded substantial discount for mitigation of over 25% and while the trial judge did not expressly refer to the appellant's family circumstances in mitigation, it is submitted that the judge's classification of the mitigation as "moderate" was correct.

12. Furthermore, the respondent says that the appellant's reference to *The People (DPP) v. Lyons* is unsuitable as the case is of a very different nature due to the manner in which the injury was sustained and in light of the actions of the appellant which included calling an ambulance, remaining at the scene, apologising to the family, cooperating with the Gardaí and offering compensation.

13. Similarly, the respondent submits that *The People (DPP) v. Foley* is not a suitable comparator case because while it does involve disfigurement through biting of an ear, the plea entered was in respect of a s.3 offence and as such, sentencing comparisons are of little benefit.

Discussion
14. This offence concerned a violent and unprovoked attack on the injured party with disastrous and largely foreseeable consequences. The appellant left the smoking area and returned to the injured party following what was described by the judge as a very minor altercation indeed. A violent assault resulting in disastrous consequences in most cases necessitates a custodial sentence. The judge properly considered this to be a grave offence.

15. The appellant argues that the judge was not entitled to take into account the fact of the appellant's intoxication or that the attack was unprovoked. We reject this contention.

16. The appellant's moral culpability was high, his act was a deliberate one and with serious and largely foreseeable consequences. In assessing the gravity of the offence, the judge was mandated to take into account that the appellant returned to the injured party and that the attack was without provocation. He rightly observed that intoxication is not a defence, a drunken intent is nonetheless an intent and in the present case, the appellant must bear responsibility for his actions. In assessing the gravity of an offence, a court must consider the moral culpability of the offender and the consequential harm done. An intention to cause harm represents the highest level of culpability. Biting another person's ear can cause a serious level of harm. The fact that it is done in an intoxicated condition is not a mitigating factor. Intoxication may go some way towards explaining an action but does not excuse the commission of a crime. The judge in this instance properly did not consider the appellant's intoxication to be a mitigating factor and indeed appears to have considered it in a neutral way. The appellant can have no complaint in this respect.

17. The judge in placing the pre mitigation figure at seven years, placed the offence in the upper end of the mid-range and this court can find no error in this respect when we consider the aggravating factors to include the devastating impact on the victim. In reducing the sentence by two years to one of five years' imprisonment, full credit was given for the matters urged in mitigation.

18. We find no error and the appeal is therefore dismissed.