**THE COURT OF APPEAL**

**[4 CJA/2018]**

Birmingham P.

Edwards J

Hedigan J.

**BETWEEN**

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

**APPLICANT**

**AND**

**KRZYSTOF NIEPOGODA**

**RESPONDENT**

**AND**

**[3CJA/2018]**

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

**APPLICANT**

**AND**

**KAMIL LACKI**

**RESPONDENT**

**JUDGMENT (Ex tempore) of the Court delivered on the 8th day of October 2018 by Birmingham P.**

1. These are applications brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review sentences imposed on grounds of undue leniency. The sentences that are sought to be reviewed were imposed on 8th December 2017 at the Circuit Criminal Court in Carlow. On that day, sentences were imposed in respect of offences of arson, false imprisonment, s. 3 assaults, criminal damage as well as unlawful cultivation of Cannabis. The longest sentences imposed were ones of six years with one year suspended which were imposed in respect of the counts of false imprisonment. Other sentences were made concurrent. There is no dispute between the parties about the legal principles that are applicable in cases where it is sought to review sentences on the grounds of undue leniency, and indeed, the principles have not been in controversy ever since the first case – the DPP v. Byrne.

**Background Facts**

2. The background to this case is that on 25th April 2017, pleas of guilty were entered by both respondents. That was on the day when the case was listed for trial. The charges had their origin in an incident that occurred in mid-December 2015.

3. The first-named injured party, Mr. Daniel Wanzuk, was invited to spend Christmas at Borris, County Carlow, with the two respondents. He arrived at their home, Shalom, at Pound Lane, Borris on Christmas Eve, 24th December 2015 in response to the invitation. When he arrived, he was falsely imprisoned, assaulted, and threatened. The incident then continued over the following days. Initially, he was punched all over his body and he was hit with what was described as a samurai knife, in its sheath, and a baseball bat. These implements would appear to have been used by the respondent, Mr. Lacki. Thereafter, he was brought to an address in Milford, Carlow, in the boot of the defendant's car. At this stage, he was bound and gagged. He was taken out of the boot of that car and put into the boot of his own vehicle which had been driven there in convoy with the car in which the injured party was imprisoned initially. Mr. Wanzuk's vehicle was then set on fire with the victim still in the car boot. Duct tape, which had been applied to his mouth, had been removed so he could be questioned. Because of this, the victim managed to bite his way through the remaining duct tape in order to free himself. He got out of the boot and the defendants then attempted to put the victim back into the car boot, but they were unable to do so such was the heat from the vehicle as a result of the fire which was developing. The

respondents then knocked him to the ground and started kicking him. The victim was then brought to another location at Ballytighlea, Borris, where they held him over a bridge by his feet and threatened to kill him. Then, he was brought back to the defendant's property at Shalom, Borris, where they continued to falsely imprison and threaten him. At one stage, an electric cable was held against his legs. He sustained electric shocks causing lacerations and burns to both legs.

4. On St. Stephen's Day, 26th December 2015, the injured party managed to escape through a bathroom window after he was allowed go to the toilet. He went to a neighbour's house and Gardaí were alerted, but the defendants had fled before Gardaí arrived at the scene. Gardaí saw what appeared to be a grow house there and obtained a warrant to conduct a search. Some sixteen Cannabis plants were located. The victim's car was later found burnt out at Cromelish, Carlow. In the course of the subsequent investigation, the victim's DNA was found in the boot of the defendant's car and also on cable ties in the house.

5. Initially, the victim said that the men who had abducted and assaulted him had questioned him about money that was missing or had been stolen, but then changed his position and said that the questioning was about the theft of Cannabis plants from the house, Shalom, at Pound Lane in Borris. The question of whether the motivation for the incident was missing money or Cannabis featured during the course of the sentence hearing. Mr. Niepogoda gave evidence in his own defence and was cross-examined by Counsel on behalf of the Director. The case then took on something of the elements of a 'Newton' hearing. Ultimately, the judge said that she was satisfied beyond reasonable doubt that the motivation was, in fact, related to the Cannabis and in the Court's view, that was a conclusion that she was quite entitled to reach.

6. The defendants were then arrested on 29th December 2015. They were arrested after they presented themselves to Gardaí. They made no admissions in relation to involvement in the violent incident. The victim of this incident indicated that another man, a Mr. Milewski, had also been assaulted in relation to the stolen Cannabis. The injured party, Mr. Milewski, was the subject of two incidents just over a year apart. On a date in December 2014 or January 2015, he was abducted, brought to a remote location, threatened and assaulted by the defendants. Then, a year later, on 17th January 2016, the respondent, Mr. Niepogoda, broke into Mr. Milewski's home and assaulted him with a weight bar or a dumbbell. He was assaulted to the left side of the face and hit at least four times with the bar. This incident occurred at a time after Mr. Niepogoda had been released from Garda custody, having been questioned in relation to the other matters on the indictment. In the aftermath of this second incident, the injured party, Mr. Milewski, gave details of what he had been subjected to a year earlier. Up to that point in time, he had not been prepared to give a statement. He told Gardaí that in the earlier incident, the two men had used knives and a wooden hammer in the course of the assault. Mr. Niepogoda had kicked him to the left side of the face and hit him with his knee. He explained that the incident went on for about two hours and that he was then put into the boot of Mr. Lacki's car and was taken to a forest area. They went into the forest and Mr. Niepogoda had a spade and the injured party was taken to an area which had been dug up. They demanded to know who had robbed the Cannabis, demanded that they be told the truth and said that if they were not told, that they were going to kill him and bury him there.

7. As far as the background and personal circumstances of the respondents are concerned, it must be said that both men have much in common. Mr. Niepogoda, a Polish national, was born in 1981. He had four road traffic convictions including one for no insurance, but otherwise had no relevant previous convictions. It was noted that he speaks good English and that he has been living in this country for some ten years. Mr. Lacki, also a Polish national, was thirty-four years of age at the time of the sentence hearing. He was a panel beater/mechanic and he too had been living in the country some ten years. Both respondents were involved together in a garage business which they had set up which involved car repairs.

8. In contending that the sentence was too lenient and should be reviewed, the DPP says that the judge erred in saying that a pre-mitigation sentence for the arson was three and a half years and erred in saying that a pre-mitigation sentence for false imprisonment was seven years. In the course of her sentencing remarks, the trial judge commented:

"[i]n relation to the criminal damage, arson on the car, for which the maximum sentence is life, there often are criminal damages in relation to arson of a much greater extent than the burning of a car and I put the appropriate sentence in that case at three and a half years taking into account the early plea which saves a small discount of mitigating factors, it comes back down to two and a half years, so a sentence of two and a half years is appropriate in this case."

Then, turning to Count 2, false imprisonment, the judge said:

> "[t]his was an extremely serious matter. For three days, Mr. Wanzuk was held, he was terrified, he was bound, gagged, put in the back of a car which was set alight and could not get out. One cannot imagine what went through his mind. He must have been absolutely terrified. The maximum sentence for that is life. The appropriate sentence in this case is a period of seven years. Taking into account the early plea and the other mitigating factors that I mentioned, it comes down to a period of six years."

9. The Court agrees with the submissions of the Director that the headline pre-mitigation sentences were very significantly too low. We cannot agree with the comments of the trial judge in relation to arson of cars. It is of course the case that there may be car arsons involving acts of hooliganism and vandalism which are in a different league to other forms of arson such as arson of a dwelling house, but this was not an ordinary common or garden car arson. Here, the car that was set alight was one that contained a person who had been locked in the car boot, having been tied and restrained. It was an arson that might be seen as having been on the cusp of attempted murder. So far as the false imprisonment is concerned, the judge commented that this was an extremely serious matter, but then went on to identify seven years as the pre-mitigation headline sentence.

10. In the Court's view, the approach to pre-mitigation headline sentence for each of these offences could not have been less than twelve years. If a figure of fourteen years or fifteen years had been identified, the Court would have been very unlikely indeed to have interfered. The Court recalls that in the Dowdall case, headline sentences respectively of 14 years and eleven years were upheld as appropriate. That was a serious case, but not the same level of seriousness as the case now before this Court.

11. Turning then to the other side of the equation. So far as mitigation is concerned, there were factors present by way of mitigation. There was, first of all, the plea of guilty. It was the case that the pleas were entered on the morning when the case was listed for trial. The judge was therefore in error when she referred to the pleas as early ones. However, even if they were not early pleas, they were pleas of value. Secondly, both respondents came before the Court without relevant previous convictions. It is also the case that until their involvement in these matters, the time that they had spent in Ireland had been a positive one. There were a number of supportive testimonials from people in the community for whom they have worked testifying to the quality of their work, to their application and to their work ethic. Having concluded, as we do, that the sentences imposed were unduly lenient, we are obliged to resentence.

12. So far as the offences involving Mr. Wanzuk is concerned, in the case of Counts 1 and 2, which are the counts involving Mr. Lacki, the Court will impose sentences of nine years' imprisonment each to date from the same date as the Circuit Court sentences. Likewise, in the case of the equivalent counts involving Mr. Niepogoda, which are Counts 9 and 10, we will impose a nine-year sentence. The Court does so having quashed the sentences imposed in the Circuit Court.

13. In the case of Count 15, which is the count referable to the second incident involving Mr. Mlewski, which involved Mr. Niepogoda alone, in the Court's view, having regard to the time lag between this offence and the earlier offence involving the same victim, there had to be an element of consecutive sentencing. That is particularly so given that it was committed after Mr. Niepogoda had actually been arrested and interviewed by Gardaí in relation to the other events that appeared on the indictment. The judge categorised this offence as a complete denial for the rule of law and a disregard for same. She took a starting point of four and a half years before settling on three and a half years she proceeded to impose and made concurrent to the other sentences. If the case is viewed in isolation, a sentence of three and half years would not have been inappropriate. However, in a situation where the Court would be requiring the sentence on this count to be served consecutively to other counts. The Court will, having regard to the totality, impose a sentence on this Count 15 of twelve months which is to be served consecutively to the sentences on the other counts.

14. In imposing the sentences that it does today, the Court recognises the disappointment factor. It recognises that the respondents are being sentenced and they are into their sentence and reflecting that, the Court is imposing sentences somewhat less than it would have regarded as appropriate had it been sentencing in first instance. Those sentences date from the same date as in the Circuit Court. In the case of Mr. Lacki, sentences are quashed and sentences in lieu of nine years on the arson and false imprisonment are imposed. In the case of Mr. Niepogoda, sentences of nine years are imposed in respect of the arson and false imprisonment and there is a consecutive sentence of twelve months in respect of the later incident involving Mr. Milewski.