



**THE COURT OF APPEAL**

**[CJA217/17]**

Birmingham J.

Mahon J.

Edwards J.

**IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**BETWEEN**

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

**APPELLANT**

**AND**

**AARON HEFFERNAN**

**RESPONDENT**

**JUDGMENT (Ex tempore) of the Court delivered on the 27th day of April 2018 by Mr. Justice Birmingham**

1. This is an application brought by the DPP seeking to review, on grounds of undue leniency, a sentence that was imposed in the Circuit Court in Cavan on 18th July 2017.
2. On that day, the respondent was sentenced in respect of two counts of s. 3 assault. In each case, the injured party was a Ms. C. Sentences of two years imprisonment were imposed on each count; the sentences were concurrent and they were backdated to 31st October 2016. Of note, is that the offences that the Court was dealing with were committed during the currency of a suspended sentence which had been imposed on 7th July 2013. That sentence was also in respect of s. 3 assaults and involved three injured parties, all females. The matters before the Court on that occasion gave rise to three consecutive sentences of two years each with the final two years of the aggregate sentence suspended.
3. The Circuit Court that was dealing with the matters on 18th July 2017 decided not to activate the suspended sentence. The DPP contends that the judge's failure to do so amounted to an error in principle on his part. However, in a situation where there has been no formal application to this Court in respect of the order in relation to activation or non-reactivation, the Court does not feel that this matter is properly before it. The Court, therefore, will be dealing today only with the issues that arise in relation to the sentences imposed in respect of the new matters that were before the Court in July 2017.
4. The specific offences the Court was dealing with on that occasion had occurred at Carrickaboy, County Cavan and had occurred on 21st October 2016 and 30th October 2016. These were the two counts in respect of which formal pleas were entered. However, the Court was asked to deal with matters on a full facts basis. On that basis, the investigating member, Detective Sergeant Sharon Walsh, gave evidence, apparently by agreement, of assaults committed on 25th July 2016; on a date during the first week in August 2016, on a date identified as being 29th July 2016 and 4th August 2016 and on 13th August 2016, as well as evidence in relation to events on 21st and 30th October 2016. All of these cases involved the same injured, Ms. CC.
5. In that regard, the Court would indicate that it has some reservations about the appropriateness of the procedure which was followed which saw the Court hearing evidence in relation to some six assaults where only two pleas had been entered. The fact that the sentence hearing concluded with a debate as to whether the appropriate course of action at that stage was that nolle prosequi should be entered in respect of the assaults in relation to which pleas had not been formally entered, or whether at that stage they should be marked as taking into consideration suggests that the procedure may not have been fully thought through.
6. By way of background to the sentence hearing in the Circuit Court and now to this review application, it should be explained that on 19th August 2016, the injured party made a statement of complaint in relation to the incidents in July and in early/mid-August. That statement on that day was made against a background that the accused was arrested on that day close to the home of Ms. C with blood on his hand. Ms C said that he had put his fist through a window. However, on 8th October 2016, Ms. C retracted her statement. The next development was that on 30th October 2016, she made a further statement in relation to an incident on that day as well as in relation to an incident on 21st October 2016. When making that statement on 30th October 2016, she indicated that what she had said back on 19th August 2016 had in fact been correct.
7. From what has been said, it will be clear that there was a relationship between Ms. C and Mr. Heffernan. That relationship began in July 2016, and quite soon thereafter, the first of the assaults with which the Court was concerned occurred. The Court heard that there were records of the injured party attending Cavan General Hospital on 14th September 2016, on 22nd October 2016 and on 30th October 2016. The Court heard that injuries sustained during the course of these assaults included bruising over her body; bite marks; a bloodshot left eye and an undisplaced fracture of the sixth left rib. It should be noted that some months before the relationship with Ms. C commenced, the accused had, in October 2015, been released from prison having served the sentence that

was imposed on 7th June 2013.

8. In terms of the relevance of these earlier offences, the Circuit Court enquired of the investigating member about the earlier offences and was told that the earlier offences were quite similar in nature. They were described as being nearly carbon copies.

9. In terms of the description that the Court was given of what these offences involved, the Court heard that so far as the events of 21st October 2016 were concerned, that Mr. Heffernan had entered the bedroom of the injured party; that he had punched her in the ribs on the left side; that she fell into the bed and that he then punched her into the left eye – it was said that that explained why her eye was bloodshot at the time she was making the statement. She said, and this was relayed to the Court, that Mr. Heffernan had also bitten her on her right lower arm. The Court heard that there was a scan performed at the hospital the following day, 22nd October 2016, and that the injured party learnt that she had a fractured rib. It seems that she told the medics, the doctors and the nurses, that she had fallen off a horse, though adding that she did not have a horse.

10. The description given then of the events of 30th October 2016, is that the injured party was asleep in her bedroom, she lives in a bungalow, and that she heard something at her bedroom window. She looked up and Mr. Heffernan was getting through the window. She said that he said to her that she should stop whinging, that she was doing his head in. She said that Mr. Heffernan lay on top of her, straddling her, and kept on about the fact that she had gone to the guards. She said that she was crying and Mr. Heffernan used his right hand and put it around her throat and squeezed her throat and told her to stop crying or he would make her stop. She described that he squeezed her throat hard and that she had marks on her neck. The squeezing of the throat was for about 20 or 30 seconds. She says that while he was still holding her throat with his right hand, he started punching her into the right side of the face with his left hand. She then said that he took his right hand off her throat and pushed her head from the right towards the wall, causing the left side of her head to come into contact with the wall. She said that, again, she was bitten; on this occasion on the left upper forearm and that he bit her with full force to the forearm. She said that when she shouted at him to stop, he then bit her on the nose. She describes that incident as lasting from about 1.30am until 6.10am.

11. Descriptions were also given of the events earlier that year, the events of July and August 2016. In relation to the incident of 25th July 2016, the injured party said that she was trying to leave in her car, but that Mr. Heffernan took the keys out of the ignition. There was a point at which they were in the house and she said that as soon as they got inside the door, that he pushed her; he pushed her so hard that her left leg hit the side of a small coffee table and that she was in pain. She was then punched three or four times into the face and was in terrible pain. She said that Mr. Heffernan said that he was going to kill her and that nobody would know where she was and that he did not care, that he was mentally unsafe and that he was going back to jail anyway.

12. A description was given of events in the middle of the first week in August 2016 which involved the injured party sitting on the bed and being punched into the face and chest at least five times; three times to the face and twice to the chest.

13. In relation to the incident dated as occurring between 29th July 2016 and 3rd or 4th August 2016, she said that Mr. Heffernan attacked her; grabbed her by the throat; threw her onto the bed; held her so hard by the throat that she could not breathe and then started to punch her in the face and stomach. He punched her twice in the face and three times in the stomach. She quotes him as saying "I hope you're not pregnant and that if you are that you have an abortion".

14. In terms of the background and personal circumstances of Mr. Heffernan, the position is that he was born in July 1978 and so was just short of his 39th birthday at the time of the sentence hearing. He had served in the Army between 2000 and 2012, serving overseas on two occasions in Chad and Liberia. His Army career had ended after he had received a custodial sentence. Apart from the directly relevant previous convictions leading to the suspended sentences which were in issue, the respondent had a number of other convictions recorded in respect of s. 3 and s. 2 assaults. The Court heard that he had a number of difficulties in his life including having lost a brother to suicide.

15. A feature of the sentence hearing was that a letter from Ms. C was handed in seeking leniency. Indeed, Ms. C also gave sworn evidence in the Circuit Court. She told the Court that she and the accused were reconciled. She described them as having become engaged and she made very clear that it was her wish that the Court would deal with Mr. Heffernan leniently and that he would be in a position to go home with her.

16. The judge's approach to sentencing saw him reviewing the facts and then commenting that the assaults were very very serious; were assaults which were continuous in nature; they spanned a number of months and observing that the individual incidents must have been terrifying. The judge commented that he could well understand why the Gardaí would express fears for Ms. C's safety. Such fears, expressed in strong terms, had in fact been expressed by the investigating member. The judge referred to the fact of the previous assaults on the other three women, stating that he had an obligation to protect the public from people who would perpetrate such assaults. The judge said that he saw the offences that he was dealing with as being "slap bang in mid-range though hovering on falling into top range". This, the judge said, meant that one was looking at a sentence of not less than two and a half years. The judge referred to the factors present by way of mitigation and to the attitude of Ms. C. Having done that, he then indicated that he was not going to activate the suspended sentence and that he was going to reduce the indicative sentence from the two and a half years to which he referred to one of two years. He then proceeded to impose concurrent sentences of two years on each of the two counts that were before him, backdating the sentences to 31st October 2016, the date on which Mr. Heffernan had gone into custody, being the day after the last assault.

17. In the course of this review, the Director essentially makes two points. She says that the failure to activate the suspended sentences was in error and in a situation where she has to accept that where no application has been put before the Court, the decision not to activate is still relevant when it comes to considering the appropriateness of the sentences that were actually imposed in respect of the recent offences. So far as the sentences for those recent offences were concerned, the Director says that the sentences for those matters were inadequate and inadequate to an appreciable degree.

18. On behalf of Mr. Heffernan, it is said that the Circuit Court judge was uniquely well placed to decide what to do in relation to the suspended sentences. It was he who had dealt with the original matters; he who had imposed the part-suspended sentences and now it was he who was dealing with the new matters. In relation to the sentences that were imposed in respect of the new matters, it is said that those sentences were not unduly lenient. It is said that while the attitude of Ms. C was not binding on the Court, it was, nonetheless, a matter to which the Court could properly have regard. It was pointed out that Mr. Heffernan's scheduled release from prison is imminent. He has a release date of Monday next week and the Court is asked to deal with this on the basis that Mr. Heffernan had in fact been released and that the Court was being asked to re-incarcerate someone who had completed a sentence, something which a Court is always slow to do, though it must be said there have been occasions when the Court has been obliged to do just that.

19. The Court begins its observations on this review by saying that the decision not to activate was a somewhat surprising one. Ordinarily, if serious offences of a similar character to those which gave rise to the suspended sentence are committed during the currency of the suspended sentence, then only one outcome could be expected: the activation of the sentence. That is more particularly so if the fresh offending comes soon after the release from custody. It must be said that the decision not to activate was extremely generous, seen from the perspective of Mr. Heffernan. Such generosity or leniency falls to be considered when it comes to assessing how lenient were the new sentences that were imposed and whether those sentences were unduly lenient.

20. At this stage, the jurisprudence surrounding applications to review on grounds of undue leniency brought by the Director are well established. In truth, there is little disagreement between the parties about the application of that jurisprudence. The jurisprudence first emerged in the first such case, that of DPP v. Byrne, and really has not been in any dispute since. It is clear that the onus is on the Director. It is clear also that only a substantial departure from the norm would justify the intervention of this Court.

21. We have referred to the issue about the decision not to activate the sentences that had been suspended, but there is another level at which the offences that gave rise to the suspended sentences are relevant because they were offences of a very similar nature – carbon copies – and this has to be seen as a significant aggravating factor. There is the further point that Mr. Heffernan’s general record shows a propensity for violence.

22. This Court is of the view that the sentences that were imposed did not reflect the gravity of the offending behaviour. In the Court’s view, aggregate sentences at or very near the maximum for any individual s. 3 offence – that being 5 years – would have been appropriate. Were it not for two factors to which we will make mention, we would have been disposed to impose sentences of two and a half years on each of the two matters where pleas were entered, but to make one sentence consecutive to the other i.e. an aggregate of 5 years. However, the Court reminds itself that it is being called on to sentence as of today’s date. In that regard, we have heard through counsel that the period in custody has been very productive for Mr. Heffernan. We have been told about a large number and very broad range of courses that have been pursued.

23. The Court also has to have regard to the fact that Mr. Heffernan is facing an undue leniency review with the prospect of seeing his period in custody extended on what is almost the eve of his scheduled release date. We recognise that this must be very difficult indeed for him. In that regard, we also take account of the fact that the review has not been handled with all the expedition that would have been expected.

24. In the circumstances, the Court will deal with the matter by imposing sentences of two years on each of the two matters where pleas were entered, but will make one sentence consecutive to the other rather than concurrent as occurred in the Circuit Court. The sentences will date, as did the sentences in the Circuit Court, from the date on which Mr. Heffernan went into custody.