THE COURT OF APPEAL

Birmingham P
Edwards J.
McCarthy J

Record No: 94CJA/2018

IN THE MATTER OF AN APPLICATION UNDER SECTION 2

OF THE CRIMINAL JUSTICE ACT 1993

THE DIRECTOR OF PUBLIC PROSECUTIONS

applicant

- V –

JAMIE COUGHLAN

Respondent

JUDGMENT of the Court (*ex tempore*) delivered on the 24th day of June, 2019 by Mr Justice Edwards

Introduction
1. On the 15th of February 2018, the respondent was found guilty by a jury of causing serious harm to the complainant, Kim Wall, on the 1st of July 2017, contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997. On the 9th of March 2018, the respondent received a sentence of six years' imprisonment, with the final two years suspended for a period of two years.

2. The Director of Public Prosecutions now seeks a review of the said sentence pursuant to s.2 of the Criminal Justice Act 1993 on the grounds that it was unduly lenient in all the circumstances of the case.

Background Facts
3. The assault in question occurred on the 1st of July 2017. The respondent and the injured party had been in a relationship intermittently over the course of several years, and on that night, they were both present in the house where they lived and had an argument. Following the argument, the complainant went to the bathroom, and upon returning, she was met by the respondent brandishing a knife taken from a kitchen set.

4. The respondent stabbed the injured party repeatedly in a frenzy, causing her several serious injuries and leading to a substantial loss of blood. The complainant sustained numerous lacerations to her face, neck and arm, and stab wounds in each of her breasts. In particular, one slash across her face led one garda who arrived at the scene shortly after the event to describe her nose as *"hanging off"*. The complainant was also noted to have a small defensive type laceration on her arm indicating that she had brought her arm up to protect her face from the attack.

5. The respondent had to be pleaded with to allow his victim to telephone the emergency services, who responded promptly and prevented a potential fatality from excessive blood loss. The respondent only relented in response to the complainant's entreaties that she be allowed to call for assistance on condition that she would assume responsibility for causing her own injuries. Following the call, the respondent fled the scene, ensuring to bring the couple's dog with him in case it would be taken into a pound. He made no effort himself to summons assistance for the complainant and left her in extremis.

6. The respondent was subsequently arrested, and detained, and over the course of four interviews while in detention the respondent denied any responsibility for the attack, maintaining the story that the wounds had been self-inflicted by the complainant who had a significant previous psychiatric history. This remained his defence at trial, although he did not give evidence before the jury.

7. During the course of the trial, the complainant's difficult psychiatric history was opened in court in order to support the respondent's narrative that she had self-harmed. In the course of her evidence at trial, the complainant claimed to have had no memory of who caused her injuries. This necessitated a reliance by the prosecution on statements made by her to the gardaí after she left hospital, admitted under s.16 of the Criminal Justice Act 2006.

Impact on Victim
8. The complainant declined to make a victim impact statement. Nevertheless, the sentencing court received several relevant medical reports. One such report was from a Mr Morgan McMonagle, a trauma surgeon in Waterford University Hospital, which documented *"multiple slash wounds to her face, neck, anterior, chest and breast"*. It also contained reference to her high degree of blood loss, but noted no signs of vascular injury or blood in the chest cavity.

9. Speaking of the injuries, Mr Morgan stated: *"as an expert trauma surgeon, Ms Wall's injuries were consistent with a sustained and vicious assault from multiple stab or slash wounds"*. He maintained that he would *"classify these as soft tissue injuries, which had bled enough to cause a lowering of blood pressure, which if untreated could potentially have had devastating consequences, including the possibility of bleeding to death. There were no deeper injuries or damage to internal organs,"*. He concluded, *"I'm confident that these wounds will go on to heal fully with no permanent disability, but will lead to permanent disfigurement which will be life long."*

10. The complainant was also treated by a Consultant Ear, Nose and Throat surgeon, a Mr. David Smith, who stated:

> *"With regard to Ms Wall's facial and nasal laceration, she has a large laceration running from below her right eye, across*

her right cheek and onto her nose, halfway down the bridge and down into the left nostril. This wound ran through the nasal cartridge and through the nasal septum which divides two sides the nose. The wound was approximately 12 centimetres in length. It required repair in the operating theatre, the reconstruction of the nasal cartilage and closure of the wound. In terms as to whether her injuries constitute serious harm as defined ... certainly, the facial and nasal lacerations had caused an obvious and permanent scar in a highly prominent part of the face which could be regarded as constituting serious disfigurement. Furthermore, as a general rule, lacerations to the head and neck region, because of the pressure of vital structures, invariably carry a potential risk of death."

Respondent's Personal Circumstances

11. The respondent has twenty-four previous convictions in all. These include seven previous convictions for possession offences under s.3 of the Misuse of Drugs Act, 1977. In addition, he has one conviction for an offence of possession of a controlled drug for sale or supply contrary to s.15 of the Misuse of Drugs Act. He has a conviction for escape from lawful custody. He has one for theft, and a very old one for larceny. He has three convictions for robbery as well as one for public order, and three convictions for burglary. He also has one conviction for production of an article in the course of a dispute, and a number of convictions for road traffic offences. He has served several substantial prison sentences during his criminal career, in particular sentences of four years, four years and two years for the robbery offences, and has also served some further shorter custodial sentences, and has received a suspended sentence on at least one occasion. The respondent was first incarcerated at the age of 16, and since then has spent a substantial portion of his life in prison.

12. The respondent left school at an early age, having been expelled for behavioural issues. He has had two major relationships, and is now single. He has two children, aged 20 and 14 respectively, who are working and in school. The respondent has maintained a good relationship with them and hopes to continue this.

13. Presently, while in prison he is making use of the services available. He is seeing a psychologist and a psychiatrist. He has been doing anger management courses and availing of the gym. He is working now as a cleaner and previously he worked in the library, and he is engaging in education. We are told that he has no P 19's.

14. At the time of the offence at the heart of this case, there was a safety order against the respondent, for the benefit and protection of the complainant. The respondent was not separately prosecuted for breach of the safety order by reason of the existence of these proceedings.

15. The respondent maintained his story that the complainant had inflicted the injuries on herself throughout a series of interviews with gardaí. However, in the final interview, he changed his account to state that he did not possess adequate memory of the incident, claiming he could not *"remember anything"*, which was at odds with his earlier contention that the injured party had stabbed herself. For example, he had stated in a previous interview that *"[s]he cut her nose and I hope it fuckin' falls off"*. In any event, he exhibited extreme bitterness towards the complainant.

16. At the sentencing hearing the respondent did offer an apology to the victim through his counsel, albeit a late one, in circumstances where he was at that stage maintaining that he had no memory of the incident.

17. Finally, with respect to his personal circumstances his mother gave evidence at the sentencing hearing to the effect that she was dependant on the respondent to a degree and that he was a good son to her.

Sentencing Judge's Remarks

18. The sentencing judge in delivering his judgment stated:

"Jamie Coughlan was convicted after a three-day trial of section 4 assault causing serious harm by a unanimous jury verdict in February of this year. The victim was his then partner, Kim Wall, and the assault took place at her home on the 1st of July 2017. The incident appears to have been entirely unprovoked and truly horrific, Ms Wall receiving multiple stab or slash wounds, leaving her with permanent lifelong disfigurement. The details of the injuries have been read into the record by Mr Whelan from the reports of Mr McMonagle and Mr Smith.

Assault causing serious harm carries a maximum penalty of life imprisonment, and the Court in considering the proper penalty in this case must have regard in the first instance to the nature and circumstances of this crime in order to determine the proper scale of gravity within the possible range of penalties for the offence. In this regard, I've had the assistance of the DPP in outlining her view on the point of seriousness, and the submissions of defence counsel, Ms Phelan, and a number of reports, all of which I have considered.

The jury, during the trial, were expressly invited to consider an alternative verdict of guilty of section 3 assault causing harm. Section 3 assault does not require the additional mental element needed for a section 4 assault, namely intention or recklessness. Mr Whelan, on behalf of they rejected the section 3 assault and convicted of the section 4 assault. Mr Whelan, on behalf of State, has indicated that the DPP is of the view that the appropriate point in the scale of offending is at the higher end. While I am not bound by the views of the DPP, I have obtained assistance from this information. The Court of Criminal Appeal has also given guidance to the appropriate ranges of sentence for section 4 assault crimes, in the two Fitzgibbon judgments of 2014, a copy which counsel has kindly furnished to the Court. At the lower end of the spectrum of seriousness, the guidance range is two to four years' imprisonment. The middle has a range of four to seven-and-a-half years, which is urged by Ms Phelan. And for offences of the most serious type, the range is seven-and-a-half to 12-and-a-half years, although, in wholly exceptional cases, sentences of greater than 12-and-a-half years, up to the maximum of life imprisonment, may be warranted, and I note the views of the DPP as given by Mr Whelan, that this case does not fall within that latter category of wholly exceptional, warranting the maximum of life imprisonment.

In considering the spectrum of seriousness, in addition to the assistance outlined above, I have considered a number of factors which are important in placing this crime at the appropriate point in the spectrum of seriousness. First is the severity and viciousness and the sustained nature of the assault on Ms Wall. And two is the continuing injuries suffered by her, leaving her with permanent disfigurement. Three is the use of a knife. Four is that at the time of the offence, Mr Coughlan was subject to a safety order, specifically for the benefit of the victim in this crime, and the breach of that is an aggravating factor. Five, the commission of the offence in the home of the victim, I regard as an aggravating factor, because, normally, such a place is one of refuge or sanctuary. A further aggravating factor is Mr Coughlan's leaving of the scene without securing medical attention for his victim, knowing that she was alone, and in circumstances where he had inflicted such injuries which, if left untreated, would have resulted, according to the medical reports, in she

"bleeding out" to use the medical expression, and would have led to fatal consequence.

Having regard to the above and to the evidence given at the trial, I consider that the actual offence in this case is properly in the upper scale of the spectrum of seriousness, but at the lower end of that higher scale of gravity. Taking the aggravating factors into account, the appropriate sentence is one of seven-and-a-half years' imprisonment. Obviously, any accused person is entitled to put the prosecution and proof of the elements of the offence and to test the reliability and accuracy of the prosecution case. The accused's position during his garda interviews is ambiguous. On the one hand, he gave a very detailed account of how and why he believed Ms Wall inflicted the injuries to herself, and, on the other hand, he claimed that he had no memory of the night, that it was all "like a dream" to him. During his trial he did not adopt this more benign latter stance. Rather his instructions to counsel on the conduct of his defence must clearly have been to pursue his original version. Therefore, the conduct of his defence involved the suggestion put to Ms Wall that she had self harmed and had repeatedly stabbed herself with the knife. In order to give credibility to this contention, aspects of the own victim's own troubled childhood, including the murder of her father and the abuse of her by her uncle were put to her. It was further put to her that these and other unfortunate circumstances were weighing so heavily on her, that she tried to kill herself, so as, in the words of Mr Coughlan's counsel, "to blot out the traumas of her past." This suggestion of self harm was completely rejected by the jury. Clearly, a sentencing judge is not entitled to treat as a circumstance of aggravation the making of such an outlandish defence. As one High Court judge stated: "A sentencing judge is punishing an offender for the crime, not for the conduct of the defence case." The reason I refer to this is that while of course I do not treat it as an aggravating factor, I do have regard to it in considering the mitigating factors that have been urged on me, particularly that of remorse and the very late apology to Ms Wall by Mr Coughlan's counsel. This expression of remorse must be seen in light of the position he maintained throughout his trial. It should of course be of some comfort to Ms Wall, that Mr Coughlan now accepts the jury's verdict, and in the circumstances, he is entitled to some mitigation in that regard. I'm also conscious of the upset to Mrs Coughlan, the accused's mother, and I have every sympathy for her. I note that she recently lost another son of hers some months ago, and I have listened to her plea, although, I do not accept that her son was never given any chances by any court, and certainly from the PULSE record I see that he was given the benefit of a suspended sentence in 2011.

I accept that Mr Coughlan has not had many opportunities in life and has had a poor schooling. It is encouraging that he has availed himself of the education and training facilities in prison, to make up for that deficiency, and that he is now hoping to undertake open university -- further education, while in prison.

For the limited mitigation to which Mr Coughlan is entitled, I will reduce his sentence by one-and-a-half years to six years. In recognition of his mother's recent loss and of her age and of the relationship which Mr Coughlan appears to have with his two children, one of whom is still an infant, and to incentivise his rehabilitation, I will suspend the final two years of the sentence for two years post release, on condition that he be subject to the supervision of the probation service for two years post release. He to enter into a bond in the sum of €100 to keep the peace and be of good behaviour. I will backdate the sentence to the 2nd of July 2017."

Grounds of Appeal

19. The grounds upon which the applicant seeks a review of the sentence can be summarised in three points:

(1) The sentencing judge erred in principle in attributing excessive weight to the mitigating factors, which she submits were very limited;

(2) The sentencing judge erred in principle in suspending such a large portion of the sentence imposed, in circumstances where the respondent was fully culpable for the offending, and was a repeat offender with little evidence of rehabilitation or remorse, and with evidence of previous suspended sentences failing to curtail his repeated offending;

(3) The ultimate sentence of imprisonment deviated from the norm for such offending to such a degree that it was unduly lenient. This was the result of the cumulative effects of starting at the very lowest point in the top part of the scale for this offence, then mitigating that sentence by 18 months to 6 years and then suspending the final two years of that 6-year term of imprisonment.

Discussion and Decision

20. Counsel for the applicant accepts that the sentencing judge imposed a headline sentence that was within his legitimate range of discretion, albeit one which the Director regards as being at the most lenient end of that range. It follows from this that the focus of the applicant's complaint is on the initial discount of eighteen months to reflect mitigating circumstances and the further suspension of a period of two years of the resultant six-year post mitigation sentence, leaving a net carceral sentence to be actually served of four years (assuming adherence by the respondent to the conditions on which the sentence was partly suspended).

21. The case was made by counsel for the applicant that in truth the respondent had very little going for him in terms of true mitigation. He did not have the benefit of the substantial mitigation that would have inured to his benefit if he had pleaded guilty and had taken responsibility for his actions. He was not entitled to mitigation for being co-operative because he was not co-operative. He was not entitled to mitigation for being of previous good character because he was not of previous good character. He had a substantial record of previous convictions and accordingly had progressively lost all credit under that heading as he accrued those previous convictions. Indeed, all that could be pointed to was some general adversity in his background involving poor educational attainments, a lack of opportunities in life, and no meaningful employment history coupled with the fact that he has a decent mother who depends upon him to a degree and has two children with whom he is anxious to maintain a relationship.

22. While there was also an expression of remorse we entirely endorse the approach to that taken by the sentencing judge. We fully agree with him that the stated remorse sits uneasily with the manner in which the case was met by the respondent, and that little weight could justifiably be afforded to it.

23. All of this would only have entitled him, it was suggested, to very modest mitigation and certainly would not have entitled him to a discount of eighteen months from a 7 ½ year headline sentence, with a further two years of what remained being then suspended.

24. We agree with this submission. The respondent was unquestionably entitled to have his personal circumstances taken into

account but the actual mitigating effect of them would have been modest indeed in the circumstances of this case. We consider that they would have justified no more than a discount of twelve months from the headline sentence of 7 ½ years. To have discounted by as much as eighteen months was excessive in our view and represented an error of principle.

25. Further, we note that the sentencing judge sought to justify the suspension of the final two years of the post mitigation sentence in part on the basis that it would serve to *"incentivise his rehabilitation."* We have stated in the past that rehabilitation is an important objective in the sentencing process to which the courts must have regard. However, it is important to emphasise that before an intervention, involving going the extra mile, would be justified on the grounds of rewarding progress towards rehabilitation to date and/or to incentivise future rehabilitation there has to be a sound evidential basis for so intervening. There has to be evidence of a real prospect of rehabilitation. It is true that in this case that the sentencing judge had evidence that the respondent was availing of education and training facilities in prison, but that was the only evidence that he had of an earnest to rehabilitate. There was no track record of achievement in that regard. We consider that the evidence before him would have justified a modest, but only a modest, intervention to further ameliorate the post mitigation sentence of six years. However, the sentencing judge partly suspended a full one third of the post mitigation sentence of six years and we consider that there was an insufficient evidential basis for doing so. That was a clear error of principle.

26. The jurisprudence concerning undue leniency appeals is well established at this stage. It was not in any sense controversial in the course of either the written submissions that were filed or in the course of the oral hearing. Accordingly, it is unnecessary to rehearse it in this short *ex tempore* judgement. Suffice it to say that the law requires that before a sentence can be interfered with as being unduly lenient this court must be satisfied that it was significantly outside the norm, most likely due to a clear error or errors of principle.

27. Applying that standard, and fully taking into account the stated reasons of the sentencing judge, we are satisfied in all the circumstances of this case that the ultimate sentence imposed by the court below was significantly outside of the norm, that that was the result of the errors of principle that we have identified, and that it was unduly lenient. In the circumstances we must proceed to quash the sentence imposed at first instance and proceed to re-sentence the respondent.

28. In re-sentencing the respondent, and in circumstances where the applicant accepts that the headline sentence imposed in the court below was within the appropriate range, we will again nominate a headline sentence of 7 ½ years' imprisonment. We are prepared to discount from that by twelve months to reflect the modest mitigation available to the respondent leaving a post mitigation sentence of 6 ½ years' imprisonment. In addition, in the spirit of the approach adopted by the sentencing judge at first instance, we are prepared to suspend a further six months of that 6 ½ year term to incentivise the respondent's continued rehabilitation in circumstances where we accept that he is doing well in prison and is taking some steps to address his issues. In that regard we consider it to be of particular importance that he has seemingly acknowledged that he has anger management issues and has undergone courses related to that.

29. The final sentence therefore will be one of 6 ½ years' imprisonment with the final six months thereof suspended on the same conditions as were imposed by the court below in the partial suspension of its sentence.