



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

The People at the Suit of the Director of Public Prosecutions

V

S.W

245/14

Respondent

Appellant

Judgment of the Court (ex tempore) delivered on the 14th day of December 2015 by

Mr. Justice Sheehan

1. This is an appeal against severity of sentence.
 2. The appellant pleaded guilty to a single count of assault contrary to s. 3 of the Non Fatal Offences Against the Person Act 1977, arising out of an incident that occurred in a public house in Navan at the conclusion of an eighteenth birthday party on the 26th January, 2013.
 3. A sentencing hearing took place on the 12th November, 2014 and the appellant was sentenced to three and a half years imprisonment with the final twelve months suspended provided that she keep the peace and be of good behaviour for the period of time and stayed away from the injured party indefinitely.
 4. At the outset of the appeal hearing, counsel on behalf of the appellant contended that the trial judge had proceeded to sentence on the basis of a version of events least favourable to the appellant which suggested that she had assaulted the appellant with a glass that was in her hand at the time as distinct from this case being an assault arising in circumstances where the appellant had thrown the glass either at or in the direction of the injured party. The court notes that the plea was entered and accepted on the basis of the appellant's recklessness and the court proposes to deal with this appeal on that basis.
 5. It is also the case that this assault occurred at a point when the appellant was encircled by a group of young people and being falsely accused of theft.
 6. At the time of the assault, NF, the injured party was a young woman with an eleven month old child. She suffered severe injuries to her left eye, necessitating a number of operations. At the time of sentence her visual acuity was 6 out of 24 and the prognosis was that she was likely to need further surgery. Understandably this injury has had a devastating effect on NF.
 7. While the appellant relies on ten separate grounds of appeal, essentially these narrow down to the submission that the sentence imposed was excessive having regard to the mitigating factors and in particular the failure of the sentencing judge to have sufficient regard for the young age of the appellant at the time of the offence and the time of sentence. Her counsel concedes that the imposition of a custodial sentence was within the discretion of the sentencing judge, but argues that the sentence was disproportionate.
 8. Counsel for the respondent in the course of his concluding submissions states that while it is accepted that there significant mitigating features in the case, there are also a number of substantial aggravating ones which were identified by the sentencing judge. In particular the use of the glass in the course of the assault and the devastating and permanent impact of the resulting injury on the injured party. Consequently according to counsel for the respondent, this was a case in which a substantial custodial sentence was appropriate and the sentence in fact imposed was entirely proportionate in all the circumstances.
- The personal circumstances of the appellant.**
9. The appellant was born on the 13th November, 1996 and lives at home with her parents. She left school following completion of Junior Certificate. A probation report indicated that since leaving school she had developed a drug problem and was at the time of the sentence hearing awaiting admission to a residential treatment programme in Kilkenny.
 10. She has five previous convictions for relatively minor offences. These are three convictions relating to shoplifting matters, one for simple possession of cannabis and the final offence relates to attempting to get into a neighbour's car that was parked in his front garden at a time when she was under the influence of alcohol.
 11. The probation report also noted that the appellant had a number of serious personal difficulties, some of which had resulted in her being obliged to undergo psychiatric treatment.
 12. The court has considered the sentencing judge's remarks and notes his understandable concentration on the terrible injuries suffered by the appellant. While he did in passing refer to the Children's Act, it is the court's view that he gave insufficient attention to the fact that the appellant in this case was just sixteen years old at the time the offence was committed and seventeen at the time of sentence, albeit a little short of her eighteenth birthday.
 13. The court considers that this failure amounts to an error in principle, which obliges it to proceed to a fresh sentence hearing.

14. The court has received further submissions on sentence from counsel on behalf of the appellant and notes that counsel for the respondent does not wish to add to what is on the transcript. It was submitted on behalf of the appellant that she is a model prisoner and on an enhanced regime at present. She recently passed her Leaving Certificate and has also undergone a number of rehabilitative programmes related to crime reduction.

15. The court notes the permanent severe injury to NF and holds that the sentencing judge was correct in holding that this was a case that was so serious that a sentence of imprisonment was required. However, the youth of the appellant was something that had not been properly factored into that sentence. Taking that matter into account as well as the significant progress made by the appellant in the Dóchas Centre, the court proposes to increase the period of suspension to recognise these matters.

16. The original sentence which was one of three and a half years imprisonment with twelve months suspended will be quashed and the court will substitute in its place a sentence of three and a half years imprisonment with the final 21 months of that sentence suspended on the same terms, namely, that the appellant keep the peace and be of good behaviour for a period of 21 months post release and have no further contact with the injured party.