



THE COURT OF APPEAL

Birmingham P.
Edwards J.
Kennedy J.

Record No: 282/2017

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

M. T.

Appellant

JUDGMENT of the Court (*ex tempore*) delivered on the 27th day of November 2018 by Mr. Justice Edwards.

Introduction

1. On the 9th of October 2017, the appellant pleaded guilty to one count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997 ("the Act of 1997"). On the 11th of December, 2017, the appellant was sentenced to three years' imprisonment, with the sentence backdated to the 20th of November 2017.

2. The appellant has appealed against the severity of this sentence.

3. This record of the Court's *ex tempore* judgment is redacted, having regard to desirability of so doing under the GDPR, so as to preserve the anonymity of the victim in circumstances where the un-redacted judgment contained identifying personal information relating to her to which it was considered necessary to refer.

Background facts

4. The appellant herein is married to the victim of the present offence. The evidence at the sentence hearing was the couple met online in July 2014 when the appellant was living in Turkey and the victim was living in England. Subsequent to communicating online, the couple met each other and ultimately married in August 2015. The evidence was that, due to difficulties faced by the appellant in terms of acquiring residency status and capacity to work in England, the couple moved to Ireland in late summer 2015.

5. After moving to Ireland, the couple were encountering financial difficulties. The victim was not working, and the evidence was that *"they occasionally slept in her motor car and ... they also stayed in short term letting arrangements."* Before the night in question, the victim had taken up employment in Dublin and the couple were staying in a cheap self-catering guest house in Rathmines. The evidence was that *"the fact that she had taken up that employment was the cause of some dispute"* between the two. The couple booked into this accommodation on the 8th of December 2015. Over the course of that evening, the appellant was said to be *"simmering...in consequence of a number of matters but most particularly in relation to her employment."* The appellant was also said to have been angry at the victim for burning pizza that she had cooked. The evidence was that the appellant had calmed down somewhat after the victim had picked up a chair so as to make the appellant back away. However, then, as the victim was having a cigarette by the window of the flat, the appellant all of a sudden grabbed her by the neck from behind, punched her on the left side of her face before hitting her again on the back of her head. It seems that the victim was rendered unconscious as a result of these blows. After regaining consciousness, the victim was very confused and did not know where she was. The evidence was that the appellant informed her that she needed to go to the hospital and it was at that stage that she realised the extent of her injuries.

6. The victim, having been driven to the hospital by the appellant, was informed that she had suffered a broken jaw on both sides. She also had a swollen left eye which was almost closed over, a cut to her forehead, swelling and bruises to her neck, and various other scratches and abrasions around her neck and shoulder area. A Dr. Moughty examined the victim at the hospital and reported on her condition in the following terms - *"On examination she was orientated in person, place and time and had a large haematoma over the left side of the face with tenderness overlying the maxilla. She was unable to open her jaw. A neurological examination was normal. She had an OPG performed which showed bilateral mandibular fractures and she was admitted under the emergency department to facilitate a CT scan of the brain."* Fortunately, the CT scan did not indicate any brain injury. Photographs of the victim's face, taken at the hospital in the aftermath of the incident, were handed into the sentencing court.

7. Members of An Garda Síochána were notified of the condition of the victim by hospital staff and attended at the hospital to investigate same. Gardaí took a statement of complaint from the victim and over the course of this process, Gardaí were furnished with a number of text messages sent to the victim from the appellant, including: *"Go baby, go far from me where you are safe. I'm really sorry for what I've done to you but I won't forgive myself"; "My prayers, my heart and my mind will be with you",* and; *"I'm sorry about your jaw and your eye bone. I feel so much pain in my head and we're soul mates"*. The evidence was that a number of voice messages were left on the victim's phone from the appellant, purporting to express his remorse for his actions. There was also a bouquet of flowers delivered to the victim, along with a note, which said *"What I have done can't be forgivable by some flowers."*

8. Gardaí continued to investigate the matter and on the 11th of December 2015, the appellant was located at Terminal 2 at Dublin Airport. He was arrested and detained under s. 4 of the Criminal Justice Act 1984 for the proper investigation of the offence for which he had been arrested. He was interviewed on three occasions. On the first and second occasions, the appellant did not accept responsibility for the offence, claiming that he had returned to the apartment in Rathmines to find the victim in the condition she was in. During the third interview, however, and having had a number of the text messages, outlined above, put to him, the appellant accepted full responsibility for the offence. During this interview the appellant stated that an argument had broken out between the two and as a result he had lost his temper and punched the victim four times in the face.

9. The appellant was ultimately charged and pleaded guilty to the count of assault causing harm and was sentenced in the terms already outlined.

Impact on the victim

10. The victim in this case read out her lengthy victim impact statement to the court in the following terms:

"The violent assault on me ... will affect me for the rest of my life. Having been in a relationship with him has been very traumatic and has made a huge impact on my mental and physical health. The night in December 2015 will be something I can never forget. There isn't a day goes by without I think about it. I received those injuries because I wanted to leave him. I finally had had enough and I believed my life was in danger, I couldn't take anymore. I still find it hard to believe that my husband who was supposed to love and protect me to be the cause of the level of the injuries I had and that he lied from the beginning and took no responsibility or remorse. I was pregnant at the time of the December 15 assault. I believe he doesn't see anything wrong with his behaviour or regrets what he did. I would like to tell you how this assault has affected my life. I am in constant pain in my jaw, mostly the left side of my face. I keep getting abscesses and have to be on regular antibiotics and pain killers. I have had to had a lot of work to rebuild my teeth due to not being able to open my mouth properly to brush my teeth for at least three months after the assault. In the first few days/weeks after the assault I couldn't even place my head comfortably on a pillow as every part of my head hurt so bad. The pain I felt from the assault is the worst pain I have ever felt, far worse than child birth. I suffer regular headaches and every so often my neck jars in a certain position. the psychological impact has affected me to the extent where I regularly feel suicidal. Even to this day, 18 months on, I cannot stop the flash backs coming into my mind. I have high anxiety every day and have been diagnosed with PTSD. The reports from my counselling service will explain this more. I have regular flash backs which can happen at any time, anywhere with many things setting it off. During a flash back I get very disorientated and it can take a few hours to be able to calm down. I take antidepressants, Diazepam and ... which is a sedative to help me sleep. I find it hard to leave the house without the fear of him being in the house when I return. Every day I have to check all my entry points to the house and I have to do this after I go out to an appointment or when I return. I rarely feel safe in my house as I know how quickly he can attack me and I wouldn't be able to defend myself. I have an alarm on my bedroom door and I always change the route I drive to my house every time I go out. I still find it hard to trust people. I don't think I will ever trust anyone again. He shattered my faith in people that someone won't hurt me ever again and I'm unable sorry, I'm very untrusting in people's actions so it's generally safer for me to be on my own. I used to be a fun, happy, confident person who enjoyed life. I had many friends but after he isolated me from everyone I'm finding it hard to trust them again, even though they have helped me so much. The assault has also affected my children. For a while after the assault I found it hard to reconnect with them. I found it hard to let them back in. I was scared of feeling any emotions at all. They couldn't understand this, why I was so closed off from them. I found it hard to show physical emotions with them for a while as I couldn't bear to be touched. Being loved genuinely felt so foreign to me. My daughter is petrified of him and him finding us or taking Mummy away again. She needs to know where I am and what I'm doing all the time. She's decided she doesn't even want to have a boyfriend in case this happens to her. She is nine years old. She doesn't need to be frightened of things like this. The assault has also affected my son. He's been especially clingy and I regularly find he's got into my bed at night and has had nightmares. My son also likes to hug me really tight but I can't bear to be touched anywhere around my neck or head. I have to push him off and he doesn't understand why and I'm worried he's going to grow up thinking it's wrong to give affection. He's six years old. They both get nervous when they're not around me and are worried about my safety and if I get a bruise they are scared [he] has found me. They are children. They shouldn't be a worry for them. I didn't get to spend Christmas December 2015 with them as I was still so heavily bruised and I didn't want them to see me like that. I will never get that time back with them. That year, on my daughter's Christmas list, the only thing she wanted to be was to see her Mummy again and to be happy..... Their quality of life has changed drastically. I am in pain. I'm scared to go out. I'm scared for my future and my confidence is very low. I don't enjoy things like I used to and I don't trust in most things. My concentration has been effected a lot. I struggle to watch a TV program all in one go. This is one of the reasons I haven't been able to work since the assault. My old job has offered me my job back but I haven't been in a position where I can function constantly on a day to day basis or where I feel I can cope with the pressures of working life. I have regular panic attacks, depression and days where my brain just doesn't function properly. Some days I even struggle to get out of the bed and get dressed. I struggle to do daily tasks. I've worked all my life and I feel ashamed I get my income through the Government sick pay. I am now declared bankrupt due to the debts he's left me in. I was stupid enough to put everything in my name. I don't sleep well and when I do sleep I wake up every few hours with nightmares. I don't think I will ever forget the feeling I was going to be killed the night of the assault. I will never forget how calmly he was when he was punishing me. I will never forget the pain of every blow, going unconscious and back and still being punched. I truly believed I was going to die. I will never forget the fear of trying to not upset him after I convinced him to take me to the hospital after he refused to call me an ambulance. All the way there I was petrified he was going to hurt me more. There are many things I will never understand about what he did or the way he is or he's never being sorry for it. I have to live with the fact I'll probably never get these answers. After hearing at the trial he went back to the room and slept that night thereafter he assaulted me and then lied straight away really disturbs me. This makes me feel extremely intimidated and I'm asking if I could have a barring safety order for me and my children for the rest of our lives. It's going to be a long time to put my life back together but I feel I have been given a second chance at life. That night he assaulted me could have ended very different. In my eyes he could have killed me. With his martial arts training he knew how hard he could hit me and what techniques to do the most damage. I have a long way to go, but I will do my best through counselling to get my life back on track and I am determined to have a happy, normal future."

Appellant's personal circumstances

11. The appellant was twenty-eight-years'-old at the time of sentence. He is from Afghanistan originally but moved to Tehran in Iran with his parents. He later moved to Turkey on his own so as "to better himself". In a written testimonial put before the sentencing court, from a church volunteer the writer indicated that as he "came to know him [the appellant], it was obvious that he had come through many challenging times both in Iran and Turkey, where violence was never far away."

12. After moving to Ireland with the victim in late summer 2015, the appellant applied for asylum here. As touched on earlier in this judgment, the appellant was not entitled to work in the State. For a period of time prior to the present offence, the appellant was sleeping with the victim in her car at various spots around Dublin City.

13. It is apparent that, apart from the victim, the appellant has no family with him in the State. However, a number of testimonials placed before the sentencing court indicated that, approximately two months after the offence, the appellant became involved with the Church of Latter Day Saints. One letter from a Minister in this Church indicated that, whilst the appellant "has some issues in his

life which he is desperately trying to overcome", he has undergone "a considerable change in his behaviour" and expressed a belief "that as we continue to support and guide [M] he will continue to make the necessary changes in his life in order to turn his life around." The other letter, from the church volunteer referred to earlier, also indicated that the appellant "desires to live a good life and has demonstrated that, by adopting our church culture, [he] has tried to bring his life into accordance with the principles of the church". The letter also indicated that the appellant had recently (January 2017) been baptised into the Church of Latter Day Saints.

14. It was also indicated at the sentence hearing that the appellant had, since the incident, entered into a relationship with another young woman who was expecting a child with him around Christmas of 2017. Defence counsel, in his plea in mitigation, urged upon the sentencing judge to "bear in mind that he is about to be the father of a child in the very near future and that a custodial sentence would inevitably impact upon the support which he should properly give to his young child and to his current partner".

15. The appellant has no previous convictions, either before or since the incident in question.

The sentencing judge's remarks

16. In passing sentence upon the appellant, the sentencing judge made the following remarks, insofar as they are relevant to the present appeal:

".....The incident can only have been regarded as an extremely frightening experience from her point of view and, of course, she -- it was perpetrated upon her by her husband and someone from whom she was entitled to the highest degree of personal respect and, one need hardly say, in no circumstances any question of the perpetration of violence"

"For reasons, whether associated with his culture or otherwise, he objected to the fact that she had sought employment, indeed she was to start a new employment some days afterwards, the Monday of the following week. And this was apparently the trigger, so to speak, for his behaviour on the evening in question. She was also alleged to have burned some pizza and apparently this also, it seems, annoyed the accused. So, it can be seen ... that the offence was in no sense explicable in terms even of ill temper, or provocation, or anything of that type, and was something to be regarded as at the most serious level in terms of offences of this kind, both in terms of the breach of trust and the want of personal respect and also the extent of the brutality used and the extent of the injuries. She described herself as being grabbed by the neck from behind. She described herself as being punched and receiving at least one blow to the head in the circumstances where she became unconscious and, when she recovered consciousness, she didn't know where she was, she was confused. The accused at that stage said that she should go to hospital and in fact he brought her to hospital.

I do not quote the report in full but I hope and would like to think that that gives a clear indication of the adverse consequences and continuing adverse consequences on her of what occurred. So, she was an innocent victim in the fullest sense on this occasion. The injuries were severe, the nature of the charge is assault causing harm. There was a gross breach of trust and it's a particularly serious example of domestic violence. For these reasons, I believe that it ranks as an offence at the top of the scale of seriousness in terms of assaults causing harm and, in those circumstances, one has to consider a sentence not quite at the maximum level but at the very upper end of the sentencing ambit in this case. And in those circumstances, it seems to me that one could not consider a sentence of -- absent other factors, of -- at the very top of the scale. When I make that observation, of course, I do so not merely because of what she has suffered but also having regard to what I have been told about the accused.

Now, his current partner was, at least when the submissions on sentencing were made to me, expecting a baby. ... [T]he submission has been made to me effectively that I should take into account that his partner is expecting a baby and that he now has what is apparently a stable relationship. I am not taking those factors into account, I'm making that quite clear as a matter of principle. The responsibility for what occurred is his ... he bears the responsibility for what has occurred and must meet it.

Now, there are a number of reports which have been furnished to me. These are reports which have been given, in the main, I think it's fair to say, by those involved in the Church of Jesus Christ of the Latter Day Saints. He became involved in the activities of the church, it seems, at -- in January 2016, after these offences were committed, or this offence was committed, I should say. The reports have been given are favourable. He is now a member of that church and it is asserted that he feels deeply sorry for what he has done and the -- and of course he has pleaded guilty. I have one report from Mr J T ... "He is described by Mr T as someone with whom he has become a good friend and he says he is convinced that he desires to live a good life and has demonstrated that by adopting his church's culture.

Now, I also have a report from Mr T D who serves as a minister of the church He [says]: "We continue to support and guide M. He will continue to make the necessary changes in his life in order for him to turn his life around."

There is also a character reference from someone with whom he has become friendly, a Ms D T, who is a Polish lady, and she describes him as being someone who has always been willing to help. She says that many people would give up having regard to his background and she would continue to support him.

Now, there is also a reference from Mr D G of the same church who asserts again his remorseful nature.

Now, he pleaded guilty and I accept that these are people of standing and I accept accordingly that he is someone who has shown a degree of remorse. He appears to have been sorry at an early stage for what he did to this lady, inasmuch as he sent texts to her in the hospital and flowers, for what that is worth - that is a matter I disregard as being of no consequence, but he does appear to have shown a degree of contrition by texting her, but the accused did not admit this offence until his third interview with An Garda Síochána and did not plead guilty until the 9th of October last.

Now, his history has been a bad one, an unfortunate one. It seems that he left Afghanistan as a refugee, lived in Iran for a period of time, and then lived in Turkey. He travelled to this country, it seems, and claimed asylum. The complainant had first contact with him, as I understand it, over the internet and then she visited Turkey. But she seems to have fallen into the hands of a man of violent disposition as we see from this incident. He is -- the question then is firstly the moral culpability of the accused for this serious offence at the top or very near the top of offences of this category. His moral culpability is mitigated somewhat by his history, but the seriousness of the offence speaks for itself. I think accordingly an appropriate starting point in respect to this issue would be a sentence of approximately four and a half years, that would be four years and six months. Sentencing is not a process of vengeance. One has to balance many

different factors. He has however pleaded guilty to this offence and, as I say, the people who have given the reports seem to be people of standing and I am prepared to accept a degree of contrition on his behalf - perhaps somewhat belated but, in the circumstances, accordingly I will impose a sentence of three years' imprisonment, affording him due credit for the factors which I believe mitigate the sentence."

Grounds of Appeal

17. The appellant, in seeking to impugn the sentence imposed upon him, proffers the following grounds of appeal:

- i. The sentencing judge gave insufficient weight to the mitigating factors in the case and excessive weight to the aggravating factors.
- ii. The sentencing judge gave inadequate credit for the guilty plea and had excessive regard to the fact that the plea was entered on a trial date.
- iii. The sentencing judge made a finding that the appellant had a predilection for violence without any evidential basis for doing so.
- iv. The sentencing judge gave insufficient weight to the fact that as a foreign national, the appellant will find a term of imprisonment more difficult than it would otherwise be.
- v. The sentencing judge gave insufficient weight to the expressions of remorse made by the appellant.
- vi. The sentencing judge gave insufficient weight to the fact that the appellant had no previous convictions.

Discussion and Decision

18. The Court has received helpful written submissions from both sides for which it is grateful. At the oral hearing three complaints were pressed in particular, and it is convenient to deal with them *seriatim*.

19. The first complaint comes within the generic ground which forms ground no. (i), namely that inadequate account was taken of mitigating circumstances, and in that regard counsel for the appellant refers in particular to the sentencing judge's statement that:

"[T]he submission has been made to me effectively that I should take into account that his partner is expecting a baby and that he now has what is apparently a stable relationship. I am not taking those factors into account, I'm making that quite clear as a matter of principle. The responsibility for what occurred is his ... he bears the responsibility for what has occurred and must meet it."

20. Counsel contends that the sentencing judge erred in asserting that he would not, as a matter of principle, take into account the second relationship and the fact that the appellant's new partner was expecting a baby. Counsel submitted that this was a matter of some weight, being indicative as it was of rehabilitation and stability.

21. In the Court's view, the fact that the offender was in a new relationship by the date of sentencing, and that his partner was expecting a child, was a matter to which the judge in his discretion might possibly have attached some modest weight, but equally he could not be criticised if he decided to attach little or no weight to it, in the overall circumstances of the case. A sentencing judge has a considerable margin of appreciation as to what weight, if any, to attach to a potentially mitigating circumstance. In this particular case, we do not consider that it is a correct interpretation of the sentencing judge's remarks to construe them as rejecting, on the basis that it was "*a matter of principle*", the idea that such circumstances could be mitigating at all. Rather, it seems to us that what he was saying was that taking responsibility for one's actions cannot be avoided by pointing to some collateral prejudice that might be suffered by a third party, such as a partner or a child, in the event of the offender having to go to prison. He was clearly correct in that respect. It was a matter for his discretion as to whether he was disposed any significant weight to the circumstance relied upon. It seems that he was not so disposed. However, we can find no error of principle in the remarks complained of.

22. The second matter of complaint pressed at the oral hearing was an alleged failure to give full credit for the appellant's remorse. In particular, complaint is made about the passage from the sentencing judgment in which the sentencing judge said:

"Now, he pleaded guilty and I accept that these are people of standing and I accept accordingly that he is someone who has shown a degree of remorse. He appears to have been sorry at an early stage for what he did to this lady, inasmuch as he sent texts to her in the hospital and flowers, for what that is worth - that is a matter I disregard as being of no consequence, but he does appear to have shown a degree of contrition by texting her, but the accused did not admit this offence until his third interview with An Garda Síochána and did not plead guilty until the 9th of October last."

23. Counsel for the appellant contends that the sentencing judge appears to have regarded the appellant's remorse as less than fulsome or genuine by virtue of the fact that he did not make admissions until his third interview with An Garda Síochána. It is also suggested that the sentencing judge erred in dismissing the significance of the flowers sent to the hospital.

24. In our view the sentencing judge, who heard the evidence, was best placed to evaluate the evidence suggestive of remorse. It seems to us that he accepted that the appellant had shown "*a degree of remorse*" and that the appellant had expressed that, in particular to the victim, from an early stage. However, he was also making the valid point that while expressions of remorse may be taken as indicative of self-perceived guilt and the existence of contrition, they can also sometimes be, but are not always necessarily, indicative of a willingness to accept responsibility for one's actions. The sentencing judge's point was, it seems to us, that whatever about the appellant's personal feelings of guilt, and contrition with respect to what he had done to the victim, there was no willingness to accept responsibility up until his third interview when he was confronted with the text messages that he had sent, and so the early expressions of remorse had to be seen in that light. However, it is clear that the sentencing judge was fully alive to the fact that ultimately the appellant's remorse was unconditional. We therefore find no evidence of an error of principle in the remarks complained of.

25. Finally, it was complained that the sentencing judge's further remark in which he stated that the victim had "*fallen into the hands*

of a man of violent disposition as we see from this incident", was indicative of an error. According to counsel, the evidence at the sentencing hearing did not support a violent disposition, in the sense of a tendency towards violence, and there was no evidence that what had occurred was other than a once-off regrettable event, i.e., something that was aberrational and out of character.

26. In this Court's view, the language used by the judge was not to be given the construction urged by counsel for the appellant. The characterisation of the appellant as being a man of violent disposition was qualified, and contextualised, by the additional words appearing in the same clause, namely "*as we see from this incident*." The sentencing judge was therefore not talking about some general tendency or disposition towards violence, but very specifically, about the fact that the appellant had actually and indisputably perpetrated significant violence on the victim in this case. We are satisfied that the judge's remarks do not provide any grounds for this Court's intervention.

27. Finally, with respect to the other grounds of appeal, which were all to the effect that there was insufficient discounting for discrete mitigating circumstances, i.e., the guilty plea, that fact that the appellant was a foreign national and would find imprisonment in an Irish jail more onerous on that account, and the fact that there were no previous convictions, we reject those complaints. The sentencing judge nominated a headline sentence of four and a half years in circumstances where he believed that the gravity of the offending conduct was such as to place it close to the top of the range. We agree with that. In circumstances where the ultimate sentence was one of three years, it is clear that there was a substantial discount of eighteen months (33.3%) to reflect all of the mitigating circumstances, and we are satisfied that it was adequate. We find no error of principle on that account.

28. In the circumstances we must dismiss the appeal.