



THE COURT OF APPEAL

Record No. 126/2016

**Birmingham J.
Mahon J.
Hedigan J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

GRAHAM MEAGHER

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 11th day of May 2018 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted at Clonmel Circuit Criminal Court on the 12th November 2015 of one count of causing serious harm contrary to s. 4 of the Non Fatal Offences Against The Person Act 1997. The appellant was sentenced on the 10th May 2016 to a term of eight years imprisonment with the final two years suspended for a period of four years post release. He has appealed against that sentence.

2. On the 12th June 2014 Mr. P.J. Kelly was subjected to a very serious and violent assault by the appellant at Kilcaroon, Cloghwen in County Tipperary. On that date, at about 3.30 p.m., the appellant's father called to the home of Mr. Kelly to collect his son, the appellant, who was asleep upstairs. When the appellant was awoken he noticed that some of his personal property, including his mobile phone was missing from a bedside locker. Convinced that the property had been stolen by Mr. Kelly, he came downstairs and struck Mr Kelly a number of times, initially with a fire shovel, and subsequently with a poker stand. As he did so he was heard to shout at him "*die, you bastard, die*". Mr. Kelly sustained a devastating brain injury and is now in residential care. He will never recover from the injury and will always be dependant on others.

3. The violent nature of the attack on Mr. Kelly appears to have been very much out of character for the appellant. While he had a number of relatively serious road traffic convictions in his past, he had never been in trouble in relation to any violent matter. He had a dysfunctional background, with some addiction problems. There was evidence that Mr. Kelly's home was used by individuals who would have been a bad influence on the appellant and there was also a suggestion, albeit unproven, that the appellant had been sexually assaulted by Mr. Kelly in the past. There was, however, no suggestion that there had been any immediate provocation for the assault on Mr. Kelly, save for his belief that Mr. Kelly had stolen his property on the date in question. The appellant was eighteen years old on the date of the offence, while Mr. Kelly was in his 60's.

4. The grounds of appeal relied upon by the appellant are as follows:-

- (i) the learned sentencing judge erred in placing the case in the higher range of the sentencing scale;
- (ii) the learned sentencing judge erred in failing to have adequate regard for the appellant's youth at the time of the offence;
- (iii) the learned sentencing judge erred in concluding that the appellant had serious road traffic convictions and in placing emphasis on same as a serious aggravating factor;
- (iv) the learned sentencing judge erred in failing to have adequate regard for mitigation offered, including mitigation for provocation and the appellant's vulnerable status;
- (v) in all the circumstances, including the appellant's youth, vulnerable status, lack of previous convictions for same or similar offences, his co-operation and his difficult personal circumstances, previous addiction difficulties, family support and offer of employment the sentence imposed was disproportionate and excessive;
- (vi) the learned sentencing judge failed to take into account or adequately take into consideration or attach appropriate weight to the fact that the appellant:-

- had entered an early guilty plea;
- had used his time in custody well;
- the content of the probation and psychological reports;
- the employment opportunities available to the appellant upon his release;
- the issue of provocation and circumstances surrounding the offence.

(vii) Psychological and probation reports were available to the learned sentencing judge at the time of sentencing. The psychological report suggests a moderate risk of re-offending, while the probation report expresses the view that the risk of re-offending is high.

5. Mr. Sheehan SC, counsel for the appellant. placed greater emphasis on the first two grounds, those relating to the offence being placed at the higher end and the appellant's youth.

6. The learned sentencing judge gave a detailed and considered decision. He referred to the fact that *"Mr. Kelly's life was utterly changed from the moment of this assault onwards"*. He said:-

"Taking all of these factors into consideration it does seem to me that this case has to come in the high range of such offences, not at the top of the high range for the reasons outlined by Mr Condon. It was not a premeditated attack, he was not one of a frenzied group, for example. He certainly did not plan this but, notwithstanding that, and it seems to me that it is a case which comes in the high range, not at the top of the high range, and one which would warrant a headline sentence of 10 years."

7. The learned sentencing judge expressly took account of mitigating factors including the plea of guilty, the fact that the appellant made admissions, the fact that he was a young man *"barely eighteen when this offence occurred"*, his lack of previous convictions for violence, his past chaotic and dysfunctional life and certain positive aspects relating to his previous employment. He also noted that the appellant had substance abuse and addiction problems in the past. He also noted that the appellant had a supportive family behind him.

8. There can be no doubt whatsoever that this assault was very serious by any measure. Its ferocity, the words uttered by the appellant as he attacked Mr. Kelly and the dreadful consequences for him combine to make that observation obvious, if not an understatement.

9. The victim impact statement prepared by Mr. Kelly's daughter provides a moving insight into the consequences of this assault on Mr. Kelly and his family. Two passages from it are particularly illustrative of those consequences.

"Physical injury: Since the attack in June 2014 my dad has been left brain damaged. He is still unable to communicate. He will answer yes/no to questions but then if we ask the same question the answer may differ. The medical staff have said that they are not sure how much he understands or can relate to. He has to be re-taught how to do basic human things i.e. self-care, everyday tasks. They have also said he is unable to ever live alone again for his own care and safety. After numerous speech therapy sessions, my dad's speech is limited to a few words and they have informed us this may never improve..."

Life changes to my dad are that he is unable to live an independent life. He will need continuous care for the rest of his life, and is unable to communicate clearly, verbally or written. This has had a major impact on him being a husband, father and grandfather.

Life changes to the family are: my mother has had to suffer the emotional torment of seeing her husband who for all of his life was a strong and independent man before the attack and is now left vulnerable. As a wife, she will never be able to have a normal husband/wife relationship again.

The life changes to me and my siblings are that our dad, as we know him, has been taken from us, not physically, as such, but emotionally and mentally, we will never be able to have the father/son/daughters' relationship that we had with him ever again.

My children will miss out on having any sort of normal life/relationship with their granddad due to the poor quality of life he has been left with..."

10. In relation to the criticism of the learned sentencing judge's decision that the offending was in the higher range on the gravity scale, the court believes this particular ground of appeal to be entirely misconceived. An assault with a large and heavy metal poker stand which has left the unfortunate victim with a catastrophic brain injury with enormous consequential disability is surely almost a text book example of a s. 4 assault in the very high range of the scale of gravity. The court is satisfied that the range identified by the learned sentencing judge was appropriate, as was the headline sentence of ten years. That headline sentence is probably within the parameters suggested by the Court of Criminal Appeal in its judgment in the case of *DPP v Fitzgibbon (No. 2)* [2014] 2 ILRM, 424.

11. In relation to the emphasised second ground of appeal argued on behalf of the appellant, namely the submission that the learned sentencing judge failed to adequately take account of the appellant's youth, it is undoubtedly the case that this specific aspect was considered and addressed by the learned sentencing judge. He said he would allow "a great deal of credit for his youth" adding, and not unreasonably so, that he also had to weigh in the balance the fact that he did have previous convictions, albeit none for a violent offence.

12. The issue of provocation was also raised, both in this court and the court below. While there may have been some element of what might be described as historical provocation its presence in a manner in which it might be considered a legal defence or a mitigating factor for sentencing purposes could hardly be said to have existed in circumstances where the assault followed the appellant being awoken after a night's sleep. In no way could a belief, rightly or wrongly, that his wallet and phone had been stolen justify such a violent confrontation. That said, the learned sentencing judge did in fact accept that provocation was a factor and decided the sentence on that basis.

13. Ultimately, what is of relevance to this court is the sentence actually imposed, and also the net custodial element of that sentence. The net term in this case was one of six years. Such a sentence, being one of eight years with the final two years suspended, was one within the range of discretion available to the learned sentencing judge and suggests no error of principle. In these circumstances the court must dismiss the appeal.