



THE COURT OF APPEAL

Record No. 289CJA/16  
Mahon J.  
Edwards J.  
Hedigan J.

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

DAVID SHANLEY

RESPONDENT

JUDGMENT of the Court delivered on the 21st day of December 2017 by Mr. Justice Mahon

1. The respondent was convicted of manslaughter by the Central Criminal Court on the 20th June 2016. He was originally charged with murder, pleaded not guilty to murder but guilty to manslaughter, and his plea was accepted by the appellant. On the 24th October 2016 the respondent was sentenced to five years imprisonment with the final two and a half years of that sentence suspended on conditions for the period of two and a half years post release. This is the appellant's application for a review of that sentence on the ground that it was unduly lenient pursuant to s. 2 of the Criminal Justice Act 1993.

2. The background to the offence can be stated briefly as follows. The deceased, John Lawlor, was a forty eight year old man who resided alone at Bartres, Ballinatrav Lower, Courtown Harbour, Co. Wexford. He had separated from his wife, Melissa Lawlor, some ten years earlier. On the date of the offence, the 24th December 2013, the respondent was in a long term relationship with Ms. Lawlor. Earlier on that day, Ms. Lawlor had asked the deceased to mind their ten year old daughter while she, (Ms. Lawlor), did some Christmas shopping. The deceased refused to do so. Thereafter, the respondent, angered by the deceased's refusal, sent a number of menacing text messages to the deceased, none of which were responded to by him. He also made unsuccessful attempts to contact the deceased by telephone. That night, the respondent went to the deceased's home. He brought a knife in his pocket in order, he said, to have it for self defence purposes.

3. The respondent said that when he arrived at the deceased's door, the deceased opened the door and immediately proceeded to seriously assault him with punches and kicks. He said the knife in his pocket fell to the ground. There was a struggle. He said he suffered a defensive wound to his hand in an effort to protect himself from being stabbed by the deceased. A garda gave evidence confirming that there was a fresh cut to the respondent's hand. In the course of the struggle, the respondent stabbed the deceased in the lower leg just below the knee. The wound was described as one which was superficial, and one which would not normally be expected to cause excessive bleeding. However it lacerated a varicose vein in the leg causing severe haemorrhage, and ultimately, death. The deceased was able to raise the alarm by telephoning his brother, who in turn telephoned the gardaí and the emergency services. On their arrival the deceased was found lying inside his house and was already dead while the respondent was on the ground outside unconscious or semi conscious. Initially the respondent claimed that the deceased had taken his own life and that the purpose of his visit was to wish him a happy Christmas. He subsequently accepted that he had, in fact, stabbed the deceased, but maintained that he did so unintentionally and in the course of a scuffle and while he was attempting to throw the knife away.

4. The respondent is aged forty eight years. He was in a relationship with Ms. Lawlor for approximately four years before the incident occurred and that relationship continues. He lived with Ms. Lawlor and Ms. Lawlor's thirteen year old daughter who has particular medical needs. Ms. Lawlor herself has a serious kidney condition and requires regular dialysis treatment. At the time of the offence, the respondent was unemployed but provided significant care and assistance to Ms. Lawlor and her daughter. The respondent has no relevant previous convictions.

5. In the course of his sentencing judgment the learned sentencing judge stated:-

*"Sentences handed down for the crime of manslaughter vary between non custodial and a maximum of life imprisonment. I accepted Mr. Gateby's contention that the injury was unusual. It appears to me on the medical evidence that the knife injury could not have been thought to have fatal consequences. In essence, this very tragic death was caused by cutting - by the cutting of a very shallow varicose vein. It was never the less a death caused by the criminal act of the accused person. Having regard to the foregoing, and entirely accepting the terrible effect the death of this much loved son, brother, father and grandfather had on all concerned, I will place this crime at the lower end of the scale for crimes of manslaughter. I believe the appropriate sentence would be five years. Having regard however, to the low risk of reoffending I am prepared to suspend the final two and a half years of that term provided the accused enters into a bond and this should be done before the prison governor, to be of good behaviour and to observe the same conditions as were imposed while he was in, on bail. Particularly referring to the conditions providing that he keep away from certain people and to observe those conditions for a period of two and a half years..."*

6. Section 2 of the Criminal Justice Act 1993 provides as follows:-

*"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of*

*(Appeal) to review the sentence.*

*(2) An application under this section shall be made, on notice given to the convicted person within 21 days from the day on which the sentence was imposed.*

*(3) On such an application, the Court may either:-*

*(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*

*(b) refuse the application.*

*(4) ..."*

7. The grounds of appeal are as follows:-

(i) Having regard to the evidence of the circumstances of the commission of the offences (as outlined by Inspector Murt Whelan at the sentence hearing on the 10th October 2016) the learned sentencing judge erred in law and in fact in determining that the offence was at the "lower end of the scale of manslaughter offences" and, thereafter, in measuring the appropriate sentence before mitigation as one of five years imprisonment.

(ii) The learned sentencing judge erred in principle in failing to have sufficient regard to the aggravating factors in the case, in particular the evidence that

(a) the incident had been proceeded by a series of threatening text messages from the respondent to John Lawlor;

(b) the respondent had armed himself with a knife prior to going to John Lawlor's home;

(c) forensic evidence confirmed that damage to the front door of John Lawlor's home had been caused by the knife which had been brought to the scene by the respondent;

(d) the respondent sought to minimise his involvement in the incident by texting his partner, Melissa Lawlor, to suggest that he (the respondent) had been attacked by John Lawlor and by telling a witness, Erica Twyford, at the scene that he (the respondent) had "called up to John's house to say Happy Christmas and he (John Lawlor) went mad;

(e) the respondent in initially denying that he had brought a knife with him to John Lawlor's home, had lied to members of An Garda Síochána who interviewed him on the 25th December 2013. Furthermore, the respondent had lied when he suggested that it was John Lawlor who had the knife and may have stabbed himself.

(iii) The learned sentencing judge erred in principle in attaching undue weight / significance to the mitigating factors in the case in particular, the fact that the respondent is the "primary carer" for Melissa Lawlor (the ex wife of John Lawlor)

(iv) The learned sentencing judge erred in principle in attaching undue weight / significance to the conclusion by the State Pathologist that the wound suffered by John Lawlor "would not normally be expected to cause excessive bleeding or to cause death".

(v) The learned sentencing judge erred in principle in failing to identify such mitigating factors as permitted / warranted the suspension of the period of two and a half years of the five year sentence imposed.

(vi) The learned sentencing judge erred in principle in imposing a sentence which, in all the circumstances, failed to reflect the gravity of the offence.

8. Mr. Kelly S.C. (for the appellant) emphasised at the commencement of the oral hearing of the appeal that its focus was the contention that the five year sentence itself was unduly lenient irrespective of any portion of it being suspended. It was further contended that the suspension of two and a half year was itself unjustified representing as it did, fifty per cent of the sentence imposed. Such a reduction was, it was submitted, entirely inappropriate.

9. The principles relevant to an undue leniency application are well settled.

10. In the first undue leniency case referred to the Court of Criminal Appeal under the Act of 1993, *DPP v. Byrne* [1995] 1 ILRM 279, O'Flaherty J. set out a number of principles relating to such appeals. They are:-

(i) The onus of proof clearly rests on the DPP to show that the sentence is unduly lenient.

(ii) The Court should afford great weight to the trial judge's reasons for imposing the challenged sentence as it is he or she who has received the evidence at first hand. In particular, if the trial judge has kept a balance between the particular circumstances of the offence and the offender, in other words, if he has observed the principle of proportionality, the sentence should not be disturbed.

(iii) It is unlikely to be of great help for the Court of Criminal Appeal to ask if it would have imposed a more severe sentence itself. The enquiry must always be if the sentence was unduly lenient,

(iv) Since a finding of undue leniency is required, nothing but a substantial departure from what would be regarded as the appropriate sentence justifies intervention by the Court.

(v) There may be cases where the question to be resolved is whether a monetary penalty, a suspended sentence or a short term of imprisonment can be categorised as unduly lenient, and some cases in that category may admit of a ready resolution.

11. In *DPP v. McCormack* [2000] 4 I.R. 356 at 350, an often quoted extract from the judgment of Barron J. states:-

*"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.*

*Each case must depend upon its own special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."*

12. Sentences imposed in manslaughter cases vary enormously with the maximum sentence being life imprisonment. This is so because of the great variation in the facts in each case. In 2013 Michelle Lynch of the Judicial Researchers Office compiled a very useful analysis of manslaughter sentencing over a period of years between 2007 and 2012. It has since been updated as far as 2017 by Mr Jack Meredith, also of the Judicial Researchers Office. We very much welcome having our attention drawn to this material. In *People (DPP) v Kelly* [2005] 2 IR 321, another manslaughter case, the Court of Criminal Appeal was provided with statistical information submitted by the Director of Public Prosecutions concerning the sentences that had been imposed by that Court in over fifty previous cases. Although the Court of Criminal Appeal felt obliged to note the limitations of that material (because it did not give information on the individual crimes or what aggravating or mitigating factors there might have been in any case, and also because it did not cover manslaughter sentences imposed in the Circuit Criminal Court) it nevertheless was prepared to note the information provided and to take it into account. Ms Lynch's and Mr Meredith's data adds to that, and is of assistance to this court. While it is confined to appellate court reviews of manslaughter sentences in the period in question, it covers cases that originated in both the Circuit Criminal Court and the Central Criminal Court, and unlike in the case of the data submitted in the *Kelly* case, each case considered is identified by its neutral citation with the result that the judgment in each instance is readily accessible on the Courts Service website.

13. One of Ms Lynch's observations in the original 2013 document was as follows:-

*"It is apparent from the present analysis that the approach to the sentencing of manslaughter is a difficult process due to the varying degrees and circumstances to which the offence may extend to. While the Court of Criminal Appeal offers valuable guidance in respect of sentencing principles such as proportionality and the importance of locating the offence at the appropriate point on the scale of offending, the fact remains that the nature of the Irish sentencing system is individualised and discretionary. Aggravating and mitigating factors may be weighed and decided differently resulting in sometimes discernable divergence sentences for what appears, for all intents and purposes to be very similar crimes."*

14. Ms. Lynch's review considered sentences imposed in forty two different manslaughter cases. She found that eight fell in the lower range incorporating suspended sentences of up to four years imprisonment, twenty six fell in the middle range resulting in sentences of five to nine years, and eight sentences fell in the upper range involving sentences of ten or more years up to life imprisonment.

15. As is often the case in manslaughter cases, there were a number of unusual circumstances pertaining to this particular case. It is evident that quite a violent struggle ensued in the course of which Mr. Lawlor suffered the leg wound which ultimately led to his death. In the course of that struggle, the deceased punched and kicked the respondent to a point where he was found in a semi conscious state lying outside the deceased's house when gardai arrived. The respondent also had what might be described as a defensive type wound to his hand which may have been caused by the knife. Unusually, and most unfortunately for the deceased, a relatively minor cut to his lower leg, probably caused by the respondent's knife, resulted in massive loss of blood and death. The medical evidence was to the effect that the wound caused would not normally have been expected to lead to this result and indeed was described as superficial in nature. It is unusual in the experience of the Courts that a stab wound would be inflicted to the lower leg, as more commonly such wounds are inflicted to the upper body. It is therefore a possibility that the respondent never intended to stab the deceased, or if he did, he only intended to inflict a relatively minor wound. It is also a possibility that the knife wound occurred in the course of a struggle and without any intention on the part of the respondent to inflict any wound whatsoever.

16. Ultimately, and of the greatest importance, is the fact that the respondent brought a knife to the deceased's home. The evidence of damage caused to the door by a knife suggested that the respondent was holding the knife when the deceased opened the door to him, rather than continuing to conceal it in his pocket. While it may be the case that the respondent merely brought the knife for the purpose of threatening the deceased, and with no intention of in any way using it, is difficult to accept, as the respondent has suggested that he brought the knife with him merely for defensive purposes only. It is clear from texts sent by the respondent to the deceased before he arrived at the house that he was angry and was seeking a confrontation.

17. The fall out from the events that took place on the 22nd December 2013 were and are immense. Mr. Lawlor lost his life and his family have been left devastated as a consequence. The respondent and his family are also badly affected, although it must not be forgotten that in this regard the respondent is the author of his own misfortune.

18. The various mitigating factors present were clearly considered by the learned sentencing judge. The respondent accepted responsibility for Mr. Lawlor's unlawful death and he pleaded guilty thus avoiding the necessity for a full trial. He had no relevant previous convictions and so was sentenced as a person of previously good character. He was also heavily involved in the care of his partner, Ms. Lawlor, and his partner's daughter, both of whom have significant medical issues. There were present, in the circumstances, all the ingredients for a sentence to include a significant suspended element.

19. In the Court's view the sentence imposed of five years with half of that term suspended was unduly lenient. A custodial term of just two years and six months for this offence given all its circumstances was inappropriate and unduly lenient. The Court will therefore quash that sentence and re-sentence the respondent.

20. The appropriate sentence in the Court's view is one of six and a half years imprisonment. The respondent is entitled to expect a discount by way of a significant portion of that term being suspended for the various matters already referred to and which were referred to in some detail also by the learned sentencing judge. A suspended element of somewhere in the region of three years of the six year and a half year term is not unreasonable. The sentence of this Court will therefore be six and a half years imprisonment with the final three years suspended on conditions.

