



Birmingham J.  
Sheehan J.  
Mahon J.

**IN THE MATTER OF AN APPLICATION PURSUANT TO  
SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**Between/**

**The Director of Public Prosecutions**

**Appellant**

**- and -**

**Dean Moore**

**Respondent**

**JUDGMENT (*ex tempore*) of the Court delivered by Mr. Justice Mahon on the 14th day of March 2017**

1. This is an application by the appellant to review the sentences imposed on the respondent on 12th February 2016 at Dublin Circuit Criminal Court on one count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and one count of assault causing harm contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997, pursuant to the provisions of s. 2 of the Criminal Justice Act 1993.

2. Having pleaded guilty to the offences, the respondent was sentenced to three years and six months imprisonment in relation to count no. 1 and to two years and six months imprisonment in relation to count no. 2. The sentences were suspended in their entirety for a period of three years on certain conditions, including that the respondent would place himself under the supervision of the Probation Service for a period of one year from the date of sentence, that he would comply with all directions of the Probation Service and attend all appointments, that he would undertake offending behaviour work (including victim awareness) with the Probation Service, that he would engage in addiction support services in the community, that he would attend therapeutic support service for gambling addiction if deemed necessary by the Probation Service and that he would attend any other services deemed necessary under the auspices of the Probation Service. A sum of €900 made available by the respondent was directed to be paid to the injured party "as a practical expression of remorse".

3. The assault occurred on the 3rd June 2013 at about 4 a.m. in the morning as the victim was making his way home after a night out. He was approached and attacked by the respondent who demanded his wallet. The respondent then kicked him about ten times on the ground and his wallet was taken. When later apprehended the wallet was found on the person of the respondent. The victim suffered a broken nose, fractures to his jaw, a soft tissue issue to his leg and bruising.

4. The mitigating factors referred to in the course of the sentencing judgment, and which were apparently taken into account by the learned sentencing judge include the following:-

- The plea of guilty, notified to the prosecution in advance.
- Co-operation with the investigation.
- Admissions made to the gardaí in the course of being interviewed.
- The assault on the victim was prompted by a misapprehension on the part of the respondent that the victim had previously struck a woman.
- The lack of pre-mediation.
- The fact that the victim made a good recovery from his injuries.
- The lack of serious previous convictions.

5. In the course of his sentencing judgment, the learned sentencing judge also referred to the respondent's "significant medical difficulties". His good education, his remorse, his practical expression of that remorse. The learned sentencing judge stated that "The court has to mark the seriousness of the offence" before continuing to the effect that he also had to take into account the personal circumstances of the respondent. He then proceeded to impose sentence on the respondent but suspended the entire of the term imposed for the aforesaid reasons.

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

*"2(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(2) 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."*

7. In *DPP v. McCormack* [2000] 4 I.R. 356, Barron J. stated (referring to s. 2 of the 1993 Act) as follows:-

*"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 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 those 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."*

8. In *State (Stanbridge) v. Mahon* [1979] I.R. 214, Gannon J. stated (at p. 219):-

*"The first consideration in determining the sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others, but also by affording a compelling inducement and an opportunity to the offender to reform. The punishment should be appropriate not only to the offence committed, but also to the particular offender."*

9. In *DPP v. Redmond* [2001] 3 I.R. 390, the Court of Appeal said:-

*"If the term "undue leniency" were considered ambiguous or unclear, so that recourse could be had to parliamentary material, the "error in principle" approach would find support. The Minister for Justice, in introducing the measure said that before a sentence could be increased the trial judge "would have to have made a serious error, a serious breach of accepted principles of sentencing".*

10. The onus of establishing undue leniency rests with the appellant (see *DPP v. Stronge* [2011] IECCA 79). It is insufficient to establish that a particular sentence is lenient or very lenient, it is necessary to establish that the sentence went beyond that, and was in fact unduly lenient. It is a high threshold because of the generally wide discretion that is afforded to a sentencing judge when imposing sentence. In circumstances where such sentence has been imposed following a full assessment of all relevant facts by the learned sentencing judge, and who had the benefit of hearing first hand the evidence from the prosecuting garda and the plea and mitigation.

11. The victim of this very serious assault, Mr. Muldoon, sustained significant injuries. He suffered a broken jaw which required a number of medical procedures, a soft tissue injury to his leg and severe bruising to his head and face. He was unable to eat solid food for a week and continued to suffer headaches thereafter. He was required to use crutches for a number of weeks. Thankfully, he went on to make a full recovery. His economic loss was in the region of €700.

12. The respondent has personal difficulties and had a difficult childhood. He developed serious addiction problems. He has three relatively minor public order convictions between 2006 and 2007. He has not come to the attention of the gardaí in the almost four years since these offences were committed. At the time of his sentencing in the Circuit Criminal Court a probation report indicated that the respondent's contact with the service was *"less than satisfactory"*. It described him as being at moderate risk of reoffending in the following twelve months.

13. This court has indicated its decision that the sentence imposed in this case were unduly lenient. The savagery of the assault on Mr. Muldoon and its completely unprovoked nature is such that, in the Court's view, a significant portion of the sentence imposed ought to have involved immediate custody. An effective prison sentence of three and a half years for these very serious offences was lenient and that is certainly rendered unduly lenient when entirely suspended.

14. When the matter last came before this court the resentencing of the respondent was adjourned to facilitate the provision of an up to date report from the probation service. Such a report has now been made available, dated the 6th March 2017. That report is reasonably positive but not altogether so. In its conclusion, the report states:-

*"While Mr. Moore says he pleaded guilty to the offences before the court, he continues to dispute aspects of the assault causing harm charge as recorded in the book of evidence and he denies the robbery charge.*

*Mr. Moore did maintain contact with addiction services throughout the year and it is the understanding of this officer that since January of this year, Mr. Moore's engagement with the Coolmine Day Programme is consistent and positive. This service has requested a report and urinalysis from Coolmine, however at the time of writing this has not been received. Mr. Moore admits to continuing to gamble throughout his time on supervision but he says he has now desisted, however this officer is unable to confirm this."*

15. The report concludes with a reference to "the Resolve programme" which is a twenty six session programme designed to support violent offenders to address their behaviour. It suggested that the respondent was suitable for this programme and had expressed his willingness to attend it. Today, the court has been advised that the appellant is about to commence participation in the programme.

16. It has also been informed that there has been an important change in the appellant's acceptance of responsibility for his involvement in this offence, in that he now fully accepts that Mr. Muldoon did nothing to provoke or precipitate the assault, and he stands over his plea of guilty. The letter of apology and acknowledgment of the offence handed into court today is frank and impressive. For the court this acknowledgment is of particular importance.

17. It is important also to emphasise the fact that the prosecuting guard, Gda. Roche, was particularly supportive of the respondent in the course of his evidence to the sentencing court. He agreed, in the course of been examined by counsel, that his experience of the respondent over a ten year period while stationed at Pearse Street garda station was a positive one. Gda. Roche always expressed his view that the offences in question were isolated incidents in terms of the respondent's general behaviour. Gda. Roche also agreed that the respondent did not appear to be a person who had *"a predilection for violence"*.

18. As has already been stated, the respondent's sentence ought to have included a significant and immediate custodial element. There has been a delay in bringing and processing this undue leniency application and when added to the period between the date of the offence and the first sentence hearing, almost four years have now passed. In that time the respondent has not re-offended, and this fact alone is of some significance, and a matter of particular relevance to this court's consideration of the appropriate sentence to be imposed today.

19. There is a strong public interest in structuring that sentence in a manner which will incentivise the appellant's rehabilitation generally and in particular his continued avoidance of involvement in violent crime. The fact that the respondent has succeeded one hundred per cent in avoiding offending of any nature is of great credit to him and the probation service who have done so much to assist him in these intervening years. A sentence which would almost certainly interrupt the rehabilitation by requiring the respondent to now enter prison, and to do so for the first time, would, in the court's strong view, be counter productive at this point in time, and in the particular circumstances of this case.

20. The court will therefore quash the sentences of three and a half years and two and a half years and in their place will impose a sentence of similar duration, but with the entire term suspended for a period of three and a half years from today's date, and with supervision by the probation service for eighteen months from today's date. The practical effect of structuring the sentence in this way is that the appellant will have been, in effect, subject to the risk of imprisonment for almost seven and a half years from the date of the assault in the event of his involvement in any criminal activity occurring within that period.