



## THE COURT OF APPEAL

[249/2018]

Birmingham P.

McCarthy J.

Kennedy J.

### BETWEEN

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**AND**

**DONAL O'HARA**

**RESPONDENT**

### JUDGMENT of the Court delivered on the 12th day of April 2019 by Birmingham P.

1. On 31st July 2018, Mr. Donal O'Hara (the respondent) was sentenced by the Special Criminal Court to a term of three years imprisonment with the final year suspended in respect of offences of false imprisonment and assault causing harm. The sentences imposed in respect of each offence were to run concurrently with each other, however, as they had been committed while the respondent was on bail, they were to run consecutive to another sentence that the respondent was serving that had been imposed by the Circuit Court in Clonmel which had been imposed on 1st October 2015. This earlier sentence was one of twelve years imprisonment with the final seven years suspended imposed in respect of an offence of aggravated burglary. The Director has now sought to review the sentence imposed by the Special Criminal Court on grounds of undue leniency.

2. The factual background to the sentence hearing, which followed the entry of pleas of guilty, and now to this application to review is to be found in events that occurred on 9th June 2015. At that time, Martin Byrne, who is one of the injured parties in the case, was working in the area of close personal security. He was employed by a businessman, JM, and resided with his family at premises provided by his employer at The Towers, Garter Lane, Saggart, County Dublin.

3. On an unknown date in May 2015, Mr. Martin Byrne was asked to accompany his employer to a meeting at Keatings Business Park. There, they met with two men, Declan Duffy and Dessie O'Hare. In the aftermath of that May meeting, Mr. Byrne's relationship with his employer began to deteriorate.

4. On 9th June 2015, Mr. Byrne was once more asked by his employer to attend a meeting at Keatings Business Park. When they arrived there, they went upstairs to an office room with Mr. Duffy and Mr. O'Hare. Five other men entered the room and prevented Mr. Byrne from leaving. His employer departed and Mr. Byrne was left alone with the seven men of whom the respondent, Donal O'Hara, was one. Mr. Byrne was told that he was going to be removed from his home at The Towers, Saggart, that he was going to be taken there and that he and his family were to pack their bags and were to be gone by the end of the day. He was then brought downstairs and placed in one of three vehicles which were waiting, along with three of the men. He was punched and slapped and told that if he failed to cooperate, his life was in jeopardy. The vehicles drove in convoy back to The Towers. They initially experienced difficulty in gaining access to the complex because of the presence of a large, wrought iron, electronically-operated gate. Another resident of the complex, Mr. John (Jay) Roche, who was another of the injured parties, appeared, but refused to open the gate when requested to do so and ran off. Mr. Byrne was threatened again and told that if he did not assist them in gaining access to the premises, his life was in danger. In response to these threats, Mr. Byrne told them of a method which would enable them to enter through the gate. The three vehicles entered the courtyard of The Towers complex and Martin Byrne was brought by a number of men to the house where he lived with his wife and son. As they did so, another group of men went looking for Mr. Roche. Ms. Lisa Byrne, wife of Martin Byrne, was at home, and at this stage, was still wearing night attire. She was brought to her bedroom by one of the men who had entered the premises who remained there with her while she was forced to dress. She was told that she had to pack a bag and that she and her family would be leaving their home that day. Her son, Brandon, was also told that he was not free to leave; he was kept in the kitchen and was told that his family were to be removed from the house.

5. The men who had gone looking for Mr. Roche located him. The sentencing court viewed CCTV footage of what happened thereafter and that footage was also viewed in the course of the review application by this Court. The CCTV records an extremely violent assault involving several men with the respondent an active participant. The injured party, Mr. Roche, was lying prone on the ground and received multiple blows all over his body from both punches and kicks. The violence recorded on CCTV is quite shocking and Mr. O'Hara and the others involved are extremely lucky indeed that the incident did not give rise to catastrophic injuries or even a fatality. It is worth noting that the CCTV indicates that Lisa Byrne and Brandon Byrne witnessed the assault that was taking place and witnessed the extent of the violence that was being directed at John (Jay) Roche.

6. While the assault on John (Jay) Roche was taking place, Mr. Byrne was detained in No. 7, The Towers, and was himself physically assaulted. The incident came to an end following an intervention by another resident of the complex who identified that something untoward was going on. He contacted Gardaí who arrived on scene in response to a call. Mr. Byrne was sent out by his assailants with a view to getting rid of the Gardaí, having been warned that his life was in danger if he failed to do so. However, the Gardaí noted his distress and observed that there were injuries to his face. Mr. Byrne's facial injuries, which arose from the incident, required treatment in the form of sutures to his ear.

7. Mr. O'Hara departed the scene, but was arrested a short time later in a nearby restaurant. Blood on his clothing matched a DNA profile of Mr. Roche. Mr. Roche had suffered an irregular-shaped wound over the bridge of his nose, including some skin loss, a fractured nose, swelling and bruising all over his head and face, bruising to his eye, tenderness to the cheekbone and left jaw and various abrasions over his body. He had a fracture of his forearm. A CT scan did not show any evidence of brain injury. He was treated by way of staples to close up some of the wounds to the scalp and a cast was applied to his broken arms.

8. Victim impact reports were put before the Court in respect of Martin Byrne, Lisa Byrne, and Brandon Byrne. It is clear from those reports that the incident had a very significant effect on their lives and that since the incident, they had effectively been living in secret. Mr. Martin Byrne is no longer able to continue in his area of employment and all three have found adjusting to their new lives extremely difficult. Mr. Roche declined to put a victim impact statement before the Court, and indeed declined to furnish the Gardaí with a statement.

### **The Background and Personal Circumstances of the Respondent**

9. The Court heard that Mr. O'Hara's date of birth was 9th January 1992, that he had a criminal record which began at age nineteen years. At the time of sentencing, Mr. O'Hara was twenty-six years old and had acquired a significant number of relatively minor convictions along with some more serious convictions. In March 2016, Mr. O'Hara was convicted of a s.3 assault causing harm which was dealt with on indictment in March 2016 and resulted in the imposition of a sentence of two and a half years imprisonment. Most notably amongst his convictions, however, was the aforementioned aggravated burglary conviction.

### **The Court's Approach to Sentence**

10. In the course of sentencing remarks, the Special Criminal Court commented that the offences were aggravated by the fact that they were committed while the accused was on bail. So far as the offence of assault causing harm on Mr. Roche was concerned, the Court said that Mr. O'Hara's involvement in that matter was specific and high level. By way of contrast, his involvement, according to the Special Criminal Court, in the false imprisonment matters was at a general and lower level. The Court accepted that he was not present as an organiser of the escapade, but as "brawn". The Court noted that he had no involvement in the earlier part of the campaign against Mr. Byrne, unlike some of the other serious participants. The Court also noted that he was the youngest participant out of the large group in attendance, being aged twenty-three at the time. With respect to the offence of the assault causing harm, they assessed the gravity of the offence as lying well within the top third of the range of such offences and therefore identified the appropriate headline sentence for that offence as one of four years imprisonment. So far as the false imprisonment matters are concerned, they felt that Mr. O'Hara's conduct left him within the lower part of the range for such offences, but as that offence involves a considerably higher starting point than does a s. 3 assault, they believed that the appropriate headline sentence for the false imprisonment was also a period of four years.

11. In relation to mitigating factors, the Court referred to the timely plea of guilty, to the fact that some allowance had to be made for proportionality as the sentence being imposed would have to be consecutive to another lengthy sentence, to the fact that Mr. O'Hara had shown some degree of remorse, and that he had undoubtedly had a difficult childhood and background as well as certain medical difficulties. The Court noted that the respondent had responded positively during his time in custody, but that while in custody, he had himself been the subject of a serious assault which had resulted in him being placed on an onerous custodial regime. The Court decided that in order to give weight and effect to the mitigating factors identified, that they proposed to have recourse to a mixture of straight discount and partially-suspended consecutive sentences. Accordingly, the Court decided not to make any of the sentences imposed in the case consecutive, as between themselves, and proceeded to apply a straight discount of 25% from the four-year headline sentence identified, having regard to the entry of a plea of guilty, and then in order to engage with the concepts of proportionality and potential rehabilitation, and in order to incentivise that aspect, suspended the final year of the net three-year sentence in each case.

12. In contending that the sentences imposed were unduly lenient, the Director of Public Prosecutions advances the following grounds:

- (i) That the Court erred in principle in imposing an unduly lenient sentence in all the circumstances;
- (ii) That the Court failed to attach appropriate weight to the aggravating factors;
- (iii) That the Judges of the Special Criminal Court failed to have appropriate regard to the aggravating factors which obtained in relation to the offence of false imprisonment and erred in determining that the headline sentence was one of four years imprisonment;
- (iv) The Court erred in principle in failing to give sufficient weight to the evidence of the prosecution as to the circumstances of the commission of the offences, and in particular, in determining that the respondent's conduct left him within the lower part of the range of offences of false imprisonment;
- (v) The Special Criminal Court failed to have appropriate regard to the intimidating and fear-inducing effects that the violent assault that was committed by the respondent during the currency of the false imprisonment which was witnessed by the injured parties, contributed the gravity of the nature of the offence of false imprisonment;
- (vi) That the members of the Special Criminal Court erred in according undue and excessive weight to the mitigating factors in the case, and in particular to the personal circumstances of the respondent, Mr. O'Hara; and
- (vii) That the sentences imposed failed to reflect the nature and gravity of the offences committed by the respondent and their effect on the injured parties.

13. In contending that the sentences imposed were unduly lenient, the Director has drawn attention to a number of comparator cases and says that if one has regard to these, that the sentences imposed were seriously out of line. Reference is made to the case of *DPP v. Maguire* [2018] IECA 71, where the Court was dealing with an offence involving assault and false imprisonment of the ex-partner of the accused/respondent. The sentence sought to be reviewed there was an effective sentence of two years. In the course of its judgment, this Court commented that a headline sentence of four years, while issue had not been taken with it by the Director, may indeed have been very lenient, but that the mitigating factors present did not justify a reduction of 50%. The Court of Appeal proceeded to resentence the respondent to two concurrent four-year sentences with the final twelve months suspended. In the very well-known case of *DPP v. Dowdall* [2018] IECA 122, another case which dealt with false imprisonment, headline sentences of fourteen years and eleven years for the two accused/respondents were not regarded as inappropriate. In *DPP v. Niepogoda & Lacki*

[2018] IECA 338, the offence dealt with by the Court was a particularly serious one which had seen the victim held for three days, being bound, gagged and put in the back of a car which was then set alight. This Court felt that the headline sentence of seven years was too low, observing that if a sentence of fourteen years or fifteen years had been identified as a headline sentence, that the Court would have been very unlikely to have interfered. The case of *DPP v. Brady & Tate* [2018] IECA 341, while not quite as serious as *DPP v. Niepogoda & Lacki*, was nonetheless a serious case, where the Court indicated that the headline or pre-mitigation figure could have been one of twelve years, and certainly could not, under any circumstances, have been one of less than ten years.

14. In the present case, the Court had available to it what might be described as “internal comparators”, in the sense that others involved in this incident had been dealt with on different occasions by the Special Criminal Court. Declan Duffy and one Daniel Keane were charged with and pleaded guilty to the same offences as Donal O’Hara. Declan Duffy received a sentence of six years imprisonment, a headline sentence of nine years having been identified. Mr. Daniel Keane received a sentence of five years imprisonment with one suspended. A man by the name of Christopher Maguire was also dealt with by the Court arising from the incident. He was not charged with assault, but was charged solely with false imprisonment. There were some unusual aspects to his sentence hearing, in that he appeared before the Court having suffered gunshot wounds to the head and in a situation where he would be experiencing enduring consequences of this. He was dealt with by way of a wholly suspended sentence. In the course of his submissions to the Special Criminal Court, senior counsel on behalf of Mr. O’Hara expressed the hope that his client would fall somewhere between Mr. Maguire and Mr. Keane.

15. In the Court’s view, these were by any standards very serious offences. The fact that the particularly serious s. 3 assault was directed at a party other than those who were the subject of the false imprisonment charges adds an additional dimension. There is the further fact that members of the Byrne family witnessed the very serious assault on Mr. Roche, which must have contributed to their sense of fear and alarm. In addition, the fact that the false imprisonments were taking place against a background of and as part of a campaign designed to cause a family to leave their home is particularly disturbing. The Court notes the view of the sentencing Court that some allowance had to be made for proportionality as the sentence to be imposed had to be consecutive to another lengthy sentence. However, that aspect cannot be divorced from the fact that the serious offences with which the Court was concerned were committed at a time when the respondent was on bail for another very serious offence and in respect of which he subsequently received a significant sentence. By statute, the fact that the offence was committed on bail had to be regarded as an aggravating factor and the Court was obliged to impose a sentence more severe than it would otherwise have done.

16. Affording all possible deference to the views of the Special Criminal Court, we are still driven to the conclusion that the net sentence imposed of two years was clearly unduly lenient and unduly lenient to an appreciable extent.

17. We are, therefore, required to address the question of resentencing and to do so as of today’s date. Had the Court been called on to sentence at first instance, it seems to us very unlikely that we would have seen any basis for dealing with Mr. O’Hara more leniently than Mr. Keane was dealt with. However, in order to give effect to the policy of affording appropriate respect to sentencing decisions of the Special Criminal Court when those sentences are reviewed on grounds of undue leniency, and in order to recognise the fact that having the respondent’s sentence extended at this stage when he is well into his sentence must be a source of grave disappointment for Mr. O’Hara, we will limit our intervention and will impose a sentence less than we would have imposed had we been dealing with the matter at first instance.

18. Accordingly, we will deal with the matter by quashing the sentence of the Special Criminal Court and substituting therefor a sentence of four years imprisonment, but with the final twelve months suspended. The Court will deal with the matter as the Special Criminal Court did by imposing the same sentence on each of the offences, and as was the case in the Special Criminal Court, the sentences will be consecutive to the sentence imposed in the Circuit Court in Clonmel on 1st October 2015.