



THE COURT OF APPEAL

[297CJA/16]

The President
Whelan J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

**AND
PATRICK HARTY**

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of October 2018 by Birmingham P.

1. Before the Court is an application brought by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1992, seeking to review certain sentences on grounds of undue leniency. The sentences sought to be reviewed were imposed on 28th October 2016 in Waterford Circuit Court. On that day, sentences of four and a half years' imprisonment with the final eighteen months suspended and a concurrent sentence of one year's imprisonment were imposed on the respondent. The longer sentence was imposed in respect of a s. 4 assault, an offence of assault causing serious harm, and the concurrent sentence was imposed in respect of a s.3 assault being an offence of assault causing harm.
2. From the written submissions and from the oral argument, it is clear that there is no real dispute between the parties about the legal principles that are applicable to reviews such as these. Indeed, those principles have not really been in dispute since the first such case, the case of *DPP v. Byrne* [1995] 1 ILRM 279.

Background to the Offences

3. The background facts are that on New Year's Eve/the early hours of the morning of New Year's Day on 31st December 2014, a very serious assault occurred at Poolderry, Waterford. The injured party, who was aged nineteen years at the time, was at a New Year's Eve party along with friends. The accused, with others, arrived, not having been invited. The stage was reached when the injured party and his friends said they were going to leave. The accused and his group also decided that they were going to leave. An argument ensued outside wherein the accused tried to punch one of the friends of the injured party, but missed. The injured party then asked one of the group that the accused/respondent was with to leave and turned away. As he did so, the accused/respondent, with force, thrust a glass bottle into the injured party's face, and in particular, into his eye. The respondent had broken a previously intact bottle immediately prior to pushing it into the complainant's eye. The accused thrust the bottle into the complainant's eye twice, and on the second occasion, a piece of glass remained in the complainant's eye. The complainant was disorientated and tried to remove whatever was in the eye, and when he did so, began bleeding very heavily. The injured party's friends sought to offer assistance and one provided a jumper for him to hold to his eye. An ambulance was summoned. As it happened, the injured party's father is a paramedic and was on duty the night in question. Ultimately, he was among those despatched to the scene only to find that it was his son who had been injured and was in need of assistance.
4. The injured party was brought to University Hospital Waterford where it was immediately evident that he had suffered a very significant injury to his right eye. He was brought to the operating theatre where he underwent surgery. This was to be just the first of a number of surgical interventions, but despite the best efforts of his doctors, he has lost vision in the eye and they have been unable to restore it.
5. In the aftermath of this initial surgery, the injured party spent approximately a fortnight in hospital. On three subsequent occasions, he underwent retinal eye surgery. After these operations, he had to lie down on his stomach with his face facing down, twenty-four hours a day, with only a five-minute break each hour. A very powerful victim impact statement prepared by the injured party sets out the detail of the ophthalmic, cosmetic, and psychological effect.
6. The respondent left the area after the incident, but with the assistance of one of those who had been present for the incident and was in a position to identify him, he was arrested and interviewed. In the course of interviews, he made admissions and expressed remorse for his actions.
7. The second incident which gave rise to the s. 3 assault charge occurred on 1st September 2015. On that occasion, the injured party, who has a very distinctive appearance, with long black hair halfway down his back and a long triangular beard, was in a car park leading to a lane in Dungarvan town. He was confronted by a number of individuals who made reference to Bob Marley. As the injured party was on his return journey, making his way back to the car, a confrontation occurred with the individuals in the course of which the injured party sustained two cuts over his eyes. In the course of the Garda investigation that followed, the respondent, Mr. Harty, was identified as the man who had hit the injured party and caused the injuries. In the course of the investigation, Mr. Harty was arrested and, while detained, made admissions.

Mr. Harty's Personal History

8. In terms of the respondent's background and personal circumstances, he was born on 1st July 1997. Accordingly, at the time of the s. 4 assault, he was 17 years of age and had turned 18 at the time of the s. 3 assault. The Court heard that he came from a Traveller background, that his childhood and adolescence was very dysfunctional and he had very limited educational attainments. The sentencing court had available to it two national educational psychological reports prepared when he was twelve and fourteen years respectively. Also before the Court was a psychological report prepared by Dr. John Bogue at the request of the defence legal team. The report of Dr. Bogue refers to the fact that Mr. Harty was of below average intelligence, was treated for late diagnosed Attention Deficit Hyperactive Disorder (ADHD) and had experienced a number of significant adverse life affects including the recent

suicide of a revered older brother and watching the fatal electrocution of a cousin when he was only five years old. Dr. Bogue also referred to the fact that he had been exposed to a great deal of violence when growing up on account of various internecine feuds with other Traveller families. Dr. Bogue records him as saying that his behaviour in recent years had become increasingly out of control which he attributed to anger problems and his heavy use of alcohol and drugs.

The Judge's Sentencing Remarks

9. At the outset, it must be said that the judge's approach to sentencing was commendably clear and transparent. He commented that the New Year's Eve incident was particularly vicious and had left the injured party with devastating and permanent injuries. He reviewed those injuries and quoted from the victim impact statement. He commented that he believed there were a number of aggravating factors to the incident: the use of the bottle as a weapon in conjunction with the assault was, he said, aggravation in itself, but the smashing of the bottle prior to the assault to transform it into a more effective and dangerous weapon was a further aggravating factor. An additional consideration was that the assault was entirely unprovoked. He commented that the physical, emotional, and psychological consequences suffered by the injured party was a factor which he was taking into account in fixing the offences in the upper reaches of the medium range of gravity for s. 4 offences. He referred to the view of the DPP that the offence should be placed in the upper range of gravity, but said that would instead place it in the medium range, but in the upper mid-range. Referring to the case of DPP v. Fitzgibbon [2014] IECCA 1, he said that the headline sentence was one of four years to seven and a half years. Finally, having considered all of the factors, he found the appropriate starting sentence to be six and a half years.

10. The sentencing judge acknowledged that the s. 3 assault was less serious, but nonetheless identified aggravating factors that were present. He noted that it involved multiple blows and that it was entirely unprovoked. He saw the pre-mitigation sentence as 18 months. The judge then commented that the Court, when sentencing, had to consider not just the nature of the offence but the offender himself. He referred to the difficult, adverse and dysfunctional childhood and background of the respondent, made reference to the reports from Dr. Bogue and from the National Educational Psychological Services, making reference to the difficult that Mr. Harty had experienced in school and that he was identified as having a mild learning disability. The judge described the person he was sentencing as a very vulnerable person from a highly dysfunctional family and referred to a number of the adverse incidents in his background, witnessing the electrocution of a young cousin and the death by suicide of an idolised older brother.

11. The judge referred to the fact that there had been some progress since the respondent had gone into prison, in particular, during his time in Midlands Prison he had undertaken anger management courses and had also become involved in boxing. However, those opportunities were not available in Cork Prison where he was, at that time, incarcerated. The judge then proceeded to reduce the pre-mitigation sentence of six and a half years for the s. 4 offence by two years to four and a half years. He went on to explain that, in respect of the s. 3 offence, he was reducing the starting sentence of 18 months to one of 12 months. The judge further indicated that he was suspending the last 18 months of the four-and-a-half-year sentence for a period of two years' post-release.

12. The judge concluded his sentencing remarks by addressing the question of whether the sentence in respect of the s. 3 assault should be consecutive or concurrent. He noted that it was not committed whilst on bail and said that in view of the accused's youth and the very difficult circumstances from which he came, he was not making the sentence consecutive, but rather, was making it concurrent.

Summary of Legal Submissions

13. In written and oral submissions, the DPP is critical of the judge's approach. It is said that he erred in viewing the case as being in the upper mid-range rather than the high range. It is said that in consequence, his starting sentence of 6 and a half years for the s. 4 assault was too low. The written submissions suggest that a starting sentence of 7 and a half years would have been appropriate. It is said that the mitigation from 6 and a half years to 4 and a half years was generous, and perhaps too generous, and that the further suspension of eighteen months was inappropriate. It is said that the decision to make the s. 4 and s. 3 assault sentences concurrent was inappropriate. It is fair to say that it seems to be the Director's position that it is the combination of these various decisions by the judge, all favourable to the accused, which is criticised and which it is said has led to a sentence that is a substantial departure from the norm, one that is unduly lenient and should be set aside as such.

14. Counsel on behalf of the respondent acknowledges that the sentence was a lenient one, but says that the final sentence was not so unduly lenient as to permit intervention by this Court. She says that while the offences are undoubtedly serious, particularly the s. 4 assault, that there are significant factors present by way of mitigation. In that regard, she points in particular to her client's youth, he was 17 years old at the time the more serious offence was committed, his very troubled background as referenced in the report of Dr. Bogue, and the remorse he has expressed. She points to the fact that the sentence imposed has been served and her client has been at liberty since March/April of this year.

15. Understandably, both sides have referred to the case of DPP v. Jordan O'Donovan [2016] IECA 119, another s. 4 case, where the injured party lost an eye. In the Court's view, the O'Donovan case is of limited assistance. In a number of respects, the facts of this case are clearly more serious. In that case, a verbal exchange in a nightclub developed into a physical altercation with Mr. O'Donovan striking the injured party into the face with a glass object which he was holding when the incident started. Absent from that case was the smashing of the bottle to make it more dangerous and the thrusting of the bottle a second time into the eye/face area. Moreover, the mitigation available was significantly greater. The sense one had was that Mr. O'Donovan's actions were entirely out of character, he had no previous convictions, there was clear remorse accompanied by a high level of empathy for his victim, and the strong sense one had was that this was a person who was unlikely to find himself before the courts again. The Court makes that comment fully conscious of the submissions on behalf of Mr. Harty that there is different mitigation, albeit still significant mitigation, available in his case.

16. The Court would agree with the Director that there was a combination of factors present here which meant that the case should properly have been seen as entering the upper band. The Court would not disagree with the submissions of the Director that a starting point of seven and a half years would have been appropriate. However, the Court is also of the view that whatever starting point is identified and a divergence between 6 and a half years and 7 and a half years would probably not of itself trigger an intervention where there was significant mitigation present. Of the factors to which reference was made at the sentence hearing and on the appeal, the Court would regard the respondent's youth and the very dysfunctional background as the most relevant. The Court is in no doubt that the factors present justified significant movement from the pre-mitigation starting sentence.

17. However, in the Court's view, discounting from what was already a low starting point by two years and then further going on to suspend e18 months or one-third of the sentence, gave rise to a sentence that was unduly lenient and clearly so. Again, in a situation where the two assaults were separated by a number of months, the Court feels that a consecutive sentence should have been imposed. This was particularly so in a situation where the sentence to which it was being made concurrent was such a lenient one. The combination of an exceptionally lenient sentence on the s. 4 assault and a concurrent sentence on the s. 3 assault was simply one decision too many in favour of the accused.

18. The Court regards the involvement in the s. 3 assault in September 2015 as very disturbing. It was utterly unprovoked and the only suggested explanation is to be found in the fact that injured party was of distinctive appearance. The idea that somebody who had been involved in an incident so serious as to cause a young man to lose an eye should be engaging in entirely gratuitous violence some nine months later is very disturbing indeed. It has to call into question the genuineness of the remorse which had been expressed for the s. 4 assault.

19. Overall, the Court is in no doubt that the sentences imposed were unduly lenient, must be quashed and that the Court must proceed to resentencing. In doing so, the Court will identify a sentence of 7 and a half years' imprisonment as the pre-mitigation sentence for the s. 4 assault.

20. For the s. 3 assault, the Court will, as the judge in the Circuit Court did, nominate a pre-mitigation figure of 18 months. Having regard to the mitigating factors present to which reference has been made, the Court will reduce the s. 4 sentence by two years to one of five and a half years. The s. 3 assault could have been dealt with by the sentence identified by the trial judge of twelve months, but in the Court's view, that sentence ought to be consecutive.

21. However, the Court is very conscious that it is resentencing a young man who has already completed his sentence and that its order means that even though he has been at liberty for several months, he would be required to re-enter into custody. Accordingly, the Court will limit the additional period of incarceration by suspending the final two and a half years.

22. In summary, the Court imposes a sentence of five and a half years' imprisonment on the s. 4 count, a consecutive sentence of 12 months' imprisonment on the s. 3 assault, but, conditional on his entering a bond to keep the peace and be of good behaviour during the period he will spend in custody and for a period of two and half years thereafter, the Court will suspend the final two and a half years of the sentence.