



THE COURT OF APPEAL

**Sheehan J.
Mahon J.
Edwards J.**

163CJA/15

**In the matter Section 2 of the Criminal Justice Act 1993
The People at the Suit of the Director of Public Prosecutions**

v

M.A.

Appellant v

Respondent

Judgment of the Court (ex tempore) delivered on the 18th day of January 2016

by Mr. Justice Sheehan

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, for a review on grounds of undue leniency of the sentence of twelve months imprisonment imposed on the respondent on the 3rd March, 2015 at the Circuit Criminal Court in Monaghan in respect of an assault by him on his partner on the 5th January, 2014, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997.
2. In order to consider this application it is necessary to set out a summary of the facts, the effect of the assault on the injured party, the personal circumstances of the respondent and the judge's sentencing remarks.
3. On the 4th March, 2015, the respondent pleaded guilty to assault causing harm to RM. The court directed a victim impact report and a probation report and adjourned sentence to the 3rd June, 2015. The court directed the respondent to have no contact with the injured party in the meantime.
4. On the 3rd June, 2015, Sergeant James Gallagher told the court that the injured party was the mother of three children, E aged 11, S aged 5 and N aged 4 and that the respondent was the father of the two youngest children. The respondent and the injured party had been in a relationship for eleven years when the offence occurred.
5. Sergeant Gallagher told the court that at approximately 12.30 am on the 5th January, 2014, RM had returned home from Kingscourt and was verbally abused by the respondent. He grabbed her by the hair and pulled her into a bedroom. He kicked her on the legs and in head whilst wearing his work boots with steel toecaps. After a few minutes he left her, but returned on two occasions to kick her again. At one point the respondent grabbed RM with one hand around her neck and lifted her up as a result of which she hit her head off the ceiling. He then threw her on the ground. RM is 4 ft. 10 ins. in height and the respondent is 6 ft tall.
6. The respondent came to the bedroom holding an article which RM thought was a butter knife and shouted at her to stab him. She knew her leg was broken, she was in severe pain. She was so afraid of the respondent that she soiled herself and was afraid that she might be killed. RM was left on the bedroom floor for approximately four hours.
7. RM's son E aged 11 went to fetch help for his mother in the early hours of the 5th January, 2014. He cycled his bicycle for a mile and a half along country roads to Pizza Point, Main Street, Kingscourt, where he asked if he could ring 999. He was afraid and on his own. The gardaí arrived at the pizza shop and brought him home and the respondent was arrested at 5.40 am on the 5th January, 2014. Garda Stephanie Harvey found the injured party in severe pain and unable to get up and her leg was very swollen and an ambulance took her to Our Lady of Lourdes Hospital in Drogheda, Co. Louth.
8. This assault occurred while a safety order dated the 11th June, 2012, directed to remain in force for three years until the 10th June, 2015, was in place. The said order directed that the respondent should not use or threaten to use violence against, molest or put in fear RM.
9. On the 7th June, 2014, RM made a statement withdrawing her complaint against the respondent. On the 25th November, 2014, RM made a statement that she had been brought by the respondent to the garda station on the 7th June, 2014, for the purpose of getting her to withdraw her complaint while he waited down the street for her. She said she was afraid of him and intimidated by him and that she did in fact want to continue with her complaint against him.

The effect on the injured party.

10. RM suffered a fracture of her left tibia fibula and was detained in hospital for three days while she underwent operations on her left knee and leg. She suffered multiple lacerations and bruising to her body and clearly suffered a great deal of pain during the assault and prior to her arrival at the hospital.

11. At the time of sentence she continued to suffer from ongoing nightmares and flashbacks. She continued to have panic attacks and was fearful at night. She was described as being highly vulnerable to the respondent.

The personal circumstances of the respondent.

12. The respondent is a 46 year old electrician who at the time of the offence was unemployed and someone with a serious alcohol

problem. Following the commission of the offence, he moved out of the family home and obtained employment. At the sentencing hearing he apologised for assaulting his partner and handed in a letter to that effect. The court was told that he had seventeen previous convictions. These convictions included one for malicious damage twenty years ago and another for a public order offence. The majority of the respondent's convictions related to drink driving offences and driving whilst disqualified. Of greater relevance to the present appeal were two convictions for breaches of safety orders.

Sentencing remarks of the trial judge.

13. In the course of his sentencing remarks, the learned sentencing judge described the case as one of very serious domestic violence and also said that it was indeed a sad case. He outlined the aggravating factors as the serious level of violence, the fear instilled in the victim as a result of the assault and the fact that there had been two breaches of safety orders. He noted the respondent had received a four month sentence of imprisonment the previous day in respect of one of these breaches.

14. He described the principle mitigating factors as the plea of guilty, the apology and a reference from a local councillor and he also noted that the HSE had indicated a willingness to provide counselling in respect of the respondent's alcohol problem.

15. He also stated that he would have imposed sentence of three years imprisonment had the respondent been found guilty following a jury trial.

Submissions of the parties.

16. Counsel for the Director submits that the sentence imposed does not adequately reflect the gravity of the offending behaviour and relies on the unreported judgment in *DPP v. Black* CCA31/709 and *DPP v. Fitzgibbon* [2014] 2 ILRM at 116 and the judgment of this Court in the *People (DPP) v. Counihan* [2015] 3 JIC 2402.

17. In respect of the sentencing judge's approach to sentence, counsel for the Director refers the court to the *People (DPP) v. M.* [1994] 3 I.R. at 306 and also to *People (DPP) v. Kelly* [2005] 1 ILRM at 19 and by way of comparator referred the court to the case of *DPP v. Joseph Carberry* [2014] 11JIC/1701.

18. Counsel for the respondent on the other hand submits that the sentence imposed was an appropriate and proportionate one and points out that by extending the safety order in this case for a period of two years, the sentencing judge further impacted on the respondent.

19. Counsel for the respondent relies on the judgment in *DPP v. Byrne* [1995] 1 ILRM 13 at 279 and the *People (DPP) v. Redmond* [2001] 3 I.R. at 390. Counsel also outlined a number of factors which he submitted were relevant to sentence including the impact of sentence on the respondent's children. Counsel concluded by contending that the sentencing judge had properly weighed all relevant factors and urged the court not to interfere with the sentence which he stated did not represent a substantial departure from what is appropriate in the circumstances.

20. This Court has considered the submissions of the parties and concludes that the particular circumstances of the offending behaviour in this case warranted a sentence substantially higher than the one imposed. Indeed the learned sentencing judge himself had identified a three year sentence as being appropriate had the respondent been convicted following a not guilty plea.

21. We therefore allow the appeal and quash the original sentence and now proceed to fresh sentence hearing. The court in accordance with its jurisprudence invited the parties to make submissions.

22. Counsel for the Director had no further submissions to make on sentence and counsel for the respondent submitted on his behalf a number of documents for consideration by the court. These included a certificate indicating that the respondent had completed in prison a six week post release programme and had also completed a one day drug education workshop. Counsel also submitted correspondence on his behalf which clearly indicated that he is much missed by his two younger children.

23. It is clear from the facts of this case which has already been outlined in this judgment that this is a particularly serious case of domestic violence which requires to be measured by a substantial sentence. We note that the maximum sentence is one of five year imprisonment. The principle aggravating factors are the severity of the assault, its effect on the victim and the children, the necessity for an eleven year old child to cycle one and a half miles at 4.00 in the morning to get help for his seriously injured mother who then lay on the bedroom floor in severe pain, as well as the attempt to get the complainant to withdraw her complaint. These factors lead us to identify a sentence of four years imprisonment as the appropriate starting point in this case.

24. The principle mitigating factors are the plea of guilty and the expressed needs of the respondent's younger children as evidenced by the letter that was handed in to court this morning. The expression of remorse and the letter of apology are also important in this regard.

25. However, this Court notes that both at the time of the original sentence hearing and today, there is little evidence to show that the respondent has taken responsibility for his undoubted alcohol problem.

26. In light of the mitigation already outlined about, the court will suspend the final sixteen months of the four year sentence for a period of two years post release on condition that the respondent enters into a bond to keep the peace and be of good behaviour for that period of time.