



**THE COURT OF APPEAL**

**Sheehan J.  
Edwards J.  
Butler J.**

**CJA 203/15**

**In the matter of Section 2 of the Criminal Justice Act 1993**

**The People at the Suit of the Director of Public Prosecutions**

**Applicant**

**And**

**Brian McLaughlin**

**Respondent**

**JUDGMENT of the Court (ex tempore) delivered on the 30th day of May, 2016,**

**by Mr. Justice Sheehan**

1. This is an application by the Director of Public Prosecutions for a review of two sentences imposed on the respondent at the Circuit Criminal Court in Letterkenny on the 14th July, 2015.

2. On that date following pleas of guilty, the respondent was sentenced to three years imprisonment for assault causing harm to his then partner Ms. S at their family home in Letterkenny on the 28th October, 2013 and three years imprisonment for falsely imprisoning her at the same time and location. The final two and a half years of each sentence was suspended on condition that the appellant keep the peace and be of good behaviour for two and a half years following his release and further that he be subject to the Probation Service during that time. The Court directed that both sentences run concurrently.

3. Counsel for the applicant submitted that the sentence was unduly lenient in light of the aggravating factors. Counsel further submitted that the sentencing judge had given undue weight to the mitigation and had failed to incorporate an element of personal and general deterrence into the sentence. Counsel for the respondent while agreeing that the sentence imposed was a lenient one, nevertheless maintained that the sentence was not unduly lenient in view of the respondent's plea of guilty and his particular personal circumstances.

4. In order to consider these submissions it is necessary to set out the background to the offences, the personal circumstances of the respondent and the general principles applicable to undue leniency appeals.

**Background**

5. Sergeant Doherty outlined the facts which related to matters which had occurred in the early hours of the morning of the 28th October, 2013. At that time the respondent and the injured party were in a relationship and living together in Buncrana. They had been out with friends earlier in the evening to celebrate Ms. S's birthday and the respondent had left alone in a somewhat aggrieved state. In her statement of complaint to the gardaí Ms. S stated that when she got home, the accused was standing at the door waiting for her, that he locked it behind her and put the snip on. He followed her to the bedroom and punched her in the face. When she fell backwards onto the bed he climbed on top of her and put his hands around her neck, strangling her. She was unable to speak and thought he was going to kill her. She fought back and he released her. He grabbed her by the right arm and put her hand across her back and began forcing her arm upwards. He then pushed her head into the blanket and she found it difficult to breathe. She said that the next thing that she remembered was waking up in the sitting room on the floor and the accused kneeling over her shouting "please wake up". She did not remember how she got to the sitting room, but believed she had been knocked unconscious. She had a sore head when she woke up and there was a bump on her head. She got her phone and rang 999. The call was received at Garda Communications at 1.55 a.m. and the gardaí then arrived at the respondent's home but were refused admission. They were able to see the injured party and were concerned for her welfare as she appeared frightened and was waving to them for help.

6. The accused was agitated and aggressive and refused to admit the gardaí or to release Ms. S. At this stage the accused had armed himself with a kitchen knife and when the injured party managed to hide that, the respondent became agitated and armed himself with two further knives. The gardaí finally persuaded the accused to release Ms. S and she was released at 4.10 a.m.

7. The medical evidence indicated that she had generalised severe soft tissue trauma to her entire body mostly over her head, neck and torso. She had facial swelling with bruising to her neck. Her right shoulder was extremely tender with lack of movement and there was also bruising to her right arm. She was in severe physical discomfort and extreme pain.

8. The respondent eventually surrendered himself to the gardaí as a result of a phone call which he had received from his father who lives in Scotland. This phone call had been arranged by the gardaí.

9. The respondent was arrested under the Mental Health Act 2001, but was refused admission to the psychiatric unit at Letterkenny General Hospital. He was intoxicated and his questioning at the garda station was suspended due to this. Although the respondent was on medication at the time for psychiatric problems, he had voluntarily consumed alcohol that night and admitted this during the course of the interview with the gardaí.

10. The respondent was 20 years old when these events occurred. At the time he was living with the injured party. He also has a three year old son as a result of another relationship. The appellant has the following previous convictions; (i) on the 23rd March, 2015, he was fined €150 for being intoxicated in public; (ii) on the 3rd February, 2015, he was convicted of dangerous driving, driving without insurance and failing to stop. He received a community service order in respect of these offences which had occurred on the 17th July, 2012. On that occasion the respondent was also convicted of committing criminal damage and fined.

11. In the course of the evidence, it emerged that at the time of sentence and sometime prior to this, the respondent had been

involved in looking after his mother who herself had mental health problems and it also emerged that he himself had been taken into care when he was seven years old. He was in care until he was sixteen and was in a number of different placements during that time. He is one of ten children a number of whom had also been taken into care.

12. The aggravating factors are:-

- (i) the attack of Ms. S was totally unprovoked and had occurred in her own home,
- (ii) the injuries inflicted on her,
- (iii) the catastrophic nature of the assault which included strangulation of the victim,
- (iv) the degree of terror suffered by her,
- (v) the effect of the offences on her as outlined in her victim impact statement,
- (vi) the false imprisonment of Ms. S which occurred for a prolonged period despite the presence of the gardaí and following the commission of a serious assault.
- (vii) The false imprisonment of Ms. S was aggravated by the brandishing of knives.

13. Section 2 of the Criminal Justice Act 1993, provides that:-

"(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 Criminal Appeal to review the sentence.

. . .

(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."

14. The principles governing the law in relation to undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993 were summarised in a judgment of the Court of Criminal Appeal in *The People (at the Suit of the Director of Public Prosecutions) v Derrick Stronge* [2011] [2011] IECCA 79 where it was stated that:-

"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are: -

(i) the onus of proving undue leniency is on the DPP:

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former:

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate:

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal:

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise:

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

The relevant cases are *The People (D.P.P.) v. Byrne* [1995] 1 ILRM 279, *The People (D.P.P.) v. McCormack* [2000] 4 I.R. 356 and *The People (D.P.P.) v. Redmond* [2001] 3 I.R. 390."

15. In applying these principles to the present case, we are satisfied that notwithstanding the very difficult personal circumstances of the respondent, the sentence imposed in this case was unduly lenient having regard to the injuries suffered by the Ms. S as well as the accompanying circumstances and nature of the assault. Accordingly we quash the original sentence imposed in this case and will now proceed to sentence the respondent afresh.

16. In considering what penalty we should now impose, the Court reminds itself of the appalling nature of the violent attack on this young woman by her then partner. In the course of her victim impact report she stated under the heading of *Life Changes*:-

17. In considering what penalty we should now impose we cannot avoid the fact that it is over six months since the appellant has been released from prison. He has moved to a new area of Donegal and appears to be making some progress. This Court also has the benefit of a full report from the Probation Service. In the course of that report, the Probation Service states as follows:-

"Since his release from custody Mr. McLaughlin has attended appointments with the Probation Service, engaged with his GP, Housing Services, Training and Employment Services and Addiction Services. His priority to date has been to gain his disability allowance and independent housing which occurred in the last few weeks."

18. The report goes on to conclude that the respondent has put in place protective factors to reduce his risk of reoffending. This report indicates a very different situation to the one that was before the sentencing judge when the original three year sentence was imposed. This Court has also had the benefit of a reasonably detailed psychiatric report which also recounts periods of time that the respondent has spent as an in patient in his local psychiatric hospital in Donegal.

19. We are told that the respondent is now drug free save for the medicines prescribed by his doctors and that he is engaging with the appropriate services. He was not doing this at the time of his original sentence.

20. We have considered returning the respondent to prison for a further period, but we are unsure at this point if this would be of benefit to society, although we do not discount the notion of general deterrence. Therefore what we propose to do is to impose a three year prison sentence, some of which has already been served. We will suspend the balance of that sentence, provided the respondent enters into his own bond in the sum of €100 on condition (i) that he subject himself for the remainder of the period of the suspended sentence to the supervision of the Probation Service (ii) that he undergo urine analysis when required to do so by the Probation Service, (iii) that he keep the peace and be of good behaviour for the period of the suspended sentence, (iv) that he undertakes not to have contact with the injured party in this case.