



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

The People at the Suit of the Director of Public Prosecutions

V

Oisín O'Byrne

[180 2016]

Respondent

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 22nd day of January 2018 by

Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence under appeal is one of four and a half years imprisonment with the final 12 months suspended that was imposed in respect of a s. 3 assault in the Circuit Criminal Court in Dundalk on 15th June, 2016.

2. The case related to an assault that had occurred on 11th September, 2014 at Carlinn Hall, Dundalk on Mr Ferdinand Murphy. On that occasion the injured party, Mr Ferdinand Murphy, went out socialising in Dundalk. He ended up in the company of a group of people and that group included the appellant, though it seems that the appellant and the injured party had not been on speaking terms. The group went to the home of someone who was a mutual friend of both the injured party and the appellant. It appears that a considerable amount of alcohol was consumed by all involved in the course of the evening in question. It appears that during the course of the evening there was some interaction between the injured party and appellant which involved the injured party giving the appellant a bear hug and that was not well received.

3. Mr Murphy was advised by another person who was present to leave the gathering having regard to the accused's demeanour, which he did. Then, some five or ten minutes later, the appellant also left the premises. There then followed an encounter between the injured party and appellant. What was described as "verbals" ensued and the appellant assaulted Mr Murphy. This involved a violent and it must be said vicious assault including blows to the face, a kick to the right leg which caused him to fall to the ground and then further kicking and beating of the injured party whilst he lay defenceless on the ground. The severity of the attack was such that the injured party says that he feared for his life and that he pleaded for mercy, referring to the fact that he was the father of a young daughter and needed to be around her. In due course Gardaí and an ambulance came upon the scene. Mr Murphy was taken to Our Lady of Lourdes Hospital in Drogheda. Upon admission he was noted to have bruising to his face, pain in his left shoulder and left knee, severe pain in his right leg and knee, together with other bruising and swelling. X-rays confirmed a right tibial fracture which required surgery. The most significant injury was to the right knee which involved a broken knee cap. It seems that arthritis has set in and the question of knee replacement in the future is under consideration. The recovery that might have been hoped for was delayed by infection. It also seems that the assault involved biting as bite marks were noted on the fingers and also on the head of the injured party. By the time of the sentence hearing in June, 2016, the injured party was experiencing ongoing severe pain and discomfort, was taking strong pain killers and was also experiencing psychological symptoms, including depression, for which he was receiving counselling and for which he was taking medication. A victim impact report from Mr Murphy indicated just how significant the consequences of this assault were. He is 41 years of age, is a single man with a young daughter, and the injury has impacted on his relationship with his daughter and his ability to run and play with her as he would have wished to do. He now has a noticeable limp. Prior to the incident the injured party had sought employment with the fire brigade, had got through to the interview and while not successful on that occasion he had been encouraged to reapply. That and other opportunities are now closed to him.

4. In terms of the background and personal circumstances of the appellant, his date of birth is 1st March, 1981. He was 33 years of age, and at the time of the assault he was living with his long term partner. He has no previous convictions. He has quite a good work record involving working with a local factory in Dundalk as well as bar work, both in Ireland and in Spain. At the time of the offence he had been working as a caretaker on a community employment scheme.

5. On the night of the incident he spoke to the investigating Garda and made certain admissions to her and expressed regret and hope to her that the injured party would make a good recovery. Subsequently he attended the Garda station for the purpose of making a statement on a voluntary basis. This statement indicated that he had little memory of the events that had occurred. A plea of guilty was subsequently entered after a jury was sworn for the case. At the sentence hearing a sum of €1,000 was offered by way of compensation which the accused had borrowed from his mother. His mother was a social welfare recipient but borrowed this amount, the maximum she was able to borrow, from her credit union.

Grounds

6. It is urged on behalf of the appellant that the judge failed to give sufficient weight to the mitigating factors as were present in the case such as the guilty plea, the lack of previous convictions and the positive work record.

7. Following the initial sentence hearing, the judge put the matter back for a short period in order to allow various matters to be addressed including an up-to-date medical report on the progress of the injured party. She also raised the question of the injured party being facilitated in attending a pain specialist as a private patient.

8. In moving this appeal, counsel has contended that somewhat excessive weight was given by the sentencing judge to the aggravating factors that were present. The Court has to say immediately that it regards this as a very serious offence indeed. Mr Murphy has been left with injuries that will impact on him for the rest of his life. The Court does accept that the sentence is a significant one, particularly if one bears in mind that Mr O'Byrne had no previous convictions and had entered a plea of guilty, albeit only after the jury was sworn. So serious was this offence however, that it was a case that required to be met with a significant sentence. The Court has said on many occasions that it will not and can not intervene merely because if it had been called on to sentence at first instance it might have been minded to impose a somewhat different sentence. In this case the Court has concluded that the sentence imposed by the judge in the Circuit Court in Dundalk, while severe, fell within the available range for what was a

very serious offence indeed. In those circumstances the Court identifies no error in principle and so must dismiss the appeal.