



THE COURT OF APPEAL

Record No: 166/2018

IN THE MATTER OF AN APPLICATION PURSUANT TO

S.2 OF THE CRIMINAL JUSTICE ACT 1993

**Birmingham P
Edwards J.
McCarthy J**

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

DANIEL SMITH

Respondent

JUDGMENT of the Court (ex tempore) delivered on the 14th January 2019 by Mr. Justice Edwards.

Introduction

1. On the 10th of May 2018 the respondent, Mr. Daniel Smith, who had pleaded guilty before Waterford Circuit Criminal Court to one count of causing serious harm contrary to Section 4 of the Non-Fatal Offences Against the Person Act 1997, received an entirely suspended sentence of three years' imprisonment.

2. The Director of Public Prosecutions now seeks a review of the said sentence on the grounds that it was unduly lenient.

Background Facts

3. On the 8th April 2015 members of the gardaí responded to a call concerning a stabbing incident that had occurred at 4 Holy Crescent in Waterford City. On arrival there, the gardaí concerned observed a substantial amount of blood in the hallway and kitchen of the premises. They also encountered the complainant, Mr. Jamie Walsh, who was in distress with two large stab wounds on his back.

4. When questioned after medical treatment concerning how he had suffered his injuries Mr Walsh contended that earlier that day he and the respondent had been drinking with two girls upstairs in the premises, and that later on an argument had developed between the two men. The complainant admitted to punching the respondent, who then left the room after which the situation appeared to de-escalate. However, the respondent had seemingly gone downstairs and had armed himself with a kitchen knife, then had returned upstairs and had stabbed the complainant twice in the back with it.

5. Upon being stabbed the complainant felt that he was losing consciousness and sought an ambulance. He was still waiting for the ambulance when the Gardai arrived on the scene.

6. The respondent had left the premises immediately after the stabbing but was later arrested at a different location. The respondent was not co-operative in the course of being interviewed, responding to the questions asked of him with "no comment".

Impact on Victim

7. The complainant chose not to give a victim impact statement, or to testify at the sentencing hearing, and it is understood that he claims to bear no animosity towards the respondent. However, whilst the complainant has fully recovered, the severity of the injuries should not be understated. Mr Smith stabbed the complainant in the posterior chest wall and the right upper arm. The chest injury resulted in a large persistent right pneumothorax with a degree of tension secondary to pulmonary laceration with bronchopleural fistulation. This made it difficult for the complainant to breathe and reduced his right-sided breath sounds. There was a large volume of blood (600 millimetres) in the chest, which required the insertion of a chest drain. The complainant had a CT scan of his thorax which demonstrated the complete collapse of the right lower lobe of his lungs with the aforementioned degree of tension. The injuries required surgery under general anaesthetic and he was exposed to a substantial risk of death. Happily the complainant did not in fact die, and went on to make a full recovery from his physical injuries.

Respondent's Personal Circumstances

8. The respondent was born on the 26th of March 1997, and accordingly at the time of the offence he had only just recently celebrated his eighteenth birthday. He was just 13 days into his majority at the date of the offence. He had no previous convictions, and no previous history of violent or aggressive behaviour. Under cross-examination the prosecuting garda acknowledged that this incident appeared to be out of character for the respondent, who has received a positive probation report. He accepted that the respondent had been abusing both drugs and alcohol on the evening in question. According to the Probation report the respondent admits to having consumed cocaine and eight cans of alcohol on that evening. very intoxicated.

9. The respondent is currently employed full time at a Call Centre as a Technical Support Worker. Prior to commencing that in mid-2017, he had done a carpentry apprenticeship. Since the incident Mr Smith and his partner, with whom he is in a long term relationship and with whom he resides, has had a son. He is the sole breadwinner in the family, and wishes to be a positive influence on his child's life. He is now abstinent from illicit substances and has reduced his alcohol consumption. He has offered €1,000 in compensation to the complainant.

10. The Probation Report concludes in the following terms:

"Mr Smith is 21 years of age and has one 16 month old son. Data from the Criminal Records Office indicates that he has no previous convictions. The risk assessment indicates that Mr Smith is at low risk of re-offending within the next 12

months, with the main area of risk being identified as alcohol and/or substance misuse.

Since the commission of the index offence, Mr Smith has become abstinent from substances and has decreased his alcohol consumption. He has become a father for the first time and is focused on being a positive influence in his son's life. It would appear that Mr Smith was shocked by his own actions during the index offence, and has changed his life for the positive in order to ensure that a similar situation does not occur again in the future.

Mr Smith has fully co-operated with this Service and is considered suitable for a community sanction. However, given that he has no previous convictions, is deemed to be at low risk of re-offending, and has addressed his alcohol and substance misuse, it is my assessment that he does not appear to require further intervention from this Service at this time. In these circumstances, the Court may wish to consider dealing with this matter by an alternative means."

11. The respondent is remorseful and pleaded guilty at the earliest opportunity. However, for reasons unknown the case was not prosecuted speedily. It was more than three years after the incident before he was arraigned, pleaded guilty and was sentenced.

Sentencing Judge's Remarks

12. In sentencing the respondent the sentencing judge made the following remarks:

There are a number of aggravating factors. The first and obvious one was the use of a knife to commit the assault. There is, rightly, great public concern that knives are so readily introduced and used in arguments, often with lethal results. In this case, the stab wounds posed a substantial risk of death and, but for medical intervention, the consequences for Jamie Walsh could have been fatal. The manner of the attack was also an aggravating factor. There was no question of Mr Smith acting in self-defence, it was simply a case of retribution for having himself got punched. Mr Smith stabbed Jamie Walsh in the back without any warning to him and without affording his victim any opportunity to protect himself. It was a cowardly act. I note that the Director of Public Prosecutions places the offence in the medium range of severity while Mr Fitzgerald places the offence in the lower bracket. I agree with the Director and I place this offence at the lower end of the mid-range on the scale of gravity, but as the Courts above have said, there is no clear blue water between where one range ends and the next begins. The appropriate sentence is five years' imprisonment.

There are significant mitigating factors. Mr Smith entered a guilty plea at the first opportunity. He has no previous convictions. The probation report shows that he has a very low risk assessment. I am told and I accept that he has changed the course of his life, he now has a young child, he is in a stable relationship and he is the sole breadwinner in the family unit. He has expressed remorse, he has offered compensation and I understand he has €1,000 in court with him. In those circumstances, I will reduce the five years to three years to reflect these various elements of mitigation. Whether or not Mr Smith should serve this sentence immediately is a matter that I have given great consideration to. It is extremely rare for a section 4 assault to be disposed of without some period of immediate imprisonment, but in the words of the now Chief Justice in the Fitzgibbon case, "It must be emphasised that there may always be special or unusual factors which properly influence the assessment by a sentencing judge of the severity of an offence and the culpability of the offender on the facts of any individual case."

In this case, there is an exceptionally positive probation report. Mr Smith, since the commission of the offence, has become abstinent from substances and has decreased his alcohol consumption, he has become a father for the first time and is focused on being a positive influence in his son's life. He has fully cooperated with the service who consider him suitable for a community sanction. He is in full-time employment, he has no previous convictions. I accept that this was an isolated incident. I accept that he has very full insight into what he did and has genuine remorse for it. He has put together €1,000 by way of compensation.

... ..

I am persuaded by Mr Fitzgerald that this is one of those exceptional cases where society is best served by suspending the sentence of three years in whole and I am doing so for a period of five years. And I am doing so on condition that Mr Smith never ever takes possession of a knife for any purpose other than for culinary activities so that if he is found in public with a knife in his possession at any stage, I expect the State to bring the matter back and he can expect that the suspended portion of this sentence will be activated."

Grounds of Appeal

13. The Director of Public Prosecutions seeks to have the sentence reviewed on the basis that the sentence imposed was unduly lenient in all the circumstances of the case. An offence of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997 warrants a maximum possible sentence of life imprisonment.

14. The sentencing judge set the headline sentence at five years. The appropriateness of this is not contested by the applicant. This sentence was then reduced to three years, taking into account the mitigating factors. Again, the appropriateness of this is not disputed by the applicant. The sentencing judge then suspended the remaining three years in their entirety for a five-year period on the usual condition plus the condition that the respondent may not use a knife for any purpose other than for culinary activities. The applicant contests this aspect of the sentence as representing an error of principle resulting, she says, in a sentence that was unduly lenient.

Discussion and Decision

15. The Court has received detailed written submissions from both sides for which it is grateful, and has been referred to and/or had opened to it a number of legal authorities and case comparators, including: *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] ILRM 116; *The People (Director of Public Prosecutions) v Cahill* [2008] IECCA 84; *The People (Director of Public Prosecutions) v (Christopher) Byrne* [1995] 1 ILRM 279; *The People (Director of Public Prosecutions) v (Anne Marie) Byrne* [2017] IECA 97; *The People (Director of Public Prosecutions) v McGinty* [2006] IECCA 37; *The People (Director of Public Prosecutions) v Jervis and Doyle* [2014] IECCA 14; *The People (Director of Public Prosecutions) v Lyons* [2017] IECA 156; and *The People (Director of Public Prosecutions) v Zaharia* [2017] IECA 36.

16. In the case of *The People (Director of Public Prosecutions) v (Anne Marie) Byrne* [2017] IECA 97, on which much reliance was placed, we said:

33. The offence in this case was subject to discretionary punishment. However, we recognise that some offences will be so serious that they effectively carry a presumption against the suspension of a custodial sentence in its entirety. That is certainly true in the case of rape offences, s.15A drugs offences, certain firearms offences and egregious crimes of violence. However, even in such cases existing jurisprudence indicates that a wholly suspended sentence can be imposed in cases where there are special reasons of a substantial nature and particularly exceptional circumstances. Examples are to be found in *The People (Director of Public Prosecutions) v. McGinty* [2006] IECCA 37; *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513; *The People (Director of Public Prosecutions) v. Jervis and Doyle* [2014] IECCA 14 and *The People (Director of Public Prosecutions) v. Flanagan* [2015] IECA 94.

34. The present case was very serious, and it cannot be gainsaid but that a sentence involving an immediate custodial element would represent the norm absent special reasons of a substantial nature and particularly exceptional circumstances. The amount of any custodial sentence to be served would obviously depend on the available mitigation, and it might be the case that where the available mitigation was substantial, as it was in this case where there had been an early plea, genuine remorse, significant co-operation, and the accused was a first time offender, that a quite substantial amount of the headline sentence would be discounted, either by way of a straight reduction, or by partial suspension, leaving only a modest balance to be actually served.

35. In this case, however, there were additional factors to which we will allude later in this judgment, and these combined with the more routinely encountered mitigating factors already alluded to, caused the sentencing judge to first consider, and then to decide to, suspend the entirety of the sentence. The question is: was he right to do so?"

17. Very similar issues arise in the present case. Before addressing them, however, it may also be of assistance to quote further from the judgment in the *(Anne Marie) Byrne* case, where we approved of the approach of the New South Wales Court of Appeal in *R v Zamagias*, cited in O'Malley on Sentencing, and said:

"that amongst the considerations that a sentencing judge must have regard to, in deciding within the second stage of the sentencing process on the subsidiary issue as to whether or not the suspension of a sentence in its entirety might be appropriate in a particular case, are (i) the nature of the offence committed (ii) the objective seriousness of the criminality involved, (iii) the need for general or specific deterrence and (iv) the subjective circumstances of the offender."

18. We are satisfied that these issues were all properly considered by the sentencing judge. General deterrence is pursued in all cases through the setting of an appropriate headline sentence. There was no quarrel in this appeal with the headline sentence of five years nominated by the sentencing judge. Although he does not reference deterrence as an objective in his sentencing remarks, it is clear from the judge's acknowledgment of public concern about the use of knives that he was fully alive to the need to encourage desistance in the case of the specific offender in question, and in the case of others to deter generally. His acknowledgement that the offender in this case "*has a very low risk assessment*" and that "*he has changed the course of his life*" makes it clear that he sees little need for specific deterrence in the circumstances of the case and that the focus of any desistance message should instead be on incentivising continued rehabilitation.

19. We consider that sight must not be lost in this case of the fact that this is an undue leniency review. The fact that a more severe sentence might have been imposed, and upheld if appealed, is not a relevant consideration. The question is whether the sentence actually imposed was unduly lenient, i.e., outside of the norm to a significant degree. Moreover, in considering that issue great weight requires to be afforded to the reasons given by the sentencing judge at first instance.

20. We are in no doubt but that this was a lenient sentence, indeed a very lenient sentence. However, we are not persuaded that it was so lenient as to be unduly lenient. The sentencing judge was significantly influenced by the Probation report which really could not have been much more positive. This was an offence committed by an offender who had only just attained his majority. He was a first time offender. He admittedly offended while in a state of self-induced intoxication. While to have done so was no excuse and reflects absolutely no credit on him, it is noteworthy that since then he has taken steps to address his alcohol and substance abuse issues. The case took a long time to get to court, some three years or thereabouts, and during that interval he did not offend again. Moreover, we note that at this stage a further year has passed and he continues to stay out of trouble. Indeed, all the evidence before the sentencing judge suggested that he had taken control of his life and was determined not to re-offend. By that stage he was in, and remains in, a stable personal relationship and has become a father. He is in good employment, and is the sole bread winner in the family unit. He has given up drugs completely and has greatly reduced his alcohol consumption. He is remorseful and has proffered some compensation to the victim.

21. In his careful and well-constructed judgment the sentencing judge expressed the view that "*this is one of those exceptional cases where society is best served by suspending the sentence ... in whole*". We see his decision to do so as the legitimate exercise of a judicial discretion that was open to the judge in the light of the evidence that he had heard, and in pursuit of the penal objective of incentivising continued rehabilitation. It was a very lenient disposition, but one that in the circumstances of the case was open to him on the evidence.

22. Counsel for the Director of Public Prosecutions sought to make the case that, although there were significant mitigating circumstances, there was nothing of a special nature or wholly exceptional about the circumstances of the respondent's case. While we agree that there is no single circumstance in this case that could be so characterised, we nevertheless consider that cumulatively all of the circumstances of the respondent's case, taken together, were sufficient to meet the required threshold.

23. We therefore are not persuaded that the sentence imposed at first instance was unduly lenient and we dismiss the application.