

THE COURT OF APPEAL

Approved

Record Number: CJA54/2023

Bill Number: LH28/2020

Kennedy J.

Ní Raifeartaigh J.

Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

DEAN DULLAGHAN

RESPONDENT

JUDGMENT of the Court delivered on the 9th day of May 2024 by Ms. Justice Ní

Raifeartaigh

- 1.** This is an appeal brought by the Director of Public Prosecutions on the ground that the sentence imposed on the Respondent was unduly lenient within the meaning of s.2 of the Criminal Justice Act 1993.
- 2.** The respondent was convicted of counts of assault causing serious harm contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997 and aggravated burglary contrary to s.13 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He received a sentence of 6 ½ years with the final 2 ½ suspended on terms.

Background

3. The incident to which these offences relate occurred on the 25th January 2020. For many years before that the injured party and the respondent had been friends, but there was a falling out between them some months before the date of the offending.

4. The injured party, who was 16 years old at the time, was asleep in his bedroom at his home in Dundalk on the afternoon of 25th January 2020. He woke up to someone at the end of the bed hitting him. Initially he thought he was being hit with an iron bar but it transpired that the assailant (the respondent) was using a machete. It started with the respondent 'hacking' at the injured party's feet and he then cut his right knee. The injured party jumped out of bed and the respondent tried to hit him in the head with the machete; the injured party raised his right hand to protect his head but was struck to the forearm with the knife, resulting in a significant injury. The injured party screamed and this drew the attention of his sister who was also present at the home. She confronted the accused and demanded that he leave the house.

5. The respondent was arrested on the same day as the incident but nothing of probative value arose from his interview during detention.

6. The medical certificate recorded the injured party as having presented to Louth County Hospital on the date of the attack, with a wound to the dorsal aspect of his right forearm leaving him unable to extend his right wrist. An x-ray showed a midshaft transverse ulnar fracture. He was transferred to Connolly Hospital where he underwent surgery to deal with (1) the fracture and (2) to have the 7-8cm deep laceration caused to the area explored. As part of the surgery, the court heard that the fracture was set with a seven-hole plate. There was damage to multiple muscles within the forearm as well as damage to a nerve which required repair under microscope. The prognosis at the time of sentence was that the overall function of the injured party's right hand was likely to be permanently impacted. The court was also advised of significant, seemingly permanent, scarring across the forearm arising from the damage to muscles sustained in the attack.

7. The respondent was convicted after a trial and a sentence hearing took place in the Circuit Criminal Court in Dundalk on the 9th of November 2022 during which the above evidence was given. Detective Garda Kelly advised the court that the injured party had declined to complete a victim impact statement and had chosen not to attend the sentence hearing. The injured party had also refused to give evidence at trial and his statement to Gardaí had been admitted into evidence in accordance with s.16 of the Criminal Justice Act 2006.

8. By the time of the sentence hearing, the respondent accepted responsibility and the verdict of the jury, and apologised.

9. The respondent was 20 years old at the time of the offence. He had nine previous convictions since reaching the age of majority. The only one involving violence was for an offence of violent disorder for which he received a sentence of 20 months' imprisonment (although the

sentencing judge was told that it was a 2 month sentence). The remainder were offences under the Misuse of Drugs Act and the Road Traffic Acts. The respondent had received a number of month-long suspended sentences, and a sentence of 32 months' imprisonment with the final 12 months suspended on the 12th January 2021 for a drugs sale and supply offence. The respondent had been in custody since the date of the offences in this case, the 25th January 2020.

10. There was a psychological report before the sentencing judge. It set out the personal history and circumstances of the respondent. The respondent had had a difficult upbringing, losing his father in a traffic collision when he was 5 or 6 years old and being removed from the home for periods because of his mother's substance abuse issues. It was accepted by the respondent that he first started abusing drugs and alcohol at the age of 14 years. Detective Garda Kelly, who gave evidence at the sentence hearing, accepted that he became known to Gardaí around this time, that he was mixing with the wrong crowd and that he was, effectively, out of control.

11. He had been in prison throughout the Covid 19 pandemic which had brought its own difficulties for him in terms of restrictions on visitors and restrictions on courses available. He had continued his drug use in the custodial setting but had, at some point, stopped using and was, as of the sentence hearing, on an enhanced wing in Wheatfield prison which is only accessible to inmates who are drug free. The court was advised that the respondent had completed numerous courses including work on alternatives to violence, a pre-hospital emergency care course, a crime awareness course, and a managing personal finances course; certificates were submitted documenting the respondent's successful completion of this work.

Sentencing judge's remarks

12. On the 10th February 2023, the sentencing judge described the aggravating factors as follows:

- (a) the swinging of a weapon of offence, the machete, with force at the injured party;
- (b) the circumstances in which the serious harm offence was committed, namely by violently invading the injured party's home;
- (c) the nature and extent of the injuries sustained;
- (d) the impact on the injured party in that he is unlikely to recover full function to his right forearm and hand;
- (e) the fact that the respondent has a relevant previous conviction being a conviction for violent disorder;
- (f) the fact that there had been a targeted, violent confrontation with the injured party in his home; and
- (g) the nature of the weapon which had been brought by the respondent to the injured party's home and the fact that it was used in the manner described to inflict a serious injury.

13. The mitigating factors were described as follows; -

- (a) the respondent's acceptance of the jury verdict;

- (b) the steps taken by the respondent at rehabilitation and his achieving enhanced status within the prison;
- (c) the respondent's good behaviour in custody together with his engagement with educational services in the prison despite being in custody for all of the Covid 19 pandemic
- (d) the respondent's personal circumstances to include his difficult background as detailed in the psychological and probation reports;
- (e) the respondent's remorse for his offending behaviour;
- (f) the respondent's youth at the time of the offending; and
- (g) the indicators that the respondent had grown in maturity and his expressed intent to lead a constructive, law abiding life in the future.

14. Before the matter was finalised on 10th February 2023, the court was advised that the DPP's view was that the offending in this case, as regards the causing serious harm offence, was at the 'high end of that level of offending'. At that point, the court said 'that would be a starting point of above 10 years'. In setting the headline sentence, the court said:-

"Were I now sentencing an offender of more mature years, I would place this offence into the upper range of offences of this type and that, I'm told, is the view of the director that that is the appropriate place for the Court to start. But on account of his youth, it is my view that the appropriate starting point is in the mid-range, and the appropriate headline sentence, in my view, is one of eight years. Taking account of the mitigation, the appropriate sentence is one of six and a half years."

15. The court said that it would, but for the respondent's youth at the time of the offending, 'place this offence into the upper range of offences of this type'. On account of the respondent's youth, the court said that the appropriate starting point was in the mid-range and set a headline of 8 years' imprisonment.

16. Taking account of mitigation, the court said the appropriate sentence was one of 6 ½ years' imprisonment for both offences.

17. In order to 'significantly incentivise rehabilitation', the court suspended the final 2 ½ years of those sentences for a period of 2 ½ years on condition that the respondent enter a bond in the sum of €100 to keep the peace and be of good behaviour during his time in custody and for 2 ½ years on release, that he place himself under the supervision of the Probation Service for a period of 18 months after his release, that he attend all appointments and follow the directions of the service with regard to attending at addiction services and undergoing treatment and therapy.

18. The sentences were to run concurrently and were backdated to 10th July 2021 to take account of the time spent by the respondent in custody on remand exclusively in relation to these matters.

Submissions

19. The Director's case turned on a clear and net submission, namely that the sentencing judge erred in setting the headline sentence by reference to the respondent's youth because the respondent was not a minor at the time of the offending and was of average intelligence. The Director submits that the respondent's age was not a factor which it was appropriate for the judge to take into account in setting a headline sentence. She emphasises the seriousness of the offending behaviour and submits that the respondent's culpability was high. This error in the starting point resulted in an overall sentence which was unduly lenient.

20. Counsel for the respondent submits that the overall sentence imposed was not unduly lenient in the circumstances of the case. He submits that a headline sentence of 10 years for 'high range' offences such as these is not set in stone or mandatory. While the sentencing judge might have merged the two aspects of sentencing (aggravating factors to set a headline and consideration of mitigation thereafter), there was significant mitigation in this case. He was entitled to a reduction in his sentence for his (eventual) acknowledgement of his guilt, for his very difficult upbringing, and for his efforts in prison to turn himself around. He submits that the question of youth does arise, and a sentence starting at 10 years would still see a reduction for the fact he was a young man who had a difficult upbringing. The respondent was an enhanced prisoner at the time of sentencing, he had finished the Alternative to Violence programme and the Male Awareness programme and is engaging with a psychologist while in prison. Counsel submits that the sentencing judge saw the prospect of rehabilitation and suspended a portion of the sentence, and that the bottom line of 4 years in custody with a period of suspension hanging over him thereafter was an appropriate sentence.

This Court's decision

21. The Court is of the view that the sentencing judge erred in principle by reducing the headline sentence which he otherwise would have deemed appropriate by reason of the respondent's age. While the respondent was undoubtedly a young adult, he was 20 years old at the time of the offence and not a minor. He was of normal intelligence. Therefore the headline should have been selected on the basis that he was an adult to reflect the culpability of an adult and the harm done, in the normal way. The question of his personal circumstances including the fact that he was a young adult were matters to be factored in at a later stage of the sentencing exercise, when considering mitigating factors, but it was not appropriate that the headline sentence for this very violent offence be reduced in circumstances where he had reached his majority two years before. This constituted an error in principle which ultimately led to the sentence imposed being unduly lenient. The Court will therefore quash the sentence and proceed to re-sentence the accused.

22. The sole error in the sentencing judge's approach was the fixing of the headline sentence, and we propose to nominate a new and more appropriate headline sentence of 10 years. Regarding the mitigating factors, we take into account all factors that were before the judge at the time of the sentencing hearing as well as the materials submitted to the Court today, including

in particular the information that the respondent has engaged positively with the Alternatives to Violence programme and that there is a job offer awaiting him, a matter which the Gardaí consider helpful. In all of the circumstances, we consider that the appropriate reduction is one of 18 months, bringing the sentence to 8 ½ years, but we propose again to suspend the final 2 ½ years on the same terms and conditions as were imposed at first instance. Thus, the custodial component of the sentence is one of 6 years (provided the respondent does not re-offend or breach the conditions of the suspension after his release). The sentence is to be backdated in the same manner as it was at first instance.