



**THE COURT OF APPEAL**

**Finlay Geoghegan J.  
Sheehan J.  
Hogan J.**

**132CJA/14**

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

**Appellant**

**V**

**Thomas Donovan**

**Respondent**

**Judgment of the Court (ex tempore) delivered on the 15th day of December, 2014, 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 of the sentence imposed on the respondent at the Circuit Criminal Court in Kilkenny on the 14th May, 2014, for the offence of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997.
2. On that day the appellant was sentenced to two years imprisonment with the final six months of that sentence suspended on condition that he keep the peace and be of good behaviour for a period of eighteen months post release, during which time he was also to be subject to the directions of the Probation Service.
3. The appellant was on bail when he pleaded to the offence on the 15th January, 2014. On that date sentence was adjourned to the 14th May, 2014, with the appellant remaining on continuing bail. On the 4th February, 2014, the appellant's bail was revoked as a result of the breach by him of a curfew condition that was part of his bail. On the 11th April, 2014, he received a sentence of nine months imprisonment in respect of a burglary that he had committed in November in 2011.
4. In the course of submissions on behalf of the Director of Public Prosecutions counsel submitted that the sentencing judge had failed to sufficiently reflect the gravity of the offences and in particular had failed in the proper exercise of her discretion by refusing to make the sentence for the assault consecutive to the nine month sentence for the burglary offence. These failures had resulted in an unduly lenient sentence.
5. Counsel for the respondent in opposing the application submitted that the learned trial judge was attempting in the course of her sentence to reconcile the seriousness of the offences with the penal aim of rehabilitation. A written submission by counsel on behalf of the Director to the effect that double counting had occurred has been withdrawn at the oral hearing.
6. The background to this offence is that on the 15th February, 2013, the respondent attempted to prevent the arrest of his uncle. He behaved aggressively and when cautioned by a member of An Garda Síochána he failed to leave the scene. He then punched the garda who was arresting his uncle and broke his nose. In the ensuing struggle the garda fell to the ground and fractured his elbow.
7. At the time of this offence the respondent had consumed eight or nine valium tablets, a flagon of cider and some whiskey.
8. The personal circumstances of the respondent are that he was seventeen at the time of the offence and eighteen when sentenced. His uncle was 21 at the time of the incident. The respondent has two children and at the time of sentence had an application for guardianship before the District Court. It was conceded that he had a difficult upbringing with no involvement with his own father during childhood and that he had moved backwards and forwards between Ireland and England. He has a low level of literacy, self direction, self control and social skills. He has 27 previous convictions all recorded in the District Court. These include convictions for burglary, theft, possession of stolen property, public order, criminal damage, assault and road traffic offences.
9. The respondent admitted the offence, but maintained that he did not remember what had happened as a result of the tablets that he had taken. The victim suffered a broken nose and a large displaced fracture to his right elbow, but fortunately has made a full recovery and he did not deem it appropriate to make a victim impact statement.
10. The principles to be followed in an undue leniency appeal were set out in *People (DPP) v. Byrne* [1995] 1 ILRM 278 as follows:-
  - "1. The DPP bears the onus of proof in showing that the sentence was unduly lenient.
  2. The appeal court should always accord great weight to the trial judge's reasons for imposing the challenged sentence.
  3. It is unlikely to be of help to the Appeal Court to ask if in the event that a more severe sentence had been imposed it would have been upheld in a defence appeal based on an error of principle. Different criteria apply to the prosecution appeals.
  4. It is clear that the wording of s. 2 of the 1993 Act, that since the finding must be one of undue leniency nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the Appeal Court's intervention."
11. This Court regards any assault on a member of An Garda Síochána as serious. One which results in a broken nose and a fractured elbow is particularly serious. We endorse the learned sentencing judge's pre-sentence remarks when she stated:-

"In relation to an assault causing harm on a garda, this is a very serious crime. The gardaí are the peace keepers in our society and deserve respect in particular when they are carrying out their functions."

12. This Court has considered the judgment of the learned sentencing judge in light of the principles that apply to a s. 2 application and holds that the sentence imposed was carefully constructed. It is clear that the sentencing judge sought to apply the principle of proportionality and reconcile that principle with the penal aim of rehabilitation in the sentence actually imposed. While the sentence might be considered lenient, it was a significant one for a young man with difficult personal circumstances.

13. We hold that the sentence imposed was not a substantial departure from what would be regarded as the appropriate sentence and accordingly we refuse the application.