



**THE COURT OF APPEAL**

**[209CJA/2018]**

**The President  
Edwards J.  
Kennedy J.**

**BETWEEN/**

**SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**- AND -**

**ANDREW CRILLY**

**RESPONDENT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 13th day of May 2019 by Ms. Justice Kennedy**

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s.2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent, Mr Crilly, on the 22nd June 2018. The respondent was found guilty of one count of assault causing harm contrary to s. of the Non-Fatal Offences Against the Person Act 1997 and received a sentence of fourteen months' imprisonment wholly suspended on terms for a period of four years.

**Background**

2. The proceedings herein relate to events that occurred on the 19th June 2016 at the Crowe's Nest Pub in Dundalk. The incident, which was captured by CCTV footage, began with a verbal altercation between the respondent and the injured party. Both men stood up and the respondent approached the injured party with a bar stool which he then proceeded to use to hit the injured party. The respondent struck the injured party a second time when he fell to the ground, this time with a kick. The respondent, Mr Crilly, then had to be restrained by a number of people.

3. The injured party was taken to Our Lady of Lourdes Hospital in Drogheda and evidence was given that he suffered multiple injuries including multiple fractures to the face, lacerations that required stitches, eyesight impairment and nerve damage. In the course of this hearing we have observed the CCTV footage of the incident itself. Following a plea of not guilty, the respondent was found guilty in Trim Circuit Criminal Court on the 14th February 2018.

**The Sentence**

4. In determining the respondent's culpability, the sentencing judge placed the offence on the lower end of the mid-range. The judge described the offence as a "violent attack" and commented that the injured party suffered significant damage. The sentencing judge referred to the limited premeditation of the respondent and noted that the premeditation was more significant in the second phase of the attack, this being the kick whilst on the ground. The judge identified a pre mitigation sentence of 24 months.

5. He then went on to consider the mitigating factors in the following terms: -

"Clearly, I cannot give you credit for a guilty plea. I can however properly consider the following: your age - you're 31 now; you were 28 at the time of the offences. You have, I gather, a child with a girlfriend with whom you are in a long-term relationship, and you're engaged to her, I gather. Your age, as I said earlier, is something which I will be influenced by. The general circumstances, and whilst I have made it clear that there was an element of premeditation involved in this by the defendant, I accept that this is an incident that occurred in a bar. Remorse, albeit very limited. Drink is never an excuse, but it provides some basic understanding as to what happened here. And the sad and unfortunate family circumstances that your counsel has alluded to"

6. Consequently, the sentencing judge reduced the sentence to one of fourteen months' imprisonment. The judge stated that after having had regard to the limited remorse expressed and the limited insight into the effect which the offence will have on the victim, he was going to proceed to suspend the sentence in its entirety for a period of four years.

**Personal Circumstances**

7. The respondent was born on the 23rd July 1987. At the time of sentencing he was in a relationship with the mother of his child. He has no previous convictions. During the sentence hearing, the Court heard details of the respondent's family history and testimonials of his good character were furnished to the Court.

**Submissions of the applicant**

8. By way of the summary of the submissions on behalf of the applicant, the applicant submits that the sentencing judge did not give sufficient weight to the aggravating factors and had excessive regard to the matters urged upon him as mitigating factors. In particular, the applicant submits that the sentencing judge erred in referring to the respondent's age at the time of offending, as it was unclear how this could merit special consideration.

9. The applicant further says that it was unclear what the sentencing judge meant when he stated:- "I accept that this is an

incident which occurred in a bar” as that is neither a mitigating circumstance or a personal circumstance. Moreover, it is argued that that the remorse shown by the respondent was extremely limited, with no specific apology made to the injured party or any offer of compensation.

10. Finally, it is submitted on behalf of the applicant that the headline sentence of twenty-four months was excessively lenient as a starting point and that there was nothing in mitigation to allow a reduction to fourteen months simpliciter, let alone to wholly suspend the sentence.

#### **Submissions of the respondent**

11. In response, the respondent submits that the sentence imposed was within the margin of appreciation and did not constitute an error in principle or a departure from the types of sentences regularly imposed for such offences and says that that there was no error in identifying a headline sentence of twenty-four months.

12. The respondent accepts that the judge referenced the fact that the incident occurred in a bar and that alcohol had been consumed, but it is submitted that this clearly relates to fact that the behaviour was out of character for the respondent and moreover, that the reference to age must mean that he was a young man starting out on family life.

13. Furthermore, the respondent says that the most significant mitigating factor was that the respondent had no previous convictions and that the judge was correct in assessing that the offence was out of character for him, thus warranting a suspended sentence. It is argued that there was ample evidence to ground the suspension of the sentence including material relating to the respondent’s personal circumstances and good character.

14. Finally, it is said that an entirely genuine and spontaneous apology was made by the respondent in evidence at the trial and the respondent refers to the fact that he offered an early plea of guilty to the offence for which he was ultimately convicted.

15. Mr Orange SC on behalf of Mr Crilly, in the course of this hearing urges upon the court to consider the manner in which the injured party first approached the respondent just prior to the incident itself.

#### **16. Discussion and Conclusion**

17. As this court has repeatedly observed, the gravity of an offence is assessed with reference to the harm caused or risked and the subjective culpability of the offender. It is the position that certain matters may lessen culpability such as the existence of an imperfect defence for example excessive self-defence. In the present case it seems that at trial the respondent relied on the defence of self-defence but was found guilty of s.3 assault by the jury. Other factors which may serve to reduce an offender’s culpability include an offender’s youth as children are regarded as less culpable than adults by virtue of their inherent immaturity.

18. The present case was undoubtedly a serious matter with an assault which has had serious consequences for the victim both physical and psychological in nature. The use of a bar stool as a weapon with which to strike the victim, kicking the victim whilst he was on the ground, and the impact on him all serve to aggravate the offence.

19. The respondent’s culpability was not lessened by virtue of his age as he was an adult aged twenty-eight years at the time of the offending conduct. The trial judge assessed the pre-mitigation sentence as being one of twenty-four months and in this respect, we do not find any error.

20. In mitigation the sentencing judge concluded that the following factors were present:- the respondent’s age, he was twenty eight years at the time of the offence, the circumstances of the offence itself, his own personal family circumstances and the limited remorse expressed by the respondent. In consequence of these factors, the judge reduced the sentence to one of fourteen months’ imprisonment, he then again considered the remorse expressed by the respondent and his insight into his offending conduct and suspended the sentence in its entirety.

21. As regards the question of mitigation as identified by the sentencing judge, the first point to note is, that as we have stated, the respondent was aged twenty-eight years at the time of the offence. In our view his age was therefore not a mitigating factor; youth may serve to reduce an individual’s moral culpability and indeed at the other end of the spectrum infirmity due to old age may impact on an offender’s capacity to serve a sentence of imprisonment. Neither were features in this instance and we are satisfied that the judge fell into error in considering the respondent’s age to be a mitigating factor.

22. Secondly, the circumstances of the offence were relevant only to a consideration of the gravity of the offence and were not part of the assessment as regards mitigation. The remorse expressed by the respondent seems to have carried weight with the judge and he was correct in assessing the remorse expressed as limited in nature. However, he then proceeded to suspend the sentence on the basis of the remorse expressed and also on the basis of the respondent’s insight into his offending conduct.

23. Whilst insight is relevant to the issue of rehabilitation which may lead to a sentence being partially suspended in order to incentivise such rehabilitation, we are of the view that the sentence ultimately imposed was very lenient. The question is whether the sentence was so lenient, that is so unduly lenient so as to justify intervention by this Court.

24. Mr Crilly is a man with no previous convictions and whilst this was not a factor mentioned by the sentencing judge, undoubtedly it must have weighed with him and indeed reference to his age may have been an acknowledgment of the absence of previous convictions. We consider the notional pre-mitigation sentence of twenty-four months as found by the judge to be within the margin of discretion available to the judge, although we do consider it as somewhat light but nonetheless within the range.

25. We are satisfied that the reduction by virtue of the mitigating factors to a sentence of fourteen months and the ultimate suspension of the entirety of the sentence renders the sentence unduly lenient and amounts to a significant departure from the appropriate sentence. In the circumstances therefore we will quash the sentence imposed and we will proceed to re-sentence the respondent as of today’s date.

26. In the present case, the mitigating factors include the absence of previous convictions, the appellant’s family circumstances, his difficult upbringing, his employment history and the testimonials furnished. He expressed remorse in the course of his trial. The single most influential mitigating factor is absent, that is a plea of guilty to the s.3 assault. This was explained in terms of the respondent offering such a plea which was unacceptable to the prosecution and subsequently a count pursuant to s.4 of the Non-Fatal Offences Against the Person Act 1997 was preferred on foot of medical reports obtained by the prosecution and the matter proceeded to trial.

27. Somewhat surprisingly, the respondent did not follow through on his offer of a plea of guilty to the s.3 assault and ultimately a

verdict of not guilty regarding the s.4 count was directed by the trial judge and he was convicted of s.3 of the Non-Fatal Offences Against the Person Act and therefore Mr Crilly does not have the benefit of that mitigating factor.

28. This was, as we have stated, a serious assault which caused serious and long-term damage to the injured party. The impact as we have noted was severe, the assault involved the use of a bar stool as a weapon and also involved kicking the victim as he lay on the ground.

29. The court is satisfied, as we have stated, that the appropriate pre-mitigation sentence was identified by the judge. In mitigation, we take into account the factors that we have already mentioned and in consequence of those mitigating factors we will reduce the sentence of twenty-four months to one of eighteen months' imprisonment and in order to incentivise rehabilitation and appreciating that we are sentencing the respondent almost three years after the event, we will suspend the final six months of the sentence on terms which were imposed before the Circuit Criminal Court.

30. Accordingly, the sentence is one of eighteen months' imprisonment with the final six months of that sentence suspended on the same terms as in the Court below.