THE COURT OF APPEAL

Record No. 13CJA/2017

Birmingham J.
Mahon J.
Hedigan J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND–

GREGORY McAULEY

RESPONDENT

JUDGMENT (ex tempore) of the Court delivered on the 12th day of December 2017 by Mr. Justice Mahon

1. This is an application by the appellant pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of a sentence imposed at Dublin Circuit Criminal Court on the 19th December 2016 in respect of an offence of assault contrary to s. 3 of the Non Fatal Against the Person Act 1997. The sentence was one of two hundred hours Community Service in lieu of a term of three years imprisonment.

2. Section 2 of the Criminal Justice 1993 provides as follows:-

> (1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the (Court of Appeal) to review the sentence.
>
> (2) An application under this section shall be made on notice given to the convicted person within 28 days from the day on which the sentence was imposed.
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> (3) On such an application, the Court may either:-
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> > (b) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or
> >
> > (c) refuse the application.

3. On the 19th February Garda Sheng and Garda Moore called to an address at Kilbarrack, Dublin 5 following a telephone call seeking assistance from the appellant's ten year old daughter. The respondent opened the door, appeared to be intoxicated, and became very aggressive when he saw the gardaí. He slammed the door. The door was then opened by his partner, Martina Masterson, who was holding her young infant son in her arms and was accompanied also by a ten year old girl. All appeared distressed. Ms. Masterson invited the two gardaí into her sitting room. The respondent came into the room and shouted at the gardaí to leave. He became increasing aggressive, both shouting at the gardaí and at Ms. Masterson. Ms. Masterson then went upstairs with her young child. The gardaí followed her upstairs to speak with her. The respondent than pursued the gardaí upstairs repeatedly shouting at them, and telling them to leave. He pushed and punched Garda Sheng in the face causing him to fall down the stairs whereupon he was rendered unconscious. The respondent proceeded to throw a mirror and a picture and a bag of clothes down the stairs, landing on Garda Sheng. Garda Power was required to deploy his OC spray on two occasions in order to subdue the respondent. Assistance from other gardaí arrived and the respondent was arrested. He was taken to the garda station but was unable to be interviewed for some time because of his level of intoxication.

4. At the time of the offence the respondent and Ms. Masterson had separated and he occasionally visited her home to spend them with his children. On the occasion in question he turned up at her home having earlier attended the funeral of the father of a close friend and was in an intoxicated state.

5. The respondent has fourteen previous convictions between 1991 and 2008. All but two were District Court convictions. None are for crimes of violent. One was a serious drugs conviction in respect of which he served a lengthy prison sentence.

Grounds of Appeal

6. The grounds of appeal are as follows:-

> (i) The learned sentencing judge erred in principle in imposing an unduly lenient sentence in all the circumstances, being a sentence of two hundred hours Community Service in lieu of a term of three years imprisonment;
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> (ii) the learned sentencing judge erred in principle in failing to take adequate account of the evidence adduced that the offence was grave in nature;
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> (iii) the learned sentencing judge failed to determine where the offence fall on the scale of offending to reflect the nature of the offence and the aggravating factors before applying mitigation;

(iv) the learned sentencing judge erred in failing to attach any or any appropriate weight to the aggravating factors in the case. In particular the learned sentencing judge failed to have any or any appropriate regard to the following factors;

(a) the fact that the assault was perpetrated on a member of An Garda Síochána carrying out his duties by attending at the scene of a domestic dispute and attempting to de-escalate the situation to prevent citizens from harm including a female and a young child;

(b) the fact that the attack on a member of An Garda Síochána continued when he was lying motionless on the floor at the bottom of the stairs;

(c) the fact that serious injuries were caused to a member of An Garda Síochána which required him to undergo considerable periods of absence from work as a result of injuries sustained. The evidence was that he suffered injuries of a soft tissue nature, concussion and symptoms of PTSD. He was still out of work at the time of the sentence hearing;

(d) the fact that the respondent had previous convictions;

(e) the learned sentencing judge erred in attaching undue weight to mitigating factors in the case;

(f) the learned sentencing judge erred in failing to structure the sentence so as to adequately express the object of deterrents;

(g) the learned sentence judge erred in failing to sufficiently incorporate elements of general deterrents in this sentence, having regard to the maximum sentence proscribed by the Oireachtas for this offence.

7. The learned sentencing judge explained the basis on which he imposed his sentence of two hundred hours Community Service in lieu of three years imprisonment in the following terms:-

> *"..But he has come to court, he has pleaded guilty. He has expressed remorse for what he did. It seems he is trying to reform himself in the sense he is trying to retrain himself, and he is trying to make a life for himself. The big question I have to decide, is his offence so serious that I must impose upon him an immediate custodial sentence by reason of the facts of the crime and his previous history. Obviously the facts have been well-outlined by the sergeant. I must say, I must comment the sergeant has given very fair and accurate evidence. It seems he has given -- he has spoken up to some degree for Mr McAuley as best he can. He has certainly put the good points of his story to the Court. Now, Mr McAuley has a record of conviction. I note most of them are for what could be termed minor offences for this Court but he has one serious fall from grace. That is that he was convicted and pleaded guilty to section 15A, for which he received a 10 year sentence and the last three were suspended.*
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> *So, I have to take all of these factors into account. Obviously the seriousness of the assault and, obviously, the mitigating factors, principally the plea of guilty, the expression of remorse and, I suppose, for the immediate past at least he has been blame free in relation to the criminal law. I have decided in this case - and it is a close-run thing - not to imprison him immediately. I think the appropriate sentence is I am going to impose upon him 200 hours community service. He is to do that within one year. And the sentence in lieu is three years."*

8. The learned sentencing judge's decision was criticised on a number of grounds by the appellant, including his failure to rate the offence on the gravity scale before then proceeding to identify the headline sentence, and then applying any reduction for mitigation. That criticism is well made. Approaching sentence in that way is best practice and has been so deemed in a number of decisions of this Court including *DPP v. Kelly* [2016] IECA 204. However, it is nevertheless the case, as this Court has also stated on a number of occasions, that a failure to follow best practice will not of itself undermine the sentence imposed. The judgment of this Court delivered by Sheehan J. in *DPP v. T.B.* [2016] IECA 250 is relevant in this respect. It is the actual sentence imposed which will be scrutinised by this Court.

9. The other criticisms emphasised by the appellant include what her counsel described as the failure to attach sufficient weight to the aggravating factors, and what is stated to be a failure to refer to the of deterrence and to Gardai Sheng's injuries. In *DPP v. Corbett* [2015] IECA 174, Edwards J., in delivering the Court's judgment stated:-

> *"…Deterrence, both general and specific, is a legitimate sentencing objective. It is a matter of significant importance for the courts to support the important role being played by front line professionals in the caring professions, to quote the trial judge "whether in healthcare, education, the fire service or in criminal justice."*

10. Ultimately, the appellant's core submission is that this offence required the imposition of an actual custodial sentence. It involved a very violent and determined assault on a garda who was engaged in doing his duty having, together with his colleague, responded to a call for assistance from the respondent's young daughter. The fact that the request for assistance emanated from the ten year old daughter of the respondent serves to emphasise the utterly damaging consequences that flow from the respondent's behaviour for, in particular, his children.

11. The Court is in agreement with the submission that this offence required a custodial element in the sentence imposed. It was not a suitable case for a Community Service Order given as it did, that it involved a serious assault on a member of An Garda Síochána performing his duty. It is the responsibility of the courts to do all they can to protect gardaí engaged in their day to day work from entirely unjustified violent attack and they ought to do so by imposing relatively severe sentences on those who engage in such activity. A Community Service Order could not be so described.

12. The Court is therefore satisfied that the sentence imposed in the Court below was unduly lenient, and significantly so. The identification of a three year prison term was not inappropriate although not on the basis of it being a term in lieu of community service. This Court will therefore quash the sentence imposed on the 19th December 2016 and will in its place impose a sentence of three years imprisonment.

13. Two matters then arise. Firstly, if the Court below had imposed a sentence of three years it would have be justified, indeed it would have been appropriate, to then suspend a portion of that term in respect of the mitigating factors including, and in particular, the plea of guilty, the expression of remorse and the efforts to rehabilitate. Secondly, there is the fact that the respondent has

remained at liberty since being convicted almost twelve months ago and has fully honoured the requirement to do community service. To now face the prospect of a period in custody is itself an added punishment not of his making.

14. There is also now available to this Court stronger evidence that rehabilitation is underway than was available in the Court below. It does appear that the respondent has taken active steps to deal with his personal problems and to maintain employment.

15. In the circumstances, and with some degree of reluctance, the Court will suspend the entire three year term for two years from today's date on the respondent entering into a bond in the sum of €100 to keep the peace and be of good behaviour. A particularly persuasive factor in the Court's decision to suspend the entire sentence is the fact that the knowledge that her father had been sent to prison would likely add to the distress of the respondent's young daughter, given the fact that she had very bravely and necessarily summoned the gardaí to her own home because of her father's behaviour.

16. Finally, the Court would again wish to emphasise its view that a violent assault on a member of An Garda Síochána performing his or her duty should, save in exceptional circumstances, result in the imposition of a custodial sentence.