



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**242/15**

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

**Respondent**

**V**

**Michael Prendergast**

**Appellant**

**Judgment of the Court (ex tempore) delivered on the 8th day of December 2015 by**

**Mr. Justice Sheehan**

1. At Castlebar Circuit Court on the 16th October, 2015, the appellant Michael Prendergast pleaded guilty to assault causing harm to Jonathan Clarke on the 14th September, 2013 and was sentenced to two years imprisonment with the final twelve months of that sentence suspended on the usual terms.

2. He now appeals against the said sentence and contends that the learned trial judge erred in principle under three separate headings when imposing sentence.

3. In the first instance he contends that the trial judge incorrectly located the offending behaviour at the higher end of the scale of penalties available. Secondly, he contends that the trial judge failed to give appropriate weight to the mitigating factors in the case and thirdly, he contends that the trial judge erred in holding that the offence was so serious that it required the imposition of an immediate prison sentence.

4. In order to consider these grounds of appeal, the court is immediately confronted with a difficulty. According to the victim impact report, the injured party described the incident that occurred in the following manner:-

"We were losing the game and many of us on the team felt that the game was already lost. At that point of the game we were playing for pride. We were attacking the Moy Davitt's goal. I was fouled, but there was nothing in it. I was going to retrieve the ball, as I did, I could not have expected what happened then. Michael Prendergast had no reason to have any bother with me. He should have been defending his own goal line from the ball that was about to come. Instead, he decided without warning to come in my direction and punch me into the left eye. The impact was so severe I landed on the ground. I had not been marking him during the game. I had no issue with him during the match. I still can't understand why he decided to attack me. The incident was entirely unprovoked."

5. The referee's report which was introduced into the sentence hearing by counsel for the appellant in the course of his plea in mitigation gives a decidedly different account of the context in which the assault is alleged to have occurred. This report describes the appellant as having struck the injured party with his hand. The referee recalls the incident occurring in the context of the injured party and the appellant fighting and tackling for the ball and then the appellant "swung out and struck the injured party in the face and the injured party clearly fell to the ground".

6. While neither account in any way justifies the assault on the injured party, the referee's report in this case assuming it represents what actually happened impacts on the level of the appellant's culpability. There is a considerable difference between an unprovoked off the ball attack and the account given by the referee.

7. Counsel for the prosecution submits that this Court should proceed on the basis of the account given by the referee and we accept that this is a correct statement of the law.

8. It seems however, that the trial judge proceeded on the version of events given by the injured party. This would particularly appear to be so when he stated in the course of his sentencing remarks that "what happened on the pitch that day was no different in principle to a street assault at night".

9. We take the view that this amounts to an error in principle, but we have to say that no fault attaches to the sentencing judge in this regard. It seems to us that on the run of the case, he took the view that he was obliged to take the victim's account as the basis for sentencing. Unfortunately it was not made clear to him as it has been to us that he ought to have sentenced the appellant on the basis of the referee's report providing the proper context of the assault in this case.

10. Given that we hold that this finding amounts to an error in principle, we propose to proceed to a fresh sentence hearing and accordingly it is not necessary for us to consider the grounds of appeal that have been advanced on behalf of the appellant.

11. In this case, the harm done by the appellant to the victim is described by the victim in the course of his victim impact statement:-

"At the time of the assault it was unclear whether I had sustained brain damage as well. I was told at the hospital that I would have to have a CT scan before surgery. My mind started to race when I heard this, because I really did not expect

this news. Thankfully this was not the case. I knew from the reactions of all those around me that my eye must be in a terrible state. Dr. O'Donoghue carried out emergency surgery to my eye and tried in vain to reconstruct my eyeball. I had no sight, I was blind. I spent a week in hospital after this. It was the toughest week of my life. I was then transferred to the Mater Hospital and I came under the care of a Dr. Keegan. Even with his skills he could not save my eye. I felt very distraught when I heard this for the first time. Dr. Keegan had unsuccessfully tried to reattach my retina. While I say that I have 95% loss of vision in my left eye, I am blind, I feel myself blind, I consider myself to be disabled. It will never be the same again."

12. The injured party in this case goes on to describe the fact that he had recently graduated from university and had commenced work. It was necessary for him to drive and he was obliged to undergo a number of tests before he was allowed to drive again and he fears that this may be a difficulty for him in the future.

13. The appellant in this case has pleaded guilty to an unprovoked assault causing harm and the facts have already been outlined. If this Court was approaching this case on the same basis that the sentencing judge believed he was obliged to follow we would have had great difficulty in interfering with any part of the sentence that was imposed. However, given that we are obliged to approach the appellant's culpability in light of the referee's report, then the appellant is entitled to be treated in a different way to someone involved in an unprovoked off the ball violent attack.

14. We consider that the injuries in the case are so serious that a prison sentence with all the ancillary disadvantages that this entails is warranted. However, we take the view that the fact of imprisonment is more important than the duration of same.

15. We note the extensive mitigating factors advanced on behalf of the appellant, we note that he has paid some compensation to the injured party and we note the contents of the probation report which states that the appellant is someone who is unlikely to reoffend. We also note the impressive character references which have been submitted to us on the appellant's behalf.

16. In the circumstances we propose to quash the original sentence and to substitute in its place a sentence of twelve months imprisonment, backdated to the 16th October, 2015. We will suspend the balance of that sentence on condition that the appellant agrees to undertake community service for a period of 100 hours.

17. Accordingly we allow the appeal against sentence, set aside the original order and impose in its place a sentence of twelve months imprisonment backdated the 16th October, 2015, with the balance of that sentence suspended as of today on the appellant's undertaking to complete 100 hours of community service within twelve months.