



THE COURT OF APPEAL

Ryan P.  
Irvine J.  
Hogan J.

188CJA/13

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 20 OF THE CRIMINAL JUSTICE ACT 1993  
THE PEOPLE (at the suit of the DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

v.

GERARD HOWE

RESPONDENT

**JUDGMENT of the Court (ex tempore) delivered on the 8th day of December 2014 by Mr. Justice Hogan**

1. This is an appeal by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act 1993 in respect of a sentence imposed of three years and six months with the final two years suspended. The Director contends that this sentence which was imposed on the respondent, Mr. Howe, following a plea of guilty under s. 3 of the Non Fatal Offences against the Person Act, 1997 was unduly lenient. Mr. Howe was sentenced on 2nd July 2013 and the court has been informed that he has now completed that sentence.
2. The background to the offence is a disturbing one. The injured party, a Mr. Fowler, was assaulted by two persons in a fast food restaurant on 19th April 2009 in Dublin city centre. It appears that there was an initial disagreement and altercation in the bathroom downstairs. When Mr. Fowler returned upstairs to his seat and then proceeded to sit down he was promptly assaulted by another person. Using a blade, Mr. Howe slashed the face of Mr. Fowler on a number of occasions.
3. According to the prosecuting member, Mr. Fowler's cheek was sliced open and there was a very prominent wound. Thankfully, Mr. Fowler has made, we are informed, a very good recovery from what was undoubtedly a very serious and grievous assault. The wound, it appears, is actually four inches long and required nineteen stitches but Mr. Fowler obviously bears a noticeable scar. The actual weapon used in this assault was never found, but it must be said in Mr. Howe's favour that he did enter a (relatively early) plea of guilty, albeit having sought a trial date on two occasions. He did also indicate remorse in that on the following day he went to Mr. Howe's family and apologised. We also note that when he was arrested by Gardaí about six weeks later, he identified himself on CCTV and he co-operated fully with the investigation. It is also fair to say that he was young at the time with no criminal record which is terribly material to the issues we are now considering and he has not since come to the adverse attention of the Gardaí.
4. Now, in assessing the sentence that was imposed, we have to bear in mind that he was only charged under s. 3 of the 1997 Act which carries a maximum sentence of five years imprisonment and therefore the question of undue leniency has to be measured against that statutory maximum as prescribed by the Oireachtas. In considering this question this Court adopts once again - as we frequently have since our establishment - the statement of principle contained in one of the first section 2 appeals, *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M.. 279. Essentially the question which we have to ask is, has there been a substantial departure from the norm in a case of this kind.
5. No issue, as such, is taken in the manner in which the learned trial judge approached the sentencing process. He fixed the starting point at some three and a half years and then decided to suspend the final two years, taking account, we infer, of the various mitigating factors which I have just set out. The point which is urged on us on behalf of the Director by Ms. Baxter is that the end result, so to speak, on the part of the learned trial judge was itself a error of principle. While she acknowledges that the two years suspended sentence is a real sentence, she nevertheless submits that in terms of the amount of time in custody at eighteen months, the sentence was simply too lenient.
6. We agree that the sentence that was imposed was a lenient sentence, but we are not persuaded that the Director has met the threshold, which is in some respects a high threshold, of demonstrating that the sentence amounted to a substantial departure from the norm as *per* the *Byrne* test.
7. While acknowledging that the sentence was a lenient one, we think that the learned trial judge was entitled to take into account, and was within his rights to take into account significant mitigating factors. These factors include the fact that there was a plea of guilty, (albeit somewhat belated plea), the youth of the accused, the admissions which he made to the Gardaí, that he had helped to identify himself on CCTV, that he made an apology to the victim's family the next day and that he has been of subsequent good behaviour.
8. This stands in comparison with the other principal decision which was relied on by the parties *The People v. Hunter* [2010] IECCA 57. That was a case where there was again a slashing of the victim's face using a knife, but the slashing incident was itself far more serious and had far more serious consequences for the victim in that case. The individual accused was much older and the attack was entirely unprovoked. The accused, moreover, had a very bad criminal record and he showed absolutely no remorse. He also pleaded not guilty and he did not, in any sense, co-operate with the Gardaí. And *Hunter* in itself stands in comparison in these respects with the present case. It is true that there was a very serious assault with a blade, - factors which this Court deplores and deprecates - and serious injury was done to the victim in the course of this terrible event.
9. But when one compares this case to that of *Hunter*, one can see immediately that the learned trial judge was entitled to take into account the factors which mitigate the sentence down from three and a half years to an eighteen month custodial sentence with two years suspended.
10. As I have already indicated, while the Court considers that this sentence is undoubtedly a lenient one, we are nevertheless not persuaded that the Director has met the *Byrne* threshold of demonstrating that it was an unduly lenient sentence and such a substantial departure from the norm having regard to the mitigating factors which we have just enunciated.