



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

102CJA/12

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 2
OF THE CRIMINAL JUSTICE ACT 1993**

THE PEOPLE (at the suit of the DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT

V.

KEVIN MEMERY

RESPONDENT

Judgment of the Court (ex tempore) delivered on the 20th day of April 2015 by Mr. Justice Mahon

1. This is an application by the DPP for a review of sentence imposed at Dublin Circuit Criminal Court on 27th February 2012 on the grounds that it was unduly lenient.
2. The offence in question was an assault on a Mr. Stephen Flynn at 4, Lower Ormond Quay on 25th September 2008, contrary to section 3 of the Non Fatal Offences against the Person Act 1997. The sentence imposed was one of three years suspended in its entirety on strict conditions. It is the suspension of the entirety of the three years that has prompted the DPP's application. A separate section 3 assault sentence was not appealed by the DPP.
3. In his submissions to the court, counsel for the DPP has focussed primarily on two aspects. The first is the serious nature of the victim's injuries, and in particular the infliction of six separate wounds requiring stitching. The second relates to what is suggested are the somewhat negative indications apparent from the Probation Report, namely that it indicated a degree of lack of insight into the commission of the crime on the respondent's part and its consequences, and his risk of re-offending. Quite fairly, however, the DPP does accept that the report is not entirely negative.
4. The respondent's counsel pointed to the positive elements in the report and his client's psychiatric and difficult personal background as being sufficient to justify the entirely suspended sentence. He emphasised that the sentence was a three year sentence for an offence which provided for a five year maximum, and was suspended on very strict conditions. He referred also to the significant passage of time since the offence.
5. The offence in this case was certainly very serious. The victim's injuries speak for themselves in that regard. Such a serious assault should ordinarily carry a sentence which involves an immediate custodial period. Indeed the learned sentencing judge's remarks acknowledge that fact. To that extent the decision in this case to suspend the entire sentence was undoubtedly lenient. The issue for this court is not merely was the sentence lenient, but was it unduly lenient? Did its leniency amount to an error of principle on the learned sentencing judge's part? In arriving at the decision the learned sentencing judge had regard to certain matters which were clearly considered to be of particular relevance by him, particularly the respondent's very difficult personal circumstances and background and the evidence of significant psychiatric problems in that background, in addition to the fact that his previous convictions related to road traffic offences and not crimes of personal violence. He was also clearly impressed with aspects of the probation report and, in this court's view, properly so.
6. The respondent's background strongly indicates severe difficulties stretching back to his childhood. He was taken into care at a young age. He and members of his immediate family have had drug and alcohol addiction problems. To his credit, he is now drug and alcohol free. The respondent was educated to junior certificate level and has spent four years in the army until 2011. An army psychiatrist provided a medical report dated 3rd May 2011 in which details of the respondent's problems prior to that time are set out. This court was also advised at the outset of this hearing that the respondent has remained out of trouble since the commission of this offence, a period of over seven years.
7. This court is satisfied that in all the circumstances the suspension of the entire sentence period was not unduly lenient. It was within the learned sentencing judge's discretion to sentence as he did because of the various factors already referred to, and which were clearly taken on board by him. It is noteworthy that the sentence was one of three years, albeit fully suspended, in respect of an offence for which the maximum term is five years. It is not therefore an insignificant sentence, and it is a sentence which was designed to deal with the particular circumstances of the respondent. It is well settled law that the appropriate sentence depends not only upon the facts of the case but also upon the personal circumstances of the accused, as indicated by Barron J. in the case of *DPP v. McCormack* (Unreported, CCA of 18th April 2000) when he said:-

"The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by the accused."
8. It is also the case that very strong and onerous conditions were imposed on the respondent, conditions which, while undoubtedly preferable to spending time in prison, would nevertheless strike many as being quite punitive in nature, although the reasons for their imposition had more to do with rehabilitation than punishment.

9. Another factor which this court has taken into account is that it is now about seven and a half years since the commission of this offence and it appears to be the case that the respondent has respected the chance given to him by the learned sentencing judge in that he has been of good behaviour during this time. In this court's view no useful purpose would be served at this remove to impose a period of imprisonment. The application is therefore refused.