



**THE COURT OF APPEAL**

**Record No. 210/2017**

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

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**LARRY MCCARTHY (NO. 2)**

**APPELLANT**

**JUDGMENT (ex tempore) of the Court delivered on the 11th day of June 2018 by Mr. Justice Mahon**

1. The appellant has appealed concurrent sentences of three years and six years imprisonment respectively in respect of his conviction in the Special Criminal Court on the 3rd July 2017 in relation to the following counts:-

- Count 1: that on the 25th November 2014 at Cornmarket Villas, Little Gerald Griffin Street, in the city of Limerick the appellant assaulted David Foran causing him harm contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997, and
- Count 2: that on the 25th November 2014 at Cornmarket Villas, Little Gerald Griffin Street, in the city of Limerick, committed violent disorder in that he, with two or more other persons present together used or threatened to use unlawful violence and such conduct, taken together was such as would cause a person of reasonable firmness present at said place to fear for his or another person's safety, contrary to s. 15 of the Criminal Justice (Public Order) Act 1994.

2. The grounds of appeal on which the appellant has appealed his sentence are as follows:-

- (i) the learned sentencing judges erred in law and/or in fact in failing to apportion sufficient weight to the testimonials presented on behalf of the appellant;
- (ii) the learned sentencing judges erred in law and in fact in imposing a disproportionate sentence in all the circumstances;
- (iii) the learned sentencing judges erred in principle in imposing a sentence which was disproportionate, overly punitive and inconsistent with sentences for comparable offences of this nature;
- (iv) the learned sentencing judges erred in principle by placing a disproportionate emphasis on the aggravating factors in the case and failing to have adequate regard to the mitigating factors effecting the appellant's overall culpability;
- (v) the learned sentencing judges erred in finding that there were limited or no mitigating factors present in the appellant's case when determining the appropriate sentence;
- (vi) the learned sentencing judges erred in principle in failing to properly balance the sentencing objective of deterrents and rehabilitation;
- (vii) the learned sentencing judges erred in principle in failing to afford credit considering the significant passage of time since the appellant's previous serious conviction;
- (viii) the learned sentencing judges erred in principle in adopting a method for conducting a proportionate sentence which was unclear, and
- (ix) the learned sentencing judges erred in principle by failing to indicate what allowance, if any, was made for each of the mitigating factors in the case.

3. The background facts can be briefly stated as follows. It is alleged that on the 25th November 2014 at Cornmarket Villas in Limerick David Foran met with another man for the purposes of receiving money from him. Mr. Foran was then confronted by a number of individuals some with their faces covered with scarves, and it is alleged that the appellant was one of those. The appellant's face was not covered. These men challenged Mr. Foran as to why he was demanding money. He was then severely beaten by the men, his face having been covered by his hoodie, and in the course of that beating it is alleged that he was stabbed in the leg by the appellant.

4. Approximately two weeks previously, a road traffic accident occurred at Lelia Street in Limerick when Mr. Foran, a pedal cyclist was in collision with a Honda motorcycle. When gardaí arrived to investigate the motor cyclist gave a false name. His correct name was Cathal Kavanagh. He later gave his reasons to Rachel McAllister, the appellant's partner, for giving a false name as the fact that he had no insurance and was disqualified and did not want to get into trouble with the gardaí. Mr. Foran was treated in hospital for his injuries. It was alleged that on the 15th November 2014, following discussions between Mr. Kavanagh on the one hand and Mr. Foran and Ms. McAllister, on the other hand, it was agreed that Mr. Kavanagh would compensate Mr. Foran with a sum of money and

the transfer of legal ownership of the motorcycle as an alternative to Mr. Foran pursuing a claim through the courts. On the 25th November 2014 it was agreed that Mr. Foran would meet Mr. Kavanagh to conclude the deal. Shortly before the meeting, Ms. McAllister received a text message to the effect that Mr. Kavanagh was not available to attend the meeting but that another individual would do so on his behalf. It was immediately following the meeting with that other individual that the confrontation with a number of men, including the appellant, took place. At the time of the meeting Mr. Foran was wearing a bullet proof vest. He managed to pick up the knife that had been used to stab him in the assault as he escaped from the men and made his way home. He received treatment for his injuries in Limerick University Hospital, which included a 4cm deep puncture wound to his left thigh. Mr. Foran sought to withdraw statements made to him in which he identified the appellant as his assailant but at trial the statements were admitted into evidence pursuant to s. 16 of the Criminal Justice Act 2016.

5. The learned sentencing judges clearly considered that the offences were particularly serious, and understandably so. They carefully approached the sentencing process, largely in accordance with best practice as so often has been reiterated by this court. They also carefully identified the aggravating and mitigating factors although they deemed the latter to have been almost non-existent. The following short extracts from her sentencing judgment aptly indicate the overall approach taken in the court below. In relation to the aggravating factors the learned sentencing judges stated:

*"In our view, the offences involved deliberate, intentional and planned behaviour with a significant degree of harm in mind. Therefore, the Court considers the aggravating factors affecting moral culpability to be the following: The conduct was intentional and premeditated; such was directed towards causing a significant degree of harm and fear to the injured party; the use of a knife and a baseball bat. We consider Mr McCarthy's previous conviction for the same offence, that is, violent disorder, to be an aggravating factor relevant to the assessment of his moral culpability in respect of the offence of violent disorder. We do, however, take into account that the sentence he received was one which was wholly suspended. In this first analysis, that is assessment of the gravity of the offence, we do not find any mitigating factors."*

6. The sentencing court proceeded to fix the appropriate headline sentences in the following terms:-

*"...Having regard to the applicable aggravating factors set out above, the appropriate notional sentence is one of three and a half years' imprisonment. On the offence of violent disorder, the range of penalty available extends from that of a suspended sentence to one of 10 years' imprisonment. Taking into consideration the aggravating factors listed above, the Court considers the appropriate notional sentence to be one of seven years' imprisonment."*

7. It then proceeded to consider mitigating before arriving at the sentences imposed:-

*"..We are of the view that there are very limited matters to be taken into account by way of mitigation. Furthermore, we consider that the previous convictions for firearms offences in 2006 in the United Kingdom cause Mr McCarthy to lose mitigation. We have considered the testimonials furnished on his behalf and also the letter which has been furnished by his wife, setting out his personal circumstances. We take into account all of those matters, to include his family circumstances and his work history.."*

8. The appellant's counsel, Mr. White SC, placed considerable emphasis on what he submitted was the inappropriate sentence of the appellant in February 1999 when just eighteen years old for a violent disorder offence. That sentence was a fully suspended six year prison term and Mr. White submitted that the circumstances relating to the commission of that offence were not fully explored at the time. It is quite clear from the sentencing remarks of the learned sentencing judges - quoted above - that this offence featured to a significant degree in their approach to sentencing and in the imposition of relatively lengthy custodial terms.

9. That said, it is of course a fact that the appellant had other, albeit less relevant, previous convictions on his record.

10. The court has identified two errors of principle in the learned sentencing judges' approach to sentencing. The first relates to the 1999 violent disorder conviction. In this court's view the learned sentencing judges attached excessive weight to this conviction having regard to the fact that it occurred almost seventeen years previously and at a time when the appellant was very young. Secondly, the learned sentencing judges erred in almost excluding all mitigating factors. There were strong testimonials opened to the sentencing court in addition to issues highlighted relating to the appellant's difficult family circumstances. Both these required some recognition as mitigating factors.

11. The court therefore purposes to allow the appeal in respect of the six year sentence only. It will re-impose a sentence of six years imprisonment to date from the commencement date identified in the court below and it will suspend the final fifteen months of that term on the condition that the appellant enters into a bond in the sum of €100 to be of good behaviour for a period post release to be stipulated.