



THE COURT OF APPEAL

[55CJA/19]

**The President
McGovern J
McCarthy J.**

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

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

SHANE TOBIN

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered on the 20th day of January 2020 by Birmingham P

1. This is an application to review the sentence on grounds of undue leniency. The sentence sought to be reviewed is one of three and a half years imprisonment, but suspended for a period of four years, that was imposed in the Cork Circuit Criminal Court on 27th February 2019 in respect of the offence of assault causing harm. The legal principles applicable to reviews on grounds of undue leniency has not been the subject of any controversy between the parties, and indeed those principles are well known and have not really been in dispute going back to the first such case, that of DPP v. Byrne.
2. The background to the case is to be found in events that occurred on 28th October 2017 at a barber's shop in the Savoy Shopping Centre in Cork.
3. The facts are that on that day, the now respondent entered the shop along with his 12-year old son. The son's hair was cut by the injured party, and while the haircut was taking place, a verbal argument developed between the injured party and the now respondent. The respondent paid for the haircut and went to leave, but then returned, running towards the injured party and then punching the injured party to the head six or seven times. He then walked calmly from the barber's shop. The injured party attempted to restrain him and the respondent assaulted him once more. In this incident, the injured party suffered a fracture of the right cheekbone. The injured party was a Turkish national who had built his business up over a number of years, but in the aftermath of this incident, the business closed and he would contend that that was at least partly due to this incident.

4. In terms of the background and personal circumstances of the respondent, he was born in England, though of Irish parents, and seems to have spent some time in both jurisdictions. He is deaf in one ear and has partial hearing in the other. The respondent has previous convictions both in England and in Ireland. In Ireland, there are 51 previous convictions recorded, a very significant number of which are for s. 2 assaults, and in respect of a number of these, he received actual prison sentences and in other cases received suspended sentences. He has s. 2 assaults recorded in Ireland from 1999 up to October 2014. In England, at St. Alban's Crown Court, he was convicted of a number of offences, including wounding with intent to cause grievous bodily harm for which he received a 5-year sentence. He was released on licence for this offence after two and a half years. There is some degree of confusion as to whether that conviction was in 2004 or 2014. The transcript of the hearing in the Circuit Court refers to 2004 as being the date that was given by the Garda when summarising the prior record of the then accused, and that accords with the note of the evidence as taken by counsel on behalf of the accused. Counsel on behalf of the Director has been proceeding on the basis that the Court hearing in St. Alban's was in 2014, referring to the fact that the understanding at the sentence hearing was that the accused had been on licence when this offence was committed and that there was reference to attempts by the Irish Probation Service to bring matters back before the English courts. In the course of the sentence hearing, a number of letters and testimonials were handed in. One of these was from the mother of the accused and this appears to have had a significant impact on the sentencing judge. The mother of the accused said that she depended on her son and that she had nobody else to look after her, and also referred to the fact that her son was turning his life around. The accused indicated that very shortly before, in fact the night before this incident, he had discovered that the person he had regarded as his father was not his actual father. This had an impact on his mental state. The respondent to this appeal had brought a sum of €1,000 to Court by way of compensation recompense, but the judge indicated that the only reason that he was not sending the accused to jail was because of the fact that his mother depended on him.
5. The judge's approach to sentencing was to say that he saw this as a midrange s. 3 offence. The Director says that was an error and that, properly, this should have been regarded as the upper end of midrange s. 3 offences. The judge is also criticised by the Director for failing to pay sufficient attention to the relevant previous criminal record.
6. In the Court's view, this was a serious offence which resulted in significant physical injuries for the injured party and significant lifestyle changes. That the injured party was going about his work providing a service to the public has to be seen as an aggravating factor. The fact that the offence was committed by someone with a significant record for offences involving violence, the offence of wounding with intent to cause grievous bodily harm in England and the multiple s. 2 assault convictions in this jurisdiction is disturbing indeed.
7. We are quite satisfied that this was a case where the custody threshold was crossed. While one must have sympathy for a mother whose son is facing imprisonment, we do not

believe that the letter written in this case provided a basis for avoiding a custodial disposal. Satisfied as we are that the sentence was unduly lenient, we must quash the sentence imposed in the Circuit Court and address the question of resentencing. In our view, the appropriate sentence at first instance would have been one of three years imprisonment. However, we are required to resentence as of today's date. We recognise that the sentence to a term of imprisonment now, having initially avoided custody, must be difficult. We also recognise that Mr. Tobin has kept out of trouble since the sentence hearing in the Circuit Court and has obtained fulltime employment.

8. In these circumstances, we will limit our intervention to quashing the sentence in the Circuit Court and substitute a sentence of two years imprisonment which will date from today.