THE COURT OF APPEAL

[145CJA/19]

[93CJA/18]

[152CJA/19]

The President
Edwards J.
Kennedy 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

MARTINA MCGRATH

RESPONDENT

AND

MARK DOLAN

RESPONDENT

AND

DALE BRAZIL

RESPONDENT

JUDGMENT of the Court delivered on the 20th day of February 2020 by Birmingham P

1. The Court has been dealing with three applications brought by the DPP to review sentences on grounds of undue leniency. The appeals are not linked or connected in any way, but each is an appeal against the leniency of a sentence imposed in respect of an offence of s. 3 assault, the offence of assault causing harm. At the List to Fix Dates, it was suggested that, notwithstanding that there is no direct link between the appeals, that there would be merit in listing them together as they appear to raise similar issues. In response to that suggestion, the Court listed the three appeals for hearing on the same day, and having heard the applications to review, we are now in a position to give judgment. While we will deal with each case in turn, we feel there may be some merit in giving one judgment which deals with each of the three cases, as that course of action may provide greater assistance in the context of future cases.

2. We should say that the legal principles applicable to undue leniency reviews have not been the subject of any dispute between the parties in any of these cases, and indeed, those principles have not been seriously in dispute since the first such case, that of DPP v. Byrne [1995] 1 ILRM 279.

Martina McGrath

3. So far as the case of DPP v. Martina McGrath is concerned, the Director seeks to review as unduly lenient a sentence imposed on 4th June 2019. It was a sentence of two and a half years imprisonment with the final year suspended. The case involved an offence that had taken place on 18th June 2018 at the Clock Tower carpark in Waterford. The sentence was imposed in a situation where a plea of guilty was entered by the respondent to this appeal and a co-accused, after the victim of the assault had given evidence, but before she was cross-examined. The victim in this case was Ms IF, who was pregnant at the time. Gardaí responded to reports of an assault, and upon arrival, found ambulance personnel treating the injured party for four stab wounds to the torso and face. The victim had to be admitted to hospital and has been left with permanent facial scarring. Two suspects were identified; the respondent, Ms. McGrath, and another young woman. There was CCTV footage which showed the two suspects drinking, both before and after the incident. The Court heard that the co-accused was pulling the victim's hair while the respondent was stabbing her. No weapon was ever recovered, but the nature of the wound leads to the inescapable conclusion that a weapon was, in fact, used. The probation report quotes the respondent, Ms. McGrath, as making reference to the neck of a bottle. The offence that is now the subject of this application to review was committed while Ms. McGrath was on bail in respect of two theft matters. The victim suffered puncture-type wounds to the face and torso, one to the left cheek, one behind the left ear, one underneath the left arm by the ribcage and one to the left lower back.

4. In terms of the respondent's background and personal circumstances, she is 27 years of age and has nine previous convictions. The most significant of these relates to the fact that on 14th February 2011, she was convicted of the offence of wounding with intent to do grievous bodily harm at Basildon Crown Court and received a sentence of three and a half years imprisonment. There is also a recorded conviction for a s. 3 assault dealt with in Waterford Circuit Court on 1st May 2013, when a two-and-a-half-year sentence was imposed. The other matter of significance was a conviction on 6th February 2013 in Cork Circuit Court for robbery.

5. The judge's approach to sentence was to say that this was a midrange offence. He identified a headline or pre-mitigation sentence of three and a half years, and for the mitigating factors present, reduced that sentence to two and a half years, and then, in view of what he described as "late efforts" at rehabilitation, suspended 12 months of the sentence.

6. The DPP says that the headline sentence was too lenient, and that thereafter, the reduction was too great. In so contending, the Director identifies the aggravating factors in the case present as including:

(a) The serious, violent nature of the offence;

(b) The use of a weapon to inflict four separate stab wounds on the victim;

(c) The fact that the offence was committed in a public carpark in broad daylight;

(d) The physical and psychological impact on the victim. There was a victim impact report presented to the Court which established that the impact on the victim was a very significant one. Physical injuries involved 22 stitches;

(e) The previous conviction of the respondent for a serious assault using a weapon; and

(f) The fact that the offence was committed while the respondent was on bail.

7. The Director says that the headline sentence represented a significant departure from what could be considered as appropriate in a case such as this. Then, having identified a headline sentence which was itself too low, there was a 30% reduction. The Director says that there were only limited mitigating factors present. A plea of guilty was entered only after the victim gave evidence. A probation and welfare report saw the respondent at high risk of reoffending. There then followed a further decision to suspend 12 months of the sentence, leaving a net sentence of one and a half years. The Director says that a net sentence of 18 months is significantly inadequate, and thus, has to be seen as unduly lenient in all the circumstances.

Mark Dolan

8. In the case of DPP v. Mark Dolan, the sentence sought to be reviewed was one that was imposed on 9th March 2018. It was a sentence of two years imprisonment in respect of a s. 3 assault with 18 months of that sentence suspended. The sentence was to date from 4th November 2017.

9. The offence in question occurred on 23rd October 2016. It involved the smashing of a glass into the victim's face in a nightclub, giving rise to permanent scarring to the left side of the cheek. The sentencing hearing heard that the victim required internal and external stitching. An additional dimension was that the victim at the time of incident had been training with the Ireland U-19 rugby team. Because of the injuries sustained, he was unable to play or train for a period and lost his place with the squad. In the course of the hearing of this appeal, the Court was invited to view and did view CCTV footage from the nightclub. The footage is quite shocking.

10. In terms of the respondent's background and personal circumstances, he was 30 years of age and the father of three children with one on the way. He had 64 previous convictions recorded, though it is the case that many of these were road traffic and public order offences and that quite a number were recorded when he was a juvenile. The defence legal team in the Circuit Court calculated that 46 of the offences related to a period when he was a juvenile. However, his previous convictions included a s. 3 assault and a s. 2 assault.

11. The Court heard that he had been drinking very heavily on the day of the offence and for several days prior to that. The Court was also told that he had had difficulties with alcohol since he was 13 years of age.

12. The judge's approach to sentencing was, because of the aggravating factors present, to place the offence at the upper-end of the scale of seriousness for assault causing harm cases and to identify a pre-mitigation sentence of three and a half years. He felt that there were significant mitigating factors present; the guilty plea, the expression of remorse, the background of difficulties with alcohol, and the fact that a sum of €5,000 had been offered in compensation for the victim. There was also an expressed willingness to participate in a residential treatment programme. The judge said that he had read a letter from the partner of the accused, who was within six weeks of delivering her baby at the time, after what had been a difficult pregnancy, and said that he was prepared to do, as counsel urged, and apply the principle of "one last chance" and would therefore suspend the last 18 months of the two years of imprisonment for a period of two years.

Dale Brazil

13. In relation to the case of DPP v. Dale Brazil, the sentences sought to be reviewed were sentences that were imposed on 6th June 2019. On that occasion, a sentence of two years imprisonment in respect of a s. 3 assault was imposed. There was also a concurrent sentence of 18 months imprisonment in respect of an offence of threatening to kill.

14. The case related to events that had occurred on 26th September 2018. On that occasion, Gardaí attended at a dwelling at Lisduggan, Waterford. It emerged that the owner, Ms. NM, had let her dog out early that morning, and as she did so, had been approached by the respondent, Dale Brazil, who said to her "I'll blow the face off you". He was holding and pointing a long object covered by a white cloth. The householder ran back into her home and the respondent proceeded to kick the door, breaking the handle. The householder's son, who lived nearby, was present, and as it was put, went to "run" Mr. Brazil from the garden. As he chased Mr. Brazil from the front lawn, a co-accused, Eddie Moloney, came from the side and struck the householder's son on the head with a wooden bat. It was described, on occasions, as a table leg. As the victim went to the ground, the respondent hit him a number of times with what was variously described as a metal bar or a golf club. The injured party suffered a fractured cheekbone, nasal bone, and skull base.

15. The incident had a very significant impact indeed on the victim. Prior to the incident, he had been working in a local distillery and was drawing a very good wage, but since the attack, he had been unable to work and was on Social Welfare. His victim impact report indicated that he had been severely affected, experiencing a loss or diminution of taste or smell and picking up illnesses to a greater extent than heretofore.

16. In terms of the respondent's background and personal circumstances, he was 24 years of age at the time of the sentence hearing. He had 49 previous convictions. Four were for theft and fraud offences, three for Misuse of Drugs Act offences, two for criminal damage, but there were also two assaults, one a s. 2 assault and one a s. 3 assault [these were as

a juvenile]. The Court was told that addiction issues were a significant feature of the case. Indeed, it was suggested that the respondent may have been taking drugs since he was 8 years of age.

17. It is of note that the respondent was sentenced on the same day in respect of another s. 3 assault which had occurred on 17th March 2017. This resulted in a concurrent sentence of 18 months. This offence, committed in September 2018, now the subject of an application to review on grounds of undue leniency, was committed while on bail for a theft offence. However, Mr. Brazil was not on bail at the time in respect of the March 2017 assault. The Court was told that his daughter, aged 5 years, had significant medical issues. One effect of these medical issues was that it was not regarded as appropriate for this young child to visit her father while he was in prison. The Court heard that the respondent's experience of incarceration was a very difficult one and that he was subject to a 23-hour lockup.

18. The judge's approach to sentencing was to place the s. 3 assault, in respect of which the review application is sought, at the upper-end of gravity and to identify a headline or pre-mitigation sentence of three and a half years imprisonment. He felt that the threat to kill was at the midrange of gravity for such offences and that the appropriate starting sentence was one of four years imprisonment. It is to be noted that the threat to kill count, in respect of which a plea was entered, involved a threat directed to the injured party during the course of or as a precursor to the assault, as distinct to the threat to the householder, the mother of the injured party. The sentencing Court was not really provided with any details about the nature of the threat to kill which was the subject of the count on the indictment.

19. In the course of sentencing, the judge then referred to what he saw as mitigating factors; the difficult background that the respondent had, particularly a difficult childhood, and the struggles he had with addiction. He referred to the guilty pleas and the apology that had been tendered to both of the victims of the assaults. He referred to the fact that counsel had said that the respondent was taking steps to deal with his addiction and was pointing to the fact that his client was on a 23-hour lockdown in prison. He also referred to the health of the respondent's daughter and the fact that it was not regarded as appropriate for her to visit the prison lest she catch an infection. The judge then said that in respect of the second assault, the assault the subject of this review, he was reducing the sentence of three and a half years identified by 18 months to two years. In relation to the s. 5 threat to kill offence, he was prepared to reduce that sentence to two and a half years, but as an incentive to rehabilitation, he decided to go further and suspend the final year of that sentence. A trespass matter that was also on the indictment resulted in a 6-month sentence, the sentences to run concurrently.

20. Again, the Director's position is that the headline sentence nominated was set at an inappropriate level, a level that was too low, and that the ultimate sentence arrived at was an inappropriate one. She contends that it was outside the norm, and therefore unduly lenient, and unduly lenient to a significant extent.

21. Resisting the applications, counsel on behalf of each respondent argues that the sentence imposed in the Circuit Court was not unduly lenient. Even if the sentence imposed might be seen as lenient, it was not so unduly lenient as to merit a review. Each counsel also argues that what has occurred since the sentence hearing militates against an intervention at this stage, even if the view is taken that the sentence originally imposed was more lenient than it ought to have been.

Discussion

22. As the facts of these three cases show, s. 3 assault cases can be very serious indeed. Amongst factors tending to aggravate such offences, we would identify the infliction of significant injuries, injuries well in excess of the threshold to constitute a s. 3 offence, the use of a weapon, the involvement of more than one assailant, the injured party's situation is more difficult if he is assaulted by two, three or more individuals and planning or premeditation.

23. In each case, the headline sentence identified is criticised by the DPP as inadequate to meet the gravity of the offending conduct measured with reference to the offender's culpability and the harm done. This Court would observe that it may be that judges have been too reluctant to consider placing the starting or pre-mitigation sentence at the maximum of five years imprisonment. For high end s. 3 assaults, a 5-year headline pre-mitigation sentence is not excluded. The Court would observe that the selection of a starting or pre-mitigation sentence in the case of a s. 3 offence has to be seen in the context of the overall architecture of assault-type offences provided for by the Non-Fatal Offences Against the Person Act 1997. As is known, the basic or entry level assault is provided for in s. 2 of the Act, which creates a summary offence. Then comes s. 3 assault, the offence of assault causing harm, and then there is s. 4, recklessly or intentionally causing serious harm. This offence is often referred to in shorthand as "s. 4 assault", but in fact, the word 'assault' appears nowhere in the section.

24. It is in the nature of things that there may be cases where the decision to charge with s. 3 or with s. 4, or to accept a plea to s. 3 if s. 4 has been charged, will be finely balanced. There will be other cases which will be identified as borderline s. 3 or s. 4. In such cases, a starting point or pre-mitigation sentence of five years may be appropriate. Certainly, judges should not operate on the basis that a starting point of five years is not generally available and that it should only be considered, if it be ever considered, in exceptional circumstances.

25. Turning, then, to the three cases before the Court, we are satisfied that on the facts, each of these three cases has to be regarded as falling in the upper-end of the scale of gravity for s. 3 assaults. Some of the factors that we have referred to as aggravating are present in each of the cases, and in some of the cases, quite a number of those are present. In the case of Martina McGrath, there is the fact that a weapon is used, that there were two assailants, that very significant injuries were inflicted and that the offence was committed by someone with a significant prior record which included directly relevant previous convictions involving serious assaults. There is also the fact that it was committed while on bail, which by statute, has to be regarded as an aggravating factor, though it is the

case that the matter in which she had been admitted to bail was of a significantly different character.

26. In the case of Mark Dolan, there was the extreme violence of the assault, the use of the weapon, the infliction of permanent scarring and the impact it had on the victim's career.

27. In the case of Dale Brazil, there is the fact that the offence was pre-planned, it involved making an approach to the dwelling where the offence occurred, it involved the use of weapons by two assailants, it involved the infliction of injuries, which were very significant in themselves and have had a very significant impact indeed on the lifestyle and quality of life of the victim. Again, the offence was committed by someone with a significant prior criminal record, including previous assault convictions. It, too, was committed while on bail, though, as in the case of Martina McGrath, the offence in respect of which he had been admitted to bail was of a different character to that which brought him before the Court on this occasion.

28. The Court is in no doubt that in each of these three cases, that there was an error in identifying the starting or pre-mitigation headline figure. In each case, consideration should have been given to a starting or pre-mitigation headline sentence of five years imprisonment. In each case, the sentence actually imposed was, in the Court's view, unduly lenient, and in each case, represented a significant departure from a sentence that might have been expected to be imposed.

29. Accordingly, in each of these cases, we must quash the sentence imposed in the Circuit Court and proceed to resentence.

30. In the case of Martina McGrath, we would identify as the appropriate starting point, the pre-mitigation sentence as being five years, the maximum available by statute. There were, as the judge in the Circuit Court identified, some factors available by way of mitigation. Such matters as were available by way of mitigation, and they were limited, were reflected in the decision of the trial judge to reduce his starting sentence by one year and we will do likewise. In the Circuit Court, because of late efforts at rehabilitation, the judge suspended 12 months of the sentence. In the Court's view, this was very generous. Overall, the reduction of the three and a half years to two and a half years and then the suspension of 12 months of that sentence was excessive and has to be seen as involving some element of double counting or double discounting. A sentence of four years for an offence of this gravity, committed by someone who had such highly relevant previous convictions, could not have been regarded as excessive. Nonetheless, the Court will suspend the final six months of the sentence to incentivise rehabilitation. In deciding on that course of action, the Court has had regard to the fact that being resentenced and having the sentence increased at this stage must be a source of considerable disappointment.

31. Again, in the case of Mark Dolan, the Court is in no doubt but that the headline sentence identified was too low, as was the actual sentence imposed. We have referred to a number of the aggravating factors present and we are of the view that this is the sort of

case where a starting sentence of five years should be considered and where judges should not shy away from a starting position at the statutory maximum for s. 3 offences. We will, therefore, quash the sentence imposed in the Circuit Court and proceed to resentence. At this stage, a difficulty immediately presents itself, a matter that was properly acknowledged by counsel on behalf of the DPP. In this case, the sentence was backdated to 4th November 2017. Accordingly, the respondent was released from custody on or about the occasion of the sentence hearing on 9th March 2018. This raises in stark terms the question of whether it is appropriate to re-incarcerate him at this time. In the usual way, the Court has been provided with up to date material designed to assist it if required to resentence. In that context, we have heard that since the sentence hearing, he has been convicted of an offence of intoxication in a public place in November 2018, which is obviously not something that is to his credit. On the other hand, we have been provided with information about a very positive engagement with the Ú-Casadh Drug Rehabilitation Community Employment Scheme. We have been furnished with a number of reports from Ú-Casadh as well as reports from the Waterford and Wexford Education and Training Board, and a report from a literacy tutor. One paragraph of the report of 14th February 2020 from Ú-Casadh merits quotation:

"Mark is a prime example of a young man who has completely turned his life around. He is a diligent worker, team player and an outstanding influence on his work colleagues. He has proven himself to be a quick, eager learner who is enthusiastic and open to new work challenges."

In the circumstances, while we are in no doubt that the sentence imposed was unduly lenient, we will deal with the matter by imposing a sentence that we would have regarded as appropriate. We will impose that sentence from today's date, but we will suspend the sentence in circumstances where he completed serving the sentence imposed by the Court almost two years ago, and would appear to have taken the chance he was offered with both hands. Thus, we will quash the sentence imposed in the Circuit Court and substitute therefor a sentence of three and a half years imprisonment, but it will be suspended on terms which we will discuss with counsel. Mr. Dolan will have credit for the period served.

32. In the case of Dale Brazil, we are again satisfied that the headline sentence of two years identified was an inappropriate one and was unduly lenient. We are also of the view that the sentence ultimately imposed in respect of the s. 3 assault was unduly lenient. In a situation where the transcript of the sentence hearing provides really no information about the nature of the threat to kill, the focus of our attention is on the s. 3 assault. In concluding that the sentence was unduly lenient, as we do without hesitation, a matter that we consider relevant is that on the same day as the sentence the subject of this application was imposed, a concurrent sentence was imposed in respect of another s. 3 assault which had occurred on 17th March 2017. That is not the subject of an application to review, but nonetheless, the Court regards it as forming part of the context against which an assessment has to be made as to whether the sentence imposed in respect of the September 2018 matter was unduly lenient.

33. We have referred to the aggravating factors present. Again, in our view, a starting or headline sentence of five years, the statutory maximum, might have been considered. Certainly, the headline sentence, if not actually placed at five years, would have had to have been in the range of four to five years. Again, there were some factors present by way of mitigation which would allow for some amelioration of the headline sentence, which included his daughter's difficult medical situation and the difficulties that imprisonment was placing on Mr. Brazil maintaining a relationship with his daughter, the fact that incarceration was a very difficult experience for Mr. Brazil and the fact that a sum of money had been raised to offer to the injured party. If account is taken of these factors, this would have resulted in a sentence of three to three and a half years to serve. Information has been put before us which indicates that the respondent has been using his time in custody constructively, he has been moved to another prison where he is not subject to the 23-hour lockdown regime, and there is some indication that Mr. Brazil is now anxious to rehabilitate himself. In the circumstances, we will confine our intervention to quashing the sentence imposed in the Circuit Court and substituting therefor a sentence of three years imprisonment. The sentence that we have decided to impose is designed to take account of the disappointment factor that must be present for Mr. Brazil when he finds himself being resentenced.