



**THE COURT OF APPEAL
CRIMINAL**

174CJA/2019

**Edwards J.
McGovern J.
Kennedy J.**

**NOTICE OF APPLICATION FOR REVIEW OF SENTENCE [SECTION 2 CRIMINAL JUSTICE
ACT 1993]**

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

BETWEEN/

**THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)**

APPLICANT

**- AND -
ROBERT MAXWELL**

RESPONDENT

**JUDGMENT of the Court delivered on the 11th day of March 2020 by Mr. Justice
McGovern**

1. This is an application brought by the Director of Public Prosecutions for the review of a sentence imposed on the respondent at Tipperary Circuit Criminal Court on 28 June, 2019 on the ground of undue leniency.
2. The respondent pleaded guilty to a count of endangerment contrary to s.13 of the Non-Fatal Offences Against the Person Act 1997. The particulars of Count 2 on the Indictment to which the respondent pleaded guilty states: -

"That you did, on 6 August 2017, in the County of Tipperary intentionally or recklessly engage in conduct to wit drive motor vehicle 04 CW 1925 at Simon Ryan knocking him to the ground and driving over him and then turning the vehicle and driving at Simon Ryan a second time, which said acts created a substantial risk of death or serious harm to another."
3. In addition, four public order charges which arose at the same location a short time later were taken into consideration. These concerned the conduct of the respondent when the Gardai returned to the scene about one hour later.
4. The legal principles applicable in applications of this nature have been well settled since *DPP v. Byrne* [1995] 1 I.L.R.M. 279 and the *People (DPP) v. Stronge* [2011] IECCA 79. The onus of proving undue leniency rests on the DPP, and the sentence in issue must

amount to a substantial or gross departure from what would be regarded as the norm in cases of a similar nature.

5. In this case, the respondent was sentenced to a term of four years' imprisonment in relation to the endangerment charge and the sentence was suspended in full for a period of eight years.
6. In reviewing the sentence for the purpose of this application, it is necessary to briefly look at the background facts and then to the approach taken by the sentencing judge having regard to the general nature of the offence and the background circumstances of the respondent. It is important to note that counsel for the DPP informed the Court that he does not quarrel with the sentence of four years nominated by the sentencing judge but rather with the suspension of the entirety of the sentence.
7. The offence occurred during the night between August 6, 2017 and August 7, 2017 at Yewstown Estate, Nenagh, County Tipperary. Sergeant Michelle Casey outlined the facts to the judge saying that she attended the scene where a number of people were assisting the injured party, Mr. Simon Ryan, who had been struck by a vehicle driven by the respondent into a group of people. The injured party was struck and run over by a van driven by the respondent and there were various accounts from witnesses suggesting that the respondent had then reversed the van over the injured party as he lay on the ground or was attempting to do so when bystanders dragged the injured party away from the van. The particulars in Count 2 of the Indictment speak of the injured party being knocked to the ground and the van driving over him and the vehicle then being driven at the injured party a second time. Whether the van, in fact, reversed over the injured party having previously driven over him does not materially alter the seriousness of the event as described by a number of witnesses and outlined to the sentencing judge.
8. The injured party thought he was going to be killed in the incident and he has suffered serious physical injuries which included: -
 - (a) a laceration to the right side of the upper lip;
 - (b) a fracture of the third rib;
 - (c) a fracture of the left clavicle;
 - (d) soft tissue injury to the right thigh; and
 - (e) soft tissue injury to the right ankle including ligament damage.

Photographs produced to the sentencing judge and to this Court showed in graphic terms the extent of the injuries and how fortunate the injured party was that his injuries were not greater. While the injured party has made a good recovery, the thought that he could have been killed has preyed on his mind a great deal since the incident and his confidence has been affected.

9. The judge set out the aggravating factors: -
- (i) The respondent was one of a number of people who were behaving very aggressively that night towards another group of people and had pleaded guilty in relation to three public order matters relating to the events of that night;
 - (ii) The respondent was intoxicated; and
 - (iii) The respondent had twenty-eight previous convictions including a significant number of road traffic offences which involved him being disqualified from driving on a number of occasions, both prior to this incident and also twice subsequently but before sentencing. He also had some drug related convictions.
10. At the time of the events giving rise to the plea to endangerment, the respondent was not under a period of disqualification although he had been recently before the said period.
11. The sentencing judge described the effect of the incident on the injured party and remarked that had circumstances worked out differently the respondent could have been facing a charge of murder or manslaughter or causing serious harm for which a maximum sentence of life imprisonment could be imposed.
12. The sentencing judge regarded the incidents before the Court as being very serious in their totality, particularly having regard to threats that were made. Referring to the charge of endangerment the judge stated: -
- "With regard to the first indictment there is a single charge, together with the summary matters to be taken into consideration and the maximum sentence for that account (sic) of endangerment is seven years. I consider that this comes towards the top end of that offence."*
13. It would be difficult to take issue with that view.
14. The judge then went on to consider the mitigating factors. The first was the plea of guilty. He noted that an apology had been given to the injured party and, although it came well over a year after the offence was committed, it had some value as it was accompanied by an undertaking given to the Court. The judge then went on to consider the personal circumstances of the respondent. He came from a home where his parents had split up and he is currently in a relationship with a partner with whom he had a family. He was employed and supported the family. He was taken into custody at the time of the offence, remaining there until June 2018. While the respondent was in prison his one-year old son died, and he was granted compassionate release. The death of his child affected him greatly.
15. The judge accepted that since the respondent went into prison his outlook on life had changed completely and that at the time of sentence he was travelling some distance to work each day to earn money and support his family. He heard evidence from the partner

of the respondent to the effect that she was fearful that the family would lose their home if he was sent to prison and was unable to support them.

16. While the sentencing judge did not set a headline sentence it is not of particular significance in the context of this application, since the applicant does not take issue with the four-year term of imprisonment nominated by the judge. It is the contention of the applicant that the suspension of the sentence in its entirety brought it into the category of undue leniency. The Court was referred to a number of relevant authorities by the parties in their written submissions. In *DPP v. Maughan* [2018] IECA 343 the Court considered an appeal against severity from two concurrent sentences of five years imprisonment in respect of two counts of endangerment where a car had reversed at speed onto a footpath, nearly colliding with pedestrians. The appeal was unsuccessful and the five-year term of imprisonment was upheld. In *DPP v. McInerney* [2016] IECA 378 this Court reduced a sentence of six years with two suspended to a sentence of four years with one year suspended. That case involved a prolonged episode of dangerous high speed driving in a town.
17. However, unlike the case before this Court, those cases did not involve the driving of a motor vehicle into a group of people and running over one of them and then reversing in such a way as to either run over the injured party a second time or come within inches of doing so depending on various accounts given by witnesses. Other cases referred to were *DPP v. O'Driscoll* [2017] IECA 91 and *DPP v. Cash* [2015] IECA 198 and *DPP v. Paul McGillian* [2018] IECA 62.
18. The respondent also relied on *DPP v. Douche* [2014] IECA 20 as an authority for the proposition that the adverse effect of jail on an offender's family may be a highly material consideration in sentencing and a mitigating factor.
19. The Court has taken into account all of the authorities which have been opened to it and the views expressed by the sentencing judge who is a very experienced judge in criminal matters. However, it is the view of this Court that the decision of the sentencing judge to entirely suspend the prison sentence in this case amounted to an error in principle and could not be justified on all the facts. The circumstances in which the offence occurred, involving the driving of a car into a group of people, demanded a custodial sentence. The aggravating factors in this case were significant. Foremost amongst them was the nature of the respondent's conduct in the commission of the offence and the extreme danger which that conduct posed to members of the public in general and the injured party in particular. It cannot be overlooked that the respondent had twenty-eight previous convictions, many of them for road traffic offences which included periods of suspension of his licence to drive a motor vehicle.
20. The sad personal circumstances of the respondent are acknowledged by the Court. While a custodial sentence will undoubtedly have an effect on the respondent's immediate family this is true in most cases where someone with a family is sent to prison but could not be a reason for not imposing an appropriate sentence for an offence at the upper end of the scale except in the most exceptional of circumstances. The Court is satisfied that

there are no exceptional circumstances in this case which would permit a non-custodial sentence.

21. The Court is satisfied that by suspending the entirety of the sentence the sentencing judge was unduly lenient. Accordingly, the sentence will be quashed.

As the sentence has been quashed this Court can impose what it considers to be the appropriate sentence, notwithstanding the fact that the DPP did not take issue with the sentence of four years. The Court is of the view that an appropriate headline sentence for this offence is five and a half years which, on account of the guilty plea and other mitigating factors, will be reduced to four years. Taking into account all the mitigating factors and the inevitable disappointment in having to serve a custodial sentence at this stage the Court will suspend the final two years of the four-year sentence for a period of two years.