



**THE COURT OF APPEAL**

**Record Number: 83CJA/2022**

**The President.  
McCarthy 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 -**

**DAVID BANNERTON**

**RESPONDENT**

**JUDGMENT of the Court delivered (ex tempore) on the 21st day of July 2022 by Ms. Justice Isobel Kennedy.**

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency. On the 27th July 2020, the respondent pleaded guilty to one count of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997 and one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. The respondent was sentenced to six years' imprisonment with the final 18 months suspended in respect of the offence contrary to s. 4 and two years in respect of the s. 3 offence. The sentences were imposed on a concurrent basis.

**Background**

2. The offending herein relates to two incidents of assault perpetrated by the respondent in Galway city centre in the early hours of the morning on the 15th June 2019. The assaults occurred within minutes of each other and were perpetrated against two injured parties neither of whom were known to one another and neither of whom knew the respondent.
3. The first assault in time occurred at approximately 1:42am. The injured party, with a date of birth of the 31st August 1950, began conversing with the respondent's partner after which he was struck in the face by the respondent on at least two occasions and

thereafter kicked by him while he was on the ground. This assault resulted in a fracture in the injured party's right clavicle and a laceration to his lip.

4. The second assault in time occurred at approximately 1:45am. The injured party exited a taxi in order to go to the aid of the respondent's partner with whom he was now engaged in a physical dispute. In this way he is described as a good Samaritan. Upon the injured party's intervention, the respondent struck him on at least three occasions causing him to fall back and hit his head on the road. The respondent left the injured party lying unconscious in the middle of the road. This assault resulted in extensive injuries to the injured party's head including a fracture to his skull.
5. The first injured party made his way to a friend's house and later received medical treatment at the Galway Clinic. The second injured party was removed from the scene by ambulance to University Hospital, Galway. He was initially treated by staff in the emergency department and thereafter transferred to the intensive care unit. On the 8th July 2019, he was transferred to Craigavon Area Hospital in Northern Ireland where he was treated until the 24th July 2019. He remains under the supervision of the Community Brain Outpatient team.

#### **The sentence imposed**

6. Taking into account the impact on the victims and the circumstances of the respondent, the judge identified a headline sentence of three years' imprisonment in respect of the s. 3 assault and nine years' imprisonment in respect of the s. 4 assault.
7. He acknowledged the mitigating factors: the respondent's plea of guilty, his expression of remorse, his complex relationship with alcohol and the impact of that on his mental health.
8. It was the judge's view that the mitigating factors reduced the s. 3 sentence to one of two years and the s. 4 sentence to one of six years.
9. The Court was furnished with a psychiatric report on the day of the sentencing hearing. Having taken time to consider this report and its contents as regards the rehabilitation of the respondent, the judge suspended the final 18 months of the s. 4 sentence for a period of five years.

#### **Grounds of appeal**

10. The Director appeals the sentence on six grounds, as follows:

"The learned sentencing Judge:

- 1) Failed to fully appreciate the gravity of the offences as committed by the offender;
- 2) Departed in a significant way from the norm that would reasonably be expected in a case of this nature;
- 3) Failed to have sufficient regard to the deterrence aspect of the sentence;

- 4) Failed to have sufficient regard to the aggravating factors;
- 5) Attached too much weight to the mitigating factors; and
- 6) In respect of the sentence imposed for the offences, failed to have sufficient regard to the particular character of the victim(s) and/or the content of the victim impact statements and the effect of the injuries on their lives.”

#### **Submissions of the applicant**

11. The applicant outlines their submissions in relation to ground 2. Relevant portions from *The People (DPP) v McCormack* [2000] 4 IR 356, *The People (DPP) v Mahoney* [2016] IECA 27 and *The People (DPP) v Byrne* [2018] IECA 120 are cited to the effect that the applicant must prove “a clear divergence by the court at trial from the norm’ that will have been caused by an obvious error of principle.”
12. The applicant submits that in failing to impose a sentence that reflected the gravity of the respondent’s offending behaviour, his culpability, and the impact of his attacks on the injured parties and in affording excessive weight to the mitigating factors in this case, the sentencing judge departed from the norm that would be expected.
13. In outlining grounds 1, 4 and 6, the applicant references the judgment of the Court of Criminal Appeal in *The People (DPP) v Fitzgibbon* [2014] IECCA 12. This judgment set out the sentencing ranges for s. 4 offences. It is noted that in *The People (DPP) v O’Sullivan* [2019] IECA 250 the Court stated that the upper limit of seven and a half years for a mid-range, which arose from *Fitzgibbon*, was too low and a figure of ten years was more appropriate.
14. Professor O’Malley on *Sentencing Law and Practice* is referenced wherein it is stated that a court will have regard primarily to the gravity of the offence, as measured by reference to the harm caused and offender’s culpability as assessed at the time of the offences. The applicant further points to s. 5(2)(a) of the Criminal Justice Act 1993 which provides that a court, when imposing sentence shall take into account and may receive evidence or submissions concerning any effect of the offence on the person in respect of whom the offence was committed. Reliance is placed on the comments of this Court in *The People (DPP) v Burke* [2015] IECA 186 in this regard.
15. The applicant acknowledges that the headline sentence for the s. 4 offence in the instant case was within the range as suggested by the Director, however, it is submitted that more weight should have been given to the circumstances of the victims and the culpability of the respondent in arriving at the headline sentence and determining that the sentences should run concurrently.
16. It is the applicant’s view that this is a case where the judge should have imposed consecutive sentences. *The People (DPP) v MJ* [2021] IECA 233 is relied on. It is said that in that case this Court made a statement that if the trial judge did not impose consecutive sentences, then the convicted person would only be punished for one offence. The offences committed by the respondent herein had profound and significant impact for the

two unsuspecting victims and the applicant submits that the imposition of concurrent sentences does not reflect the harm caused to both men.

17. A headline sentence of 9 years was fixed by the judge in this case. This was reduced to 6 years taking account of mitigation and then suspended for 18 months. In this way, the applicant says that, ultimately, a reduction of 50 percent was made on the headline sentence. It is submitted that this departed from what would be the norm in cases such as this.
18. Turning to ground 3, the applicant outlines, as per *The People (DPP) v O'Reilly* [2008] 3 IR 632, that a sentence should contain elements of both personal and general deterrence. The applicant cites a number of cases demonstrating this and says that the judge in the instant case failed to have sufficient regard to the retribution and deterrence elements of sentencing.
19. On ground 5, the applicant acknowledges the mitigating factors in the instant case but notes that the respondent was not co-operative in interview and when inferences were put to him and that when CCTV evidence was played for him, he simply claimed he did not remember what had happened.
20. In terms of the respondent's guilty plea, the applicant cites *The People (DPP) v Kenny* [2011] IECCA 16 and *The People (DPP) v Ryan* [2014] IECCA 11 to the effect that a guilty plea merits less mitigation where a person is caught "red-handed." The applicant submits that the circumstances of the respondent's guilty plea are relevant: CCTV evidence captured much of what occurred, there were eyewitnesses to the attacks and the respondent was arrested near the scene of the incidents.
21. The applicant outlines that the respondent has 24 previous convictions dating between 1997 and 2020 with four relating to s. 2 assaults.
22. In terms of the respondent's relationship with alcohol the applicant submits that this is not a mitigating factor and cites *The People (DPP) v Eadon* [2019] IESC 98 in support of this contention.

#### **Submissions of the respondent**

23. The respondent outlines the principles to be applied in an application such as this as per *The People (DPP) v Byrne* [1995] 1 ILRM 279. O'Malley is relied on to the effect that the DPP must "demonstrate that the sentence is clearly and significantly less than the sentence that would normally have been expected in similar circumstances."
24. *The People (DPP) v de Paor and Zdanowski* [2008] IECCA 137 and the *Fitzgibbon* case are relied upon to emphasise the burden that must be discharged by the Director in the instant case and the deference that must be had to the reasoning of the sentencing judge in formulating sentence.

25. Comparison is drawn between the instant case and that of *The People (DPP) v Anne Marie Byrne* [2017] IECA 97 and extensive quotation is made therefrom. The respondent also relies on the decision of this Court in *The People (DPP) v Mark Hehir* [2018] IECA 244.
26. In response to ground 2, the respondent submits that the court did not depart in any significant way from the norm. It is pointed out that the judge accepted the Director's view on where the case fell in comparison to cases of a similar nature.
27. It is further submitted that the judge listened carefully to the victim impact evidence and had specific regard to same when determining the appropriate sentence. It is the respondent's view that the judge was well apprised on all the issues in the case and best placed to formulate a sentence therefrom and that this is borne out in the transcript.
28. The respondent notes that the applicant submits that the judge should have imposed consecutive sentences in the matter despite never having made such a submission at the sentencing hearing. It is submitted that even if such a submission had been made, the judge would not have been bound to follow same and nor do the circumstances of the case warrant the imposition of consecutive sentences.

#### **Discussion**

29. The jurisprudence relating to undue leniency appeals is well-settled at this point. This Court will not intervene in the sentence imposed unless it is satisfied that the sentence constitutes a substantial departure from the appropriate sentence.
30. There is no doubt but that the offending in the present case is of a serious order. These are grave offences, and the acts were entirely unprovoked. The injuries sustained by Mr. Connolly, the person described as a good Samaritan, and the subject of count 4, are serious and ongoing. His life and the lives of his family will never be the same. Mr. Connolly was 70 years of age at the time of the assault and sustained significant injuries to his head. We have had regard to the medical reports in each instance. The respondent's conduct has had a profound impact on these two unsuspecting victims, and he is not without previous convictions, including a relevant previous conviction under s. 2 of the 1997 Act.
31. No issue was taken by the applicant with the headline sentence nominated for the s. 4 offence being that of nine years' imprisonment. Equally, no issue was taken with the reduction afforded for mitigation, leading to a sentence of six years' imprisonment. However, the Director argues that the ultimate sentence, taking into account the period of eighteen months suspended, is simply too low in the circumstances, in the context of two assaults on two separate individuals. It is also said by the Director that consecutive sentences may have been appropriate in the circumstances in order to reflect the gravity of the offending conduct in respect of both offences.
32. In response, it is said on the part of the respondent that considerable weight must be given to the sentencing judge's discretion and to the careful approach adopted by him in sentencing the respondent. Moreover, it is emphasised that the Director placed the

offending within the range which was ultimately nominated by the sentencing judge as the notional or headline sentence.

33. In the Court's view, these offences are, as stated, serious offences. We do not need to rehearse the aggravating features present, however, it is also the position that there were many mitigating factors present including the respondent's plea of guilty, his expression of remorse, his considerable difficulties with alcohol, his mental health, and the difficulties in his background. Reports from the Probation Service were available and, also, a very detailed report from a consultant psychiatrist of the Central Mental Hospital, those documents were all before the court of sentence.
34. Having considered all matters, this Court, if imposing sentence in the first instance, might well have been minded to impose a greater period of incarceration, however, we are mindful of the jurisprudence of this Court that the Court will not interfere with a sentence imposed by the court below unless that sentence constitutes a substantial departure from the norm.
35. Moreover, we take account of the Director's approach to this review of sentence in that no issue is taken with the nominated notional sentence of nine years' imprisonment and nor is any issue taken with the reduction afforded for mitigation leaving the sentence as one of six years' imprisonment before the sentence was part suspended.
36. We are influenced by the careful approach of the experienced sentencing judge. Evidence was heard on the 5th November 2020, on which date, the matter was adjourned so that the court could receive various reports on behalf of the respondent, including the report we have mentioned of the consultant psychiatrist and the Probation Reports. He also heard a plea in mitigation.
37. On the second occasion, the judge did not proceed to sentence but indicated that he considered the appropriate headline sentence in respect of the s. 3 offence to be one of three years' imprisonment and nine years' imprisonment in respect of the offence contrary to s. 4 of the 1997 Act.
38. The judge required time to consider how the sentence ought to be structured, to consider the detailed psychiatric report and the other reports before him in order to determine the extent to which he could build rehabilitation into the ultimate structure of the sentence.
39. In that regard, the matter was put back for a period of time to enable the judge to consider the various issues and on the 14th January 2021, bearing in mind the objective of rehabilitation in the context of the imposition of sentence, the judge suspended the final eighteen months of that sentence and, unusually, he suspended that sentence for quite a lengthy period of time being a period of five years.
40. In the present case there was material before the sentencing judge in the context of rehabilitation. The respondent had engaged with the Probation Service and the Probation Officer indicated that he had demonstrated good insight into his offending behaviour and

was eager to address his risk factors. In this regard, certain criteria were suggested by the Probation Officer. It is also the position that the consultant psychiatrist was of the view that the respondent's risk into the future, of violence towards himself and others could be mitigated by engagement with the various services. The psychiatrist also made suggestions regarding conditions which might prove helpful in encouraging and continuing his rehabilitation. It is clear that the sentencing judge was concerned to incentivise his rehabilitation and, in that regard, as we know, he suspended the final eighteen months of the sentence.

41. As we have already stated, if this Court were sentencing the respondent in the first instance, it is very likely that all of any one of us would have imposed a greater sentence. However, we give weight and due deference to the discretion vested in a sentencing judge.
42. In the present case, whilst we believe the sentence to be a very lenient one, and one, perhaps, where it could be said to be at the outer limits in terms of leniency, we note that no issue was raised by the Director regarding the headline sentence nominated and that the Director focused significantly on the suspended element of the sentence. We are influenced also by the fact that the sentencing judge took a considerable period of time to consider the structure of the sentence which he ultimately imposed.
43. Given the complicated history of this particular respondent, we can see why the judge took the view that a structured sentence being a part suspended sentence was appropriate in the circumstances. As we have said, had we been sentencing in the first instance we might have arrived at a greater sentence than that of six years' imprisonment but in the circumstances, given the history of the matter and this respondent's particular history and the approach adopted by the Director in this review of sentence we are not persuaded ultimately that there is such a substantial departure from the norm to intervene.
44. Accordingly, the review is dismissed.