



# THE COURT OF APPEAL

Court of Appeal Record No. 155CJA/2021

Neutral citation number: [2022] IECA 55

[UNAPPROVED]

**Birmingham P**

**McCarthy J**

**Donnelly 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)**

**PROSECUTOR/APPLICANT**

**-AND-**

**STEPHEN DUFFY**

**ACCUSED/RESPONDENT**

**JUDGMENT (*ex tempore*) of the Court delivered by Mr Justice McCarthy on the 8th day of March 2022**

1. This is an application pursuant to section 2 of the Criminal Justice Act 1993 for a review on grounds of undue leniency of the sentence imposed on one count of assault causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997. This was the subject of one indictment (Bill No: DUDP0557/2018). The respondent herein pleaded guilty on the 20th of April 2021 and he came before Dublin Circuit Criminal Court on the 15th of July 2021 where he was sentenced to a term of four years imprisonment which was fully suspended on condition that the respondent undertake to pay an additional sum of €10,000 to the injured party within a period of two years (this has been paid and a sum of

€5000 was paid at the time of sentence) and enter a bond to keep the peace and to be of good behaviour for four years subsequent to the date of sentencing.

2. The facts can briefly be outlined. In the early hours of the morning of the 29th of August 2016 in the environs of the old Tallaght village, the respondent and the injured party, Darren Darley, came into contact with each other. CCTV evidence from various locations showed that there was an initial conversation between the parties at approximately 12:35am which lasted for approximately one minute. There was no apparent build-up of aggression arising from the conversation as seen from the CCTV footage and without any given reason the respondent struck a single blow to the injured party who was standing near a third party. This was an unprovoked and unjustified attack on Mr Darley which caused him to fall to the ground and into an unconscious state.

3. Initially the respondent walked away but moments later he returned to the scene and put the injured party into the recovery position; he then left. Mr Darley was found in a collapsed state shortly afterwards by a member of the public at approximately 12:40am. The injured party was taken to hospital where he had a CT scan from which it was concluded that he suffered a bleed to the brain – a consequent serious brain injury – and required extensive medical treatment. Thereafter he remained in a coma for two weeks.

4. A victim impact statement was provided by the injured party from which appears the grave effect the assault has had on his life. Mr Darley described his significant difficulties over the period of two years after the assault which included an inability to drive given the risk of seizures. He also suffers from chronic headaches, blackouts and dizzy spells which have led to a number of falls. One such blackout caused Mr Darley to fall down a flight of stairs and suffer injuries to both ankles which required a cast for seven weeks. Mr Darley also described being nervous in public and having lost his confidence – he has been unable to maintain regular employment as a result. Mr Darley has had difficulties paying his bills and

he had to leave Tallaght because he did not feel safe there after the incident; his relationship with his young daughter who resides there has been affected. Mr Darley could not continue in business as a result of his injuries and having become homeless as a result of these difficulties he had no recourse other than to stay in shelters and hostels; he could not work as he was sharing a room with three addicts who made it difficult for him to sleep at night. Mr Darley has lost all sense of taste and smell and it appears this is permanent. In conclusion Mr Darley summarised the effects of the assault on him as follows: -

*“I am a shadow of the person that I was before the attack. I have lost all confidence and self-esteem and I have a lot of dark days where I do not want to go on. I have endured a horrible time since the attack especially having to live in the homeless system for 2 years. My relationship with my daughter is not what it was before the attack and I wonder will it ever get to the level it was at before the attack. I still to this day have trust issues when out in a public place as I am always worried of a similar unprovoked attack by a stranger having experienced this once in my life.”*

5. The respondent did not stay at the scene until the arrival of Gardaí and emergency services, nor did the respondent volunteer himself to the authorities thereafter. He was identified on CCTV as the person who struck the blow to the injured party; apparently, he was wearing distinctive clothing which allowed Gardaí to trace his movements. The respondent was arrested. He did not make any admissions, claiming a poor memory of the night in question and of having no recollection of assaulting anyone. He did however acknowledge that the person identified on the CCTV looked similar to him but did not go so far as to admit that he was the person in question. Thus, the cooperation of the respondent with the Gardaí was limited.

6. The judge referred to the adverse impact on the victim as follows: -

*“...there is absolutely no doubt as to the very severe impact of this assault on Mr Darley in every area of his life and he was, indeed, fortunate to escape with his life, by reason of the impact and the injury sustained”.*

7. At the conclusion of the sentencing the victim was addressed by the judge and stated inter alia that *“I didn’t look forward to this. It’s... I just think everyone was against me here ...”*. In this regard the judge responded by saying: -

*“All right. I’m sorry that you feel that way. I have a wide range of factors to take into consideration and I fully appreciate how serious your injuries were and the impact of them on you and you articulated that extremely effectively. I’m sorry if you feel that you haven’t been well served but I’ve reached the decision I’ve reached, and I wish you well, nonetheless. Thank you.”*

8. The tenor, in substance, of the submissions made here on the behalf of the respondent was that the facts that the injured party was of a forgiving nature, did not seek vengeance and was inferred to be content with the sentence, were relevant; further we were informed that in the immediate aftermath of sentencing the victim communicated with the respondent in sympathetic terms and wished him well. It was contended that the victim did not want to see the respondent imprisoned; the very limited extent to which the views of the victim can be relevant (and the general rule is that they are not) is dealt with in *DPP v R.O’D* [2000] 4 IR 361. We need not elaborate on this issue here as, whatever else, there is no clear or coherent evidence as to his present view; criminal proceedings are between the prosecutor and the accused. The respondent should be dealt with in accordance with legally relevant sentencing principles and we do not think that such factors can be relied upon in mitigation, at least in

the present case. The fact that the victim did not seek to influence the court has no significance one way or another.

9. The judge had regard to the fact that the respondent came before the Court with no prior convictions and the offence was committed when he was 20 years old. The judge was also cognisant of the life changes of the respondent since the assault which include the fact that he has become a father and has a stable relationship with his family and partner as was evidenced in the numerous testimonials offered by the respondent's family members, friends and from his employer. The respondent was also noted as not having come to Garda attention since and his disposition seems to reflect someone who is of a low risk of reoffending as was evident in the probation report compiled for the sentence hearing; this indicated that he does not binge drink anymore (he had apparently done so from time to time), was not associating with negative peer influences and had conducted a "pro-social" and hardworking life since the assault on Mr Darley. The judge took account of what she deemed a "*very considerable remorse for his actions through his letter to Mr Darley and also in the accumulation of €5,000 by way of a gesture of remorse which Mr Darley has, quite understandably, accepted, which might alleviate some of the difficulties that he has experienced*". The judge took the view that the actions of the respondent in relation to offering to plead guilty to a section 3 assault at an earlier stage and thereafter to section 4 assault once the former was unacceptable to the DPP were such as to afford mitigation as an early plea of guilty. The judge also considered the assistance of the respondent in the investigation as a mitigating factor with the toll this has taken on his own life and mental health as was evidenced in a medical report submitted by counsel for the respondent.

10. The trial judge remarked at the outset that "*the actions of Mr Duffy in the immediate aftermath, of returning to Mr Darley and placing him in the recovery position, are untypical and uncharacteristic of someone who was intent on causing the serious harm*". The judge

acknowledged that while intoxication was involved “*the consequences of the assault were extremely significant, and far reaching, and lasting, for Mr Darley and for that reason I'm placing the offence in the mid-range for a section 4 assault and I'm setting a headline sentence of six and a half years*”. Having regard to the “*very high level of mitigation*” she found that the appropriate post-mitigation sentence was one of four years imprisonment and which she then suspended in its entirety.

### ***Grounds of Appeal***

11. The appellant appeals against the sentence imposed as being unduly lenient in the circumstances of the case on the following grounds for which they claim the sentencing judge failed to have regard to all of the circumstances of the case including: -

- i. *The sentencing judge erred in failing to have regard to the diminution of mitigation arising from the protracted proceedings and the lateness of the plea of guilty;*
- ii. *The sentencing judge erred in failing to have regard to the effect of the offending of the injured party;*
- iii. *The sentencing judge erred in failing to have regard to the serious nature of the offence;*
- iv. *The sentencing judge erred in failing to have regard to the unprovoked nature of the attack;*
- v. *The sentencing judge erred in having too much regard to the plea of guilty, the respondent's background and previous good character and his personal circumstances.*

vi. *The sentencing judge erred in determining that a wholly suspended sentence was appropriate in this case in a manner that was inconsistent with the sentences imposed by the courts in similar cases.*

12. We shall deal with these together.

13. The threshold justifying intervention by this court on an application for undue leniency is a high one. It is further the fact that the Court must afford due deference to the trier of fact who has the benefit of having all the evidence before him for sentencing.

14. Reference is made to the decision of *People (DPP) v Byrne* [2017] IECA 97 (at paragraph 33) in respect of the circumstances in which a non-custodial sentence can be appropriate: -

*“The offence in this case was subject to discretionary punishment. However, we recognise that some offences will be so serious that they effectively carry a presumption against the suspension of a custodial sentence in its entirety. That is certainly true in the case of rape offences, s.15A drugs offences, certain firearms offences and egregious crimes of violence. However, even in such cases existing jurisprudence indicates that a wholly suspended sentence can be imposed in cases where there are special reasons of a substantial nature and particularly exceptional circumstances.”*

15. Counsel for the respondent argues that the sentencing judge correctly identified the relevant aggravating and mitigating factors, took account of the principle of proportionality in assessing the sentence she imposed and that this Court should afford great weight to the sentencing judge’s reasons as outlined. They further submit that this sentence was well within the judge’s margin of appreciation and does not meet the standard required by the legislation and the caselaw to allow a conclusion that it was unduly lenient.

16. Neither party disputes the fact that that the headline sentence of six and a half years was correct. The appellant does not criticise the post mitigation sentence of four years nor that some suspensory element may be legitimate; the appellant's core point however is that the suspension of the entirety was wrong. In written submissions counsel for the appellant compares the facts to those of *People (DPP) v Smith* [2019] IECA 201; there the headline sentence identified was one of five years imprisonment which was, post-mitigation, reduced to three years imprisonment and entirely suspended. There the accused had only just turned 18 and, after the assault, he put the victim into the recovery position and remained with him until the Gardaí had arrived. In addition, the accused had turned his life around when sentenced and was the sole breadwinner for his young family. The Court of Appeal accepted that the sentence was lenient but declined to find that it was unduly lenient. In so doing the Court accepted that there was no single compelling factor in the evidence that justified a suspended sentence but found that the cumulative effect of the mitigation could be sufficient to justify a departure from the norm.

17. Counsel for the appellant contends that the judge made a number of errors in arriving at a non-custodial sentence. The appellant says that "*special reasons of a substantial nature and particularly exceptional circumstances*" warranting such an approach are not present. In this regard, they contend that excessive weight was given to the respondent's co-operation and that undue weight was given to the guilty plea - offered over four years after the assault. Furthermore, the appellant considers that the fact the respondent absconded from the scene of the crime and never surrendered himself should have been given greater weight. The appellant also argues that excessive weight was applied to the offers of compensation.

18. We do not doubt that some value must, having regard to the state of the evidence, be attributed to the plea per se. It seems to us that the extent to which remorse existed and the significance to be attached to the plea of guilty lacks the significance which was attached to



those factors by the learned trial judge. The position is similar so far as the payment of compensation is concerned. It appears to us that the learned trial judge fell into an error of principle in concluding that this was a case where there are “*special reasons of a substantial nature and particularly exceptional circumstances*” which would have warranted an entirely suspended sentence in the case of an assault under section 4.

**19.** The first thing to be said is that the plea of guilty on any view was at a very late stage – on the day of trial only – in circumstances where the injured party had attended for the purpose of giving evidence. Indeed, the trial had them listed on an earlier occasion but was adjourned because of the Covid-19 pandemic. Even during that pandemic, the Circuit Court was dealing with sentencing matters, and, by definition, was accepting pleas of guilty. Thus, there is no basis for saying that the period which elapsed between first and second trial dates is a delay which is not of the respondents making. Remorse did not extend to entering a plea on that date, but the respondent sought to derive benefit from the adjournment.

**20.** The extent of his remorse is also undermined by the course of action taken in procedural terms by the respondent. In particular, the respondent made an application under section 4(e) of the Criminal Justice Act 1999 to dismiss the proceedings. We were informed by counsel that that application was brought for two reasons, namely, to canvass the issue of whether or not the blow struck might have been lawful and that of whether or not the prosecution would, on the evidence, be a position to prove the *mens rea*, either on the basis of intention or recklessness. That application was dealt with in February 2019. In any event, there is no suggestion that the judge hearing the application had any concerns about the unlawfulness of the respondent’s conduct. She took the view that so far as *mens rea* is concerned, the evidence was sufficient to allow the prosecution to rely on the concept of recklessness. Whether or not the procedural approach adopted was appropriate, one might have supposed that any plea of guilty would have been entered at that stage at least. In fact, at

some unidentified point in the process, the plea of guilty to the assault contrary to section 3 of was offered to the prosecution and rightly rejected, given the recklessness of the respondent, and the serious harm which the victim had suffered.

**21.** Cases of the present kind, namely, where one blow causes catastrophic consequences have come before the court as we know on more than one occasion. In those cases where a non-custodial disposition has been appropriate it seems to us that remorse of an earlier and more significant kind has almost invariably been displayed. Whilst the payment of a sum of money can be indicative of remorse the court must always be mindful of the fact that a party cannot by payment of money alone trigger some entitlement to a reduced sentence. The fact that the victim accepts the sum in question, which in the present case might be regarded as trifling in terms of the levels of damages he might recover were he to sue, cannot be relied upon as a mitigating factor. In this instance the victim merely received a fraction of that to which he is entitled.

**22.** We think that the issues pertaining to use of controlled drugs or alcohol, or any health difficulties cannot be regarded as significant factors in sentencing, on the evidence, in the present case. This is not a case where an individual, against an extremely troubled background, behaved badly by committing a serious crime when say an addict and thereafter put his life in order, so to speak. It is clear from the probation report that at that stage the respondent was remorseful but as we have said this was so very late in the day. He did not cooperate fully with the gardai. The moral culpability of the respondent is to be measured inter-alia by reference to the harm done. Considerations of just retribution and general deterrence must be relevant.

**23.** We think that it was legitimate to suspend a portion of the sentence. We think, however, that the learned trial judge fell into an error of principle by wholly suspending the

sentence for the reasons set out above and we accordingly quash it and proceed to re-sentence.

**24.** A post mitigation custodial penalty of four years was appropriate. We think a period in custody must be served as this does not fall into the exceptional category identified in the authorities. We impose a sentence accordingly of four years and we suspend the last three year thereof on the same terms as those imposed in the Circuit Court.