THE COURT OF APPEAL

APPROVED **Record Number: CCACJ0234/2023**

Bill Number: DUDP0547/2021

Birmingham P.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

-AND-

JASON OWENS

RESPONDENT

JUDGMENT of the Court delivered on the 9th day of April 2024 by Ms. Justice Ní Raifeartaigh

1. This is an appeal brought by the Director of Public Prosecutions on the ground that the sentence imposed upon the respondent was unduly lenient. Sentence was imposed in the case by His Honour Judge Martin Nolan in the Dublin Circuit Criminal Court on the 31st July 2023, the judge having heard the evidence three days before.

2. Evidence was given by Detective Garda Keith Cassidy, of Coolock Garda station, of a serious assault which took place in the early hours of the morning of 1st January 2020 in the Cock and Bull Pub in Coolock village. The injured party was taken to Beaumont Hospital by ambulance and had no memory of the incident. Nor has he recovered any memory of it since then. Fortunately for the investigation, CCTV footage of the incident showed it taking place, although it does not

have any audio content and it is therefore impossible to tell what is being said. What is clear is that two men, the victim (Conor Kelly) and the respondent, previously unknown to each other, were talking to each other in the bathroom area in the pub. A toilet attendant was standing nearby and various other people were coming and going to use the toilets situated behind the two men. The recording has been viewed by the Court and is a somewhat perplexing one insofar as it shows the two men having a perfectly amiable conversation for about four minutes or more, followed by a sudden blow being struck by the respondent which knocked the victim to the floor. The respondent had a background in Taekwondo and the blow administered was in the nature of an elbow punch, a particular type of move in that martial art.

3. After the victim was rushed to hospital, he was operated upon and a craniotomy performed. He had another operation on 10th January 2020, and ultimately four surgeries in total. He was transferred from ICU to a high dependency unit and not discharged home until the 12th February 2020. He attended the National Rehabilitation Hospital from October 2020. He had obtained what is known as an acquired brain injury and had severe symptoms including extremely painful headaches and depression. The medical opinion provided to the court described it as a "severe life-threatening head injury" involving "an acute right subdural haematoma, traumatic subarachnoid haemorrhage, right frontal contusions, and a left occipital skull fracture".

4. Gardaí traced the respondent as the person who had inflicted the injury from the CCTV footage of the incident. By arrangement the respondent then presented himself to the Gardaí on the 25th June 2020 and was arrested. He was interviewed three times and chose to make no comment during the interviews, as was his right. A trial date was ultimately fixed for the 20th June 2023 but he pleaded guilty on the trial date, this having been flagged to the prosecution on his behalf a few days in advance.

5. Mr. Kelly, who was in his early twenties at the time, and members of his family made victim impact statements. Mr. Kelly's statement made for harrowing reading. He said that he had gone out for New Year's Eve for a social evening and had returned home six weeks later, "unrecognisable, scarred physically and mentally forever". He described the surgery he had to endure and the "many different side effects and conditions that are direct result of this injury". These included a "rare and very painful headache condition known as cluster headaches" which involve side effects such as nausea and vomiting, fever and chills, severe sensitivity to light and sound, and pain. He said: "The pain is nothing other than unbearable, and all I can do is sit and suffer until it's over. I take prescription tablets specifically for these headaches, but they still don't take all the pain away. They also cause me to be very drowsy and unwell, leaving me unable to take them if I have work. This in turn leads me to taking other painkillers such as Alka-Seltzer, Solpadine, Nurofen and Paracetamol. At 24 years of age this is far from healthy habit, but I am left with no choice. I should be able to plan to do things with my friends, girlfriend or family, but oftentimes I am unable to go through with these plans as I lay in bed in agony".

6. He described having ongoing fatigue and how this had disrupted what would be a normal lifestyle for someone of his age. He referred to other matters, such as high blood pressure and

taking daily medication to lower it; a clicking in his head on the side of his scar when he lies down; his speech being impacted and his experiencing "word jumble".

7. He said that the most challenging change of all was psychological and that he faced "a daily struggle with mental health", "bouts of suicidal thoughts", "irritability, mood swings, and anger problems". He talked about going through a "severe identity crisis" and that he had spent "three years struggling to figure out who I am, and hating myself every time I look in the mirror, not only because my physical appearance has changed and I'm faced with the sight of my scars, but because I sometimes don't even recognise myself". He talked about the upset and worry and suffering of his family and girlfriend and friends watching him go through all of this. He talked about no longer feeling safe anywhere, because it had been an unprovoked attack. He also talked about no longer being able to play sport and his loss of earnings.

8. In mitigation, the accused offered a bank draft for €10,000 (which was given to a charity nominated by the victim), testimonials which offered a picture of him that suggested that the offence was completely out of character, and a psychological report of Dr. O'Leary, Chartered Forensic and Counselling Psychologist. The Garda confirmed that he had no previous convictions and that he was 34 years old.

9. Dr. O'Leary's report described that the respondent had a normal childhood, positive relationships within his family, and no background of addiction, violence, or mental health problems. However, at the age of seven, he had been subjected to an incident of severe child sexual abuse by an adult cousin. This, together with the fact that he was bullied at school, led to his wanting to be able to physically protect himself, and he took up Taekwondo from the age of seven at which he trained until he was an adult. By the time he was in his early twenties, he had trained as a personal fitness trainer and was competing on behalf of Ireland at an international level. He had told his sister about the abuse much later on one occasion only, but had never obtained professional assistance to deal with the trauma of it, although it was having clear effects upon his adult intimate relationships with women. Because they were family, there was some ongoing contact with the cousin who had perpetrated the abuse and he had subsequently been threatened by him in a sexual manner. His most recent encounter with the cousin had been in the very same pub that the incident took place, the Cock and Bull.

10. As to the night in question, he said that at some point during the conversation with the victim in this case, the latter leaned towards him and said something, all of which he interpreted as sexual in nature and he experienced acute anxiety and panic. He felt extremely threatened and responded impulsively with the elbow blow. He had been shocked to learn of the extent of the victim's injuries afterwards and expressed remorse. We pause to emphasize that there is no suggestion that the victim in fact behaved or spoke in a sexual manner or that he was in any way at fault in the situation; rather, the problem arose from how the respondent interpreted the situation in his own head because of his own history.

11. Dr. O'Leary assessed the respondent's risk and found that he fulfilled only two out of the twenty risk factors and that he should be considered "low risk" of further violence. Her view was that the incident had to be viewed in light of the respondent's "unresolved trauma" and that he had interpreted the situation as one where a sexual advance was being made and this triggered a "fight or flight" response on his part that made him lash out and elbow-punch the respondent.

The sentencing judge's remarks and decision

12. The sentencing judge, having adjourned the case from the 28th to the 31st July 2023, observed that he had watched the CCTV recording and that the conversation was friendly for four minutes but that at the end of it, "for reasons that cannot be fathomed", the accused attacked the injured party with an extremely powerful punch. He referred to the explanation given by the respondent as set out in the psychologist's report, described above. He said that given the respondent's work record and the absence of previous convictions, it seemed unlikely he would re-offend and he was of the view that this was a once-off offence. He accepted that the respondent did not intend to cause these injuries but pointed out that what he did was highly reckless and that there was always a possibility of severe injury in such cases. In selecting a headline sentence, he said that the case fell into the mid-range category, perhaps 6-8 years, and identified 7 years as the headline sentence. He then made reductions to take into account the mitigating factors; first by reducing the 7 years to 3 ½ years, and then by suspending the final year of the 3 ½ years.

The Court's Decision

13. Some key points may be made at the outset. First, the sentencing jurisprudence of the Irish cases is clear on the point that all sentences must take into account not only the offence but also the particular circumstances of the offender i.e. the accused person. The sentence must seek to balance those two things and achieve a proportionate result in light of all the circumstances. Every sentencing judge must take account of this sentencing imperative, which has been laid down by the Supreme Court as a matter of constitutional interpretation and is regularly confirmed as being the correct approach.

14. Secondly, the most common method currently used to provide transparency in the sentencing process as regards striking that balance is by choosing a headline sentence first, and a final sentence thereafter. A headline sentence is supposed to represent the part of the sentence that reflects the gravity of the offence, while the final sentence is reduced to take account of mitigating factors relating to the particular accused person.

15. Thirdly, an appeal against undue leniency is underpinned by a considerable volume of caselaw of this Court and its predecessor court, the Court of Criminal Appeal. What has been emphasised is that "undue leniency" is not the same thing as mere "leniency", and it does not mean that this Court is simply entitled to substitute its own view for that of the sentencing judge if it thinks that a more severe sentence would have been appropriate. A sentencing judge has a

considerable range of discretion in sentencing and it is only if he or she has strayed beyond the permissible range of discretion and/or has made an error of principle that this Court may consider that a sentence was "unduly lenient" as distinct from "lenient".

The headline sentence selected by the sentencing judge

16. The sentencing judge in this case selected a "headline" sentence in the mid-range of 7 years. It is necessary to make a few comments about setting "headline" sentences because it may be difficult for the victim and his loved ones to understand the idea of a "range" of cases when the victim has suffered serious harm, the effects of which have been described not only by the doctor but also and most eloquently by the victim himself in his victim impact statement, set out earlier.

17. S.4 of the Non-Fatal Offences Against the Person Act 1997 provides that "a person who intentionally or recklessly causes serious harm to another shall be guilty of an offence". It is a more serious offence than that contained in s.3 of the same Act which provides that it is an offence where a person assaults another causing him or her "harm". The primary difference between the two offences is that s.3 concerns "harm" whereas s.4 concerns "serious harm". This is reflected in the maximum prison sentence which may be imposed; 5 years in respect of a s.3 offence, and life imprisonment in respect of a s.4 offence.

18. It may seem odd to some that one can talk about "bands" or "ranges" of cases within the category of the s.4 offence because all such cases by definition involve "serious harm". Serious harm is defined as "injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole, or of the function of any particular bodily member or organ". However, even within the s.4 offence there is a spectrum of cases. An example may assist. At the top of the range, for example, would fall a case where a person is still alive but in a permanent vegetative state. This harm would be more serious than a case involving a person who had been shot in the leg and walked with a limp after surgery, although both cases would fall within "serious harm".

19. Another factor which affects whether a case falls in the lower, middle or top range of the s.4 offence is the state of mind with which the offence was committed. The offence talks about causing serious harm "intentionally or recklessly". As lawyers well know, recklessness is somewhat less culpable than intention. Again an example may assist. Shooting someone with a sawn off shotgun would usually be described as "intentionally" causing the injuries which followed. Doing something in a reckless way might involve something like waving a knife or stick around in a crowd with the risk that contact might be made, or giving someone a hard push while they are standing on a hard surface, with the risk that they might fall and hit their head. The risk may materialise without the person necessarily having intended the result. Both intention and recklessness fall within s.4, but intentionality is somewhat more serious than recklessness.

20. Further, the overall background against which the offence was committed may be relevant to where the offence should be placed on the spectrum of s.4 cases. For example, a group attack on an individual is usually considered more serious than an attack by a single individual. A planned attack is usually considered more serious than a sudden, spontaneous action. All aspects of the incident must be taken into account.

21. The Court has said on previous occasions that where the maximum sentence for an offence is life imprisonment, the "range" can be thought of as involving three categories; cases where the appropriate headline sentence is 0-5 years; those where the appropriate headline sentence 5-10 years; and those where the appropriate headline is 10-15 years. Extremely exceptional cases attract sentences which are higher than this, including life imprisonment.

22. Bearing all of the above in mind, it will be recalled that this was a case of an individual delivering a single blow to another in a context where for the previous four minutes approximately, they had been engaged in an amicable conversation, having met for the first time in the toilets in the bar in question. Their meeting was pure chance, the conversation started amicably, and something happened or was said to cause the accused man/respondent to lash out with a single but powerful blow which knocked the victim to the ground. From watching the video it is clear that he also delivered a kick to the victim as he lay on the ground just before he walked out the door.

23. These circumstances do not suggest that the headline should have been selected as being in the upper category. However, while there was a single blow, it was delivered by a person who had extensive training in Taekwondo and who had serious expertise in the area, having participated in international competitions. The choice, even if instantaneous, by a person of this experience and training to use such force brings the case into a different category to many of the so-called "single punch" cases that the Court has to deal with. Further, the number of surgeries that the victim had to endure, the serious nature of the injuries, as well as the short-term and long-term consequences, are very grave. Accordingly, putting the headline sentence in the lowest category would not have been appropriate either in light of these factors.

24. The trial judge in this case thought that the headline sentence should be mid-range, around the 6-8 year mark, ultimately choosing 7 years as his starting point. While the prosecution has suggested that this was too low, this was not strongly pressed at the oral hearing, and the challenge to the sentence was focussed primarily around the degree to which a reduction was made from that headline sentence.

25. Having watched the recording of the incident itself, and having considered the circumstances as a whole, the Court agrees with the sentencing judge that the headline sentence should fall within the middle-range of the spectrum i.e. the 5-10 year range. The sentencing judge further specified that he thought 7 years was the appropriate headline. This Court might itself have selected a slightly higher headline sentence in circumstances where the blow was intentionally inflicted by someone with considerable training and experience and who must have

been at least somewhat alive to the potential consequences of knocking someone down onto a hard surface, even if he did not intend the actual consequences which materialised for the unfortunate Conor Kelly. But an appeal on grounds of undue leniency does not permit the Court to simply substitute its views for the views of the sentencing judge. Much more is required than simply substituting what the members of this Court might have done for what the sentencing judge did. At this first stage of the exercise, the Court is satisfied that the sentencing judge's selection of the 7-year headline was within his range of discretion and he made no error of principle in that regard. We move then to the second stage.

The reduction given by the sentencing judge having regard to the mitigating factors

26. Next, we must address the mitigating factors which were in favour of the accused man/the respondent to this appeal. Importantly, he had no previous convictions and a good work record. More than that, he had healthy, functional relationships in his life and provided care for various family members in a concrete way. The testimonials went so far as to suggest that the offence was entirely out of character.

27. All of this of course raised the question as to why this offence had been committed at all. The question presents itself most acutely when one views the recording of the incident, as the Court did at the appeal hearing. This showed two people apparently having a perfectly amicable conversation until a blow is administered almost out of the blue. Shortly before the blow is administered, the victim had turned to face the respondent who had his back to a wall and leaned towards him. Before all of that, there was talking between them in what appears to be a relaxed manner, and the victim was pulling coins and perhaps paper money out of a pocket and handing some of it to the respondent, who was holding it while talking and then giving it back. Apparently the witness statement of the toilet attendant confirmed that the conversation was amicable, although he also thought there was some reference to purchasing drugs and that the respondent said he did not do drugs. Whatever the content of the conversation, the body language of both men is entirely good-natured until the very last minute. It is not a situation where an amicable encounter becomes gradually sour and escalates into something different. All is fine until suddenly and explosively it is not.

28. Here the psychologist's report provided on behalf of the respondent provided an explanation for the turn of events. As described above, the psychologist put forward the respondent's explanation of events, namely that the respondent, during the conversation in the toilet, suddenly thought that his personal space was being invaded and due to a prior serious experience of having been sexually abused as a child, was triggered into impulsively reacting as he did. The psychologist explained that the respondent had never received professional help and had tried to suppress the trauma of the abuse but had failed to do so satisfactorily, and that he had acted in an instinctive manner because he thought he was under threat. The Court has considerable collective experience, unfortunately, of cases involving victims of child sexual abuse and the traumatic long-term effects that this can have. Having watched the video, the events do sit consistently with the explanation provided and the Court sees no reason not to consider the

explanation offered as a genuine one. Let us be clear: that is not for a moment to say that the respondent had any real reason to fear anything at all from the victim, or that he was in any way whatsoever to blame for what befell him. It is merely to say that what was going through the respondent's head (only) may well have been what was described by him to the psychologist.

29. We note that the respondent also came to Court with €10,000 by way of compensation but the victim chose to have it given to a charitable organisation instead. We note that he also provided an apology during the sentence hearing, and had expressed shame and remorse to the forensic psychologist.

30. The only real points of contention during the sentence hearing concerning the respondent's mitigating factors were:

i. his failure to present himself unprompted to the Gardaí or show any interest in the victim after the offence, having left the victim on the floor on the night in question;
ii. his failure to co-operate with the Gardaí in interview even after they located him some six months after the incident (June 2020); and
iii. the lateness of his guilty plea, of which notice was given only some few short days before the trial, in circumstances where (because of Covid restrictions) the trial was not scheduled until over 2 years after his return to the Circuit Court for trial (April 2021-June 2023) and some 3 ½ years after the incident itself (1st January 2020), leaving the victim with this hanging over him for years and until the last minute.

31. We do not consider it important to focus on whether factually the respondent merely left the toilet or the pub on the night in question; the point is that having left the victim in a manifestly injured condition on the bathroom floor, he did not make himself known to anybody at any subsequent time as being the person who had done this. It fell to the Gardaí to identify him during their subsequent investigation. This is not to his credit. Matters would have been different if he had, say, presented himself at the pub and then to the Gardaí the next day, accepted responsibility, offered an apology, and pleaded guilty at an early stage. He may well have received an even more lenient sentence had he done so.

32. It is true that his failure to assist the Gardaí when interviewed cannot be a factor in aggravation of the offence. It is a neutral factor overall. It is part of the overall matrix of facts in which the reality is that his plea, apology and offer of compensation all came very late in the day.

33. Counsel for the respondent said that the psychological explanation for the lateness of these was due to his inability to confront his own past sexual abuse, which he feared would all come out in public if he were to admit his guilt. We have reflected on this explanation. Even if it is true that there was an element of burying his head in the sand and refusing to confront a traumatic issue, it does not provide a complete explanation for the lateness of his guilty plea and apology.

He could have offered both of those without explaining why the offence had happened. He would of course have not then had the benefit of the psychological report explaining why he had lashed out, but it is hard to see how choosing to go to trial was any better. Meanwhile, his choice of strategy had a significant effect on the victim, who had to endure years of anticipating a trial in which the respondent's responsibility for the injury would be disputed.

34. Accordingly, while giving some value to the psychological explanation for the lateness of the plea, apology and offer of compensation, the reality is that in terms of mitigating factors, they all came at the last minute and should be treated as having done so. Nonetheless, a guilty plea is always a very important mitigating factor even if it comes late in the day. Of course, the mitigation for a late plea is much less than for an early plea, even if Ireland does not follow the kind of arithmetic that our neighbouring jurisdiction does.

35. In sum, the primary factors in mitigation were:

(1) The respondent's previous life and good character and the reality that this was entirely out of character and unlikely to be repeated;

(2) The previous history of child sexual abuse which provided an explanation for his having been triggered to the extent that he was on the night in question;

(3) A late plea of guilty, apology and offer of compensation.

36. The sentencing judge, taking the 7 year headline sentence as the point of departure, reduced the sentence to 3 ½ and then suspended the final year. This left what is sometimes described by this Court as "an actual carceral sentence" of 2 ½ years. He did not specifically describe the weight he attached to different mitigating factors, nor did he indicate how much he was reducing for the late plea, apology and offer of compensation.

37. We have carefully considered the final sentence arrived at by the trial judge and the deduction for mitigation that he used to do so. We have reached the conclusion that this did not amount to an unduly lenient sentence in all of the circumstances. What is unusual in this case is that the offender behaved on this particular night in a manner that was completely out of character and by reason of a prior traumatic experience that triggered him to react in a violent way towards the unfortunate victim. A period of 2 ½ years is a significant sentence for a first time offender and even though the unfortunate victim has already gone through much suffering and will undoubtedly go through more, Irish sentencing law requires that the sentence be proportionate not only to the harm done but also to the individual offender. While the Court would likely have upheld a more severe sentence (should there have been an appeal against severity in that eventuality), the test is not whether the Court might have a different view to that of the sentencing judge but whether the sentence was "unduly lenient" in the sense of the Court's caselaw. The sentencing judge sought to strike a balance between the harm done to the victim and the need to sentence the offender in light of his own particular circumstances and we cannot

say that he made any error of principle or that we strayed outside the parameters of his range of discretion. Undoubtedly this will provide cold comfort to the victim as he continues to suffer the ongoing effects of this dreadful incident, but the sentencing exercise is about striking a balance and rarely strikes one which is palatable to all sides. The Court considers that the sentencing judge remained within his rightful area of discretion in choosing the sentence that he did, that the sentence was not "unduly lenient" within the meaning of the Court's caselaw and therefore dismisses the appeal.

38. In the circumstances it is not necessary to consider the potential impact of further information/report which was made available to the Court by way of update as to the respondent's situation.