



**THE COURT OF APPEAL**

**[306/18]**

**Birmingham P.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

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

**APPELLANT**

**- AND -**

**ALAN CURTIS**

**RESPONDENT**

**Judgment of the Court ex tempore delivered on the 11th day of October 2019 by Mr. Justice McCarthy**

1. This is an application brought by the Director of Public Prosecutions pursuant to s.2 of the Criminal Justice Act, 1993 seeking a review of sentence on the grounds of undue leniency. The sentence sought to be reviewed is one of four years' imprisonment, the final two years of which were suspended on terms imposed. The offence is one contrary to s.4 of the Non-Fatal Offences Against the Person Act, 1997, and the sentence was imposed on the 15th of November, 2018 following a contested trial.
2. The trial related to events that had occurred on the 28th March, 2014 at Cashel Road, Crumlin in Dublin, and the jury concluded that the respondent had assaulted the injured party, a sixteen-year-old youth. What occurred on the date in question was the subject of controversy at the trial. It is clear that the injured party was one of a group of young people, perhaps as many as twenty in number, who were playing music and talking loudly in the vicinity of the home of Mr Curtis' mother. It is clear that Mr Curtis emerged from the house, that he was carrying a hurley, that he struck the injured party, Mr McClelland, and that Mr McClelland sustained a depressed fracture of the skull requiring emergency surgery at Beaumont Hospital.
3. In the course of the trial the defence was essentially one of self-defence. Mr Curtis claimed that Mr McClelland was witnessed by him damaging his car with a plank. He said that he feared for his safety and that of his mother and sister who resided in the house. He accepted that he had followed Mr McClelland for some distance: The Court was told at the appeal hearing it was about seventy-five yards from the area outside the house, but the appellant says that whilst he had sought to strike Mr McClelland on his body in self-defence, he had made unintentional contact with his head.
4. In terms of his background and circumstances, the appellant was thirty-four years of age at the time of the offence, the father of four children, one of whom experiences medical difficulties, and it appears that he is a good family man. He was out of work at the time of the offence, but had a work history that involved marble cutting and working in security. He had had some engagement in community activities.

5. He has seventeen previous convictions, fifteen of which were for road traffic matters. There is however, a conviction for an offence under s.3 of the Non-Fatal Offences Against the Person Act, 1997 and also a conviction for an offence contrary to s.4 of the same Act. They arose apparently out of the same incident and a term of imprisonment of six years was imposed in respect of the offence contrary to s.4, two of which had been suspended, and in May 2004 the incident involved a stabbing and was described by counsel as being a "domestic situation". The injured parties were a former partner and the former partner's boyfriend of the appellant.
6. In terms of the impact on the victim, the injury has involved significant permanent effects due to injury to the brain in his speech and personality have been adversely affected, as was his capacity for concentration. He is left with, amongst other things, hesitancy of speech and difficulty in finding appropriate forms of words. We do not have an up to date report but we are happy to hear that he has begun a new job.
7. It is contended that a clear basis for the verdict did not exist and that there were two or more potential bases for it. On the facts it is further submitted that the version reasonably open on the evidence most favourable to the accused is the one upon which a court must proceed to sentence. We cannot see how this can be so. The jury could only have been satisfied of the guilt of the accused having regard to the defence on which it had been advanced. If they had not only rejected the proposition that the force used by the appellant was objectively justified, but also that there was no reasonable doubt as to whether or not in his own mind subjectively speaking, he thought that he was entitled to act as he did. The jury must accordingly have rejected any question of the reality of any threat at some point with a plank or otherwise.
8. The jury may or may not have taken the view that the mirror of the appellant's car was damaged by Mr McClelland or by persons' unknown. It need hardly be said that the proper approach was at most to approach the individuals in question in a peaceable manner and if that approach failed in terms of bringing the incident to an end to call the Gardaí one cannot obviously take the law into one's own hands.
9. The judge summarised his understanding of events as follows: -

"This was a situation in which the accused was essentially minding his own business, he was in his mother's house and he was while not asleep he was preparing to sleep when an anti-social incident occurred outside his mother's house. He saw his car being damaged deliberately by somebody, he identified Mr. McClelland as the person who did that, I don't have to decide that. He was involved in damaging his car deliberately and there was noise, loud music and a general congregation of certainly nearly twenty or thereabouts young men outside his mother's house. It was undoubtedly a frightening occasion for him and the accused responded to it, particularly when he saw his car being damaged by grabbing a hurley stick and exiting the premises to drive away the boys. These young men around fifteen to sixteen years of age, I heard some of them in the course of the trial, scattered but Mr. McClelland attempted to strike the accused

with a plank. He failed to do so, letting go of the plank, and at that stage the accused man hit him with a hurley into the back.”

10. Having regard to the verdict, we cannot see, how even if that occurred it could be of any relevance. There may have been an element of provocation, albeit not one which gave rise to a lawful justification for what happened. Further, it does not impinge, if it arose, on the jury's verdict. We proceed to sentence on the basis that such provocation is a minor mitigating factor on sentence. We accordingly set aside the verdict and we now proceed to sentence. This is because we think there was an error in principle in failing to have due regard to the gravity of the offence, and we must make a valued judgment as to where on the scale of seriousness this case, objectively speaking, lies for the purpose of fixing a headline sentence. We think it falls in the middle range of being approximately being five to six years, the middle of the middle range. Whilst we do have regard to the Director of Public Prosecutions in DPP v O'Sullivan (Unreported, Court of Appeal, October 11th 2019) in which judgment was given today, we apply the guidelines and have regard to the earlier case of DPP v. Fitzgibbon [2014] IECCA 12, since that was the law applicable at the time of the offence and sentence.
11. We have regard to the fact that we are now imposing a more lengthy sentence than that which was imposed in the trial court. There were a number of mitigating factors present, which have been identified. Accordingly, even though a higher sentence might have been imposed at first instance, we limit our intervention to imposing a sentence of five years' imprisonment, with the last twelve months suspended in order to incentivise the appellant in rehabilitating himself and for the purpose of re-introducing the appellant into society.
12. We are therefore quashing the sentence in the court below, substituting a sentence of five years' imprisonment with the final twelve months suspended and the respondent will have to enter into a bond to avail of the twelve months' suspension. The terms will involve him being subject to the probation service and complying with their directions during a period of one-year post-release from custody.