



**THE COURT OF APPEAL**

**UNAPPROVED**

**NO REDACTION NEEDED**

Neutral Citation Number: [2021] IECA 2

[265/19]

**The President**

**McCarthy J**

**Kennedy J**

**BETWEEN**

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

**RESPONDENT**

**AND**

**N.O'R.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 15<sup>th</sup> day of January 2021 by Birmingham P**

1. This is an appeal against severity of sentence. The sentences under appeal were imposed on 14<sup>th</sup> November 2019 in Cork Circuit Criminal Court. On that occasion, sentences were imposed in respect of an offence of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994, and an offence of dangerous driving causing serious bodily harm contrary to s. 53 of the Road Traffic Act 1961, as amended. A sentence of 12 months imprisonment was imposed in respect of the violent disorder offence (to date from 16<sup>th</sup> September 2019), and a sentence of six years imprisonment, with the final two years suspended, was imposed in respect of the dangerous driving offence (to date from the lawful expiry of the violent disorder sentence). There was also provision for a disqualification from driving for 20 years.

## **Background to the Offences**

2. The violent disorder offence relates to events that occurred on 16<sup>th</sup> March 2017 at the Maxol filling station at Skehard Road, Blackrock. On that occasion, the injured party parked his car in the garage forecourt before being approached by a group of males, of which the appellant was one, who had been standing at the entrance to the garage shop. A brief conversation ensued and the injured party entered the shop. Moments later, the injured party left the shop to return to his car when he was approached again by the same group of males. They became violent and began chasing the injured party. Six people were charged with violent disorder and one also with a s. 3 assault. Of note is that the appellant was the youngest of those charged arising out of the incident. Also of note is that three of the others involved had previous convictions recorded against them; in two cases, significant previous convictions, while the appellant had no previous convictions at the time, though he had been dealt with, the Court heard, pursuant to the Juvenile Liaison Scheme.

3. The substantive sentence hearing in relation to the violent disorder matter occurred on 27<sup>th</sup> February 2019. The sentencing judge referred to the actions of those involved as akin to that of a wolf pack. The judge decided not to finalise matters at that stage, and instead, put the matter back to October 2019, indicating that if compensation had not been made available then each of them could expect to be spending time in custody. On the adjourned date, all of those who had been before the Court, with the exception of the appellant, had brought a sum of money to court (€1,000 each) and the Court heard that, with the exception of the appellant, all of those involved in the incident had stayed out of trouble and were behaving themselves. In those circumstances, the judge dealt with those other than the appellant by way of suspended sentences (12 months imprisonment in each case). So far as the appellant is concerned, unlike the others who had been involved in the Maxol filling station incident, he

had not remained out of trouble, nor had he brought a sum of money to Court by way of compensation, though this latter factor was obviously of far less significance. In his case, he was involved in an incident of dangerous driving causing serious harm on 25<sup>th</sup> March 2019. He came before the Court in relation to that on foot of signed pleas of guilty.

4. The dangerous driving causing serious harm was committed on 25<sup>th</sup> March 2019 at approximately 3.40pm. On that day, the appellant – who was on bail in respect of the violent disorder matter – got into a vehicle that he had purchased the day before for a sum in the order of €100. He picked up two passengers. It was then noted that there was a period of horn-hooting and engine-revving before the appellant drove off at speed. This was in a suburban housing estate. He came to an area where there was a sharp left-hand turn followed by a sharp right-hand turn; at trial, it was described as being in the nature of a chicane. In passing through these turns, through the chicane, he struck a two-year old child, causing very serious injuries, in particular, brain injuries. The appellant did not stop the vehicle that he had been driving, but rather, drove on at high speed, exiting the estate. The injured child, Zach Higgins, was first brought to Cork University Hospital. He was put on life support and transferred by special ambulance to Temple Street Children’s Hospital in Dublin. Because of Zach’s very young age, the extent to which he will recover is not entirely clear. What is clear is that he has experienced a permanent traumatic brain injury, the effects of which will be with him for the rest of his life.

#### **Appellant’s Circumstances & Sentence**

5. In terms of the appellant’s background and personal circumstances, he was 17 years of age at the time of the sentence hearing. He was the second youngest of seven children. He had experienced difficulties with education and with literacy. At school, he had been referred to the Child and Adolescent Mental Health Service (CALMS). While on bail, there were

issues relating to self-harm and apparent suicidal ideation. In September 2019, the appellant was remanded to Oberstown. A report was submitted to the Court by the authorities there. This report caused the very experienced Circuit Court judge who dealt with this matter to observe that going to Oberstown was the best thing that had ever happened to the appellant. From Oberstown, the appellant wrote letters expressing remorse and also referring to the progress that he was making there in areas such as literacy. These letters were the subject of comment by the judge who distinguished them from the usual run of letters that are often submitted by accused persons which sometimes carry little weight. What the judge had to say in that regard bears quotation. He said:

“I have a number of letters from him. I don’t expect the mother, or anybody related to Zach Higgins to understand this, but I have read them, they’re different to what I normally get. Normally, you get letters from prisoners, they’re written by somebody else in the prison, probably for cigarettes or whatever, they’re completely worthless. This is not a letter, or these are not letters, in that context, these are letters from a child or a young person coming to terms with what he did and in my opinion, they’re genuine. They express remorse, maybe even a sense of bewilderment, he doesn’t really know where he is or how he’s going to get out of it and he does realise, even at his young age, he’s going to have to put up with it and do the best he can from now on. But, they’re the only letters that I have received in a long time that I would regard as anywhere genuine and I will give him credit for that. So, I do accept he is remorseful, he’s very young.”

6. In passing sentence, the judge referred to the fact that the sentence he was imposing on the dangerous driving causing serious harm offence had to be consecutive to the violent disorder. He commented that so far as the violent disorder was concerned, he was no better or no worse than the others that had been involved and that they had “got 12 months”.

Therefore, he set the initial sentence at 12 months and imposed a sentence of four years consecutive to that in respect of the dangerous driving causing serious harm offence. Senior Counsel on behalf of the appellant responded by pointing out that all of the co-accused in the violent disorder matter had ultimately been dealt with non-custodially and she urged the judge to likewise deal with that aspect of the matter by way of a suspended sentence, but the judge was not prepared to change his order.

7. An issue which arose and which was addressed by the judge at the sentence hearing was whether the appellant should be named in respect of the offence of dangerous driving. The relevant statutory provision in issue is s. 93 of the Children Act 2001 (as amended), which provides:

“93.—(1) In relation to proceedings before any court concerning a child—

(a) no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and

(b) no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included.

(2) A court may dispense, in whole or in part, with the requirements of this section in relation to a child if satisfied that to do so is necessary—

(a) where the child is charged with an offence—

(i) to avoid injustice to the child,

(ii) where the child is unlawfully at large, for the purpose of apprehending the child, or

(iii) *in the public interest*”. (emphasis added)

It is this possibility of dispensing with the entitlement to anonymity in the public interest which was in issue.

### **The Present Appeal**

8. The grounds of appeal advanced are as follows:

- (i) That the judge erred in imposing a custodial sentence in respect of the violent disorder offence contrary to s. 15 of the Criminal Justice (Public Order) Act 1994, when each of the co-accused received a wholly suspended sentence, particularly in circumstances where the appellant was the youngest of those involved.
- (ii) That the judge failed to afford sufficient weight to the mitigating factors present.
- (iii) That the judge failed to afford sufficient weight to the public interest in the appellant's rehabilitation.
- (iv) That the judge erred in principle in imposing a driving disqualification for 20 years.
- (v) That the judge erred in hearing the mother on the issue of the right of the then accused to anonymity and then permitting the identification of the accused.

9. We propose to deal first with the offence of dangerous driving causing serious harm. We do so, even though it was second in time, as it was very obviously the more serious matter before the Court. In that regard, it is difficult to overstate the seriousness of the offence. The incident has its origin in the decision to purchase a motor vehicle for a sum of €100, and then drive the vehicle which was in a dangerously defective state. The manner of

driving the following day in a densely populated urban area, at a time when there was every possibility that there would be children out playing, was nothing short of outrageous.

**10.** In contending that the sentence imposed for this offence was too severe, counsel on behalf of the appellant does not take issue with the gravity of the offending, but says that the sentence imposed had insufficient regard to the personal circumstances of the offender, including his youth; the absence of a significant prior record; and the evidence of real and genuine remorse. It is said that insufficient regard was had to the fact of admissions at interview and to the fact that he came before the Circuit Court on a signed plea of guilty. There can be no doubt but that the judge was fully aware of the appellant's age, both at the time of offending and at the time of sentencing. We are very struck by the judge's comments regarding the impact that the letters written by the appellant had on him. The judge who was called on to sentence was one of the most experienced judges in the country in the area of criminal law and, in particular, one of the most experienced sentencing judges. Over a long career, he must have heard a great number of expressions of remorse and the fact that he was struck by the genuineness of this one is highly significant. However, it seems to us that the sentence selected was one that had regard to the gravity of the offence, the enormity of the harm done and reflected the personal circumstances of the appellant. Had this offence been committed by a mature adult, the sentence might have been expected to be appreciably greater. This would particularly be the case if the offender had a significant relevant previous record. While we have carefully considered the arguments advanced on behalf of the appellant, we can see no basis for interfering with the sentence imposed in respect of the offence of dangerous driving causing serious harm.

**11.** We turn now to the ground of appeal which deals with the judge's approach in questioning the mother of the injured child, who had already given evidence in presenting a victim impact report, when determining the question of whether the accused should be

identified. The judge addressed the mother by saying that this young man is, “what, 16, 17 years of age and the law says he shouldn’t be identified”. The judge asked her whether she had any views about that and she thought the appellant should be identified. The judge asked why that was to which she responded, “[h]e’s almost 18 anyway, he’s 18 in January”. The mother added that she thought the crime was so serious that it would be a benefit to everyone to know what he had done. Having heard from the mother of the injured child, the judge then set out the following position. He said that the mother of the injured child had been called up “completely out of the blue”, but that what she had to say was quite straightforward; there was no “element of vindictiveness” nor was there an element of “putting the knife in”. She had “expressed a purpose” which, the judge said, was probably not a bad way of looking at it. She said that anybody who sees him near a car would know that he should not be near a car for a long time. On that basis, the judge felt there was a public interest in allowing the press to name the appellant in relation to the dangerous driving charge, but not in relation to the violent disorder charge which was the sort of offence, he said, that children could become involved in and then get over it. The appellant’s legal advisers were realistic enough to accept that, at this stage, this issue is largely moot as the media has reported the sentence hearing in the Circuit Court and the appellant has been identified. We do believe that there was a rational basis for departing from the normal requirement for non-identification. This was a case involving a mechanically-propelled vehicle. The disposal of the matter by the Court was obviously going to involve a substantial period of disqualification from holding a Driving Licence. The protection that the public would receive as a result of the disqualification order would be enhanced if it was known publicly that the appellant was not somebody who should be behind the wheel of a car and that it would be a cause of concern if he was seen there.

**12.** We do not think that the judge was wise to seek the views of the mother of the injured party. It must be said that when her views were sought, the injured party’s mother expressed



her views in a responsible, restrained and measured fashion; in fact, her views were entirely rational. However, in general, we would not expect that injured parties or their relatives would be particularly well-positioned to balance the competing considerations in issue. For that reason, we would not like to see the procedure followed in this case becoming widespread. For completeness, we would refer to the fact that the grounds of appeal, as formulated, had contended that the judge was in error in paying attention to the views of the mother of the injured party in relation to the question of disqualification from driving. However, it is accepted that did not, in fact, happen and that was not an issue that featured on the hearing of the appeal.

**13.** We turn, then, to the violent disorder aspect. Six offenders came before the Court in relation to this matter, and to quote the judge, the appellant was no better or no worse than the others. Five of those who came before the Court received a suspended sentence, while the appellant was dealt with by way of a custodial sentence to be served. While there may have been little, if anything, to distinguish the appellant from the others involved in the filling station incident (other than the fact that he was the youngest of those there), his situation is to be differentiated from the others in terms of what happened subsequently. The judge did not finalise sentence, but rather, stayed his hand. Five of the six offenders took the opportunity offered by bringing forward compensation and by staying out of further trouble. The appellant did not produce compensation, and much more significantly, did not stay out of trouble; rather, he reoffended in a very serious manner. By no stretch of the imagination could it be suggested that he took the chance that was offered. In those circumstances, it was inevitable that his situation would be differentiated from those who came before the Court alongside him. Given that he was 15 years old at the time of the violent disorder incident, we would not pay undue attention to the failure to provide compensation, but we do regard the fact of reoffending while on bail, having been offered a chance, as highly significant. As it

happened, the reoffending resulted in enormously grave consequences. However, even if there had been no collision, the fact of purchasing and driving a dangerously defective vehicle, and more particularly, driving it in an outrageously reckless manner through a populated urban area, would have shown the appellant as somebody who was not taking the chance he was offered and was no longer deserving of that chance.

**14.** It seems to us that, given what transpired, it was inevitable that the appellant in the present case was going to be treated differently than his co-accused in the violent disorder matter and the fact of different treatment was fully justifiable. The one matter that causes us concern is the extent of that differentiation. Does a situation where five of the six involved were dealt with by way of entirely suspended sentences, while the appellant is required to serve the entirety of the sentence with no element of it suspended, amount to excessive differentiation? Not without considerable hesitation, we have concluded that it does. We believe that a requirement to serve a sentence of six months rather than 12 months in respect of the violent disorder matter would more appropriately mark the way in which his situation was to be differentiated from the co-accused.

**15.** Finally, all that remains to be considered is the driving disqualification. We have a concern that a very lengthy period of disqualification could, in some circumstances, serve as an impediment to rehabilitation. An example in this regard would be a situation where somebody offends very seriously as a juvenile, in a way that indicates that they are not a person who should be allowed the privilege of driving a car, but then, some years on, indicates that they have turned their life around; perhaps they have taken on domestic responsibilities or secured employment. In those circumstances, an inability to even apply for a licence may impede rehabilitation and set back the progress made. For this reason, we are minded to reduce the period of disqualification from 20 years to 15 years, which would mean that it would be possible for the appellant to apply for a restoration of the licence after he has

served a disqualification period of seven and a half years, and there would be the possibility that the licence could be restored after he has served a disqualification period of 10 years.

**16.** In all the circumstances, we will deal with this case as follows. In relation to the violent disorder matter, we will quash the sentence of 12 months imprisonment and substitute therefore a sentence of six months. In relation to the dangerous driving causing serious harm matter, we will dismiss the appeal and uphold the sentence imposed in the Circuit Court. As in the Circuit Court, the sentence will be consecutive to the violent disorder matter, as it was required to be, having been committed while on bail. In relation to the driving disqualification, we will reduce the period of disqualification from 20 years to 15 years.