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THE COURT OF APPEAL

Neutral Citation No. [2022] IECA 199
Court of Appeal Record No. 189/2019

**President
McCarthy J
Kennedy J**

BETWEEN/

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

PROSECUTOR/RESPONDENT

-AND-

LAWRENCE MUBANGO

ACCUSED/APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 30th day of June 2022 by Mr Justice McCarthy

1. This is an appeal against the severity of sentence imposed in the Dublin Circuit Criminal Court by Her Honour Judge Codd on the 15th of July 2019 on Bill No: DUDP990/2018. Lawrence Mubango, the appellant herein, pleaded guilty to two counts; one count of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 and another count of assault causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997. The judge imposed a sentence of ten years' imprisonment with the final 18 months suspended in respect of the count of assault causing serious harm and further, a concurrent sentence of three years' imprisonment was imposed on the count of assault causing harm. Both sentences were backdated to the 17th of May 2018 when the appellant first entered custody. The appellant now appeals only against the sentence imposed in respect of the sentence on the count of assault causing serious harm.
2. We will now briefly outline the facts of the matter. The appellant was aged 29 years old at the time of the offences committed herein. The offences occurred on the 17th of May 2018 at 11 Parknoe House, Tyrone Court, Inchicore, Co. Dublin. There were two victims Messers. Ncube and Ndluli (who was also known by a nickname of "Click"). The three men came into contact having met in the city centre in the afternoon of the 16th of May 2018. The three

men stayed in town to socialise and were later drinking and smoking cannabis at Wolfe Tone Park.

3. At approximately midnight the three returned to the apartment of the appellant's then girlfriend, Ms Conroy, at 11 Parknoe House. Ms Conroy was at home at the time in bed with her young son. The appellant asked whether or not the two "*lads*", as she described them, could stay, and Ms Conroy was amenable to this request. Ms Conroy then went to sleep in circumstances where she had to be up for work the next day and the three men went to the kitchen where they shut the door and proceeded to continue drinking, having ordered a bottle of vodka. Controlled drugs were used by the respective men including the appellant.
4. As events proceeded into the early hours, Ms Conroy was disturbed by a knock on her bedroom door. She was awoken by Mr Ndluli who entered her room and asked if she had a cigarette. Ms Conroy was annoyed by this thoughtless request and ultimately, he apologised for disturbing her and left. Shortly after, Ms Conroy went into the sitting room, where the men now were, and she told them to be quiet or they would have to leave. She then returned to her bedroom and went back to sleep.
5. Later, Ms Conroy was again awoken by the appellant who asked her if Mr Ndluli had tried to sleep with her. She responded sharply and observed the appellant "*sitting on the left side of the bed with his hands on his head*", following on from which he left the bedroom, slamming the door. Ms Conroy followed him and told him not to slam the door and he apologised.
6. Following this exchange, the appellant became extremely agitated and accused Mr Ndluli of having tried to sleep with his girlfriend. Mr Ndluli denied this. In the next stage of the sequence of events, shortly before 6am, the appellant hit Mr Ndluli and Mr Ncube sought after Ms Conroy's assistance by knocking on her bedroom door, following which the appellant proceeded to hit him as well. Mr Ncube and the appellant shouted at each other, as Mr Ncube was angry at what had been done. At around this time, Mr Ncube picked up a knife in the kitchen and the appellant went out onto the balcony, broke a glass candleholder, and threatened to throw himself from the apartment's third floor balcony. Ms Conroy prevailed on the appellant to come back inside where he then continued his argument with Mr Ncube.
7. Mr Ndluli disarmed Mr Ncube at Ms Conroy's request. Then, Mr Ndluli and Ms Conroy ejected the appellant and Mr Ncube from the apartment, where Mr Ndluli followed. Ms Conroy then closed the front door to the apartment, leaving the three men outside in the corridor. Shortly after that, the appellant broke through the door of Ms Conroy's apartment, going to the kitchen and picking up a red knife. Mr Ncube followed him and picked up a smaller knife. Mr Ndluli intervened and managed to get Mr Ncube to leave the apartment with him. As both were in the corridor outside the apartment, the appellant followed them out and disarmed Mr Ncube. Then the appellant, wielding a knife in each hand, stabbed Mr Ndluli once in the side of the chest. This was the subject of the assault causing harm count on the indictment.

8. Having been stabbed, Mr Ndluli told the appellant to stop. He and Mr Ncube moved back towards the front door of Ms Conroy's apartment at which point the appellant proceeded to attack Mr Ncube. This attack forms the subject of the assault causing serious harm count on the indictment. Mr. Ncube fell to the floor and the appellant stood over him and continued to attack him as Ms Conroy tried to pull the appellant away, shouting at him to stop.
9. After the appellant finished this attack, Mr Ncube tried to crawl away from the appellant and towards the lift area of the hallway. Ms Conroy took her child and fled to a neighbour's apartment who had become aware of the altercation outside. Mr Ndluli tried to assist Mr Ncube and asked the appellant to call an ambulance wherewith the appellant responded by telling them both to "fuck off". He then poured a bottle of 7-up over both Mr Ndluli and Mr Ncube and walked away.
10. Gardaí were called, arriving shortly thereafter. They found Mr Ndluli cradling Mr Ncube and found Mr Ncube to have been "eviscerated with his intestines protruding from his stomach". Ambulance paramedics then arrived, and Mr Ncube was removed to St. James's Hospital by ambulance. Mr Ndluli made his own way to the hospital thereafter.
11. The appellant was later apprehended at the nearby Blackhorse Luas stop. The appellant told Gardaí at the scene that he was sorry and that he had stabbed two people. He was then arrested and cautioned, following which he said: -

"They were supposed to [be] (sic) my guests, the two of them. We had drugs. They overpowered me. I should have called you guys. The fight was over my girlfriend. I had the knife in my hand. I stabbed the two people"; and further added "it was self-defence, but I took it too far."
12. The appellant was then conveyed to Kilmainham Garda Station and detained for investigation. He co-operated in the taking of forensic samples. The appellant was interviewed on six occasions. During the currency of those interviews, he asserted that he was not able to remember various details surrounding the assaults owing to his intoxicated state. He described his guests as being disrespectful to him and that they would not leave. He alleged that Mr Ndluli had groped his then girlfriend, Ms Conroy, whilst she was asleep and that both men had discussed raping Ms Conroy. In this vein, he sought to justify his actions. The appellant made various false claims to the Gardaí but, ultimately, he accepted that his actions may have been wrong and expressed his regret for everything that had occurred.
13. As to the injuries caused, Mr Ncube sustained two stab wounds – one wound to the wrist area and another, the more serious one, to the abdomen, which eviscerated his bowel. The more serious stab wound was described by one of his doctors, a Dr Maguire, as a "life-threatening penetrating injury to his abdomen. The bleeding was arrested in St James's Hospital theatre by surgery, but Mr Ncube was left with a significant vascular problem to his liver, necessitating a complicated liver operation and ongoing liver issues." Mr Ncube remained in hospital until the 10th of August 2018 and remains a candidate for further liver surgery and potential liver transplant.

14. In his victim impact statement, Mr Ncube described himself suffering from severe insomnia, flashbacks of the attack, occasional depressive episodes, and anxiety. He said that his whole life has changed, as has his personality, as a result of the attack. He gets tired very easily, becomes sick with infections, and cannot walk upstairs without becoming winded. He required someone to help him bathe and dress and believed his injuries had robbed him of his independence at such an early stage of his life, being only 24 years old at the time of the attack. Furthermore, he stated that he lost his job because of missing days from work as a result of his injuries and is fearful of going into the city since then.
15. Information as to the appellant's background is limited. He has a number of previous convictions (stated in the evidence of Detective Inspector Harrington as being 84 in number). A written summary of these was proffered to the judge, however, it is not available to us and there is a certain lack of clarity about them. Amongst the convictions, there is at least one for robbery, five for burglary as well as previous convictions for production of an article with intent to cause injury and possession of a knife. With two exceptions it seems that all the convictions were rendered in the District Court or, on appeal, to the Circuit Court. The exceptions seem to be a conviction for robbery at Dublin Circuit Criminal Court on the 19th of July 2012 wherewith a sentence of one year was imposed, there were also what might be termed a group of convictions on the 9th of March 2012 in respect of which a cumulative sentence of two and a half years' imprisonment was imposed – it seems that it was on that occasion that the production and possession offences were dealt with. The previous convictions also include a number for offences relating to controlled drugs. Primarily based on the numerous convictions, including the latter, it was not disputed by the Garda witness that the appellant had had a chaotic lifestyle. He was born on the 1st of April 1989 and was 30 years old at the time of sentence for the offences before us as well as having a then two-year-old son. It is not in dispute that the appellant was intoxicated through drink and controlled drugs at the time of the offence herein.
16. Counsel for the appellant in their plea in mitigation emphasised the appellant's chaotic lifestyle, addiction issues and his family support as well as being the father of a young child. They handed in several letters to the Court including from his mother. They submitted that notwithstanding that a guilty plea had been entered on a trial date, the plea was an early one in the circumstances where additional evidence had been served, including some evidence from Ms Conroy, that had been served the month prior to the trial – although her statement was in a disclosure previously furnished to the them. The court was also asked to have regard to the circumstances in which the offence was committed and the admissions made by the appellant positing that the plea entered was "*on the basis of recklessness, not intention, and that has a bearing on where this type of offence falls in terms of its seriousness, and that -- that plea was accepted by the Director of Public Prosecutions on that basis*". Counsel for the respondent also advanced the proposition – which is not disputed – that although the appellant did intend to cause harm, he did not intend to cause serious harm but was reckless as to whether or not it would be caused by the appellant's actions and sentencing should be considered on that basis.

17. In considering a headline sentence, the judge had regard to the sentencing guidelines provided for in *DPP v Fitzgibbon* [2014] IECCA 12 rather than those later set out in *DPP v O'Sullivan* [2019] IECA 250, as required by this Court in *DPP v Schaufler* [2020] IECA 299. The judge concluded that the offending fell into the most serious category of such offending and held that the recklessness of the appellant was "*recklessness in the highest degree brought on in a state of self-induced ... drug fuelled state of paranoia and jealousy*". The judge helpfully summarised the aggravating factors to the offending which we quote as follows: -

"Firstly, Mr Mubango comes to this court with 88 previous convictions, 24 in the Circuit Court and many relevant to knife and assault offences, as well as drugs offences. The first two aspects of those -- of the categorisation of those offences significantly aggravates the offending conduct in this case. The second aggravating factor is the fact that these offences were committed while Mr Mubango was on bail. Thirdly, the use of two knives simultaneously is in itself an aggravating factor, albeit one was obtained following his disarming of Mr Ncube. Fourthly, the attack was carried out in the near presence of a young child, the accused's own son, young son, in circumstances where he permitted the place where the child was -- his child was living to be used for what can only be described as a drink and drugs den for himself and his companions. Fifthly, the fact that the accused followed the men out of the apartment armed with a knife when they had left the apartment, that significantly aggravates the offending conduct. Sixthly, Mr Ndluli, who had tried to stop the row and who at no point was armed, was stabbed in the chest as he asked the accused to stop. The seventh aggravating factor, the fact that he had disarmed Mr Ncube and then approached him with two knives when Mr Ncube was already outside the apartment, but, instead of walking away or back into the apartment, Mr Mubango chose to engage in stabbing the two men, and this significantly aggravates the conduct in respect of the offence."

The judge on consideration of these factors and within the range of sentences available nominated a headline of sentence of 12 and a half years' imprisonment in respect of the count for assault causing serious harm.

18. As to the mitigating factors, the judge acknowledged the level of co-operation offered by the appellant to the Gardaí as well as his guilty plea (entered at a relatively late stage) were of limited weight for mitigation. She was also cognisant of the appellant's level of intoxication: whilst acknowledging this was not considered a mitigating factor, it tied to what was said about his history of addiction and personal circumstances. Furthermore, the judge accepted the remorse shown by the appellant both in his communication with Gardaí and in a letter he provided to the Court for the victim. Finally, the judge accepted the appellant had the support of family and was actively seeking help in respect of his addiction issues.
19. Considering all these factors in the round, the judge concluded that the case came "*within the mid part of the upper range for section 4 cases*" and imposed a custodial sentence of

10 years for this offence with the final 18 months suspended on condition that he “*keeps the peace and be of good behaviour for the duration of his sentence and post-release, that he remain under the supervision of the Probation Service post-release, that he undergoes drugs and alcohol rehabilitation as directed by the Probation Service, including, if so directed, residential treatment, that he abide by all directions of the Probation Service, and provide urinalysis as directed by them.*”

Grounds of Appeal

20. The grounds of appeal as to the sentence imposed for assault causing serious harm, are advanced by counsel for the appellant as follows: -

- i. *The Learned Judge attached insufficient weight to the plea of guilty entered by the Appellant where she made a finding that the said plea was made in early course as a result of the late service of additional evidence by the Respondent.*
- ii. *The Learned Judge, although very serious were inflicted by the Appellant, gave disproportionate weight to the victim impact evidence tendered by the Respondent.*
- iii. *The Learned Judge fixed a headline sentence of 12.5 years which was excessive in all the circumstances of the case.*
- iv. *The Learned Judge gave insufficient regard to the fact that the injuries sustained by the injured parties were inflicted as a result of the recklessness on the part of the Appellant as opposed to the intentional infliction of harm or serious harm.*
- v. *The Learned Judge place insufficient regards to the matters advanced in mitigation.*

We will deal with all grounds together.

21. Counsel for the appellant makes the principal argument that the headline sentence identified, having regard to *DPP v Fitzgibbon* [2014] IECCA 12, was wrong. It was submitted, by reference to the ranges identified in *Fitzgibbon*, that the offence under section 4 was not one which fell at the top of the highest range. The highest range under that authority attracts a sentence of between seven and a half years to 12 and a half years as a headline sentence. *Fitzgibbon* has been superseded by *DPP v O’Sullivan* [2019] IECA 250 but as held by *DPP v Schaufler* [2020] IECA 299, any sentence imposed by the trial court was to be decided by reference to the law as it then stood, namely, by reference to the *Fitzgibbon* principles prior to the ruling in *O’Sullivan*. This is what the judge did. Counsel could not really contend that that offence did not fall in the highest range but submitted that it was an error in principle in placing it at the top of that range. He said that such an error, by definition, had the knock-on effect that the post mitigation sentence was higher than ought to have been the case.

22. In that regard counsel referred to factors, as identified in *Fitzgibbon*, as relevant to deciding the seriousness of the offence. These factors are not exhaustive. They are listed as follows:

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- (i) the severity or viciousness of the assault
 - (ii) the degree of injury suffered;
 - (iii) the degree of culpability of the accused;
 - (iv) the general circumstances surrounding the assault, such as potential commission in the context of other criminality; and
 - (v) the use of weapons or other objects likely to make more severe the injuries
23. As set out above, the appellant has numerous previous convictions including convictions which aggravate the offences, that is to say, offences involving knives and assaults. Counsel for the appellant urged the Court to take a cautious approach in taking the view that such previous convictions were aggravating, less the appellant be subject to a double punishment. We might say at this stage, however, that we are quite satisfied that this did not happen here.
24. Counsel for the appellant urged on us that having regard to the degree of culpability of the appellant and the general circumstances surrounding the offence, it did not fall at the top of the highest range. He submitted that the offence was not planned, or, at another point, that the appellant had acted spontaneously. It was submitted that he was not the first of the protagonists to resort to the use of knives and that it was accepted that his *mens rea* was one of recklessness rather than intent to cause serious harm. He stressed also that since there were, as he submitted, two stab wounds, he had not engaged in an extreme attack.
25. On the face of it the plea of guilty was entered at a very late stage but counsel for the appellant submitted that it cannot be disputed that absent the evidence of Ms Conroy, which was not part of the Prosecution's case initially, it might not have been an easy case to prosecute to conviction. Nonetheless, it was only when notice of additional evidence containing her statement was served on the 24th of April 2019 that guilty pleas were entered. It was submitted that there was ample evidence of remorse (although at a certain stage the appellant in the immediate aftermath of the crime refused to call an ambulance) and he cooperated to a limited degree with the Gardaí.
26. Counsel for the respondent pointed out that the factors referred to in *Fitzgibbon* were not exhaustive. He pointed to the fact of prior relevant convictions, the absence of evidence of good character, the harm done and the fact that the appellant, having left the premises, returned, smashing the door in the process to obtain a large knife. Counsel for the respondent argue that this revived the violent activity which had taken place in the house earlier and furthermore, the appellant had a second knife for the attack that was taken from Mr Ndluli who was thereafter defenceless.
27. It seems to us that all relevant mitigating and aggravating factors were considered by the Circuit Judge when sentencing. In substance the effective sentence imposed provided for

eight and a half years in custody, representing a very substantial discount from the headline sentence. This was in circumstances where the mitigating factors were modest.

28. Ultimately, the question is whether or not the headline sentence identified was excessive and represented an error of principle. We do not think so. Apart from the fact that the judge engaged with all relevant matters, whether or not a given sentence is properly imposed involves a case by case judgment on the facts by judges as to whether or not, the principles of sentencing having been properly applied and they were here. We think that the identification of the headline sentence was within the judge's margin of discretion. Furthermore, we think that ample, indeed, more than ample, credit was afforded for the mitigating factors and that given the gravity of the crime. The appellant could not have legitimately expected a lesser custodial sentence. We emphasise also the importance of general deterrence of offences involving the use of knives, a factor stressed by prosecuting counsel and the headline sentence clearly took that into consideration.
29. We therefore dismiss this appeal.