



THE COURT OF APPEAL

Record Number: 27CJA/2022

**The President
Edwards J.
Kennedy 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

APPLICANT

AND

DC

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 17th day of November 2022 by Ms. Justice Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of a sentence of five and a half years' imprisonment imposed on the 12th January 2022 with the final 12 months suspended.

2. The respondent was convicted of several counts following trial and was sentenced to 5 ½ years' imprisonment with the final year suspended on a count of aggravated burglary, 4 ½ years on a count of sexual assault, 3 years and 8 months on a count of assault causing harm, 4 months on a count of criminal damage, to which the respondent had entered a plea of guilty, and 3 years and 8 months on a count of making a threat to kill or cause serious harm. A count of producing an article was taken into consideration.

Background

3. In the early hours of the morning of the 17th July 2020, An Garda Síochána were called to the home of the complainant herein. She was visibly upset and shaking. She stated that her ex-partner, the respondent herein, had gained access to her home during the course of the night and entered her bedroom armed with a weapon which she described as a mini axe or a sickle-like sharp adapted hook object and had threatened and assaulted her. This was preceded by a series of menacing text messages from the respondent prior to his arrival on the property.

4. The respondent and complainant have six children, four of whom reside with the complainant and whom he was entitled to visit during the daytime but with no entitlement to attend at the house during the night.

5. After an initial altercation in the bedroom, which included the respondent kicking her to the chest, the respondent followed the complainant to the sitting room whereupon he sexually assaulted her by attempting to put a sex toy into her vagina, rectum and mouth. During the course of this struggle, one of the respondent's fingers entered her vagina.

6. The complainant resisted as much as she could, but the respondent restrained her by pinning her up against the couch, he had his knee on her thigh and she was unable to move. The complainant stated that the offending behaviour lasted for a protracted period of time and that towards the end of the incident, the respondent got up and hit her in the mouth with the implement he had brought to the house, causing her lip to bleed and swell. A doctor's report was before the court below which stated that the complainant had been complaining of a loose tooth.

7. The complainant also sustained a cut to her vagina following the sexual assault. The weapon was brought onto the property by the respondent and had not been there prior to the night in question.

8. The complainant gave evidence of a number of threats being issued to her by the respondent during the course of the offending behaviour, including: *"You don't know how lucky you are, you could have got a belt of this, I mightn't give you a chance to -- and I'll back on the hour every hour."* She further stated that the respondent had been texting her with threats before appearing at the house that night. The respondent had threatened to come over if the complainant did not unblock his number.

9. The complainant indicated that at the end of the offending behaviour, the respondent went outside and broke a number of garden ornaments and pots. While he was outside, the complainant used this opportunity to call the Gardaí.

10. The respondent was located by Gardai in a car near the complainant's house. The weapon was found in the vehicle.

Personal Circumstances

11. The respondent has 16 previous convictions, including a public order offence, failure to comply with the directions of member of An Garda Síochána and two convictions for sexual assault, one occurring in 1998 and the second, in 2020, a sentence of 9 months was imposed for the latter where the facts disclosed that the respondent put his hands between a female's legs in an elevator. The respondent is 50 years old.

12. Testimonials were provided by the respondent's children, his landlord, and his neighbours. They disclose that he is a good father and that he is willing to help out his neighbours to a significant degree. Moreover, that he is a member of a scooter club where he has assisted in raising money for a hospice and for Pieta House. At the time of sentence, he enjoyed enhanced prisoner status and was studying various courses in prison. He was a trustee in the prison, a head cleaner and was accepted as a listener for prisoners.

Sentencing Remarks

13. The sentencing judge identified the aggravated burglary as the most serious offence. In terms of nominating a headline sentence, he placed the offence on the lower end of the mid-range and nominated a headline sentence of six years' imprisonment. The aggravating factors included the time of the entry into the dwelling, that the offence was premediated and followed a series of texts to the complainant's phone in which he indicated his intention to attend at the house, and that the offending was protracted.

14. The judge noted that there were a number of other matters which could be treated as aggravating the aggravated burglary offence but decided to deal with them separately as they formed the basis of separate convictions. He took the production of a weapon into consideration.

15. The judge placed the sexual assault in mid-range and nominated a headline sentence of five years' imprisonment. The offence occurred in the complainant's home during the night, involved an element of premeditation and the respondent has two relevant previous convictions for sexual assault, all of which serve to aggravate the offending. The judge referred to the nature of the offence and that the inside of the complainant's vagina was cut.

16. Turning to the s. 3 assault, the judge placed this offence at the upper range of gravity and nominated a headline sentence of four years' imprisonment. He identified the aggravating factors as the assault having occurred at the complainant's home, at night-time, while her children were

present. The judge referred to the protracted nature of the assault, the use of various items as weapons, that the complainant suffered a loose tooth and that the imprint of the respondent's footwear was left on her nightshirt.

17. Turning to the criminal damage count and the threat to kill or cause serious harm, the judge nominated headline sentences of six months and four years respectively. In relation to latter, the judge observed that the complainant believed the threats and was terrified.

18. In terms of mitigation, he had regard to the respondent's enhanced prisoner status, the fact that he was a trustee in the prison, that he attended school, the gym and mass and that he was a listener for prisoners. The court also had sight of letters of testimonials from the respondent's children, his landlord, his neighbours and a scooter club with which he did charity work.

19. The judge reduced the six-year headline sentence nominated for the aggravated burglary count to one of five and a half years and the five-year headline sentence on the sexual assault count to one of four and a half years. He further reduced the two four-year headline sentences by four months leading to a net sentence of three years and eight months in each case. The criminal damage headline sentence of six months was reduced to a net sentence of four months. All sentences to run concurrently.

20. The final year of the five-and-a-half-year sentence was suspended for a period of one-year in order to encourage rehabilitation.

Submissions

21. The applicant contends that the ultimate sentence imposed of an effective 4 ½ years for the aggravated burglary count with concurrent sentences imposed on the balance of the counts is unduly lenient given the seriousness of the offending, the pre-planning, the many aggravating factors, and the violent and degrading nature of the attack.

22. Moreover, it is said that the judge erred in separating the various aggravating factors across the offences and thus failed to have regard to the overall circumstances of the offending. As a consequence, it is said that the effective overall sentence of 4 ½ years does not properly reflect the seriousness of the offending.

23. The respondent contends that the aggravating factors were carefully taken into consideration by the sentencing judge. It is pointed out that the judge expressly took the production of an article into consideration as an aggravating factor in his formulation of the sentence on the aggravated burglary counted.

24. Insofar as totality is concerned, it is said that the judge was clearly cognisant of all of the circumstances of the case when imposing sentence on each of the counts.

Mitigating Factors

25. It is the Director's position that the mitigation proffered on behalf of the respondent did not warrant the discount of six months from the headline sentence and, more particularly, the suspension of a further year from the sentence. Edwards J in *The People (DPP) v Coughlan* [2019] IECA 173 is relied upon in this regard, as follows:

"We have stated in the past that rehabilitation is an important objective in the sentencing process to which the Court must have regard. However, it is important to note that before an intervention involving going the extra mile, would be justified on the grounds of rewarding the progress towards rehabilitation to date and/or to incentivise further rehabilitation, there must be a sound evidential basis for so intervening. There has to be evidence of a real prospect of rehabilitation."

26. The Director submits that having regard to the respondent's lack of remorse, apology and insight into his offending behaviour, as well as his highly relevant previous convictions, the fact that he was of good character while in prison was not a sufficient basis upon which to justify the suspension of a further year of his sentence, reducing the effective custodial sentence from five and a half years to four and a half years.

27. The respondent contends that there was considerable mitigation advanced on the accused's behalf including *inter alia* the letters from his children expressing that he is a kind and loving father. It is submitted that the discount of six months from the headline sentence was an inadequate reflection of the mitigation proffered.

28. It is further submitted by the respondent that the suspension of a year in order to incentivise rehabilitation was not representative of a reduction for mitigation. It is pointed out that the suspended portion of the sentence is open to reactivation under s. 99 of the Criminal Justice Act, 2006.

29. Reliance in this regard is placed on the case of *The People (DPP) v Walsh* [2015] IESCDT 26 in which the Supreme Court held:

"The precise way in which it would be appropriate either for a sentencing judge or the Court of Appeal to impose or confirm a sentence to reflect mitigating factors is very much a function of the particular circumstances of each individual case involving not only a consideration of the offence but also all of the circumstances of the offender. While there may be factors

which ... might lead to the suggestion that either reduction or suspension was more appropriate in a particular case, it would only be in a clear case (if at all) that the choice made by a sentencing judge in that regard could be said to be circumscribed as a matter of law."

30. The respondent further relies on the connected commentary of Prof. O'Malley in his textbook on *Sentencing Law* at para 22-19:

"The court was obviously correct in acknowledging the discretion vested in judges to decide how a sentence should be structured provided the fundamental principle of proportionality is observed. It is not being argued here that part-suspension is never appropriate in these circumstances, but it is suggested that a court should always begin by asking if there is any reason why a straight reduction would be an inappropriate means of granting mitigation."

31. In relation to remorse, it is submitted that the sentencing judge placed undue weight on the respondent's lack thereof. It is said that it is the respondent's right to contest the charges and maintain his innocence in the face of the jury verdict.

Deterrence

32. It is submitted by the applicant that the sentences imposed failed to have regard to the societal need for general and specific deterrence given that these were extremely serious and violent offences.

33. It is the respondent's position that the need for general and specific deterrence was met by the sentences imposed and further, that deterrence ought not to have been a primary feature of the sentence in this case.

Comparator Cases

34. The respondent places reliance on the case of *The People (DPP) v Casey* [2018] 2 IR 337 in which case, this Court, in the context of an undue leniency application, substituted sentences of six years and four months' imprisonment for that of four and a half years' imprisonment with the final year suspended. *Casey* concerned two respondents who had pleaded guilty to three offences of burglary and one offence of criminal damage, occurring in rural locations, on the same day, as part of a spree of offending

35. The respondent distinguishes the instant application from *Casey* by reference to two separate features of the case. Firstly, that one of the occupiers of a premises targeted by the respondents in *Casey* died during the course of the burglary and secondly, that the respondents

were engaged in a well-organised and extensive "burglary operation" spanning over a significant geographical area whereas the present offending was lacking in any such dexterity or sophistication.

36. Further reliance is placed on *The People (DPP) v Coughlan* which, it is said, has a similar factual background to the instant case. The respondent in *Coughlan* was convicted of causing serious harm to the complainant, with whom he had previously been in a relationship. He received a sentence of six years' imprisonment with the final two years suspended. The complainant sustained serious injuries during the course of the attack by the respondent which resulted in lifelong disfigurement. Further, the respondent had little by way of mitigation. In the context of an undue leniency application, this Court nominated a headline sentence of seven and a half years' imprisonment, which it reduced by twelve months and suspended the final six months thereof, ultimately leading to a sentence of six and a half years' imprisonment with six months suspended.

37. The respondent submits that the offending in *Coughlan* was significantly more serious than in the present case and that as the headline sentence of seven and a half years was within the appropriate range in *Coughlan*, the headline sentence of six years imposed on the respondent herein must be within the appropriate range for his offending.

Analysis and Decision

38. The law regarding undue leniency reviews is well settled, from 1995 in *The People (DPP) v Byrne* [1995] 1 ILRM 279 and more recently in *The People (DPP) v Stronge* [2011] IECCA 79, where McKechnie J. summarised the principles relevant to applications under s. 2 of the Criminal Justice Act, 1993, namely that the onus is on the moving party and that this Court will not intervene unless it is demonstrated that the sentence imposed is a "substantial departure" from the appropriate sentence in the circumstances.

39. The Director must establish that the sentence imposed was unduly lenient so that the disparity between the sentence imposed and that which ought to have been imposed amounts to an error of principle, thus justifying intervention by this Court.

40. It cannot be gainsaid but that the offending in the present case was serious offending. The aggravating factors are readily apparent; involving an intrusion into a dwelling in the dead of night, whilst a woman was in her bed, only to be faced with her ex-partner armed with an implement. This followed earlier menacing text messages, which indicate that the respondent was

fuelled by anger and was in a jealous rage. There followed a prolonged physical and sexual attack, the sexual assault was violent, degrading and designed to humiliate the complainant.

41. The respondent does not seek to detract in any way from the seriousness of the offending but argues *inter alia* that the judge took account of the aggravating factors in nominating the sentences and that, moreover, greater discount could have been afforded for mitigation. Mr O'Higgins SC for the respondent cavels with the contention by the Director that the offence was pre-planned in that the offending in the present case does not have the same element of premeditation such as may be present in cases where rural homes are the target of criminal gangs intent on burglary.

42. We agree with the submission in so far as it goes, in that this is a different type of aggravated burglary, one fuelled by anger and jealousy, nonetheless, the respondent entered his ex-partner's home with an agenda, and that was clearly to do her harm.

43. The Director's argument is a simple one; that the judge erred in nominating a headline sentence of 6 years for the aggravated burglary and 5 years on the sexual assault and that the overall ultimate custodial sentence of 4 ½ years does not adequately reflect the gravity of the offending conduct.

44. In our view, this is serious offending, and we are satisfied that the fact that the complainant was both physically and sexually assaulted by her ex-partner, he having entered as a trespasser increases the gravity of the aggravated burglary offence. We agree that the various offences are a continuum of offending and that consecutive sentences would not be appropriate, however, we are persuaded that the nomination of 6 years for the aggravated burglary is a substantial departure from the appropriate sentence in the circumstances of this case and that the Director has established an error in principle.

45. Accordingly, we will quash the sentence imposed on the aggravated burglary offence and proceed to re-sentence. For this purpose, we consider the materials which were before the court of trial and also, the additional material which the respondent has accumulated in the meantime. It appears that he is continuing to make good use of his time in custody, and we take account of this fact.

46. Insofar as the testimonials from his children are concerned, in different circumstances, testimonials from family members might not carry significant weight, but in the present case, we see them to be of significance, not so much from their contents, but from the very fact that the children were prepared to write in the circumstances.

47. We also take careful account of the testimonials from his landlord and neighbour, which show him to be a considerate neighbour. However, we are cognisant that this offending occurred as a result of anger toward one person and that was his ex-partner and so we attach lesser weight to those testimonials.

48. Finally, we acknowledge his good and charitable works and are satisfied that he is a man who has the capacity to rehabilitate and reform.

49. In imposing sentence for the aggravated burglary, we consider the appropriate notional sentence to be one of 9 years' imprisonment, this is in circumstances where s. 40 of the Domestic Violence Act, 2018 has application to a number of the offences charged and the fact that the offences were committed against a relevant person is a relevant factor. In other circumstances, we may have considered a notional sentence of 8 years absent this provision.

50. However, we are satisfied that there is mitigation present. During this hearing, the respondent altered his position and now acknowledges his guilt, taking full responsibility for his actions and apologising to the victim. He has been given liberty to withdraw his appeal against conviction. Whilst such acceptance has come late in the day, it is nonetheless welcome, and we give him credit for this and hope that this acknowledgement and apology gives comfort to his ex-partner and family.

51. We will therefore reduce the sentence of 9 years to one of 8 years and, in order to incentivise his rehabilitation, we will suspend the final 2 ½ years of that sentence for a period of 2 ½ years on the usual terms and on the condition that the respondent observe the terms of the safety order imposed on the 21st October 2020.

52. We consider that a period of post-release supervision is merited in the circumstances, and we order such supervision for a period of 2 ½ years under the supervision of The Probation Service.