



THE COURT OF APPEAL

Court of Appeal Record No. 138CJA/2022

**Birmingham P
McCarthy J
Ní Raifeartaigh 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)**

PROSECUTOR/APPLICANT

-AND-

MICHAEL DELANY

ACCUSED/RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 26th day of January 2023 by Mr Justice McCarthy

1. This is an application pursuant to section 2 of the Criminal Justice Act 1993 for a review on grounds of undue leniency of the sentence imposed for offences on two separate Bill Numbers. Sentencing was dealt with at Waterford Circuit Criminal Court on the 17th of June 2022. Bill No: WDDP0018/2020 contained one offence and that committed first in time, namely, the offence of violent disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994. Michael Delany, the respondent herein, received a sentence of eighteen months suspended entirely for the period of eighteen months. Bill No: WDDP0094/2021 dealt with various offences which we list as follows: -

Count 1: Unlawful seizure of a vehicle contrary to Section 10 of the Criminal Law (Jurisdiction) Act, 1976

Sentence: 4 years imprisonment, with the final year suspended for one year.

Count 2: Assault causing harm contrary to Section 3 of the Non-Fatal Offences against the Person Act, 1997

Sentence: 3 years imprisonment.

Count 4: Dangerous driving contrary to Section 53(1) of the Road Traffic Act, 1961 (as substituted by Section 4 of the Road Traffic No. 2 Act, 2011)

Sentence: 4 months

Count 5: Using a mechanically propelled vehicle without having in force an approved policy of insurance contrary to the provisions of Section 56(1) and (3) of the Road Traffic Act, 1961, as amended

Sentence: 4 months

Count 6: Driving a mechanically propelled vehicle without holding a valid driving licence contrary to the provisions of Section 38(1) of the Road Traffic Act, 1961, as amended

Sentence: 4 months

Count 7: Refusal or failure to provide a specimen contrary to the provisions of Section 12(3)(a) and (4) of the Road Traffic Act, 2010, as amended

Sentence: 4 months

All sentences on Bill No: WDDP0094/2021 were made consecutive to the wholly suspended sentence imposed on Bill No: WDDP0018/2020 providing an effective sentence of three years backdated to the 27th of October 2021.

2. We will briefly outline the facts of both matters. The offence of violent disorder occurred in the early hours of the 12th of August 2018 at 9 Anne Street in Waterford City at the home of the Ward family. Gardaí had been dealing with a separate public order matter at another part of the city and the two incidents appear to have been linked. The Gardaí had attended at the Anne Street address earlier due to a report of a disturbance. They were enroute to it when an investigating Garda observed a red car driven by one of the respondent's co-accused. The vehicle was driven through a junction without stopping or without lights and was visibly damaged. The driver was struggling to control the vehicle and Gardaí pursued the vehicle for a short distance. Three individuals could be seen in the vehicle and what were described as timber poles were thrown from it – there were subsequently recovered by the Gardaí. When the vehicle was eventually stopped, close to the respondent's home, the respondent, who was found to be topless, exited from the rear left of the vehicle and attempted to flee from the scene, but was stopped and detained by Gardaí.

3. CCTV was obtained and viewed by the Court which showed three topless individuals with items in their hands including the respondent outside the home of the Wards. Damage was found to have been caused to the family home of the Wards. The vehicle was so driven as to have caused damage to a number of parked vehicles along the street. The respondent was arrested, detained, and made no admissions when interviewed.

4. In respect of Bill No: WDDP0094/2021, which concerns the offences committed second in time, the respondent was on bail in respect of the violent disorder matter at the time and disqualified from driving. On the 21st of June 2021 at approximately 5pm Gardaí were called to an incident on what was described as the "high road" in Kilmeaden, Co. Waterford where they met the victim, one Mr Zolt Tolmowski. He was observed to have blood coming from his nose and mouth. Garda Sharon Ryan was informed that the victim's car had been stolen from him and that he had been assaulted by the male who stole his car. The victim outlined that he was driving from his home in Portlaw to Kilmeaden and had seen a black car stopped on the road. He observed a female and a male by the car. He stopped to enquire if they were okay, at which point the couple, including the respondent, asked if he could bring them to Kilmeaden and he obliged. The respondent then asked the victim to return to his stationary black car as he had forgotten his phone. The victim did so but came to the view that they were wasting his time and he asked them to leave the car. At this point the respondent got out and punched the victim repeatedly into the face and head. When the victim got out of the car the assault continued as he was forced to move across the front of the vehicle and into a roadside ditch – the respondent continued to kick and repeatedly punch him into the head and body. The respondent then took the car and drove off in the direction of Waterford City. The respondent revved the car a number of times before driving the car at the victim, forcing him to jump out of the way. The car was later found abandoned at a roundabout on the outskirts of Waterford City. The respondent was subsequently arrested near the scene. He was intoxicated. The next morning, he was interviewed on four occasions, but exercised his right to silence on all occasions. Blood obtained from the respondent's clothing and footwear was analysed by the Forensic Laboratory of Ireland and DNA was extracted from it. That DNA discovered on the footwear was found to be that of the victim.

5. No medical reports were furnished to the Court, but the injuries suffered and the consequences for the victim were summarised by him in a Victim Impact Statement to which we refer as follows: -

"...My teeth were broken, face full of injuries and some wounds on my body. And my right eye had vision problems, which was later on in the hospital treated. Four times, visited eye casualty with it... I cannot have a proper sleep by night; I am waking up often because of bad dreams or light sounds from outside. The ringing of my ears is disturbing me too; it is very hard to fall back to sleep again because of it. I don't feel any more reposed in the mornings, I just feel tiredness. These things have changed my life, I must say, in a very negative way. Later on, I realised that I don't feel safe anymore in public places. I feel dizziness and feel confused in a crowd of people, and because of it I can only go shopping to small local shops where the prices are different from shopping centres, meaning much higher... I am a bus driver, I spent my life driving big vehicles, and now I don't feel safe to drive the same vehicles. I don't feel that I can be responsible for the lives of 50 people. We had a plan with my wife, that she moves to live here with me in Ireland with daughter, but meanwhile, a big part of my savings were spent to my life costs... I was working five years as a bus driver for one company here in Ireland, and that was the way how and where I made costs for a living. Now I can't go back on the roads. Need help to get my life and be an equal part of the Irish community. Yours sincerely, Zolt."

6. The respondent had 99 previous convictions which included *"previous convictions for criminal damage, assault, assault causing harm, public order, violent disorder, production of an article, possession of a knife..., Dangerous driving, no insurance, no driving licence, possession of drugs, disqualified driving, hit and run, drunk driving and handling stolen property."*

7. The judge dealt with the offence of violent disorder on Bill No: WDDP0018/2020 as follows: -

"The violent disorder to which Mr Delaney has pleaded guilty is in the low range of gravity. I heard the evidence in relation to Stephen Power, which I recall, and I've heard it again more briefly today. But it's in the low range, the appropriate sentence is two years' imprisonment. And the mitigation, which I'm going to come back to in relation to the seizure of the vehicle, means I'm going to reduce that sentence by six months, to leave a sentence of 18 months' imprisonment."

Now, Mr Delaney was on bail for the -- so, for reasons that I will explain, I'm going to suspend that sentence of 18 months in its entirety for a period of 18 months. I am

encouraged that there seems to be some settling down of this difficulty that exists between these two families, and that this is a feud-related incident. In relation to the second matter for which -- sorry, in a bond of €100 to keep the peace and be of good behaviour for 18 months."

8. With respect to the sentences on Bill No: WDDP0094/2021, when dealing with the aggravating factors in respect of the unlawful seizure offence the judge referred to the grave adverse effect of the offence on the victim as follows in some detail. He went on to nominate a headline sentence of six years imprisonment for the unlawful seizure and four years imprisonment on the assault causing harm. It is plain from his observations that he, rightly, had regard to the assault (from which the adverse effects on the victim principally flowed) and thus even though a separate sentence was imposed in respect of assault causing harm, the punishment for the latter is subsumed in the former.

9. He dealt comprehensively with issues of mitigation and rehabilitation in these terms: -
"The mitigation has been outlined by Mr Hutchinson; an early guilty plea to the seizure of the vehicle, compensation of €7000 paid to the victim. Remorse, and again, I have carefully read this letter that Mr Delaney has written, and it's quite poignant to read that he says is "a different lad without drink and drugs in him." He feels badly and constantly feels it about the effect that it has had on the victim, but also on the effect that it has had on his own parents, his own children. He points to his sick child, his sick mother, and these are circumstances that unfortunately exist. For the mitigation, I am reducing the sentence of six years by two years, to four years, and the sentence of four years by one year, to three years. This sentence has to be consecutive to the violent disorder. However, because I am suspending the violent disorder sentence in its entirety, I believe that no further adjustment needs to be made to the overall sentence, from the point of view of the totality principle. BY the time this sentence is served, the violent disorder suspended sentence will have expired.

I am encouraged that there is some effort, finally, at rehabilitation. I am obviously aware all these medical reports I've got don't relate to Mr Delaney himself but to members of his family, and I am very conscious that he is, and he knows it from his own letter, that he is depriving them of his society and the help that he can give them, so I'm prepared to

suspend the final year for a period of one year on the sentence of the seizure of the vehicle. I'm suspending that for a period of one year and making him subject to post-release supervision for a period of one year."

It was accepted that the plea in respect of violent disorder could not be regarded as an early one but was such in respect of the unlawful seizure and the other offences on that Bill. One of the principal mitigating factors was accordingly present in the latter case. Heavy emphasis was placed upon health issues pertaining to the respondent's mother (who from the medical evidence appears to suffer from chronic ill health under various heads) and one of his children who suffers from leukaemia and requires constant care, in which the respondent was heavily engaged. He also paid €7000 in compensation to the victim of the unlawful seizure. This was of course a fraction of the amount to which the victim would have been entitled in damages. The concurrent penalties in respect of offences other than that of violent disorder and unlawful seizure are of no real significance in the current context.

Grounds of Appeal

10. The applicant summarised their grounds of appeal in their written submissions as follows: -

- I. The learned sentencing Judge erred in principle in imposing an effective three year custodial sentence on the Respondent for two serious offences the second of which was committed while on bail.*
- II. Failing to have adequate regard to the aggravating factors in the Unlawful Seizure Offence in Bill No. WDDP0094/2021 and failing to set an appropriate Headline Sentence*
- III. Undue regard to the Mitigation*
- IV. Structuring of the Sentences to effectively disregard the mandatory Consecutive Sentencing requirements and need for general and specific deterrent.*

The principal propositions into which the grounds resolved at the hearing are four in number.

11. Firstly, counsel for the applicant submit that the Court fell into an error of principle because by suspending the sentence for violent disorder charged in Bill No: WDDP0018/2020, he thereby set at nought the statutory obligation to order that the sentences imposed on Bill No: WDDP0094/2021 be served consecutively pursuant to the provisions of section 11(1) of the Criminal Justice Act 1984, as substituted by section 22 of the Criminal Justice Act 2007.

12. Secondly, it was submitted that the suspension of the entirety of the sentence of eighteen months for violent disorder was an error in principle having regard to the gravity of the offence.

13. Thirdly he says that the headline sentence imposed in respect of the unlawful seizure was insufficient in length having regard to the fact that the maximum penalty for that offence is one of fifteen years imprisonment and that it fell at a higher level in the middle range of gravity than a headline sentence of six years indicated, thereby giving rise to such an error.

14. Finally, it was submitted that one had to have regard to the final outcome, regardless of how it had been arrived at, which was simply too low having regard to all of the relevant factors, including deterrence. Counsel for the applicant submitted that there was an effective reduction of 3 years (50%) from the headline sentence on the Bill No: WDDP0094/2021 to leave an effective custodial sentence of three years. It was said that this error was compounded where the Court fully suspended the earlier 18-month sentence which, by operation of law, had to be consecutive to it; such a contention is similarly advanced that this too was an error in principle.

15. These errors, it is said, give rise to, or, constitute, a substantial departure from the applicable norms for the sentencing of cumulative offending. We do not need to repeat here the principles of law applicable to prosecution applications for review.

16. It is plain that the judge had regard to all relevant factors when arriving at his decision but that is not the point – he fell into error, it is said, notwithstanding that he had regard to them and that is a perfectly rational proposition.

17. We think that in the light of the previous convictions of the respondent including violent disorder, the judge fell into an error of principle in suspending in its entirety the sentence of eighteen months for that offence charged on Bill No: WDDP0018/2020. We further consider that the sentence imposed in respect of the unlawful seizure, aggravated as it was by the assault (as well as the multiple breaches of road traffic legislation), the fact that it was committed whilst he was on bail – an aggravating factor in itself, his previous record of offending, and the specific necessity for deterrence both personal and general mean that the offence should have attracted a headline sentence in the upper part of the midrange. rather than at or near the bottom. We note that compensation in the amount of €7,000 was paid. We have considered the recent ruling of the Supreme Court in *DPP v Stephen Duffy* [2023] IESC 1 with particular regard to the judgment of O'Malley J on that issue. We think that in the present context it is appropriate to refer to the following extract therefrom: -

79. *...It is apparent that the voluntary payment of compensation by offenders has long been a feature of the Irish sentencing process. Practical experience shows that such payments will rarely afford full compensation, particularly in cases of serious injury, but they are nonetheless seen as relevant to the outcome of the process... The relevance of the voluntary offer of compensation lies in its relevance to the assessment by the court of the personal circumstances of the offender. It represents a full acceptance by the offender, not only that he or she has committed a criminal offence, but that he or she is responsible for the harm done by that offence... That may be implicit even if, for example, the money has been raised by family and friends, since they may be in a position to exert pressure on the accused to change his ways. The offer can still be seen as evidence that the offender is remorseful and is willing to attempt to undo the harm to some extent. This is clearly relevant to the question of rehabilitation.*

80. *A voluntary offer is, therefore, a relevant mitigatory factor in all cases, to be considered as part of the relevant personal circumstances of the offender. However, it is essential to realise that acceptance of compensation does not preclude the imposition of a custodial sentence. Otherwise, there is a risk of undermining the constitutional principle of equality before the law by implying that a person with means can "buy" a lighter sentence. It must therefore be accepted that some cases are simply too serious, in that the gravity of the harm caused is so significant, that the acceptance of responsibility, remorse and rehabilitation cannot outweigh the need for a sentence of imprisonment.*

81. *The legislature has provided an additional mechanism for ordering payment, capable of use in the absence of the consent of the offender. That mechanism may result in order being made "instead of or in addition to" dealing with the accused in any other way. I think that it is important to be clear about the difference between a voluntary offer of compensation and an order under s.6 of the Criminal Justice Act 1993, and also the difference between an order made instead of another order, and one made in addition to another sentence.*

82. *The structure of the provision is such as to make it clear that the reparation envisaged is intended for the benefit of the injured party and must to at least some extent relate to the damage caused to that party. It does not depend on the attitude of the*

accused and can be made without his or her consent. However, its availability depends largely on the court's objective assessment of the accused's means...

and she went on to say *inter alia*: -

90. *In my view, it follows from the foregoing that, if an accused person makes an offer of compensation and the sentencing court finds that there are realistic grounds for thinking that the offer does indeed reflect acceptance of responsibility, remorse and a prospect for rehabilitation, such a voluntary offer should not be converted into a s.6 order. To do so would mean depriving the accused of the mitigatory element. Further, if a suspended or part-suspended sentence is in any event appropriate in the circumstances of a particular case, I do not see a difficulty in making the suspended element conditional on payment of the sum offered.*

91. *The appellant is, therefore, entitled to a level of credit for the offer and actual payments... However, while this is not a matter that can easily be dealt with in terms of hard and fast rules..."*

18. We think that the judge accordingly fell into errors of principle in sentencing on both Bills. We therefore quash the sentences for violent disorder on Bill No: WDDP0018/2020 and for unlawful seizure on Bill No: WDDP0094/2021. We do not quash the sentence for the sentence of assault causing harm even though it might be argued that the headline sentence should be one of five years – there is simply no practical necessity to engage with that sentence or to quash it. We proceed to resentence *ab initio*.

19. We have regard to the evidence before the trial court which we have sought to summarise, together with certain additional material placed before us. Counsel for the respondent has proffered, with the applicant's consent, a number of documents showing that Mr Delany has engaged with services available to him whilst incarcerated. He has engaged with the Traveller Mediation Services training programme as well as undertaken a Crime Awareness Course with the Education and Training Board. He is currently participating in a second level mediation training course, a "setting learning goals" course and a course in resilience training. A letter from Merchants Quay Ireland also outlined that he has been engaging with addiction services in prison having been attending a course in anger management and a twelve-week recovery group. It seems to us that these indicate the beginnings of rehabilitation.

20. We are also cognisant of the difficulties faced by his family and particularly the child who is ill. A report is available indicating that the incarceration has caused “*stress and upset*” for the child who was used to taking his medication from his father and having his father with him during periods of hospitalisation. In accordance with those principles elaborated in *Duffy*, we take the compensation provided into account as a mitigating factor although this is a case where a custodial sentence is warranted. We also have regard to the fact that the sum in question was not insignificant, in the light of the respondent’s means. Further, we think that in the nature of the offence of unlawful seizure and the previous record of the respondent, this is a case where personal and general deterrence are of considerable significance.

21. We consider the appropriate headline sentence in respect of the unlawful seizure offence to be one of eight years. We think that the appropriate headline sentence in respect of the violent disorder was correctly arrived at by the judge when he nominated eighteen months. We think that the appropriate reduction for mitigating factors from the nominated headline sentence for unlawful seizure should be two years. Accordingly, we impose a sentence of six years imprisonment in respect of that offence. We think that a post-mitigation sentence in respect of the violent disorder of twelve months is appropriate. So far as the latter offence is concerned, we have particular regard to the desirability of diminishing the antipathy between the respondent’s family and the Ward family because of a feud which apparently exists between them. The sentences on the second Bill will run concurrently *inter se* – we take a similar view to the judge in this respect. They too should commence on the lawful termination of the sentence on the first Bill.

22. Having regard to the provisions of the 1984 Act, as amended, the sentence in respect of the unlawful seizure and the others imposed on the same Bill must be served consecutively to that imposed for violent disorder. This would give rise to a cumulative sentence of seven years imprisonment. In arriving at those terms, we take into account the decisions to the effect that when a sentence is increased on appeal, one must have regard to the consequences for an individual of such a change adverse to him. Having arrived at such a cumulative period of imprisonment of seven years (with suspension of the last year of the sentence for unlawful seizure as hereinafter dealt with) we now apply the principle of totality.

23. Taking the matter in the round, we think that the sentence is appropriate for that totality of criminality (with a suspensory period), in the personal circumstances of the respondent. An adjustment under that heading does not accordingly arise.

24. We think that to encourage rehabilitation and, indeed, to facilitate the respondent's safe return to the community, the last year of the sentence for unlawful seizure should be suspended. We do so on the same terms as those imposed in the Circuit Court. The sentence in respect of violent disorder will date from the 27th of October 2021 being the date fixed by the Circuit Court. By definition, no specific date arises in respect of the sentences imposed consecutively since they will merely follow the lawful termination of the preceding sentence.