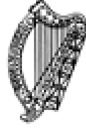

THE COURT OF APPEAL

Neutral Citation: [2025] IECA 33

Record Number: 182CJA/2024

Edwards J.
Kennedy J.
Burns 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 -

Cathal Crotty

RESPONDENT

JUDGMENT of the Court delivered *(ex tempore)* on the 23rd day of January 2025 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s.2 of the Criminal Justice Act, 1993, seeking

a review on grounds of undue leniency of a sentence of 3 years wholly suspended imposed for the offence of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997.

Factual Background

2. The factual background is that the respondent was socialising in a bar in Limerick with a group of 5 male friends on the night of the 28th of May 2022. The victim, Ms. O'Brien was working that night in a different bar. In the early hours of the morning of the 29th of May 2022, the respondent and his group of friends were walking along O'Connell Street in Limerick which can be seen on CCTV footage gathered by the Gardaí. The victim, who was walking home from work could be seen walking behind that group with a female friend.

3. Some of the respondent's group shouted the word "faggot" towards a male across the street, causing the victim's friend, and then the victim, to politely request that they desist, with Ms. O'Brien saying, "*Ah now don't be using them kind of words*".

4. She then described that all she could remember was one of the men shouting very aggressively towards her, roaring "faggot" at her on several occasions and saying "dirty lesbian" to her. This transpired to be the respondent who then proceeded to grab her by the hair and to punch her in the face repeatedly. The respondent held on to her head with his left hand while punching full force into her left eye, nose, cheek and head. She tried to push him away but failed as he had such a strong hold of her hair. Ms. O'Brien described getting six right hook punches into the same area of

the head and after those punches, the assault continued as she fell to the ground, despite the victim shouting "please stop" repeatedly. The assault continued with the victim on the ground attempting to cover and defend herself, at which point she believes she lost consciousness. The assault only ended when a passerby, Mr Teer intervened and successfully stopped the attack. The respondent fled the scene, while some of his friends remained.

5. Ms. O'Brien attended UHL, but left as she was hysterical, confused, frightened and in pain. She attended A&E in St. John's hospital in the afternoon following the attack presenting with a possible fractured nose, concussion, facial swelling and facial injuries, and obviously in severe pain. It transpired she had a fracture to her nose which ultimately did not require surgery.

6. The respondent was identified and interviewed by gardaí. He initially claimed to have acted in self-defence after the victim punched him first, and that he stopped the attack of his own volition, however, he was then shown the CCTV evidence, vindicating the victim's account of an unprovoked attack and that a third party intervened. He accepted that the CCTV footage displayed what had actually occurred, and expressed regret upon seeing photos of the victim's injuries.

7. The respondent was also asked about a Snapchat message which he had sent in the aftermath of the assault, in fact on the afternoon of the attack saying, "two to put her down, two to put her out". He stated that, in sending the message, he was trying to "play it cool".

8. Photographs were furnished to the court below showing the victim's injuries and she read her victim impact statement setting out her physical injuries, the necessity for follow up tests and the psychological impact of this assault upon her.

9. The defence called Commandant Togher who gave evidence of the respondent's service record of 3 ½ years and expressed the view that this conduct was most out of character for the respondent and the witness expressed his surprise that he engaged in conduct of this nature.

Personal Circumstances of the Respondent

10. The respondent was 22 years of age at the time of sentence and 20 years of age at the time of the offence. The respondent was a serving member of the defence forces at the time of the offence and sentence and had a good service record. He has no previous convictions, or convictions since the offence the subject of the within application.

Sentencing Remarks

11. The sentencing judge noted that this case was one of the "most outrageous" that he had come across in recent times, and that the conduct of the respondent was "utterly appalling" in conducting a "most grievous and egregious" assault.

12. He considered the respondent's training as a member of the defence forces and resultant physical strength to be an aggravating factor. He also considered the significant injury inflicted to be an aggravating factor. He remarked negatively on the respondent's attempt to paint the victim as

having incited the attack and in the same vein took a very dim view of the Snapchat message posted by the respondent.

13. In mitigation, the sentencing judge had regard to several factors including: the signed guilty plea, that the respondent had no previous convictions, that he was a serving member of the defence forces, with the judge remarking that a custodial sentence would end his career with the defence forces.

14. The sentencing judge had regard to the victim impact statement of Ms. O'Brien which she read in court, which he considered to be "poignant", "erudite" and "frightening".

15. The sentencing judge nominated a headline sentence of 4 years, which he reduced to 3 years for mitigation. He wholly suspended this sentence for a period of 3 years on the condition that the respondent pay the victim a sum of €3,000 within 2 years.

Grounds of Application

1) *The learned sentencing Judge having indicated the headline sentence might be as high as 4 years erred in proceeding to impose a 3 year fully suspended sentence which gave excessive discount for the guilty plea even allowing for the accused having come forward from the District Court by way of a signed plea of guilty.*
2) *The learned sentencing Judge erred in that he placed insufficient weight on the aggravating factors.*

3) *The learned sentenced* (sic) *Judge erred in that he failed to give sufficient weight to the victim impact evidence.*
4) *The learned sentencing Judge erred in giving excessive credit for the mitigating features and the personal circumstances of the Respondent and the potential effect of a prison sentence on the Respondents employment in the army.*
5) *The learned sentencing Judge erred in principle in suspending the whole of the sentence in all of the circumstances of this case.*
6) *The learned sentencing judge erred in principle in failing to attach any, or any sufficient, weight to the principle of punishment.*
7) *The learned sentencing judge erred in principle in failing to attach any, or any sufficient, weight to the principle of general deterrence both in respect of the respondent and of other offenders in the future.*
8) *In all the circumstances the sentence imposed was unduly lenient.*
9) *Such further grounds as may be advanced at the hearing of this application.*

Submissions of the Director

16. We move to the submissions of substance in the within review where the focus rests on the suspension of the entire sentence and the contention that the ultimate sentence did not reflect the gravity of the offending conduct. The Director strongly contends that the ultimate sentence did not take account of the principles of general or specific deterrence and that this was a case where it was necessary to incorporate a custodial element to

the sentence. It is said that while the sentencing judge determined that the Snapchat message was an expression of "pride in striking a defenceless female", the judge ought to have considered them in the context of general deterrence. It is argued that the judge failed to take proper account of either general or specific deterrence in failing to impose a custodial element to the sentence, and reliance is placed on the decisions of *People (DPP) v Lyons* [2014] IECCA 27 and *People (DPP) v DO'S* (Court of Appeal, 6 December 2019).

17. While the Director does not take issue with the reduction of one year afforded for mitigation, the submission is made that an excessive discount was afforded for the guilty plea and the other mitigating factors and that there was insufficient mitigation present to justify wholly suspending the sentence of 3 years imprisonment leading to a sentence which failed to reflect the gravity of the offending.

18. The Director places reliance upon the recent Supreme Court decision of *People (DPP) v John Faulkner* [2024] IESC 16 and the comments of Charleton J. in finding that a signed plea of guilty may deserve up to a one third reduction from the headline sentence depending on the circumstances.

19. The Director submits that the sentencing judge gave excessive credit for the respondent's employment within the Defence Forces. Reliance is placed on Thomas O'Malley's *Sentencing Law and Practice* (3rd Ed. 2016), and the commentary therein to the effect that there are ethical issues in accounting for consequential loss of employment in sentencing, as it may

lead to the logical outcome of one offender receiving a more severe sentence than another similar offender, by virtue of the fact that they did not have a job or other source of wealth to lose as a result of conviction.

20. The Director seeks to distinguish the case of *People (DPP) v O'Meara* (*Ex tempore*, Court of Criminal Appeal, 10 March 2003*)* where a 6 month prison sentence was suspended on appeal because it would have led to the appellant's dismissal from the defence forces, such would have had an effect on the dependants of the convicted person which is not a factor in the instant case. Further, the Director seeks to distinguish that case on the basis that the convicted party was not himself involved in the infliction of violence directly and had merely prevented others from fleeing violence, and those that had actually inflicted violence had also received suspended sentences.

21. The Director surveys several cases involving sentencing of serving members of the defence forces, citing *People (DPP) v Gilmore* (Dublin Circuit Criminal Court, 1 May 2014) and *People (DPP) v Richard Cleary* (Court of Appeal, 19 May 2014). The Director notes that "different information has been available in different cases regarding the effect of suspended sentences on the careers of a soldier."

22. The Director submits that the nomination of a figure for compensation at €3,000 lacked a reasoned basis, although in truth there was little focus on this submission on the oral hearing of this appeal.

23. The Director submits that the evidence of Commandant Togher extended to good character evidence on behalf of the accused and submits

that the prosecution was not on notice that this witness would be called, and no documentation had been supplied in advance. We do not consider this a point well made; the defence are entitled to call oral evidence without notice to the prosecution. Objection may be taken by the prosecution to the receipt of evidence if appropriate.

Submissions of the Respondent

24. The respondent submits that the sentencing judge correctly identified the relevant aggravating factors and considered them appropriately in arriving at a 4 year headline sentence.

25. Moreover, that the sentencing judge applied the discount of 1 year from the headline accounting for the signed plea of guilty in line with the parameters identified in *Faulkner.* In response to the Director's contention that excessive weight was given to the mitigating features, the respondent submits that there were several mitigating features beyond the respondent's employment in the defence forces, specifically: the signed guilty plea, the absence of previous convictions, previous good character, and expression of remorse.

26. The respondent contends that the sentencing judge engaged fully with the victim impact evidence, having heard the victim give her statement personally, and having engaged with her while she gave evidence. The respondent submits that the sentencing judge's regard to the impact on the victim was evident in his sentencing remarks, and central in his nominating a headline sentence of 4 years towards the higher end of possible sentences. The respondent says that the making of a compensation order

as a term of the suspended sentence is a "clear indication" of the weight the sentencing judge attached to the victim impact evidence.

27. In relation to the previous good character of the respondent, it is submitted that this finding was supported by evidence of Garda Brian Carroll and Commandant Togher at the hearing in the court below. It is submitted that the absence of previous convictions is ordinarily treated as a significant mitigating factor. In support of this, reliance is placed upon *DPP v Perry* [2009] IECCA 161 and commentary in O'Malley's *Sentencing Law and Practice.*

28. It is submitted that the sentencing judge was justified in accounting for remorse in mitigation in light of evidence given by Garda Carroll at the sentencing hearing to the effect that the respondent had expressed "remorse and shame".

29. The respondent submits that, while this was not the sole factor which caused the sentencing judge to suspend the sentence, he was entitled to place some weight on the effect of any sentence on the respondent's future in the army, having regard to the evidence of Commandant Togher. The respondent places reliance on *DPP v O'Meara* in support of this.

30. The respondent rejects the Director's contention that the sentencing judge erred in suspending the whole of the sentence, submitting that here is no statutory requirement to impose an immediate custodial sentence. The respondent relies on commentary in O'Malley's *Sentencing Law and Practice* in this regard. The respondent submits that the jurisprudence on undue leniency applications stresses that considerable weight should be

attached to the stated reasons of the sentencing judge, and that the judge in this case gave clear and cogent reasons for his decision.

31. In response to the contention of the Director that insufficient weight was afforded to the objectives of general deterrence and punishment in imposing a fully suspended sentence, the respondent submits that these objectives can in fact be achieved through a suspended sentence. The respondent relies on the case of *People (DPP) v Damon Buggy* [2023] IECA 34.

32. Finally, the respondent submits that while the sentence might be considered lenient, it is not unduly so, and was delivered by the sentencing judge in a measured, careful, and balanced manner.

Discussion

33. The principles for determining undue leniency reviews are well established, commencing with the decision in *People (DPP) v Byrne* [1995] 1 ILRM 279. The starting point for our consideration is that the onus rests on the Director to establish that this sentence was unduly lenient so that the divergence between the sentence imposed and that which ought to have been imposed amounts to an error of principle before this Court may justifiably intervene.

34. The sentence imposed must be proven by the Director to constitute a substantial departure from the norm and one which was outside the margin of appreciation afforded to a sentencing judge.

35. Offences of assault may range quite extensively in terms of gravity and the law has changed since this offence regarding the maximum penalty

for s.3 offences. However, the maximum penalty available at the time of this offence is one of 5 years imprisonment.

36. Sentencing an individual is complex; the judge must sentence for the offence as committed by the offender before the court. That is a well-established principle which needs no further elucidation. A judge must take account of the aggravating factors and the mitigating factors if present and come to a proportionate sentence and one which properly reflects the gravity of the offending conduct.

37. Having carefully reviewed the evidence in the court below, it is clear that the attack on the victim was of an inherently serious nature. The judge in the court below identified the aggravating factors and indeed no issue is taken by the Director with the nomination of 4 years by way of headline sentence and the reduction of one year afforded for mitigation.

38. In truth, on the issue of mitigation, should the judge have decided to give a reduction of up to 1/3 for the signed plea of guilty, this would have resulted in a sentence of 2 years and 8 months, before any consideration of the balance of mitigation. The judge however approached sentence by reducing the notional sentence by 1 year and also by suspending the entire sentence to reflect the mitigation. It is primarily on this latter aspect that the Director founds this review. She also contends that the ultimate sentence imposed did not reflect the gravity of the offending conduct and that the principle of general deterrence was not properly addressed.

Decision on the Director's Application

39. We will consider firstly the issue of general deterrence; there are, as stated in *Lyons*, certain cases which "inculcate in women a sense of apprehension, or even fear, when walking quiet or lonely places on their own". The decision in *D.O'S.* also analysed the issue of deterrence, where Edwards J. stated:-

> *In our view this was conduct of such gravity that it required to be punished by an element of hard treatment in the interests of communicating society's deprecation of it and societal censure.*
>
> *Moreover, quite aside from required retribution, the sentencing process ought to have incorporated an element of actual custody to send a deterrent message, both specific and general.*

40. It is the position in the present case that the victim was not walking on her own, however, the fact remains that people should be entitled to walk the streets without fear at night whether alone or in the company of others. Attacks on individuals, whether male or female are far too common, and it is necessary that such conduct be punished in the appropriate manner in order to communicate society's deprecation of such conduct. This may require a custodial sentence in order to give effect to general deterrence.

41. A sentence must be proportionate to the gravity of the circumstances in any given case but the element of general deterrence is important for the obvious reason; that is to deter others from behaving in a similar

fashion. In our view, the sentencing judge failed to impose a sentence which properly reflected this principle.

42. There can be no doubt that this was a brutal and unprovoked assault on a defenceless woman who had properly asked the males to refrain from unacceptable homophobic abuse. The respondent reacted in the most appalling manner by viciously assaulting his victim and only for the assistance of a good Samaritan who had the courage to intervene, this attack could have had even more serious consequences. Assaulting any person in any manner is reprehensible, but we have repeatedly stated, to attack someone while on the ground can have the most serious and often in fact, fatal consequences.

43. Added to this cowardly attack was the further cowardice and callousness on the part of the respondent in running from the scene and leaving his victim bloody and injured on the ground. He then compounded these actions by posting a reprehensible message on Snapchat and, frankly his motivation in so doing is incomprehensible. This message shows a complete disregard and enormous disrespect for his victim and society in general. When interviewed by the Gardai, he sought to deflect the blame and only when confronted with the evidence on CCTV did he make admissions.

44. We have stated the above in order to ensure that the seriousness of this offence is readily apparent. We agree with the Director that the sentencing judge was correct in placing this offence at the upper end of the range in nominating a notional sentence of 4 years imprisonment. We

agree to an extent that the reduction for mitigation of one year was within range, albeit that a greater reduction could have been afforded in light of his previous good character and the signed plea. However, where we diverge from the approach of the sentencing judge is in the suspension of the entire sentence which he did in light of the mitigation. Moreover, we are satisfied that the principle of general deterrence is not reflected in the ultimate sentence imposed.

45. This was a case where the custody threshold was clearly passed, as acknowledged by the sentencing judge. The consequences for the victim were traumatic, both physically and psychologically. The fact that the respondent was in all likelihood to lose his employment with the defence forces was not a ground for avoiding a custodial sentence. The loss of occupation as a mitigating factor depends on the circumstances of any given case, more weight may be assigned, for example, should there be dependents. A court cannot in general give too much weight to the inevitable consequences of a sentence which comes about as a result of an accused person's own actions. If this were a case where there was a delicate balance between a custodial sentence and a non-custodial sentence, in other words, if this case were on that cusp, then perhaps greater weight would be afforded to the loss of one's livelihood, but this is not one of those cases.

46. We are of the view, having regard to the gravity of the offence, as acknowledged by the sentencing judge himself, that an error in principle

arises in that the judge gave undue weight to the mitigating factors and did not properly take account of general deterrence.

47. Also, while it is no part of sentencing to exact vengeance, this was nonetheless conduct which deserved to be censured and punished in a sufficiently meaningful way, and it was not.

48. Accordingly, we are of the view that the sentence imposed is a substantial departure from the appropriate sentence and is unduly lenient and so we will quash the sentence imposed and proceed to re-sentence *de novo* as of today's date.

Re-sentence

49. In re-sentencing the respondent, we have considered the evidence, the aggravating factors and the mitigating factors. The aggravating factors are very clear and there were also several mitigating factors including the signed plea for which significant credit may be given, up to 1/3 in accordance with *Faulkner*, depending on the circumstances, the admissions ultimately made, the absence of prior convictions, his previous good character, his shame and remorse, the compensation offered to reflect that remorse and his employment history.

50. There were concerns expressed on the respondent's behalf regarding a letter received since his sentence which caused the Gardai to prioritise any calls to his residence. In that latter regard, we simply state that people cannot take the law into their own hands.

51. We note that the respondent has since been discharged from the defence forces but as we have said, this does not in the present case lead to a non-custodial sanction. The weight to be given to the loss of employment is negligible in the present case; he is a man without dependents and the loss of his employment has come about as a consequence of his own conduct. A distinction may be drawn regarding, for instance, a person with mental health difficulties which would make serving a sentence more difficult for that person, whereas the loss of employment in the present case is a direct consequence of the respondent's own actions, but will not lead to greater hardship in serving his sentence. This case is very clear cut, the custody threshold has been passed and the respondent must be punished for his actions.

52. The appropriate headline sentence is that as nominated by the sentencing judge, one of 4 years imprisonment bearing in mind that the maximum sentence is that of 5 years imprisonment.

53. In light of the mitigation present, we will reduce the 4 years to that of 3 years and we will suspend the final 12 months of that sentence on the mandatory condition that the respondent be of good behaviour for a period of 1 year.

54. Insofar as the compensation offered is concerned, that may be paid to the injured party forthwith and we do not make that a condition of the suspension.