



THE COURT OF APPEAL

196CJA/18

The Chief Justice
The President
Kennedy J.

IN THE MATTER OF
SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

GARY O'MAHONY

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 4th day of December 2019 by Ms. Justice 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 imposed on the respondent on the 14th June, 2018 in Cork Circuit Criminal Court. The respondent pleaded guilty to a count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997. The sentencing judge applied the provisions of the Probation of Offenders Act 1907.

Background

2. By way of background, the assault in question occurred on the 11th November, 2017 at the Farm in Curraheen, Bishopstown, Cork during the course of a soccer match. During the match the injured party, one Michael O'Donovan, committed a foul and the referee intended giving him a yellow card. A few words were exchanged and the respondent, who was a member of the opposing team punched the injured party on the right side of his face knocking him unconscious. The respondent walked off the pitch and an ambulance was called and the injured party was taken to Cork University Hospital. The injured party suffered concussion, a damaged cheekbone, loose teeth, cuts to the inside of his mouth and damage to his right eye.
3. The respondent went to Togher Garda Station on the 18th November 2017 and arranged to speak with members of an Garda Síochána at which point he cooperated fully with the investigation.

The Sentence

4. In imposing sentence on the 14th June, 2018 the sentencing judge remarked as follows:-

“I suppose Mr O'Mahoney needs to be aware that he is lucky that he is not facing a much more serious charge and there could have been a much more serious result of his action on the day. His surrounding circumstances seem to worsened considerably since this particular incident and it's admitted that he lost his job as a result of it. And I am also impressed with the evidence that was given by the Detective Sergeant in relation to the matter and I am struck by how fair he was to

the accused man. I think in fairness to everybody, it must be acknowledged that he has expressed remorse at the earliest opportunity; he did present himself to the Gardaí. It is said that it is out of character and it would appear from his actions on the day that he was ashamed of what he had done in the light of the presence of his young son and, I suppose, that shows a certain amount of insight into the, I suppose, the seriousness, the gravity of what had occurred at what is supposed to be a hobby. There are risks associated with soccer and playing sport, but an attack like that is not acceptable and it is important in light of that to mark it.

So I will mark it and say that it is most regrettable that these types of incident would occur in – as I say, it's something that people are supposed to enjoy rather than possibly have to endure and one needs to be confident that in the kind of ordinary vicissitudes, if you like, of a soccer match that you would expect to leave the pitch uninjured, particularly in light of the fact that this was a deliberate assault. So in all of the circumstances, I take into account that he has one previous conviction. It seems to be around the same time. I suppose, Mr O'Sullivan, I think it's important that you explain to him that the fact that he is before the Circuit Court is actually much more serious than a section 3 possession. It indicates perhaps that there is something that your client should examine in his life. I will mark it by - I will mark the conviction and I will apply the Probation Act under section 112 (sic) of the Probation Act 1908, but he will not receive any benefit."

Personal Circumstances of the Respondent

5. During the course of sentencing, the Court heard that the respondent was a twenty-seven-year old man at the time of offending. He has a nine-year old child and one previous conviction for the unlawful possession of drugs for his own use for which he was fined €200. The respondent was a trainee butcher at the time of the offending but subsequently lost his job and his earning capacity has been reduced as a result. The Court also heard that the respondent had raised the sum of €2,300 by way of compensation to be paid to the injured party.

Submissions of the appellant

6. The appellant submits that the trial judge erred in the manner in which he applied section 1(2) of the Probation of Offenders Act, 1907 as it provides for a conditional discharge whereas in this case the respondent was discharged unconditionally.
7. The appellant submits that given the seriousness of the offence, including that it occurred during a game of soccer with no opportunity for the victim to protect himself and resulted in a serious injury, an immediate custodial sentence was required. Therefore, an unconditional discharge was a significant departure from what the sentence ought to have been.
8. The respondent submits that the trial judge gave excessive weight to mitigating circumstances. The plea of guilty must be seen in the light of the evidence linking the respondent to the crime. It is accepted that the respondent did co-operate, and the assault was not pre-planned, but it did happen in the course of a soccer game open to

members of the public including a child. The respondent did lose his job, but, it is said that this should be weighed with the financial detriment and interference with the victim's job. The appellant further submits that the sentencing judge did not have sufficient regard to the respondent's previous conviction albeit a summary matter and the respondent was not to be excused because of his youth at 28 years of age. The respondent submits that the sentencing judge did not regard the matter as trivial within the meaning of the Act of 1907.

Submissions of the respondent

9. The respondent accused characterises the central complaint of the appellant as being that the sentencing judge went too far in applying the Probation of Offenders Act, 1907. In reply, the respondent relies on *The People (DPP) v. Jagoe* [2008] IECCA 128 IN WHICH THE Court considered an undue leniency appeal where the sentencing judge had applied the Probation Offenders Act 1907. The Court stated as follows: -

"It has to be accepted that in circumstance if an assault of the nature that occurred in the present case, it must be very rare indeed that the provisions of the Probations of Offenders Act would be applied but that does not mean that it may not be applied by the judge since it may apply in all circumstance or to all offences that are punishable with imprisonment."

The Court ultimately decided that the sentencing judge was entitled to come to the view which he did in applying the Probation of Offenders Act, 1907.

10. In the instant case the respondent accepts that the sentencing judge's reliance on the Probation of Offenders Act, 1907 was lenient but it is submitted that it was not unduly so and did not represent a gross departure from the norm. In this regard the respondent relies on *The People (DPP) v. Stronge* [2011] IECCA 79 wherein it was stated that to establish undue leniency it must be established that the sentence imposed constituted a substantial and gross departure from what would be the appropriate sentence in the circumstances, in the absence of guidelines or specifies tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose.

Discussion

11. The principles concerning a review of sentence are well settled commencing with the decision of the Court of Criminal Appeal in *The People (DPP) v. Byrne* in 1994. In essence a court will not intervene in the sentence imposed by the lower court unless the sentence is a substantial departure from the appropriate sentence. The principles were somewhat restated in *DPP v Stronge* in 2011 and it is clear that the disparity in the sentence imposed and the appropriate sentence must amount to an error in principle before this Court may intervene.
12. The principal argument advanced on behalf of the Director of Public Prosecutions is that the application of the Probation of Offenders Act was a significant departure from the sentence which ought to have been imposed and amounts to an error of principle. Furthermore, it is contended that the judge erred in unconditionally discharging the

respondent. The Director also contends that excessive weight was afforded to the mitigating factors. Whilst the appellant says that an unconditional discharge is not available to offences tried on indictment, the real focus of the appeal is whether the Probation of Offender's Act ought to have been applied at all.

13. It is the position that a conditional discharge may be granted by the Circuit Court and such requires an accused to enter into a recognisance.
14. We have considered whether the judge erred in applying the Probation of Offenders Act assuming that his intention was to apply s.2 (2) of that Act, in that regard, he was entitled to have regard to the factors under the 1907 Act and the relevant provision of the Act provides as follows at subs. (2):-

“(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of the opinion that, having regard to the character, antecedents, age, health, or mental condition of the person in charge, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.”

Conclusion

15. This was, without doubt a serious assault. The injuries sustained by the victim were significant necessitating surgery and which impacted on his studies and career opportunities. The terms of s.2(2) were expressed disjunctively and so a court may, while not finding out the facts of a case to be trivial, nonetheless apply the Act if other factors are present.
16. The instant case, as we have observed involved a serious assault. We do not believe it was a case on its facts for the application of the Probation of Offenders Act, and so in that respect we are satisfied that the judge erred in principle. The assault came about in the course of a soccer match and was unprovoked causing significant injury to the victim. That an assault takes place in the course of a sporting occasion, such as a football match, does not take away from the fact that it is nonetheless a criminal act.
17. The application of the Probation of Offender's Act is a substantial departure from the appropriate sentence in this instance and so we find the sentence unduly lenient in terms of s.2 of the 1993 Act
18. We therefore quash the sentence and proceed to resentence the respondent as of today's date.

Re-Sentence

19. In resentencing, we are satisfied that the offence merits a pre-mitigation or a headline sentence of three years' imprisonment. However, we will reduce that sentence to one of eighteen months' imprisonment in view of the signed plea of guilty, the respondent's cooperation with the authorities, the fact that he approached the Gardaí and to the other mitigating factors.
20. Taking into consideration the effort since to continue with his rehabilitation, the fact that he has not come to Garda attention since, and to permit of the disappointment factor in receiving a sentence at this remove from the offence we will suspend that sentence on the condition that he be of good behaviour for a period of two years.