



THE COURT OF APPEAL

Record Number 6/19

**McCarthy J.
Kennedy J.
Ní Raifeartaigh J.
BETWEEN/**

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOSEPH FRASER

APPELLANT

**JUDGMENT of the Court (ex tempore) delivered on the 28th day of February 2020 by
Ms. Justice Kennedy**

1. This is an appeal against sentence. The appellant pleaded guilty to a count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997, a count of theft contrary to s.4 of the Criminal Justice Theft and Fraud Offences Act, 2001 and a count of criminal damage contrary to s.2(1) of the Criminal Damage Act, 1991. The appellant received a sentence of four years' imprisonment with the final eighteen months suspended on terms.

Background

2. This appeal relates to events which occurred on 19th September 2017 at the home of the injured party who lived there with her two children. The injured party was the former partner of the appellant. They had been dating on and off for a number of months and at the time in question they were attempting to patch up the relationship.
3. The appellant arrived at the injured party's house in his mother's car. He appeared to be intoxicated and followed the injured party into her house. He indicated he was going to the shop to get more beer and she was worried about him driving while intoxicated so she hid the car key. When the appellant discovered that she had done this, he became very angry. He left the house and came back in and began punching the injured party in the ribs. He also punched her in the face and head repeatedly. The injured party described how the appellant got a wooden spoon and broke it over her head. He proceeded to break through her kitchen door. She attempted to escape out the back garden through a dog cage, but she became trapped and the appellant began punching her again. He then rammed her head off the garden railings and grabbed her by the hair and pulled her from the ground to a standing position. He dragged her back into the kitchen where he then kicked her head with steel-toe shoes. He then headbutted her and punched her in the face again. Eventually, the injured party succeeded in escaping from the house and got a neighbour to contact the Gardaí.
4. When the Gardaí called, she noticed that her house key, car key, mobile phone, a photo album and a traditional Indian staff which she had kept as a souvenir were missing.

5. She was taken to hospital. She had sustained numerous injuries including extensive bruising to the arms and legs, severe facial bruising and a right periorbital haematoma.

The sentence

6. In imposing sentence, the sentencing judge identified the following aggravating factors: the breach of trust involved in perpetrating such extreme violence against a partner; the level of violence towards the injured party in her home, which involved the use of a wooden spoon, kicking the injured party with steel-toed boots, and banging her head against the door repeatedly. The sentencing judge also took into account the significant impact the offending had on the injured party both physically and psychologically.
7. Having assessed the aggravating factors, the judge stated that the offence lay in the upper range for a section 3 assault and identified a headline sentence of four years.
8. In terms of mitigation, the judge identified the following: The plea of guilty, the appellant's limited previous criminal history which included two convictions for drunk driving offences, but no convictions for violent offences, the expression of remorse, his excellent employment history, favourable testimonials on his behalf, his respectable background, and that his family and partner are supportive of him, the fact that he has a number of children who are dependent upon him, the probation report which identified that the appellant appreciated the role alcohol played in his offending behaviour, his mental health issues and stresses in his life relating to the collapse of his business, and the offer of compensation made as a tangible expression of remorse.
9. The sentencing judge concluded that she would impose a sentence of four years' imprisonment with the final eighteen months suspended on terms in respect of the count of assault causing harm with the other two counts taken into consideration.

Submissions of the Appellant

10. In written submissions, the appellant says that the sentencing judge erred in excluding the possibility of a non-custodial sentence from the outset. While the appellant accepts that the level of violence involved in the assault was high, there were numerous factors which justified the possibility of a non-custodial sentence, namely, the good character of the appellant, his excellent employment record, the dependence of his children on him and the admission of guilt and remorse.
11. The appellant further submits that the sentencing judge did not have adequate regard to the mitigating factors in the case, and the manner in which the sentencing judge imposed sentence did not make clear whether she took account of the mitigating factors put before the Court. It is submitted that the suspension of eighteen months was inadequate to take account of the mitigation and to have regard for his rehabilitation.
12. It is said by the respondent, that given the level of violence perpetrated on the injured party in her own home and the extent of her injuries both physical and psychological, the sentencing judge was perfectly entitled to conclude that it was a case that merited an immediate custodial sentence. Indeed, the respondent submits that if a non-custodial

sentence had been imposed, it would have constituted a very significant error in principle in light of the gravity of the offence and the culpability of the offender.

13. In respect of the mitigating factors, the respondent submits that the sentencing judge gave a full account of all the mitigating factors applicable to the case and significant weight was attached to such by suspending the final eighteen months of the sentence.

Oral Submissions by Mr Fraser

14. Mr Fraser who represented himself on appeal made further oral submissions at the hearing. He emphasised the submission that the sentencing judge failed to consider a non-custodial sanction in that she ordered the appellant to be lodged in custody immediately following the sentencing hearing on 2 October 2018, and that she said: -

“So, Mr Neville I am going to remand your client in custody. I will certainly direct a probation report if you feel he could benefit from an assessment by the Probation Service particularly in relation to his alcohol dependency and the very extreme demonstration of anger and violence that was in play on the particular date in question. So I can put it back for that purpose, but the circumstances of the offence are so extreme that a custodial sentence in this case is absolutely unavoidable.”

15. In this regard it is submitted that the judge erred in failing to consider a non-custodial sanction and had in effect, it is submitted, come to a determination prior to receiving a probation and welfare service report.

Discussion

16. We look to the nature of the assault on the date in question. It is our view that this was a most serious assault and that the judge was correct in identifying the gravity of the offence as being in the upper range.
17. The assessment of gravity incorporates a consideration of the culpability of an offender which includes both aggravating and extenuating factors. In this case there were many aggravating factors present including the prolonged nature of the attack, that the assault took place in the injured party's own home, a place where she was entitled to feel safe and secure. The injuries sustained by the injured party included injuries to her body and to her face. The Gardaí initially suspected a broken eye socket which was, fortunately for the injured party, not borne out by x-rays conducted in hospital. The contention of a suspected broken eye socket is the subject of further submission by the appellant and we will address this issue shortly.
18. Further aggravating factors include the physical and psychological impact on the victim, the use of the wooden spoon and the breach of trust.
19. We are, in the circumstances, wholly satisfied that the judge did not err in her initial view that the offence merited a custodial sanction. She was fully entitled to come to this conclusion when she adjourned the matter for the preparation of a probation report.

Having heard further submissions on the adjourned date, she proceeded to sentence the appellant.

20. It is also important to note, that the judge heard the evidence on 2nd October 2018, she heard on that date a plea in mitigation and therefore at that point and prior to acceding to the defence application for a probation report, the judge was fully aware of the factual matrix and the matters urged in mitigation on behalf of the appellant and it was in those circumstances that she acceded to the defence application to adjourn the matter for a probation and welfare service report.

21. Furthermore, in considering the headline figure of four years' imprisonment, we have regard to a recent decision of this Court on 20th February 2020 in cases concerning section 3 assaults in *The People (DPP) v. Martina McGrath, Mark Dolan and Dale Brazil* (Unreported, Court of Appeal, 20th February 2020), where Birmingham P. delivering the judgment of the Court said:-

"This Court would observe that it may be that judges have been too reluctant to consider placing the starting or pre-mitigation sentence at the maximum of five years imprisonment. For high end s. 3 assaults, a five-year headline pre-mitigation sentence is not excluded."

22. Therefore, we are wholly satisfied that the identified headline sentence fell well within the margin of appreciation of the sentencing judge.

23. As we have already mentioned, the appellant submits that the judge erred in stating that the injured party was hospitalised with a suspected broken eye socket. In that respect, we refer to the transcript of the evidence which was given by Detective Garda Collins on 2nd October 2018 wherein he stated: -

"The damage going all the way up and then just following on from that there are several pictures of the injuries that Ms Sandhu sustained throughout her body from the assault, both from her face, her head, her arms, her legs. As you can see judge, she suffered two black eyes from it. We had suspected initially judge, that Ms. Sandhu may have actually sustained a fractured eye socket, but it turned out just to be badly bruised."

24. Unsurprisingly, following the attack, the injured party was taken to hospital. There, she was x-rayed and it transpired that she did not have a broken eye socket. However, it was absolutely factually correct for the judge to observe that the injured party was hospitalised with a suspected break to her eye socket.

25. Moreover, in sentencing the appellant, the judge referred to the victim impact report which sets out the injuries sustained by the injured party which injuries do not include a suspected broken eye socket but refer to a swelling of the eye. It is, in our view, inconceivable that the judge sentenced the appellant on the basis of a fractured eye

socket. The appellant was sentenced for the actual injuries caused which were, we observe, extensive and as documented by the photographs which we have received.

26. Mr Fraser seeks to argue that the judge would have benefited from having DNA evidence arising from DNA analysis carried out, which seems to concern swabs taken from the steel capped boots.
27. In submissions before the Court below on 27th November 2018, the issue of a Newton Hearing was canvassed with the judge in the context that Mr Fraser did not wish to pursue such a hearing out of concern for the injured party. Clearly as the matter was not advanced in the court below, it is not an issue which can be addressed on appeal. It must be said also, that in many instances, a Newton Hearing is not pursued for the very simple reason that such may serve to lessen the weight to be given to the mitigating factors of a plea of guilty and an expression of remorse.
28. In the present case, such a hearing was not pursued by the appellant and so does not serve to impact in any negative fashion on his plea or expression of remorse.
29. It is said by the appellant that the judge failed to take into account that he was on bail without issue prior to the sentence hearing and also that he had five dependent children. In this respect the judge in sentencing the appellant was undoubtedly aware of the efforts made by him to address his issues. His counsel in the court below specifically adverted to the efforts he had made in the recent past before the sentence hearing. These were also referenced in the probation service report to which the judge had specific regard. She clearly knew that he had no previous convictions other than those concerning his two convictions for drunk driving. The judge also specifically referred to his dependent children.
30. However, even if the judge had not specifically referenced to these aspects of the plea in mitigation, in suspending the eighteen months of the sentence, she did so in order to take account of the mitigating factors and in order to incentivise rehabilitation. Rehabilitation is addressed in suspending the sentence on the terms she did in order to enable the appellant to address his addiction and emotional difficulties.
31. Finally, Mr Fraser says that the judge did not know that he would not be entitled to temporary release given the nature of his actions. This is firstly, not something which was canvassed before the judge of sentence and secondly, temporary release is a matter within the power of the executive and as such is not a relevant consideration or issue for a sentencing judge.
32. In those circumstances, we are satisfied that the judge did not err and accordingly we dismiss the appeal.