



**THE COURT OF APPEAL**

**Record Number: 209/2022**

**The President.  
Kennedy J.  
Burns J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**L.H.**

**APPLICANT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 7<sup>th</sup> day of December 2023 by Ms. Justice Isobel Kennedy.**

- 1.** This is an appeal against severity of sentence where the appellant was sentenced to five years' imprisonment and 3 years' imprisonment on two counts of reckless endangerment of children contrary to s. 176(2)(a) of the Criminal Justice Act, 2006 with five counts of child cruelty taken into consideration. The sentences were imposed concurrently.
- 2.** Count 6 concerned the appellant failing to seek medical attention for her child for a significant injury to her genital area. Count 7 related to the appellant leaving her two children with her partner, creating a substantial risk of serious harm

**Factual Background**

- 3.** The appellant in this case is the mother of the two children concerned and was in a relationship with a man at the time of offending. The children were very young indeed, one child aged just over two years and the other child under two years. In or around November 2017, the appellant brought her daughter to A & E regarding extensive bruising on the child whereupon the child was examined. A determination was made that her injuries were non-accidental and an investigation commenced.

4. In April 2018, gardaí were alerted to a male, the appellant's then partner who was observed behaving roughly with the two young children in a shopping centre. Gardaí called to the family home on the same date with social workers where the appellant's daughter was seen in a very lethargic state, with extensive bruising on her face. She was taken to hospital that day where she was examined and found to have swelling to her face, bruising to her face, a bloody nose, bruised cheekbones, bruised back and a bite mark over her left thigh with other marks which appeared to be from her being grappled with or held firmly.

5. The next day a consultant paediatrician attempted to conduct an examination of her genital area however, the appellant refused to allow the child's nappy to be removed. Efforts were made by the appellant and her partner to remove the child from the hospital. The child was subsequently examined and noted to have suffered a significant vaginal and perineal injury one or more days prior to her being brought to the hospital. The consultant concluded that the child was the victim of both physical and sexual abuse and that she would likely suffer long term possible lifelong adverse sequelae as a result of her injuries.

6. X-rays disclosed a distal radial fracture to her left wrist which injury had occurred up to four weeks prior.

7. The second child was then examined and found to have abrasions to his face, including three bruises which appeared to be bite marks, one on his right forearm, two on his left posterior lower leg and three on his left posterior thigh. When interviewed, this child described the 'monster biting him' and being punched in the family home.

8. On the 11<sup>th</sup> April, the appellant was interviewed voluntarily. In relation to her daughter's genital injury, she denied that her daughter had been abused and claimed that this could be attributed to her partner wiping the child too vigorously.

9. On the 20<sup>th</sup> July, the appellant was arrested and interviewed three times. She ultimately made an admission of witnessing her partner physically abusing her daughter and that he threw her against a wall in the family home. She had never said anything of that nature either to Tusla or to the gardaí.

10. Staff at the creche attended by the children informed gardaí that they had noticed bruising to the girl's vagina, her groin and lower back and that they had noticed a bruise or scrape to the boy.

11. Reports furnished to the court set out the trauma caused to the children and the psychological difficulties which both children will likely have for the rest of their lives. A victim impact report was prepared by a social worker and by their foster carer. Suffice to say all reports make for harrowing reading.

#### **Personal Circumstances**

12. The appellant is the mother of three children. Reports were available to the court below including a detailed psychological report, together with numerous character references. She had experienced emotional and physical abuse in past relationships and has had difficulties in the past. She descended into drug and alcohol addiction from a young age. She has obviously suffered as a result of the loss of her children. The appellant has no previous convictions.

**13.** Prior to sentencing, the appellant attended a QQI course, psychotherapy sessions, and had some casual employment. She expressed remorse and was willing to engage with the probation services.

#### **Sentencing Remarks**

**14.** The sentencing judge nominated a headline sentence on count 6 of eight years' imprisonment, reduced to five years in light of the mitigation. On count 7, a headline sentence of six years' imprisonment was nominated and reduced to three years in light of mitigation.

**15.** The judge had regard to the booklet of mitigation, letters and testimonials from the appellant's family and friends which speak to her love of children and the previous difficulties encountered by her in her life, a health report detailing the appellant's previous suicidal ideation and depression, that she was cooperative and was not endeavouring to divest responsibility from her offending behaviour, that she suffered from substance misuse, that she has good insight into her criminal behaviour, that she was in an abusive relationship at the time of the offence and the control her partner had over her at that time, including managing her medication and that she has no previous convictions.

#### **Ground of Appeal**

**16.** At hearing, the appeal was confined to a sole ground:-

*"1. Upon hearing that the Appellant was a person with no previous convictions, who had engaged with mental health services and counselling services, and had a history of substance abuse issues, the learned Sentencing Judge erred in law in failing to suspend any portion of the custodial sentence imposed, in order to incentivise further engagement with such services, to maintain a drug-free status, to incentivise rehabilitation, and/or to discourage reoffending."*

#### **Submission of the Appellant**

**17.** It is submitted that the appellant was under the control of her partner at the relevant time, and heavily medicated, which, it is said, explains why the otherwise loving and caring mother ignored the tell-tale signs of abuse.

**18.** Reference is made to the "copious" amounts amount of mitigation material before the sentencing judge which it is said is demonstrative of the appellant's insight into her addiction issues, mental health issues and the instant offending.

**19.** Reliance is placed on the letter from a Probation Project which outlines the appellant's voluntary attendance, enthusiastic engagement and "*heartfelt remorse*." Further reliance is placed on the psychiatric report which concluded *inter alia* that the appellant was polite and cooperative, that she was eager to address her problems, that she has insight into the nature of her difficulties and that she did not want to believe what was happening was happening at the time of the offending.

**20.** It is submitted that the other reference and medical letters demonstrate the appellant as a caring but vulnerable person, predisposed towards domineering men, who still harbours hope to be a part of her children's lives in the future.

**21.** Reliance is placed on *People (DPP) v O' Reilly* [2015] IECA 21:-

*"There is no doubt at all but that this was a lenient sentence. In many circumstances, a sentence of this kind for this type of offence might well be regarded as unduly lenient so*

*that it amounted to 'a substantial departure from the appropriate sentence' in the manner enunciated by the Court of Criminal Appeal in Byrne. Yet the sentencing judge was plainly influenced by the statutory test contained in s. 27B(6)(b) of the 1964 Act (as amended), namely, whether the public interest would be served by the imposition of the lesser sentence than the presumptive statutory minimum. He considered that this was such a case since drug addiction was the root cause of this offender's criminal behaviour. The sentence was accordingly structured in such a manner as sought to persuade and encourage the offender to wean himself from his drug addiction.*

*The sentence in the present case may thus be said to offer an example of where rehabilitative considerations were properly to the fore. The suspended element of the sentence was designed to operate – and did in fact operate – as a real deterrent to the offender, as the subsequent re-activation of the sentence in the days leading up to this appeal plainly shows.”*

**22.** In light of this excerpt, it is submitted that the sentencing judge erred in failing to incentivise the appellant's continued rehabilitation by way of part suspension of the custodial sentence imposed, contingent on her continuing to engage with rehabilitative services.

### **Submissions of the Respondent**

**23.** The respondent distinguishes the case of *O'Reilly supra* from the present case on the basis that the accused in that case had 27 previous convictions and the appellant herein had no previous convictions. It is submitted that in that case, the principle of deterrence applied because he had a history of serious previous convictions which were fuelled by a chronic addiction and the imposition of a suspensory portion to his sentence was necessary to incentivise him to live a life free from crime, a factor not present here.

**24.** It is submitted that despite the appellant's commendable effort to address her addiction and mental health issues, it was not demonstrated to the sentencing judge how same addressed the nature of her offending, justifying the suspension of part of the sentence imposed upon her. It is noted that prior to going into custody none of the appellant's children were in her care.

**25.** Prof. O'Malley's text on *Sentencing Law and Practice* is relied upon by the respondent. This Court's attention is drawn to Chapter 22 of the text, entitled 'The Suspended Sentence.' At para 22-19, Prof. O'Malley states that "*courts quite commonly suspend a portion of a custodial sentence in recognition of a mitigating factor such as a guilty plea*" it is noted that in the present case, a very late guilty plea was entered.

**26.** The respondent refers to *People (DPP) v Kearney* [2016] IECA 394, an appeal against a three year sentence for dangerous driving causing serious harm. Ultimately, this Court suspended the final 9 months of the sentence. The respondent distinguishes between that case and the present case on the ground that the appellant in *Kearney* suffered from a major mental illness.

### **Discussion**

**27.** No issue is taken with the headline sentence nominated or with the discount afforded for mitigation. The issue rests with the failure to suspend any portion of the sentence.

We have set out some detail in respect of the offending and it is clear that the offences involved are very serious, where a parent failed to ensure the safety of her children, leaving them open to terrible abuse and undoubted long-term consequences. The appellant pleaded guilty having fixed a trial date and accepts her culpability. She is remorseful and engaged in efforts to rehabilitate herself prior to sentence.

**28.** The submission is made that the judge ought to have suspended a portion of the sentence to reflect her efforts to rehabilitate and to incentivise her further rehabilitation. Moreover, that a structure ought to have been put in place by the judge to assist in her re-integration into society upon her release.

**29.** The decision to suspend any portion of a sentence is one within the discretion of a sentencing judge. Matters may be considered to be relevant, such as to incentivise further rehabilitation and/or to deter a person from further criminal activity.

**30.** There must be an error in principle before this court will intervene. It must be recalled that not only did the judge sentence the appellant for the two offences to which she pleaded guilty, but also took into account five counts of child cruelty. There is no doubt that there was considerable mitigation before the court of sentence, including the plea, albeit a late plea and the additional factors to which we have already referred.

**31.** This is not a case of an individual with a mental disorder or a list of previous convictions. This case involves a person who has had suffering and trauma during her life, she has addiction difficulties and has sought to address her problems. She has engaged in therapy which will hopefully assist her in the future.

**32.** The judge in our view engaged in a careful analysis in determining a proportionate sentence. She was fully entitled to determine on the facts before her, that the appropriate structure of sentence was to impose a sentence simpliciter without suspending a portion of that sentence. Indeed, it could be said that were she to suspend an element of the sentence, she may have well felt it appropriate to give a lesser discount for mitigation. As it stands, she gave a generous discount for mitigation and clearly was alert to the steps taken by the appellant to address her issues. Those efforts to rehabilitate herself were incorporated by the judge in affording such a discount from the headline sentence.

**33.** In the circumstances, we do not find an error in principle and dismiss the appeal.