



**THE COURT OF APPEAL**

**Neutral Citation: [2024] IECA 297**

**Record No: 203/2023**

**Edwards J.  
McCarthy J.  
Burns J.**

**[IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL  
JUSTICE ACT 1993**

**BETWEEN/**

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

**APPLICANT**

**V**

**NICHOLAS O'NEILL**

**RESPONDENT**

**JUDGMENT of the Court delivered (ex tempore) by Mr. Justice Edwards on the 12th of  
November, 2024.**

**Introduction**

1. Before this Court is an application brought by the Director of Public Prosecutions (i.e., "the applicant" or "the Director") pursuant to s. 2 of the Criminal Justice Act 1993 ("the Act of 1993") for review of the sentence imposed on Nicholas O'Neill (i.e., "the respondent") by the Circuit Criminal Court, Wexford on grounds that it was unduly lenient.
2. On the 14th of June 2023 the respondent pleaded guilty in relation to:
  - (i) Count no. 1 – assault causing harm contrary to s. 3 of the Non-fatal Offences against the Person Act 1997.
  - (ii) Count no. 3 – production of an article capable of inflicting serious injury contrary to s. 11 of the Firearms and Offensive Weapons Act 1990.

However, he pleaded not guilty to a further charge on the indictment arising out of the same incident, i.e., a charge (count no 2) of threatening to kill, and a trial proceeded. On the 15th of June 2023 the respondent was acquitted of that charge.

3. On the 20th of June 2023, the court below sentenced the respondent in respect of the two counts to which he had pleaded guilty. The respondent was sentenced to 12 months' imprisonment on each count, in both cases fully suspended for two years on the condition that he stay away from a Mark Foley (i.e., "the complaint"), and anybody associated with him, and maintain sober habits and keep the peace and be of good behaviour with a bond of €1,500.

## **Factual Background**

4. At the sentencing hearing on the 20th of June 2023, a Detective Garda Edward Barry gave evidence in relation to the factual background to the respondents' offending.
5. D. Garda Barry confirmed that evidence was given during trial by Mr. Foley in relation to the incident on the 20th of June 2020. On the date in question, Mr. Foley had his eight-month-old son with him. Mr. Foley's plan was to go to Assumption Terrace to visit his parents, and thus, he came out of his apartment and turned to go up Rosbercon Hill. Mr. Foley also had his dog with him. The respondent was across the road and within seconds of his seeing Mr. Foley he said words to the effect of, "*oh its you*" and immediately crossed over to Mr. Foley's side of the road. It is accepted by both sides that there was "bad blood" between the two men.
6. At the time the respondent was in somebody else's company, who was not before the Court at all. It was stated in evidence that:

*"... effectively, Mr O'Neill crossed the road, [and] threw a glass bottle at Mr Foley. Mr Foley then moved away a bit, applied the brakes to [Mr. Foley's son's] pram. Then Mr O'Neill again approached Mr Foley, and smashed the glass bottle off his forehead and the top of his head, and swung for him a couple of times".*
7. Mr. Foley was further hit to the head and punched "*a couple of times*" by the respondent. Mr. Foley was afraid to fall to the ground as he was aware that the respondent had a couple of bottles, and he thought there might be glass on the ground. He said he tried to stay on his feet and his head began to bleed quite profusely. Mr. Foley described his face as being covered in blood. Photographs were taken by a Garda O'Flynn of Mr. Foley when he attended Caredoc for treatment of his injuries and these were handed into the sentencing judge.
8. Once the dealings between the two men had concluded, the respondent went "*off around the corner*". Mr. Foley then went to see about his son, and he was bleeding quite profusely from his face. Mr. Foley then rang his sister, a Ms Mag Foley, and she came and also people also came to his assistance from the nearby mart.
9. At 3:59 pm Mr. Foley telephoned New Ross Garda Station. His sister took Mr. Foley's child to his parents' house in Assumption Terrace. The gardaí arrived on the scene and had dealings with Mr. Foley who initially did not wish to make a statement of complaint and did not give very many details as to what had occurred. One of those who attended, Garda O'Flynn, arranged for Mr. Foley to attend the Caredoc, which he did, and he received seven stitches for the cut to the top of his head. His eye was bruised and bloodshot. His ankle was swollen and sore from the struggle. He also had some other bruises. Mr. Foley described himself as being dazed when he was hit by the bottle and as being traumatised following the incident. He described himself as being terrified of leaving his house after it.
10. A medical report prepared by a Dr. Woods detailed that:

*"Mr Foley attended the Caredoc team on the 20th of June 2020, and he described getting a belt of a glass bottle some 30 minutes earlier. He alleged he'd been assaulted, and the incident reported to the gardaí. He had sustained a head wound and his forehead was bleeding, there was no nausea, no vomiting, he was not feeling faint, he had not sustained any other injuries. Mr Foley was examined at 17:32 in the Caredoc by another doctor who is no longer in Ireland. He stated he was attacked by a bottle one hour earlier, sustained a cut to the head, no loss of consciousness, no headache, no dizziness. The examination revealed a two-centimetre-long laceration to the forehead, with associated bruising of the left upper eyelid. He was conscious and alert. Examination of the central nervous system did not show any abnormality. His wound was cleaned with a suture and he was given head injury instructions, and in relation to his prognosis, Dr Woods says that he expected full healing of the wound without long-term complications. However, he stated that he's likely to have a permanent facial scar as a result of the incident."*

11. D. Garda Barry confirmed that Mr. Foley has a scar in front of his head but stated that *"it's not terribly bad"*.
12. The respondent was arrested and detained in relation to this incident. He was interviewed in detention but nothing of evidential value emerged.

#### **Victim Impact Statement**

13. A victim impact statement was prepared by Mr. Foley and the relevant parts were read out by D. Garda Barry at the sentencing hearing as follows:

*"He seriously assaulted me while I was walking with my eight-month-old child in his pram to my parents' home. He threw a glass bottle at me from across the road which smashed over my head, and he boxed me a number of times and tried to smash my head through the window of the health centre, where the attack took place. Mr O'Neill will claim that he is a family man, but he showed me absolutely no respect or regard for my child that day. It's a daily struggle for me not knowing if Mr O'Neill will attack me again, and I live in absolute fear of when this threat will become a reality. While physically, I recovered from the assault, mentally, I live in fear that he is going to do it again. I just don't know when. Since the assault, I've attended counselling and tried to get over my fear, my constant anxiety, and gain control of my life. Even simple things like bringing my child for a walk or to playschool, causes me great anxiety and fear in case I meet Mr O'Neill. As my child is getting older, he is becoming more aware of my severe anxiety. I only wish this nightmare that I live every day to be over. I simply want to live a normal life where I can get up in the morning, go to work, collect my child, visit my family and friends, and go to a shop without fearing for my life. Thank you for reading my statement today"*.

#### **Personal Circumstances of the Respondent**

14. The respondent is 44 years of age, and he has four children. At the time of sentencing two of his children (aged 7 years and 5 years, respectively) were living in Cambodia with his former partner and he had a further child in New Ross. His fourth child was unborn at the time of the sentencing hearing and thus, the child's current location is unknown to the Court. Concerning his two children in Cambodia, it was stated at the sentencing hearing that the respondent sends money for their care every month, in the sum of €400 approximately.
15. The respondent has had a serious problem with drink through most of his life. The respondent completed his Junior Cert, left school at 16 years of age, and then for quite some time, he was a ground worker. He has a good work record and at the time of sentencing he was in full-time employed with a Plant Hire firm. A testimonial from his employer was handed in, which made clear that the employer is aware of the type of trouble that the respondent is in, but which spoke well of him as an employee.
16. The respondent has eight previous convictions. He has four for assault, one for threatening to kill or cause serious harm, two for public order offences, and one for obstruction under s.21(4) of the Misuse of Drugs Act 1977. The respondent's most recent conviction prior to this was on the 24th of June 2019, where he was convicted of a threat to kill or cause serious harm in the District Court, and he received a term of imprisonment for four months, which was suspended for 18 months, and this incident falls within that 18-month period.

#### **Sentencing Judge's Remarks**

17. On the 20th of June 2023, the judge in the court below passed sentence on the respondent. The sentencing judge noted the factual background of the case as described by Det Garda Barry.
18. The sentencing judge then identified the relevant aggravating factors at play in this case as follows:

*"Now, undoubtedly, an aggravating factor is the violence visited upon this man which was unprovoked, and not that provocation would be a defence but it might put it in a different context. So, that's an aggravating factor. The previous convictions, particularly, the fact that there are four previous convictions for assault, are of particular concern to this Court today, and there are two previous convictions for threats to kill apparently. But anyway, that's six previous convictions of particular concern to the Court".*

19. In relation to mitigation, the sentencing judge made the following remarks:

*"The mitigating circumstances are that you have acknowledged -- you've manifested an insight, a degree of insight, into your problem. You accept that you've got a problem with drink or when you've had drink. So, you need to cut it out. You don't need to temper it, you simply need to cut it out, it seems to me. But I'm not doctor. But you have displayed a degree of insight. You've displayed a*

*degree of remorse and apologies and all of that, and that's all in mitigation. You've indeed, offered compensation, which has been not indicated, or not acceptable, or not desired by the victim, Mr Mark Foley. So, the payment of compensation is not a part of this sentence, will not be a part of this sentence.*

*So, I have to look at your personal circumstances. So, the drink situation is the particular problem and recurring problem that needs to be dealt with. You've cooperated with the gardaí from the off. You've offered a plea in respect of two of the three counts, and you have brought home a not-guilty verdict in respect of the third count.”.*

20. The sentencing judge identified a headline sentence of 15 months' imprisonment and a post-mitigation sentence of 12 months' imprisonment. When considering whether any portion of the sentence should be suspended the sentencing judge remarked:

*“In circumstances where I have somebody who has expressed remorse, who is gainfully employed, who has all sorts of other things going on in his life, not least the imminent arrival of another child, who is somebody who is behaving in a completely responsible way towards two children in a faraway country, and paying them, paying for their maintenance, something of the order of €400 a month, I don't believe that the interests of society would be served at all by insisting on you spending any time imprisonment. So, I propose to impose a 12-month sentence upon you and to suspend it in its entirety on certain terms. One, that you will stay away from Mark Foley, and anybody associated with him, and that you maintain sober habits. How you do that is up to you, but don't come back before me because if you do, you'll be going out of here in a van. So, you're to maintain a sober disposition. Stay away from Mark Foley and all of his clan, and you are to enter into a bond to be of good behaviour and to keep the peace, and you're earning, so, it'll be your own bond of €1,500 and you'll enter into it for a period of two years, where you will undertake to be of good behaviour, to keep the peace and be of good behaviour”.*

## **Submissions of the Parties**

### **Applicant's Submissions**

21. The applicant submits that the sentence imposed in this case represents a substantial departure from an appropriate sentence in all the circumstances and on the following grounds:
1. Placing the offence too low on the scale of seriousness.
  2. Failing to refer to the use of a weapon (glass bottle) as an aggravating factor.
  3. Failing to incorporate any element of general deterrence in imposing sentence and therefore failing to reflect society's abhorrence of such offending. In particular, the

offences occurred in the middle of the day on a Saturday in a public place which was busy and in the presence of an infant.

4. Placing excessive emphasis on the mitigating factors.
  5. Placing the headline sentence too low in the circumstances.
  6. Failing to have sufficient regard to the accused's previous convictions and the fact that he was on a suspended sentence for the offence of threat to kill or cause serious harm when these offences were committed.
22. The applicant refers the Court to the cases of *DPP v. McGrath, Dolan and Brazil* [2020] IECA 50; *DPP v. Reilly* [2004] 3 IR 111; and *DPP v. Olatunbosun* [2020] IECA 236.
23. The applicant submits that the sentence imposed is out of keeping with the norm for this offence and is unduly lenient, given the previous convictions of the respondent and the gravity of the offence.

#### **Respondent's Submissions**

24. The respondent submits that, while the sentence imposed in the court below was lenient, it was not unduly lenient on the following grounds:
- a. "A more severe sentence could have been imposed; however, the sentence did not fall outside the ambit or scope of sentence within the judge's discretion having regard to the margin that must be afforded to him.
  - b. The [applicant's] submission ignores the fact that due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence in light of the evidence and submissions received, evaluated, and considered at first hand by him.
  - c. The [applicant] has not proven that the sentence imposed constituted a substantial or gross departure from what would be an appropriate sentence in all of the circumstances and therefore the sentence imposed does not amount to an error of principle."
25. The respondent refers the Court to the case of *DPP v. Byrne* [1995] 1 ILRM 279. In addition the respondent submits that while the sentencing Court did not specifically mention that the use of a weapon in the form of the beer bottle was to the front of the Court's mind where it opined that the "*violence visited upon the victim*" was an aggravating factor, the sentencing judge had sat through the trial in which the prosecution lead evidence concerning the assault and had the opportunity to see the injury of the victim in person making an assessment concerning the level of sentence to be imposed.
26. Further, the respondent submits that the sentencing Court also had regard to the following in making the said assessment and refers this Court to consider the same, namely:

- a. "The indication of a plea of guilty.
- b. The alcohol issues of the respondent.
- c. His insight and remorse and the fact that compensation was offered.
- d. His personal circumstances and employment history".

### **Court's Analysis & Decision**

27. The law applicable to undue leniency appeals is well settled. An appellate court will only be justified in intervening if the sentence imposed at first instance was unduly lenient in the sense of being not just very lenient but so lenient as to represent a substantial departure from the norm. Moreover, such sentences will usually be the result of a manifest error of principle. Further, in considering whether a sentence is unduly lenient a reviewing court should closely consider the stated reasons of the sentencing judge and give appropriate weight to them.
28. We have considered the sentence in the present case, and the sentencing judge's stated reasons. Having done so, and notwithstanding the sentencing judge's stated reasons, we are satisfied that the sentence imposed in this case was not just lenient but was unduly lenient. We consider that it represents a substantial departure from the norm and ought to be quashed. Insofar as the sentencing judge's reasons are concerned, we are not satisfied that there was a sufficient evidential basis in the case for his decision to wholly suspend the sentence that he had determined upon, and that was a manifest error of principle.
29. It was acknowledged in the evidence that the respondent has a significant problem with drink. It was not mentioned, but it is also clear that he has a significant problem with anger management. The sentencing judge accepted evidence that he was remorseful, however the only evidence of remorse was a bare assertion in that regard and the offer of the payment of some compensation which the victim was not inclined to accept. The expression of remorse has to be seen in context. The respondent was a recidivist offender with four previous convictions for assault and two previous convictions for uttering threats to kill or cause serious injury. He had received a suspended sentence for one of those offences involving threatening to kill or cause serious injury to the sister of the victim in this case, and that suspended sentence was current at the time that he offended in this case. He had been given a chance, and had clearly spurned this. He had given an undertaking to keep the peace and be of good behaviour but he did not keep the peace and he was not of good behaviour. The sentencing judge properly accepted that he will had been gainfully employed and that he had had a number of other issues in his life. It is clear that he had had a hard time due to the fact that he has a child with a serious cardiac issue, and other issues in his life were alluded to. There was clear evidence that he was in employment and was contributing in a responsible way towards the maintenance of two of his children who were living abroad with his former partner. There was, however, no evidence whatever of meaningful steps having been taken by this respondent to address his underlying drink, and, we would suggest, anger management,

issues. It was suggested that he had reduced his drinking so that he was only now drinking at home and was being monitored in that regard by his current partner. However, there was no evidence that he had signed up with Alcoholics Anonymous, or that he had undertaken any residential or non-residential substance abuse course, or that he had any meaningful period of demonstrated sobriety. The sentencing judge queried whether the interests of society would be served by insisting on him spending any time in prison. If that question were asked rhetorically, we think that the answer could only be in the affirmative having regard to his very bad track record of previous offending, the fact that he had spurned a chance previously given to him, had breached his solemn undertaking to stay out of trouble and had taken no concrete steps to address his acknowledged underlying difficulty with drink, whatever about anger management.

30. There was simply an insufficient evidential basis for wholly suspending the sentence in this case in the interests of reform and rehabilitation. We have said in the past that it is of course a matter within the discretion of a sentencing judge as to which of the many, and sometimes conflicting, objectives of sentencing to prioritise. However, there has to be an evidential basis on which to justify whatever decision is made. We are talking in this case of a significant crime of violence. There is a strong case for the expression of censure, for the expression of the deprecation of society in respect of the conduct of the respondent, and for requiring the respondent to undergo some deserved penalty or hard treatment in response to the conduct. There is also a case for seeking to deter him specifically from further offending and for seeking to deter others more generally from engaging in similar behaviour. Yes, it is in the interests of society if he could be persuaded to turn over a new leaf and not to further offend, in other words to reform and rehabilitate. However, to base a sentence on that objective there requires to be evidence to justify prioritising that over the other objectives of sentencing. There has to be something in the circumstances of the case, viewed objectively, to justify a belief that if the offender in question is given a chance on this occasion he will take it.
31. There was nothing in the circumstances of the present case to justify an expression of confidence that that might occur. He had a very bad record. He was a recidivist offender who had been given previous chances which he had spurned. The present offence was committed during the currency of a suspended sentence. Further, to add insult to injury the unprovoked assault the subject matter of these proceedings was perpetrated on the brother of the victim of the crime in respect of which he had received the suspended sentence. In those circumstances what confidence could the sentencing judge reasonably have had, absent evidence of concrete and meaningful steps being taken to address his underlying drink and anger management issues, that if given a further chance this man would take it? In the circumstances, while we have considered the sentencing judges stated reasons for wholly suspending the sentence we are not impressed with those reasons and do not consider that it would be appropriate to attach weight to them.
32. We therefore find the sentence imposed at first instance to have been unduly lenient in the sense that we have spoken about, and will quash that sentence.



### **Re-sentencing**

33. We have considered the gravity of the offending conduct in this case and in doing so have considered both culpability and the harm done. In assessing culpability we have had regard to the aggravating factors that this offence was unprovoked, and was committed during the currency of a suspended sentence. We have taken into account further that the appellant has relevant previous convictions. Further, a weapon was used in the assault and the assault was committed in the presence of a small child that was in the care of the victim at the time. Having considered the range of available sentences for each of the offences in respect of which we are required to resentence, we consider that the appropriate headline sentences in each case should be one of four years imprisonment.
34. As regards the harm done we have considered the medical evidence, the photographic evidence and the victim's impact statement.
35. At this point it is appropriate to take into account the mitigating circumstances. While drink was a factor in the case, self-induced intoxication does not provide the appellant with any mitigation. The principal mitigating factors were his pleas of guilty, his good employment record and the fact that he was contributing in a meaningful way to the financial support of his children. It was also a relevant personal factor in the sense of being a personal adversity with which he had to cope that he has another child with a serious health issue.
36. We think that the mitigating circumstances in this case justify discounting from the headline sentence by a period of 18 months, and we will give effect to this by suspending the final 18 months of the 4 year headline or pre-mitigation sentence.
37. Accordingly, the respondent is required to serve a net sentence of two years and six months, assuming that he faithfully adheres to the conditions of suspended portion of his sentence. The conditions on which the sentence will be part suspended will be the same as those imposed in respect of the suspended sentence imposed by the court below, namely that he stays away from Mr Foley and his family, that he maintains sobriety, that he enters into a bond in the same amount as before to keep the peace and be of good behaviour. The period of suspension will be for two years following his release.
38. For the avoidance of doubt, Mr O'Neill is to receive credit for any time served on remand solely in relation to the offences the subject matter of this appeal.