



THE COURT OF APPEAL

**Birmingham P.
Edwards J.
McCarthy J.**

Record No: 143CJA/2019

**IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993,
AND IN THE MATTER OF AN UNDUE LENIENCY APPLICATION BY**

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

V.

D. O'S.

RESPONDENT

**JUDGMENT of the Court (ex tempore) delivered on the 6th day of December, 2019 by
Mr. Justice Edwards**

Introduction

1. The respondent in this case was convicted by a unanimous jury after a trial before the Circuit Criminal Court in Limerick of one count of child cruelty, contrary to s.246 of the Children Act 2001.
2. At the sentence hearing on the 5th of June 2019, the respondent was sentenced to a term of imprisonment of two years, which sentence was to be consecutive to a sentence of four years imprisonment which he had received at [a named] Circuit Criminal Court on the 10th of March 2017. The two-year sentence was then suspended in full for a period of six years from the 5th of June 2019. The respondent entered the required bond in the sum of €100 and agreed to keep the peace and be of good behaviour towards all citizens for the same period.
3. The applicant contends that the sentence the respondent received is unduly lenient and asks this court to review it.

Background Facts

4. The court heard evidence that between the 1st of January, 2015, and the 30th of June, 2016, at various addresses at which the family had resided, the respondent had treated his son cruelly, by wilfully assaulting him, ill-treating him and neglecting him.
5. Garda James Fairbrother gave evidence that he encountered the respondent on the 30th of June, 2016, while he was on duty attached to the drugs unit in [a named town]. He witnessed the victim's mother, "L", a known heroin user, with her three children – including the victim, "D" – all of whom were in a dishevelled state and carrying a number

of black bin bags in the carpark of [a named] B&B. The garda noted a sharps bin filled with syringes on top of a pram containing a child. While conducting a search of the black bags, pursuant to the Misuse of Drugs Act 1977, Garda Fairbrother saw the respondent exiting the B&B. On seeing the Garda, he appeared nervous and anxious to leave the area where the bags were being searched. However, he did not leave, presumably because Garda Fairbrother was interacting with his partner and their children. During the search it was discovered that the black bags contained approximately €2,800 worth of heroin. The children were also found to be carrying drugs in various ways, such as in their backpacks. Garda Fairbrother accepted that the respondent could have left without implicating himself, but instead he came forward and took responsibility for the drugs. It was commented on by Garda Fairbrother that both the children and the clothes they were wearing were dirty.

6. The appellant was arrested and was later charged with two counts of possession of a controlled drug for sale or supply contrary to s.15 of the Misuse of Drugs Act 1977. The condition of the children was reported to TUSLA who became involved at that stage. An initial application to take the children into care in mid-June 2016 was unsuccessful, but Care Orders were ultimately made on the 30th of June 2016. Since then the children are being cared for by grandparents and are doing well in their care.
7. The respondent was subsequently sentenced to seven years imprisonment with two suspended in respect of the s. 15 offences.
8. He has subsequently been charged with the offence the subject matter of the present review, which specifically relates to his eldest son who was then aged 13. He contested the trial and was convicted by a jury. The evidence was that the respondent had on one occasion hit his then 12/13-year-old son into the stomach so hard with his fist that he winded him. The evidence was that on another occasion the child was hit with a closed fist into the face hitting his jaw which was then very sore. The victim gave evidence that the respondent would inject heroin in the home in front of the children and lash out at them if they came into the room. The victim was not allowed to have friends to the house because of the drugs in the house. The victim was upset by recalling the events and cried during his evidence. The evidence was that the victim now lives with his maternal grandmother and he is happy there and is being well cared for.
9. The victim gave evidence that he had been sleeping on the floor as he had no bed. The victim had a hearing disability and had been falling behind in school as nobody had sought medical assistance for him. When TUSLA took the victim into care a hearing aid was obtained for him from London. A social worker gave evidence that the children did not have adequate accommodation and were staying in a one-bedroom apartment when there was a 3-bedroom Council house available to them. Despite the availability of a Council house four children were sleeping in one bed with the victim, the eldest, sleeping on the ground.
10. While it was stated in the plea in mitigation that the family were homeless the evidence had established that this was not the case. The social worker who had done home checks

testified that she had found kitchen counter tops to be filthy and the kitchen was full of debris and unfit to prepare food in. It was clear the children were being fed with "take away" food, and their nutrition was poor. The evidence was that the decision to take the children into care was taken as a last resort.

11. The respondent committed this offence whilst on bail for a previous drugs offence.

Impact on Victim

12. The victim in this case opted not to submit a victim impact statement, but the extent of ill-treatment suffered by him at the hands of the respondent was well established in evidence.
13. As already described there were two incidents of direct physical assault.
14. The victim was raised in an environment where his parents' drug use took centre-stage, and in which his own care, and that of his siblings, was treated as being secondary. The respondent would lash out if bothered by his children and chose not to avail of services which would have benefitted the wellbeing of his children. The evidence was that the child the subject matter of the charge before the court has thrived since moving to the care of his grandmother.

Applicant's Personal Circumstances

15. The respondent has a long-standing chronic addiction to heroin. He has no trappings of wealth of any description.
16. The respondent has been together with his partner for many years. She also has difficulties with heroin and was involved in the initial circumstances which brought the respondent to the attention of the Gardaí, but she was not charged. The couple have five children together. The victim indicated that he would like his family to come together again. However, TUSLA personnel have indicated to "L" that if she visits the respondent in prison, they will object to her having continued access to her children.
17. The respondent has ninety one previous convictions, including eight for possession of controlled drugs for sale or supply, nine for possession of controlled drugs for personal use, fourteen for public order offences, seven for assault type offences, twenty six for road traffic offences, three for criminal damage, two for possession of offensive weapons, twenty for theft, one for burglary and one conviction for failing to appear in court.

Sentencing Judge's Remarks

18. In imposing his sentence, the sentencing judge stated the following:

"This is, in my view, certainly it's one of the first prosecutions where we've gone to trial in relation to a cruelty to children charge under the provisions of the Children Act 2001. And it's the particular section itself, section 246, is very broad in its ambit, if I can put it that way, and it covers a multitude of potential difficulties that can arise, insofar as the responsibility of the custodian of children and their welfare,

as such. And it's a bit like, it's so wide in my view, and I'm not in any way criticising it, but it runs possibly from an isolated incident to incidents where children have been not looked after properly for a lengthy period of time. It's that wide in its ambit as such. But I think I'm entitled to also look at the context of this particular matter, and this, while the charge is specific in relation to incidents involving D, to isolate that alone would not be suitable, for want of a better word, in the particular circumstances. The circumstances that have been disclosed in this particular case have been one of absolute chaos amongst a family and a family at large, and I don't wish to sound like I'm making excuses for anybody, but the facts on the ground, literally on the ground, so to speak, at the time, were the gardaí were on a, to coin a phrase, a drugs bust of sort and the mother was observed at the particular time. The mother was intercepted and the children were found carrying, transporting a number of items as such. The accused then appeared on the scene. And while Detective Garda Fairbrother made quite clear during the course of the trial that he came out of a building, he could have exited stage right, he would have been followed, there's no doubt about that; but in fact he came over and he took responsibility there and then. He was part of the equation at the particular time and he took responsibility for the drugs. Garda Fairbrother and his colleagues had to make a judgment call at the time in respect of the mother and children and decided, correctly in my view, that the appropriate thing to do was not to arrest the mother as well, but to actually alert Tusla and let matters take their course from there. And it's quite clear that just to isolate D alone wouldn't do, in my view, justice to the whole complexity of matters that were there.

A thorough investigation followed in respect of this particular matter. The accused exercised his right to silence, as he's entitled to do. A trial date was set, and we had a number of difficulties that were there regarding disclosure. I'm not criticising anybody. All that I'm saying as a fact is we didn't get to this trial until very, very recently. I am conscious of the fact that D gave evidence through our new facilities here which made matters much easier, and I compliment both prosecution and defence in the manner in which they dealt with the trial and the trial process, both in the interests of the child in particular, and in fairness to the jury and myself, in that there were several admissions made at the particular time which speeded up the trial process as such. I was very taken by D's evidence about the incidents

involving his father, and to that loaded question that was put to him by [defence counsel] about these things: "I have to suggest these things didn't happen", "I was there, you weren't. They did. They did". A very clear and emphatic answer in respect of it. But I'm also conscious of the fact that, in the course of cross examination, to a number of responses from D at the particular time, it was put to him, and I have my notes from my summary giving my charge to the jury the other day, "Tough family circumstances?" "Yes." "Drugs an awful effect on the family dynamic?" "Yes." "Would you accept if there were no drugs there may be no difficulty and it might be a normal family?" "Yes." "You care a lot about your family?" "Yes." "Including your father?" "Yes." "You find it very hard to be in court?" "Yes." "Your grandparents on both sides are a huge help?" "Yes." "Without their help, things might be even more difficult?" "Yes." "No help from social workers at this time?" "No." "If you had help and support then you may not be here at all?" "Yes." "Insofar as your parents are concerned, no drugs, normal family life?" "Yes." "In a perfect world, would like to have the family reunited?" "Yes." "You're the eldest child, you're the man about the house, it's a heavy burden on you to carry that mantle?" "Yes." "Heavy for a 16-year-old?" "Yes." "Didn't see mother for a while, but see her quite a lot now?" "Yes." And then he went on to mention school, et cetera. And he, in the course of his evidence, in my view, it was quite clear, that in a perfect world he would like to see the family reunited as such.

I respect, given the dynamic that was there in 2016, and there's still a lot of ongoing work in that regard, the children are still in care, they're not all together; but given the sentence that the accused is serving at the moment, it is quite clear by the time he has finished that particular sentence, that D will be 18, if not past 18, he'll certainly be very close to 18, and will be an adult at that particular time. And the accused, through his own actions, has to live with the knowledge that through his own actions he has missed most of his children's growing up because of the fact that he's been involved in the drug world as such, both as an addict and involved in the sale and supply as well. And while I hear this trappings of wealth aspect, again, there's a context here. Not alone were the mother and father serious heroin addicts as such, but it is a sad reflection on both of them that their children were being effectively used and implicated to transport drugs for them.

And that's something that both mother, who wasn't charged with anything, who hasn't been charged with anything in this regard, from the particular events of this day as such, but that's something that they have to live with.

There's also the conviction itself under this particular section. Again I emphasise the fact that, these cases, thankfully, are rare enough, but there is the stigma of the conviction of a person for cruelty to their own children, and it's a stigma that will, in my view, stay with them for a lifetime as such. But during the course of the case, there was a discussion about the law and justice and such, in respect of matters. I think that D was extremely brave. He stood by his story, and I don't use the word 'story', he stood by his statement to the gardaí, the specially trained gardaí. He had the courage to give evidence in the particular case, despite certain misgivings from his sister in respect of the matter, but nevertheless he stood by his statement in the matter. The jury believed him 1,000% in my view, but it was very striking to me that, despite the fact that it wasn't said, and didn't need to be said, this is a young man who still finds the circumstances extremely difficult, with an aspiration that someday the family may be reunited again, whether there's any reality to that or not, I can't second-guess that. But I don't believe that imposing a further period of incarceration on the accused is going to assist matters and there is always the hope in respect of matters that this family may be reunited. Evidence was given that there is contact with the mother back again, as such, and that that's a step along the way. Evidence was given by D that he's enjoying being with his maternal grandparents as such, and that he's getting on well, but he would love to see a day that without drugs et cetera, that this family may get back together again.

I am conscious of the fact of proportionality as well, and the fact that the accused is serving a lengthy sentence, effectively a seven-year sentence with two years suspended in relation to the matter, and what I would intend to do is that, I think the appropriate way to deal with this matter is to impose a sentence of two years' imprisonment and suspend that for a period of six years from today, and his own bond of €100. It means that sentence effectively is consecutive, and I have to be clear on this: it's either consecutive to the four years or it's either consecutive to the four plus three years as such. My understanding is that I can't make a

consecutive sentence to a consecutive sentence.” ... “[W]hat I'm going to do is, in respect of the sentence, the two years is suspended for a period of six years and the sentence is to run consecutive to the sentence of four years imposed at [a named] Circuit Court on the 10th of March 2017 as such, where I imposed a sentence of four years for a section 15 sale and supply matter.”

...

“The context in this case is a mother and father who are in the throes of a very, very serious and very public drug addiction in [a named] area as such.”

(Quotation redacted where necessary by this Court.)

Grounds of Appeal

19. The Applicant argues that the sentencing judge erred in the following:

- a. Failing to determine a starting point at a level appropriate to the gravity of the offence and reflecting the specific aggravating factors.
- b. Proceeding to suspend the sentence in its entirety notwithstanding the presence of significant aggravating features including the commission of the offence while on bail for serious offences.
- c. Failing to have regard to the respondent’s past record of serious offending which included previous convictions for assault.
- d. Failing to have regard to the concepts of punishment and deterrence particularly where this was an offence committed over a date span of the 01/01/15 to the 30/06/16.
- e. Failing to have regard to the effect of the offence on the victim and placing excessive weight on rehabilitation in the absence of little if any evidence of rehabilitation.
- f. Partially circumventing provisions relating to consecutive sentencing.

Discussion and Decision

20. The by now very well-established jurisprudence relating to the conduct of undue leniency reviews was not at issue in this case. It is accepted by everybody that before we would be justified in intervening we would have to be satisfied that the sentence was lenient to such an extent as to be unduly lenient in the sense of representing a significant departure from the norm. The “norm” spoken of is the range within which a judge applying accepted principles of sentencing law would be expected to select a sentence that is both proportionate to the gravity of the offence and to the circumstances of the offender. The judge has a discretion as to the sentence he/she might impose within that range, and this

discretion will be sufficiently wide to afford him/her an appropriate margin of appreciation allowing selection between a sentence which lenient in the circumstances, one which is severe in the circumstances, or one which is somewhere in between. A judge who acts within his/her range of discretion will not have their sentence interfered with on an undue leniency review. However, if the judge strays outside of his/her range of discretion to produce a sentence that is disproportionately lenient then the jurisdiction exists to correct that on the basis that it is outside the "norm".

21. In addition, the jurisprudence relating to undue leniency reviews indicates that great weight should be afforded to the reasons of the trial judge. We think that that is a particularly important consideration in this case where the trial judge was very experienced, not just in criminal law but also in juvenile justice having presided over a very busy Children's Court for many years during an earlier stage of his career. Moreover, the judge in question is known and respected for his great empathy and humanity.
22. The present case was a particularly difficult one. Child Cruelty cases are fortunately relatively rare and this is to our knowledge the first to come before the Court of Appeal on an undue leniency review.
23. The sentencing judge saw the case as having a particular context, and referred to the fact that the victim's parents were *in the throes of a very, very serious and very public drug addiction*. He alluded specifically to the family dynamics and to the poignant position of the victim in this case who is clearly thriving in care on the one hand, but who yearns for a normal family life on the other. The judge commented:

"This is a young man who still finds the circumstances extremely difficult, with an aspiration that someday the family may be reunited again, whether there's any reality to that or not, I can't second-guess that. But I don't believe that imposing a further period of incarceration on the accused is going to assist matters and there is always the hope in respect of matters that this family may be reunited."

24. While we fully understand the trial judge's stated reasons for the sentence that he imposed we respectfully suggest that he may have somewhat lost focus on the need to consider the gravity of the offending conduct. He also does not seem to have considered adequately to what extent did the offending conduct require to be met by a punishment involving actual custody, whether for retributive purposes or for deterrent purposes (both general and specific) or in furtherance of both of those objectives. Having regard to how the case was met it is clear there was little scope for the pursuit of a rehabilitative objective, at least at that point. He was rightly concerned with the welfare of the victim but was required nonetheless to direct his primary focus on the issue of what sentence would meet both the gravity of the offence and the personal circumstances of the offender. The victim's situation fell to be considered as part of the assessment of gravity, in as much as gravity is assessable with reference to culpability and harm done. There

was undoubtedly harm done here and it was necessary to take account of that in the sentencing process.

25. There were significant aggravating factors. It was committed while on bail. There were numerous previous convictions, including convictions for assaults which are relevant convictions in the context of this case where part of the cruel conduct alleged involved assaults on the victim. There was serious neglect, and the exposure of this victim and the other children to drug taking and drug dealing activities and exploiting them in furtherance of those activities was especially reprehensible. 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
26. 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. In so far as specific deterrence is concerned, it seems apposite to quote the renowned sentencing scholar Andreas von Hirsch who has said, "*the hard treatment in punishment ... serves a prudential reason for obedience to those insufficiently motivated by the penal censure's moral appeal.*" [von Hirsch, A (1998), "Proportionate Sentences: a Desert Perspective" in von Hirsch, A & Ashworth, A (1998), *Principled Sentencing – Readings on Theory and Policy* (2nd ed) (Oxford: Hart Publishing)].
27. We have no hesitation in finding the wholly suspended sentence imposed here as being unjustified and outside of the norm in the sense spoken of earlier.
28. In the circumstances we must quash the sentence imposed by the Court below and proceed to re-sentence the respondent. We will nominate a headline sentence of two years imprisonment to reflect the gravity of the offending conduct. To reflect such mitigating circumstances as existed, and in acknowledgment of the concerns expressed by the sentencing judge at first instance, and what it was that he was trying to achieve, we will suspend 50% of the headline sentence or one year. However, the respondent must serve a year in custody, and that must, pursuant to s.11 of the Criminal Justice Act 1984, be consecutive to the sentence that he is presently serving in circumstances where this offence was committed on bail.
29. We will make the suspended portion subject to the same conditions as in the court below, but will add as further conditions that upon his release the appellant is to submit to the supervision of the Probation Service, that he is to comply with all of their requirements and recommendations, and that he is to co-operate in any treatment programs that they may suggest and arrange for him.