



THE COURT OF APPEAL

[42CJA/19]

**The President
Peart J.
McCarthy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

JOHNNY MCDONAGH

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered on the 21st day of October 2019 by Birmingham P.

1. This is an application brought by the DPP seeking to review a sentence imposed on grounds of undue leniency. The sentence sought to be reviewed was one imposed in the Circuit Court in Castlebar on 14th February 2019 in respect of offences of violent disorder, s. 3 assault and production of an article in the course of a dispute. The article was a machete/bell hook.
2. The sentence that the DPP sought to have reviewed was one of three years imprisonment, but suspended. It was imposed following a conviction by a jury after a contested trial. The jury returned verdicts of guilty on certain counts and not guilty on other counts on what was a lengthy indictment. The conviction was recorded on 30th June 2017, and the respondent was initially remanded in custody and he was in custody until October 2017, when he was admitted to bail. The sentence hearing was then adjourned to 2nd February 2018, and in the case of the respondent in this matter, Mr. Johnny McDonagh, was eventually finalised on 14th February 2019.
3. The trial related to events that occurred on 16th May 2016 in Ballyhaunis. The events that occurred that day, and they were disgraceful events, related to a long-running feud. A funeral was taking place, and it was the funeral of the grandfather of the respondent to this application and those who were his co-accused at trial and also the funeral of the grandfather of the injured parties. Thus, the assailants and the injured parties were cousins. The origin of the dispute, as we pointed out in the course of an earlier judgment, seems to have been lost in the mists of time. The respondent and those who were charged with him were living in County Donegal, in the Letterkenny area, while the injured parties were living in England and they had travelled from there for the family funeral.

4. Four brothers were charged, but of particular note, is that two brothers, Johnny and Martin, opted for trial, and in both cases, ultimately, were the beneficiaries of suspended sentences. An application to review on the grounds of undue leniency was brought in the case of Martin and this Court dealt with that and concluded that while the sentence imposed had been very lenient, that it was not so lenient as to require an intervention by this Court. The judgment on that day was delivered by Edwards J. and it makes the point that the Court was of the view that a very considerable margin of appreciation had to be afforded the trial judge. It explained that the trial judge had made the point that had he sentenced in the immediate aftermath of the conviction, he would have been imposing significant custodial sentences, but by the time he was finalising sentence, some of the heat had gone out of the dispute and he felt it possible to deal with it on the basis of suspended sentences.
5. In the case of Martin McDonagh, the judge imposed a suspended sentence of six years imprisonment. When, at a later stage, and the reason it was at a later stage is that the judge was of the view that a period of continuing supervision was appropriate in the case of Johnny McDonagh, an additional period over and above that which had been provided for Martin. When the judge was dealing with Johnny McDonagh, he operated under the misapprehension that he had dealt with the brother, Martin, by way of a 3-year suspended sentence, and wishing to treat them alike, imposed a 3-year suspended sentence on Johnny McDonagh and that is the sentence that is now sought to be reviewed. While the Director's position that this is a matter that could and should have been dealt with custodially, the Director is realistic in accepting that in a situation where the Court did not incarcerate Martin McDonagh on foot of the Director's review, that it is unlikely that we were going to do it in the case of Johnny. The Director does make the point that it is possible to differentiate to some extent, in that Johnny McDonagh's previous convictions list is longer than that of his brother, though the response to that by counsel on behalf of Johnny McDonagh is that in terms of the substantive offences, offences involving violence, there is little to choose between them. The Director also makes the point that Johnny McDonagh was arguably the more culpable, in that, it was he who struck the injured party with the slash hook, but it is accepted that this was very much, and classically, a case of joint enterprise.
6. If the Director is realistic in accepting that it is unlikely that we will incarcerate today, counsel on behalf of Johnny McDonagh is also realistic, in that he recognises that there does not seem to be any rational reason why his client should emerge with a sentence, albeit suspended, that is half that which was imposed on his brother when the judge was anxious to treat them both alike. This is a case where suspended sentences are real and have the potential to be very significant.
7. The Court feels the fact that the judge imposed a 3-year suspended sentence, when it is very likely he would have wanted to have imposed a 6-year sentence had he appreciated the full facts, requires an intervention from this Court. The judge was in error in believing that he had sentenced the co-accused to three years, and the judge was in error in

believing that he had sentenced the co-accused to three years and this gave rise to an error in sentence in the present case.

8. The Court will deal with the matter by acceding to the Director's application, will quash the sentence of three years, suspended, in the Circuit Court and substitute a sentence of six years, suspended, to date from the same date as the original sentence, thus achieving parity between the two brothers who went to trial.
9. In all other respects, save that it is a 6-year suspended, rather than a 3-year suspended sentence, the terms and conditions are exactly the same as in the Circuit Court.