



**THE COURT OF APPEAL**

**Court of Appeal Record No. 94/2022**

**President  
Edwards J  
McCarthy J**

**BETWEEN/**

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

**RESPONDENT**

**-AND-**

**KEVIN MCCABE**

**APPELLANT**

**JUDGMENT (*ex tempore*) of the Court delivered on the 16th day of January 2023 by Mr Justice McCarthy**

1. This is an appeal against a sentence imposed on the 23rd of November 2021 at Carrick-on-Shannon Circuit Criminal Court by His Honour Judge Aylmer on Bill No. LMDP0010/2019. Kevin McCabe, the appellant herein, pleaded guilty on the 30th of June, 2021, which was the day of trial, to one count of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997. The appellant was sentenced to a term of imprisonment of three years and nine months commencing from the date of sentence.
2. We will now briefly outline the facts of the matter. The offence occurred on the 1st of January 2018. The victim was one Frankie McGough, the appellant's brother-in-law (the appellant was married to his sister). On the evening in question the appellant's wife had hosted a party at their home, at which the victim's mother (the appellant's mother-in-law) and sister were present, and had chosen not to invite her younger brother Mr McGough. Mr McGough was, with his girlfriend, in his mother's house in Ballinamore at the time. At approximately 8.45pm his mother and sister returned home where a dispute arose apparently because he had not been invited to the party. Afterwards, Mr McGough left the house to calm down and sat on a bench which was situated across from the local Garda Station.
3. After approximately ten minutes, his two brothers-in-law (the appellant and his co-accused, one Ryan Collins) approached him. The victim believed that the argument would be

resumed but the appellant started throwing punches at him. He was punched four times in the face and head by the appellant whilst the co-accused was pulling at his shoulder and head which prevented him from getting up from the bench. Thereafter the appellant repeatedly struck him, the co-accused forced him into a prone position on the bench and also began striking at him and shouting, "What was he doing? What was he playing at?" in reference to the dispute that took place earlier with his mother and sister. The victim sought to defend himself but the assault continued. When Mr McGough protested that he couldn't see with one of his eyes, both stopped for a short time before the appellant started to hit him again four or five times.

4. The Gardaí arrived to assist the victim. Initially he sought to minimise what had happened and stated that "two people had jumped him or that he had fallen down". The Gardaí were however of the view that he had been assaulted and observed that he had a small cut within a bruise on his left cheek; however, the victim did not wish to make a statement at that point. He was taken to the Emergency Department at Sligo Hospital and was observed to have been punched a number of times. The injuries were described in a report by a Mr Fergal Hickey, consultant in emergency medicine in Sligo, as follows: -

*"...Francis (Frank) McGough, who gave his address as 36 Páirc Feá, Ballinamore, County Leitrim, attended the Emergency Department at 11.55 pm on the 1st of January 2018. Mr McGough had come by ambulance following an incident which had taken place in the Ballinamore area that night. The assessment nurse notes that he was the victim of an alleged assault... The scan confirmed a complex fracture of the latter wall of the left maxillary antrum with displacement of fragments inferiorly. There was also a depressed fracture of the left inferior orbital margin and a double fracture of the left zygomatic arch. In addition there as a comminuted fracture of the left zygoma cheek bone and furthermore a displaced fracture in the region of the left zygomatic suture. The scan also showed extensive surgical emphysema, which is air in the soft tissues in the left peri-orbital, peri-maxillary and infratemporal regions as well as aerial gas around the eyeball. The left inferior rectus also was entrapped in the fracture but the eyeball itself was unremarkable. Mr McGough was seen by the on call ophthalmology team who noted that his visual acuity was preserved and although he had some limitation of upward and downward gaze and a subconjunctival haemorrhage, he did not have double vision. As a result of the scan showing such a complex facial bone fracture which would require a surgical intervention, arrangements were made for Mr McGough to be transferred to the maxillofacial service at Altnagelvin Hospital in Derry for surgery."*

5. The Gardaí met the appellant by appointment and arrested him. He made no admissions and claimed Mr McGough's injuries were self-inflicted and that he had a history of self-harm. The appellant stated that there had been a family dispute between the victim, his mother and other family members because he and his partner had not been invited to the party. The appellant stated he merely went to find the victim because he wanted to be sure he didn't attempt any form of self-harm and denied having caused any physical injury to him; a similar account was given by the appellant's co-accused.

6. Mr McGough gave a detailed victim impact statement at the hearing which outlined both the physical and psychological effects of the injuries. We quote portions of significance from it as follows: -

*"Since the attack I no longer trust people. I find it hard to relax in social situations. I rarely leave my house, especially after dark, and if I do I stay on the periphery of crowds and avoid most people... If people approach me when I'm sat down I will stand up. I don't feel safe or like I could adequately defend myself if I'm sat down...*

*Everything changed within my life immediately after the attack. As a result of the attack itself and the threats that were made by Kevin McCabe during and after the assault I left the town of Ballinamore where I was living because of threats made by Kevin McCabe. I couldn't see my children until my face had healed, I became homeless and was couch surfing, as it were. I haven't spoken to my family that live in Ballinamore since aside from a text or two and a brief conversation when I went to collect some belongings. The attack changed the way I live my life and continues to do so to this day...*

*The year I was attacked was the worst year of my life so far. The six months before and the six months after contained the worst times I've ever suffered. At the time of the attack I was suffering with a crippling depression and was actively self-harming. I was at the lowest point I've ever been and I was considering suicide, a fact that both of my attackers were fully aware of, as evident in their attempt to claim I'd done the damage sustained during the assault to myself, a defence the guilty party maintained until the eve of the trial. The truth about what happened the night I was attacked has been denied, twisted and ignored for more than three years...*

*The truth is that on the night I was attacked the two men in question hunted me down to deliver their own brand of justice. They delivered it fast and without mercy. I begged for them to stop but they didn't. Ryan pushed and pulled at my defences and Kevin made use of every opening, delivering powerful punches, the likes of which I'd never felt before. I've never felt so small and weak before or since. If it were not for the arrival of the two Gardaí I don't think Kevin would have ever stopped hitting me. He made threats to kill me and at the time I believed him."*

7. Counsel for the appellant outlined to the judge that the appellant was a married man with children and had a history of security work in night clubs and odd jobs in addition to that. A number of character references were also put forward to the Court including a reference from Austin Quinn of St Vincent de Paul to the effect that the appellant was a reliable and regular volunteer with the charity. There were further references from the appellant's doctor, Dr Sean Bourke and from his employer, both of which were also favourable. It seems fair to summarise the position as being that he was someone that was making a valuable contribution to society.
8. In a probation report dated the 8th of November 2021, that had been ordered by the Court, counsel for the appellant acknowledged that *"it's not the most glowing of reports that I*

*have seen before, but the report does say that our client fully appreciates the gravity of the offence before the Court and that he is aware and realises that it may warrant a custodial sentence". In the course of his interview with the probation officer, the appellant repeated the assertion that the victim's injuries were due to self-harm and the tenor of the report was that he was not remorseful for his actions. The report deemed the offence a violent overreaction. Furthermore, the appellant had no convictions prior to the incident; at the sentence hearing however it emerged that a number of further offences had been committed thereafter; the Court was told that these were not offences of violence although there was no evidence of what they were; in the absence of evidence we cannot have regard to them – the Circuit Court judge took a similar approach.*

9. When the matter was before the Court on the 22nd of November 2021, counsel for the appellant made submissions as follows: -

*"Judge, by way of admission of his wrongdoing my client has managed to gather a sum of €2,000 in compensation for the injured party as an acknowledgement, as I said, of his wrongdoing in respect of this offence. While the Court heard that my client does have previous convictions, albeit after the incident, I would like to assure the Court that they are non-violent offences and that this is not a common feature for the man who is before the Court. On that basis, Judge, I would be asking the Court to take into account that he is a family man, he's very active in the local community in Ballinamore. This was an isolated incident and my client is very remorseful for it. I'd ask the Court to do its very best for Mr McCabe."*

10. The judge was not prepared to sentence on that date. The judge then went on to ask counsel about the offer of compensation as follows: -

*"I have to say that I have not at all formed a view as to whether the payment of that compensation is going to make any difference one way or the other as to whether or not I deal with it on a custodial basis or not. In those circumstances do you want the monies paid over anyway or do you want to wait and see what the determination is?"*

To this question counsel for the appellant replied that she would wait until tomorrow when the sentence was to be finalised. Nothing further was said about this aspect but the judge understood the position to be that the offer was contingent on the imposition of a non-custodial sentence.

11. In his sentencing observations, firstly the judge had regard to the aggravating factors when he said that the offence was: -

*"...a premeditated sustained and very violent attack on Mr McGough, a family in law. Wherein, Mr McGough was restrained by Mr Collins to facilitate Mr McCabe delivering multiple blows to his face and head, as a consequence, of which, Mr McGough suffered very serious injuries, both physical and psychological. The physical injuries included multiple complex fractures of the facial bones, requiring surgery and the insertion of*

*plates. The assault took place when the accused already knew that Mr McGough was in a vulnerable psychological state."*

12. Thereafter in imposing a headline sentence, the judge found that the offence lay in the upper end of the scale of offending (a conclusion with which we agree) and nominated a headline sentence of four and a half years imprisonment. The sentencing judge also had regard to the fact that the appellant and his co-accused were engaged in a joint enterprise but made some distinction between them as follows: -

*"I see little reason to distinguish the role of Mr Collins in restraining Mr McGough from defending himself and the role of Mr McCabe, who was inflicting the blows. Except, that it was accepted by the investigating guard that Mr McCabe was the main mover, and that Mr Collins appears to have rowed along with him as an accessory."*

13. In considering the question of mitigation, he observed as follows: -

*"Now, in relation to Mr McCabe, the mitigating features that have been identified to which consideration must be given by the Court are, that he entered a plea of guilty, albeit on the morning of the trial, thereby sparing Mr McGough any further trauma by having to give evidence in the trial. Secondly, his absence of previous convictions. Now, I note his offer of €2000 in compensation as a token of remorse, subject to the Court deciding to deal with the matter on a non custodial basis. The Court does not see the case as one suitable for disposal on a non custodial basis.*

*So it appears that the Court must view that offer as withdrawn. In any event, having regard to the very serious injuries inflicted on Mr McGough, the Court views the figure as somewhat derisory. Unfortunately, the apparent lack of remorse demonstrated by Mr McCabe to the Probation Service was not much improved by his attempt to demonstrate remorse in evidence to the Court. The Court notes that Mr McCabe has done good work in the past for his community, for the St Vincent de Paul, and the Court notes his references in that regard and the content of the reference from his GP, who appears to have a good opinion of him.*

*The Court also notes that he is married with two children and that a custodial sentence will be onerous on his family."*

14. Having regard to all these factors, the judge determined that a post-mitigation sentence of three years and nine months imprisonment was appropriate in the circumstances.

### **Grounds of Appeal**

15. Whilst no grounds of appeal are identified within the Notice of Appeal, the written submissions referred to four headings namely, the identification of an excessive headline sentence, an erroneous finding of aggravating factors, the attachment of inadequate weight to mitigation, including plea of guilty and the appellant's prior good character (that is good character prior to the offence). We will deal with these matters together.

16. Counsel for the appellant made a number of submissions. Firstly they argue that the headline sentence of four and a half years was excessive having by reason of the absence of certain aggravating factors typically associated with offences of the present kind, relying on *The People (Director of Public Prosecutions) v McGrath, Dolan and Brazil* [2020] IECA 50. Specific reference was made to the following passage in that judgment (at para 22): -

*"As the facts of these three cases show, s. 3 assault cases can be very serious indeed. Amongst factors tending to aggravate such offences, we would identify the infliction of significant injuries, injuries well in excess of the threshold to constitute a s. 3 offence, the use of a weapon, the involvement of more than one assailant, the injured party's situation is more difficult if he is assaulted by two, three or more individuals and planning or premeditation."*

17. It seems to us that this argument is not persuasive; the assault was serious by reference to the medical evidence and the harm caused significant; the attack itself was carried out by more than one assailant. Therefore we think that the judge was well within his discretion to determine that the offence fell at the upper range on the scale of offending and was a particularly violent attack.
18. Counsel for the appellant made further submissions in respect of the compensation of €2,000 tendered; the judge remarked on it in passing sentence taking the offer as "somewhat derisory" and that it had been withdrawn. Counsel for the appellant argued that on the day in which sentence had been passed an opportunity had not been afforded to counsel to raise the issue of compensation again. The lack of remorse was apparent from the probation report notwithstanding the apology given in evidence. It seems to us that the term must have been in reference to the amount in damages which might have been recovered by the victim. Having regard to the manner in which the question of compensation was dealt in the judge's ruling, it was not considered by him to be relevant as to sentence and certainly not decisive. We do not think the judge had an obligation on that day to invite counsel to address him on the status of the offer having regard to the way in which he dealt with it.
19. Counsel for the appellant placed the greatest weight on the fact that a reduction to three years and nine months after mitigation failed to reflect the mitigating circumstances. It seems fair to say that in this respect the main emphasis was on the plea of guilty and the fact that, so far as the evidence went, the appellant had no relevant previous convictions and was a person otherwise of good character as referred to above.
20. We think the judge was right in nominating a headline sentence of four years and six months having regard to the gravity of the offence. We think, however, that the reduction from the headline sentence for mitigation to three years and nine months was insufficient and constituted an error in principle. We accordingly quash the sentence and proceed to resentence.
21. In doing so we have regard of course to the totality of the factual circumstances as set out above. We think that the absence of convictions prior to the offence (as we have said we

cannot have any regard to what was apparently said by counsel to the effect that there were subsequent convictions in respect of non-violent offences – as the judge did not), the plea of guilty and his positive engagement in the community warrant a post mitigation sentence of three years, the last six months of which we suspend for twelve months on the terms that the appellant keep the peace and be of good behaviour during his period of imprisonment and for a period of twelve months after his release, that he will place himself under the supervision of the Probation and Welfare Service for twelve months.