THE COURT OF APPEAL

Record Number: 54/2022

The President.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.B.

APPELLANT

JUDGMENT of the Court delivered on the 25th day of July 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against severity of sentence. On the 7th March 2022, following conviction, the appellant was sentenced to 14 years' imprisonment in respect of two counts of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997. Three counts of child cruelty contrary to s. 246 of the Children Act, 2001 were taken into consideration. The offences concerned his daughter, and the appellant was tried jointly with his co-accused, his wife, the mother of the injured party.

Background

2. The factual background is set out in the judgment of this Court delivered on the 12th June 2023, concerning the appellant's appeal against conviction, which was dismissed. However, it is necessary to briefly rehearse some of the background to the offending for the purpose of this sentence appeal.

3. Count 6 is a count contrary to s. 4 of the 1997 Act being assault causing serious harm and relates to the 2nd July 2019, where the child sustained a serious head injury inflicted by the co-accused, leaving her requiring permanent care for the rest of her life. The injuries were inflicted in her home by the co-accused whilst the appellant was at work.

4. Count 7 relates to a timeframe between the 28th June 2019 and the 2nd July 2019 where the child suffered serious disfigurement by severe burns to her hands and feet. Again, these injuries were inflicted by the co-accused.

5. The focus of the within appeal rests with the sentence imposed on counts 6 and 7 where in essence it is contended on the part of the appellant that the judge erred in failing to distinguish the moral culpability of the offenders.

6. Counts 8, 9 and 10 are charges of child cruelty under the Children Act, 2001. Count 8 refers to the time frame between the 28th June and the 2nd July 2019 and the subject matter of that count concerns an incident of choking by the appellant rendering the child unconscious.

7. Count 9 concerns the same time period, but is that of causing, procuring or allowing the child to be assaulted in the manner reflected in count 7, and finally, count 10 concerns the 2nd July 2019 and is that of neglecting the child following the head injury.

8. The three child cruelty counts were taken into consideration.

Sentencing Remarks

9. The sentencing judge began his comments by observing that the appellant and his co-accused were convicted following trial of the various counts where the evidence adduced demonstrated that the child:-

> *"was attacked in the most grievous way by her parents. The evidence disclosed that she was beaten, punched, kicked, beaten and indeed burned by her parents.*
> *There is also evidence to say that she was put into the attic to chastise her, which terrified her. Eventually it seems on the 2nd July something occurred causing the injured party, [ ], to sustain a severe head injury, which had devasting consequences for her. It seems that this injury occurred sometime around midday or so but it seems that the ambulance wasn't contacted or the emergency services until about 10 o'clock that night. I think the accepted evidence is that [the appellant] travelled to work at around 7 pm (sic) and the events that gave rise to the head injury and the brain damage occurred sometime, it is estimated, between 11 and 1, around that time. It seems there was contact between the two defendants and eventually it seems [the appellant] arrived back at home around 3 or so. But despite [the injured party's] difficulties being apparent, no contact was made with the emergency services until about 10 pm. There was an attempted phone call or a phone call that was cut short, I believe, around 8 pm."*

10. He later moved to consider the culpability of the two accused and said:-

> *"What can you say about the levels of culpability of both of the defendants? Obviously it seems the injuries sustained by [injured party] on the date in question, [co-accused] was the defendant present at that time. So, the Court must infer whatever happened was caused by [co-accused] on that morning. But the Court is of the view this was part of a pattern of what could be termed pretty savage behaviour by both parents towards their child. The jury in this case were instructed in relation to joint enterprise and they accepted that both defendants were jointly responsible for what occurred to [injured party]. So, is there any difference in their level of culpability? This Court fails to see it. I think both parties were acting together in concert in relation to what occurred to this child.*
>
> *It seems beyond imagination that one of these parents didn't try stop and put an end of this behaviour but they didn't. They both behaved in this way for reasons only known to themselves. Obviously the Court had the benefit of the evidence of Inspector McInerney*

who had conversations with both of the defendants, where they intimated that it was their belief that around this time the child was possessed by a spirit, an evil spirit referred to as a djinn, and they were taking steps to remove the djinn or evil spirit from the child; that's a possible explanation. They may have thought that to be the case but in my view that doesn't help them. What they did was savage. To destroy their child in this way is, putting it at its mildest, grossly reprehensible. Now, this child, as indicated, as I have said and I think the uncontested evidence, will remain in care for the rest of her life and that's a tragic situation."

11. This Court entirely agrees with the judge's remarks regarding the appalling barbaric acts of the appellant and his co-accused. Inflicting such suffering on an innocent defenceless child of nine years simply beggars belief.

12. In terms of mitigation, the court took into account the appellant's lack of previous convictions, his long history of work, the difficult family circumstances leading up to the offending, the fact that the appellant had lost his children as a result of the offending and the difficulties he would face in prison as a foreign national with a language barrier.

13. We comment now as we did at the hearing of the sentence appeal, the fact that the appellant has lost the society of his other children through his own brutal actions is not, and never could be a mitigating factor and we disregard it in that context.

14. The judge nominated a headline sentence of between 20- and 22-years' imprisonment for the appellant and his co-accused. Applying mitigation, this was reduced to a sentence of 14 years' imprisonment imposed on each of the s. 4 counts on a concurrent basis with the child cruelty counts taken into consideration.

Grounds of Appeal

15. *1. The learned trial judge erred in law and in fact in the manner in which he failed to distinguish between the culpability of the co-defendants in sentence.*

2. The learned trial judge in imposing sentence had excessive regard to the aggravating factors in the case.

3. The learned trial judge in imposing sentence gave inadequate consideration to the mitigating circumstances in the case.

Submissions of the Appellant

16. It is the appellant's position that equal treatment of the two co-accused in respect of the sentences imposed has created an injustice whereby the appellant's sentence does not reflect the fact that he did not inflict, nor was he present during the infliction of the serious injuries on the injured party.

17. Reliance is place on *People (DPP) v Fitzgibbon* [2014] IECCA 12, where the Court of Criminal Appeal provided bands of 2-4 years' imprisonment for offences in the lower range, 4-7 ½ years' imprisonment for offences in the mid-range, a higher range of 7 ½ -12 ½ years' imprisonment with exceptional cases warranting a sentence above 12 ½ years' imprisonment and wholly exceptional cases warranting the maximum sentence of life imprisonment. It is further noted that the higher range was increased by this Court to 10-15 years' imprisonment in the case of *People (DPP) v O'Sullivan* [2019] IECA 250, however, that case postdates this offending.

18. It is not argued that the sentence falls outside the range, notwithstanding that it lies above the higher range described in *Fitzgibbon,* but that an unfairness arises by virtue of the sentencing judge's failure to differentiate between the appellant and his co-accused in terms of moral culpability, in breach of the principles surrounding parity.

19. In relation to the appellant's culpability, it is submitted that the physical chastisement of the injured party by the appellant was of an entirely different degree to the catastrophic injuries inflicted on her in his absence, emphasis is placed on his shock on his arrival home following the infliction of the devastating head injury.

20. Reliance is placed on the following passage from the judgment of Keane CJ in *People (DPP) v Duffy* [2003] 2 IR 192:-

> *"There appear to be two reasons underlying the principle that an appellate court will interfere where there is a significant and unjustifiable disparity between the sentences imposed on two or more persons involved in the same criminal offence. The first, identified by Finlay C.J. in The People (D.P.P.) v Conroy (No. 2) [1989] I.R. 160 is the substantial sense of grievance at unfair treatment which may be caused by apparently unequal sentences. It could be added that the appellate court should only take into account a grievance which, objectively viewed, could be reasonably entertained by the accused person: a person who has received what appears to him/her to be a severe sentence may be unable or unwilling to recognise that the disparity between that sentence and a lighter sentence imposed on his/her co-accused is, in the particular circumstances, justifiable. The second reason is the harmful effect on public confidence in the administration of justice resulting from a significant disparity in the sentences which seems incapable of being justified: see R. v Fawcett (1983) 5 Cr. App. R. (S.) 158*."

21. It is submitted that in a case such as this, where two co-accused receive equal sentences, but where the culpability of one party is significantly greater, the same issues arise.

22. Further reliance is placed on *People (DPP) v Jason Davis* [2022] IECA 57 wherein this Court found that the sentence imposed on the appellant was appropriate, however, comparing his degree of culpability and his sentence to that of his co-accused, the degree of divergence between them could not be justified and the sentence was reduced on that basis.

Submissions of the Respondent

23. It is the respondent's position that the sentencing judge was entitled to conclude that the appellant was equally culpable to his co-accused. It is submitted that the following are significant factors in assessing the gravity of the appellant's offending:-

- The violence done to the injured party was such that the appellant was convicted of two counts of serious harm relating to separate serious harms suffered by her.
- The violence done to the injured party by the offenders was sustained over a period of days.
- The serious harm caused (in the case of the burns/scars) was indicative of an extraordinary level of prolonged violence visited upon the injured party and resulted in 28 scars which were readily visible two years later.

- The serious harm caused (in the case of the brain damage) created such a risk to the injured party's life that she was ventilated, and not expected to survive the removal of the ventilator.
- That serious harm was profoundly life altering, leaving the injured party with minimal consciousness and requiring 24-hour care for the rest of her life.
- The severity of the consequences suffered by the injured party were neither disproportionate to, nor unlikely consequences of, her parents' mistreatment of her.
- The appellant and his co-accused were in a particular position of trust, having a moral duty to protect the injured party from harm.
- The injured party was particularly vulnerable, being only 9 years old, speaking little English and knowing no other adults apart from her parents in Ireland where she had arrived for the first time some four months previously.
- The assaults were not carried out in response to any provocation on the part of the child.
- The injured party's sibling was co-opted by the co-accused to assist in burning her.

24. Accordingly, it is submitted that the sentencing judge was entitled to determine that the appellant's offending was in the exceptionally high category of such offending and that the headline nominated by the judge was properly within his discretion given the circumstances of the case.

25. It is further submitted that the approach advocated for by the appellant, that the *Fitzgibbon* guidelines should apply to the appellant's sentence, is not supported by the jurisprudence of this Court. It is submitted that this Court, when addressing the severity of sentences imposed for s. 4 offending, has looked at the bands applicable at the time of the offending and at the time of the impugned sentence. The following from *O'Sullivan* is relied upon in this respect:-

> *"Notwithstanding our view that the guidance offered by DPP v. Fitzgibbon requires some refinement at this stage, we think it reasonable to address this appeal by reference to the Fitzgibbon guidelines which were those that were applicable when sentence was imposed."*

26. The respondent further points out that the distinction between the higher band of sentences as set out in *Fitzgibbon* and that set out in *O'Sullivan* is not significant and that the offending here was such that the sentencing judge could have lawfully and properly imposed a sentence of life imprisonment.

Discussion

27. The focus of the within appeal lies with the nominated headline sentence rather than with the discount afforded for mitigation. The reduction for mitigation, was, in our view, a most generous discount.

28. In terms of distinguishing the levels of culpability for joint offenders, reference is made to para. 5-45 of Prof O'Malley's text on *Sentencing*, 2nd ed:-

> *"In practice, of course, two or more participants in the same offence will seldom be so similarly situated as to merit identical sentences. The question for an appeal court will typically be whether the degree of difference between the sentences imposed at first instance was objectively justified. Offenders' level of involvement may vary. One may have*

been the prime mover or perpetrator, while another may have had a more minor role. One may be entitled to mitigation because of youth or absence of previous convictions, while another may not. One may have pleaded guilty while another was convicted following trial. When all of these and other relevant matters are considered, it becomes clear that different, and sometimes substantially different, sentences are justified even though all of the offenders participated in the same criminal enterprise. Disparity in such circumstances would arise from the imposition of identical rather than different sentences. An offender who receives a heavier sentence than other participants in the same offence may nonetheless claim to have suffered an injustice. The test to be applied by an appeal court in these circumstances is an objective one and is usually expressed in terms of whether the appellant has a justifiable sense of grievance. ***Even in a case of joint enterprise, account may (and usually should) be taken of differences in culpability****. The law governing the sentencing of co-defendants was subjected to a particularly close analysis by the Court of Criminal Appeal in People (DPP) v Daly."* (our emphasis).

29. The issue here is a reasonably straightforward one, but one which is challenging nonetheless. The offending in question is without doubt of the most grievous kind. The nature of the injuries inflicted on this child were horrific. The level of cruelty was quite extraordinary and totally unfathomable.

30. This Court must consider the issue at the heart of the appeal and that is whether a distinction can be drawn between the appellant and his co-accused in terms of moral culpability in a case of joint enterprise in determining the appropriate headline sentence.

It seems to us in most instances of joint enterprise, there will be limited scope for such a distinction, but of course each case is fact-dependent.

31. In the present case, while there is some level of disagreement between the parties regarding the appellant's presence over the entire period in question, it is common case that he was not present when the injuries leading to the dreadful head injury were sustained. It is also the position that he certainly spent time with the child during the relevant time period and must have been aware of the terrible burn injuries to her hands and feet. This Court viewed photographs of the injury to the child's hand which disclosed a very obvious and deep burn injury which nobody would fail to notice. We are told that she had difficulty walking due to the burns to her feet.

32. The child was also noted to have a litany of injuries when examined by doctors following the head injury, these including numerous bruises, burns to her body and bruising and swelling of the genital area which was completely blackened. The evidence of one sibling was that the co-accused sprayed some substance onto the injured party's genital area. The choking incident perpetrated by this appellant involved him holding the child by the neck with her back to the wall and her feet off the ground until she passed out.

33. The appellant argues that he should be considered of lesser culpability to his wife in the infliction of the injuries for which the sentence was specifically imposed, that being for the two s. 4 offences. It is said that the judge failed to take sufficient regard of the evidence of the appellant's apparent shock on being informed of the head injury and his words of admonishment to his wife on his return to their apartment.

34. While noting those matters, it is also the position that both he and his co-accused used coconut oil in an effort to hide the bruising to the injured party's body prior to the arrival of the medics.

35. The sentencing judge saw no reason to draw a distinction between the appellant and his co-accused in terms of the role played by them and at first blush, it is difficult to disagree with that when one reads of the nature of the torture inflicted on this child.

36. However, this Court must carefully look at his role in this enterprise. He clearly was party to an agreement to harm and seriously harm this child. He inflicted some of the injuries himself by beating her, kicking her and, of course, the choking incident. That incident is reflected in one of the child cruelty counts. The other two child cruelty counts concern the failure to seek medical help for the child and allowing her to be assaulted during the relevant time. We note that Mr Dwyer SC makes the point that the "*golden hour*" following the head injury had passed before the appellant knew of it. However, those counts serve to increase the headline sentence on each of the s. 4 counts as those counts were taken into consideration by the trial judge.

Decision

37. This is a very difficult case, on the one hand, the sentence imposed was fully deserved; the offending was that of the physical and emotional torture of a vulnerable child. On the other hand, the appellant is marginally less culpable than his co-accused and we believe that it is necessary that some distinction should be made in that respect. The challenge for this Court is to ensure that we carefully assess his moral culpability on the s. 4 counts. He is clearly legally culpable, but we are of the view that he is less culpable in terms of moral culpability than his co-accused and we therefore find that the judge erred in this regard.

38. Accordingly, we will quash the sentence imposed and proceed to re-sentence *de novo* as of the present circumstances.

Re-Sentence

39. In so doing, we do not intend to reiterate the aggravating factors, they are readily apparent to anyone reading this judgment or our earlier judgment. The facts are shocking, the injuries are of the gravest kind and all point to the conclusion that this case is of an exceptional nature meriting a headline sentence in excess of the highest band marked in *Fitzgibbon.* The judge placed the headline sentence between 20-22 years for both culprits, we consider the appropriate headline sentence for this appellant, given his role in respect of the two s. 4 counts to be that of 18 years' imprisonment. The notional sentence is elevated by virtue of the child cruelty counts.

40. Insofar as mitigation is concerned, we see those factors to be somewhat limited, but acknowledge the absence of previous convictions, that he is undoubtedly a hardworking man, the difficult family circumstances, the fact that he is a non-national and the language difficulties as a consequence in his case. His co-accused shared those same factors with the exception of the work history. We note the contents of the Prison Governor's Report.

41. Applying the mitigation, we reduce his sentence to one of 13 years' imprisonment backdated as in the court below. The three child cruelty counts are taken into consideration.

42. We agree with the trial judge's comment at the conclusion of the sentence hearing that the contention of the presence of an evil spirit or djinn within the child provides no excuse whatsoever and that it was not the child who was possessed with evil, but the parents.