



THE COURT OF APPEAL

Birmingham J.  
Mahon J.  
Edwards J.

CJA 58/2017

IN THE MATTER OF S.2 OF THE CRIMINAL JUSTICE ACT, 1993,

AND IN THE MATTER OF:

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

V

STEPHEN COMEY

Applicant

Respondent

**JUDGMENT of the Court delivered on the 31st of May 2018 by Mr. Justice Edwards .**

**Introduction**

1. On the 21st of July 2015, the respondent to this appeal pleaded guilty in Dublin Circuit Criminal Court to one count of unlawful seizure of a vehicle contrary to s. 10 of the Criminal Law (Jurisdiction) Act 1976; one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997; and one count of possession of a syringe with intent to injure or to threaten or intimidate, contrary to s. 7(1) and (7) of the Non-Fatal Offences Against the Person Act, 1997.

2. These guilty pleas were entered on the basis that the full facts of the incident would be given at the sentence hearing.

3. On the 10th of February 2017, the respondent was sentenced to a term of imprisonment of three and a half years in respect of each of the counts that he had pleaded guilty to. Each sentence was backdated to the date at which the respondent entered into custody, the 12th of May 2014. The balance of each sentence was suspended from the date that sentence was handed down, the 10th of February 2017, on the condition that the respondent would enter a bond in the sum of €150 to keep the peace and be of good behaviour. The sentencing court also ordered that the respondent undertake to remain under the supervision of the probation and welfare services for one year post release and to comply with any other directions from these services regarding training and employment, drug addiction and offence focused work. Liberty was also given to the Probation and Welfare Service to re-enter the matter before the sentencing court for the purposes of reactivating the sentence in the event of non-compliance with these conditions.

4. The applicant, namely the Director of Public Prosecutions, now seeks a review of the said sentences under s. 2 of the Criminal Justice Act 1993 on the basis that they were unduly lenient.

**Facts of the case**

5. At the sentence hearing, on the 22nd of January 2016, Sergeant David Wogan gave evidence of the incidents forming the subject matter of the present case. These offences occurred on the 12th of May 2014. At approximately 3 pm on that date, a Mr Mei Bing Zheng and his wife Ms Xiaoling Zhou had parked their car on a street parallel to Parnell Street in Dublin's city centre. Mr. Zheng went to the parking metre which was located behind the car to get a ticket, leaving his key in the ignition and his wife in the passenger seat. Ms. Zhou was seven and a half months pregnant at the time.

6. Suddenly, the respondent opened the driver's door and sat into the car. Ms. Zhou had taken off her seat belt at this time and, having turned around to get her coat, she did not see where the respondent had come from. Having sat into the seat, the respondent shouted at Ms. Zhou to get out of the car and proceeded to engage the gear and drive the car forward, leaving Ms. Zhou with no chance to get out of the car. The evidence was that Ms. Zhou *"was crying and very upset and kept begging the man to stop the car, but that he was ignoring her"*.

7. When Ms. Zhou tried to put the car into neutral gear, the respondent punched her to the right side of her face. She was wearing glasses at the time and the punch caused her glasses to dig into her face. This punching persisted whilst the respondent continued driving, and Ms. Zhou continued trying to grab the steering wheel and the gearstick in an effort to stop the car. Ms. Zhou did not know how many punches she received. At one point, Ms. Zhou tried to open the passenger door and get out of the car. She used her leg to try to keep the car door open as she shouted for help from passers-by. At this juncture, the respondent tried to push Ms. Zhou out of the car with his left hand whilst steering and driving the car with his right.

8. The respondent was shouting at Ms. Zhou, telling her to get out of the car and threatening to kill her. Ms. Zhou's concern was that she was unable to jump from the car on account of being so heavily pregnant. Ms. Zhou was crying and begging the respondent to stop the car. He continued to ignore her and kept driving. The sentencing court heard that Ms. Zhou did not know how long the incident went on for but that at one point the car was driven down a narrow lane with cars parked either side; the car was being driven in such a way that it scratched off the parked cars in the lane.

9. Sergeant Wogan and a Garda Hunt were on duty on the date in question. They began to pursue Mr Zheng's car as they observed it being driven at a high speed and in an erratic manner with the passenger door open. Sergeant Wogan also gave evidence to the sentencing court that he noticed that there was a man driving the car who appeared to be in a physical altercation with the woman in the passenger seat, the latter appearing very distressed.

10. As the car travelled down the lane, the car slowed down to a stop and the two Gardaí approached the driver's side of the vehicle. As they did so they *"observed a number of blows"* inflicted by the respondent on Ms. Zhou. Garda Hunt attempted to open the

driver's door but was unsuccessful; the driver took off again towards Gardiner Street and broke a set of red traffic lights on Sean McDermott Street on the way.

11. Eventually, the car came to a halt and the respondent alighted and walked directly in front of the Garda car, at which point the respondent was arrested. A syringe with a substance in it was found on the respondent's possession at the time of arrest. The respondent was subsequently taken to Store Street Garda Station, where the evidence before the sentencing court was that he was detained in accordance with law and interviewed during the course of his detention.

12. On the date of the sentencing hearing, counsel for the respondent made an application to the sentencing court to defer the finalisation of sentence until the 4th of March 2016 in order for a urine analysis and a governor's report to be furnished to the sentencing court on that date. This application was acceded to. A psychological report in respect of the respondent was also handed into the sentencing court.

13. The matter was before the sentencing court again on the 4th of March 2016. On this occasion, that court was asked to deal with one re-entry application (Bill No. 413/2011) pursuant to section 99 of the Criminal Justice Act, 2006. The offence in question was a robbery offence and, on the 19th of December 2011, the court imposed a six year sentence on the respondent with two years suspended on the condition that he keep the peace and be of good behaviour. The respondent was released from prison on foot of that sentence on the 14th of March 2014 and the bond was signed by him on that date. The current offences were committed on the 12th of May 2014. Dealing with the re-entry application, the sentencing judge noted the length of time the respondent had spent in prison on foot of the sentence imposed in respect of Bill No. 413/2011, and went on to say that *"because of [the] efforts that [the respondent has] made to rehabilitate himself. I am going to put it back for a Probation and Welfare Service Report. I want you to understand and understand well that I have taken into account all matters set out in the psychological report, his history, his family history and now he enjoys happily the support of his mother and his sister. I'll finalise the matter on the next occasion and it will be by way of a sentence with part suspended and then allow him to access those programmes in the community, okay"*

14. Accordingly, given the respondent's efforts at rehabilitation, which were borne out by the urine analysis reports that the sentencing court had received, along with reports from a drugs counsellor in Cloverhill prison, the sentencing judge declined to make any order on the reactivation applications at that stage.

15. The matter was further adjourned to the 22nd of April 2016 and a Probation Report was requested by the sentencing judge. Thereafter there were a number of further adjournments, to allow for finalisation of reports, and to see how the respondent was progressing. A Probation Report, dated the 15th of July 2016, was provided to the court below in the first instance, which assessed the respondent as being at high risk of re-offending over the following twelve months. While noting risk factors contributing to this level of risk, the report also noted that there were protective factors evident in the case; that Mr. Comey was in good health, that he had engaged well with services in Cloverhill Prison during his remand and that he had verbalised a desire to not only address his addiction but also the issues that had led to his substance misuse (which we set out in some detail in the report and included a dysfunctional childhood environment, institutionalisation at a young age for anti-social behaviour and physical, emotional and sexual abuse while in two institutions). This report concluded and proposed as follows:

### **"Conclusion**

*Mr. Comey is a thirty year old man who appears before the Court today for sentencing in relation to offences of assault, unlawful seizure of vehicles and possession of a syringe which occurred on 14th May 2014. He co-operated with the Probation Service in the preparation of this report. Mr. Comey advised he had little recollection of the incident as he was heavily under the influence of substances. He accepted accounts contained within the Book of Evidence and expressed remorse for his actions. He possessed good insight into victim awareness and presented as though he had greatly considered the impact on the victim.*

*This is Mr. Comey's third referral to the Probation Service; He failed to engage when first referred in 2002. In 2011, he was placed on a Part-Suspended Sentence in 2012 and he committed the index offence approximately eight weeks following his release. He accepts he did not fully engage with the Probation Service but admitted during this adjournment that he requires the support and assistance of professionals to assist him in making meaningful pro-social lifestyle changes.*

*Formal assessment of risk of re-offending in the coming twelve month period, without interventions, placed Mr. Comey at high risk of re-offending. Pertinent risk factors identified in this case are his offending behaviour, his substance misuse, history of unemployment, non-productive use of time prior to his remand, lack of stable accommodation, negative peer influences and poor coping skills. Mr. Comey has commenced addressing some of these needs whilst in custody and must continue to do so in order to lower his level of risk.*

*Mr. Comey has a significant addiction history. He first began to address his addiction during his previous sentence in 2012 however, quickly relapsed upon release. He has identified and I concur that a residential treatment programme would address his current presenting needs, which are substance misuse, accommodation and poor coping skills. A referral has been completed for Coolmine Addiction Service and will be progressed following sentencing. Mr. Comey has stated that he needs to transfer from custody to residential treatment as a release into the community will likely lead to relapse prior to commencing the programme.*

### **Proposal**

*Should the Court be considering a period of supervision as part of disposal in this matter, I respectfully request that the following conditions be included, in order to address the risk and needs highlighted by the risk assessment:*

- *Mr. Comey should continue to engage with relevant services, including the Probation Service whilst in custody;*
- *He should complete a residential drug treatment programme;*
- *He should engage with relevant education/employment services as directed by the Probation Service;*
- *He should engage in anger management work;*

- He should engage in offence focused work;
- He should follow all directions given to him by his supervising Probation Officer.

*Failure to adhere to the above should result in the matter being brought before this Court."*

16. On the 24th of August 2016, an order was made admitting the respondent to bail for the sole purpose of allowing him to take up a place at Coolmine residential treatment centre. It was a condition of this bail that the Gardaí would be notified if the respondent left the programme before its conclusion. When Gardaí became aware in September 2016 that the Respondent had left Coolmine, an arrest warrant was sought and obtained. The respondent was arrested on foot of this warrant on the 8th of October 2016.

17. The matter came back before the sentencing court on the 10th of October 2016 when evidence was given by a Garda Joe O' Connor of having arrested the respondent on the 8th of October 2016. It was accepted that the respondent was not encountered in the commission of any offence and that he did not appear to be under the influence of any intoxicant. The respondent was further remanded in custody to the 16th of December 2016. A further Probation Report was presented to the sentencing court on that date. This report stated inter alia):

*"This Officer received a telephone call from Ms. Suzanne White, Coolmine Addiction Service, on 26th September 2016 to advise that Mr. Comey had left the residential treatment programme of his own accord the previous evening. She advised prior to this, staff felt he was settling into the programme well. I understand Mr. Comey was arrested by members of An Garda Síochána on 9th October 2016 and he was returned to Cloverhill Prison on 10th October 2016. During interview with Mr. Comey, he advised that he left the residential programme as illicit substances were available to him and he feared relapse in his recovery. Mr. Moylan later advised that a number of programme participants were found to be using benzodiazepine tablets and it was suspected that Mr. Comey had also relapsed in his drug use; this is something Mr. Comey adamantly denies and asserts he continues to be abstinent from substances.*

*I have met with Mr. Comey on two occasions since he returned to Cloverhill on 10th October 2016. He is currently on the standard prison regime and has re-commenced engaging with Mr. Noel Dowling, Addiction Counsellor. Mr. Comey has expressed a desire to engage with day programme upon his release to continue to address his addiction. Mr. Moylan advised that Mr. Comey can contact him upon release to arrange attendance at a pre-entry group, with a view to entry onto their Day Programme.*

#### **Accommodation**

*Mr. Comey stated upon release he intends to initially reside with his sister until he can secure stable accommodation. During this period of adjournment, I had telephone contact with Ms. Leanne Comey, Mr. Comey's sister who confirmed he is permitted to reside with her at her flat in Dublin 2 until he can source alternative accommodation. An application form was completed with Mr. Comey for PACE, an organisation who provides accommodation to single homeless men who are in custody. This referral cannot be progressed however, until Mr. Comey's outstanding Court matters have been dealt with.*

#### **Anger Management and Mental Health**

*During this adjournment, Mr. Comey has continued to express a desire to engage in anger management work and counselling, to address a number of issues including bereavement and abuse experience in childhood. The Probation Service can assist Mr. Comey to access relevant services upon his release from custody.*

#### **Proposal**

*Should the Court be considering a period of Probation Supervision as part of disposal in this matter, Mr. Comey is deemed a suitable candidate for a period of supervision post release. The Probation Service can continue to engage with Mr. Comey whilst in custody to further develop his current pre-release plan, with a view to continue addressing his accommodation and addiction needs."*

18. Following receipt by the court of this report, the respondent was remanded in continuing custody to the 10th of February 2017. On this date, he was sentenced in the terms described at the outset of this judgment.

#### **Impact on the victims**

19. A full victim impact statement of Ms. Zhou was submitted to the sentencing court and its contents were outlined at the hearing. Thankfully, this traumatic incident did not cause any adverse difficulties for her unborn child. Nonetheless, the incident did have a significant psychological effect on Ms. Zhou and she expressed her concern that the emotional stress may have an impact on her pregnancy. She also feared that a similar incident would happen to her again in the future. Further, Ms Zhou suffered minor facial injuries and was at a financial loss of approximately €3600 due to the incident. She had to take a number of weeks off work after the incident. The victim impact statement indicated that the whole ordeal has also had a significant emotional effect on Mr Zheng, who was witness to the incident.

#### **Respondent's personal circumstances**

20. The respondent was born on the 28th of June 1986, making him 30 years of age at the time of sentencing in Dublin Circuit Court. The respondent has had an unfortunate history. His father was an alcoholic who had a bad temper and was often verbally abusive towards his mother. His parents separated when he was seven years old. His father died when the respondent was nine years old, on foot of his ill-health due to his addiction to alcohol.

21. The respondent enjoys a good relationship with his mother, but he was removed from the family home by the HSE in 1995 at nine years of age, as his mother was unable to control his "risk-taking behaviour", which included jumping out of windows as a child. The respondent spent six weeks at St. Michael's Assessment Centre in Finglas Co. Dublin, and two months at Warrenstown House in Blanchardstown, at which time he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Subsequently, he was sent to St. Joseph's Industrial School in Clonmel, Co. Tipperary, where he spent two years there. The respondent described his time there as extremely unpleasant and reported that he was subjected to sexual and physical abuse there. The respondent was sent to Oberstown Boys School in Lusk when he was twelve, where he was again subjected to physical and sexual abuse by staff members. In 2002, the HSE returned the respondent to the family home. He was 16 years old at the time. It was at this stage that he began engaging in

anti-social behaviour with his peers such as substance abuse and theft. In 2003 he was sentenced to a period of detention in St. Patrick's Institution for juvenile offenders.

22. In 2006, the respondent's younger brother committed suicide. He had been using cannabis and ecstasy regularly since he was 12. However, he found it very difficult to cope with the death of his brother and began using heroin a year later, at the age of 21. He quickly became heavily addicted to the drug and began to engage in more serious offending in order to fund his addiction. At the time of committing the offences which are the subject matter of this application, the respondent was reported to have consumed a combination of alcohol, crack cocaine and 'Xanax' medication.

23. The respondent has 70 previous convictions, including two for robbery, one of which involved the robbery and assault of a car driver by the respondent and two others. There are three convictions for burglary, three for possession of articles in relation to a burglary or theft, eight for theft, one for handling stolen property, one for possession of knives and other articles, three for criminal damage, seven for unauthorised takings of mechanically propelled vehicles, six for assault and obstruction of a peace officer and two for trespass. The last conviction recorded was on the 15th of April 2014 for an offence which occurred on the 31st of March 2014.

24. At the time of sentencing, the respondent enjoyed the support of his family in his efforts at rehabilitation. Members of his family were present at each sentencing hearing. During the plea in mitigation, counsel for the respondent noted that his mother, sister and brother "have been here on many of the occasions" that the finalisation of the sentence was adjourned.

25. As indicated above, the sentencing court was provided with various pre-sentence reports in respect of the respondent, most notably the Probation Report, dated the 13th of July 2016, as well as a Forensic Psychological Report, dated the 1st of December 2015. The contents of the Probation Report have already been noted. A letter from Noel Dowling, an addiction counsellor attached to Cloverhill Prison, dated the 15th of July 2016, noted that the respondent had completed an 8 week course of workshops entitled "Moving Beyond Addiction", that he was on a drug free-landing in prison, and had reduced down to 7mg/day of methadone.

26. The psychological report noted that the respondent was a "psychologically vulnerable man" who has "limited psychological resources to cope with his problems and is more vulnerable to stressful situations". The report also notes that the respondent's cognitive abilities were assessed as being within the "borderline" range and were exceeded by 94% of adults his age.

27. The report concludes, *inter alia*, that:

*"1) It will be important for [the respondent] to engage in individual psychotherapy. He would benefit from addressing; his offending behaviour; his history of substance misuse; his childhood and time in care; his past victimisation; the impact of his victimisation; his complex bereavement skills; his poor decision making ability.*

*2) It is of the utmost importance that [the respondent] is supported in maintaining his current drug-free status in order to prevent future offending. He is currently engaged with addiction services within Cloverhill Prison. [The respondent] will make progress in prison provided he remains drug free. He expressed interest in remaining on his current landing, which is believed to be drug-free. It is recommended that he remain on this landing in order to counteract his potential vulnerability to relapse.*

.....

*It is recommended that [the respondent] is linked in with rehabilitation supports prior to his release from prison. He has expressed an interest in attending High Park Rehab & Detox centre in Merchants Quay, Dublin. It will be imperative that he is engaged with a residential drug rehabilitation programme to ensure he maintains his drug-free status upon his transition back into the community."*

28. The sentencing court also had the benefit of documentation submitted conforming an application to the Residential Institutions Redress Board on behalf of the respondent, which included a variety of reports annexed thereto providing further details of the respondent's life history, social background, and his mental and physical health including his addiction issues. In addition the court below had a letter from Fr Peter McVerry SJ, and certain certificates of accomplishment earned by the respondent while in prison.

### **The sentencing court's remarks**

29. In sentencing the respondent the sentencing court made the following remarks:

*"The Court is dealing here with counts 1, 3 and 5 on the indictment and count 1 is unlawful seizure. On the 12th of May, a vehicle on the 12th May 2014 at Grenville Street in Dublin 1, count number -- you can sit down if you want to, thanks. Count No. 3 is assault causing harm, same date, at Gardiner Lane, Dublin 1 and count No. 5 is possession of a syringe at Sean McDermott Street intended by him unlawfully to threaten or cause injury to another or intimidate another, and the Court has been told on a previous occasion the circumstances surrounding the commission of these offences. The injured party was punched and she was in the car when it was taken. She was unable to jump out of the car because she was expecting a baby at the time. She was shouting for help. He, Mr Comey, was trying to push her out, to get out of the car, and the matters relating to the driving of the car were outlined to the Court. Cars were scratched in the laneway and the circumstances surrounding count No. 4, which is the robbery charge, also was opened to the Court. And the Court heard of the circumstances regarding the woman's husband running after the car when he realised what was happening. The car that Mr Comey was driving when followed by a garda car didn't slow down and broke red lights on to Gardiner Street and he got out in Gardiner Street and was arrested and a syringe with a substance in it was found on him. The Court has the benefit of a victim impact report in this regard and the Court has taken into account and well into account the contents of that report. The court has been advised that Mr Comey had 70 previous convictions; two for robbery, three for burglary and others, including theft, criminal damage and unlawful taking. The Court has the benefit of a psychologist's report and probation reports in this matter. The Court has evidence of the efforts he has made to rehabilitate himself and has reports from the Merchants Quay Centre and also has certificates of courses he has completed successfully while in custody. The Court also has the benefit of urine analysis and the Court is taking into account, and well into account, all of those matters. In count No. 1, which is the unlawful seizure of the vehicle, the Court has been advised that the penalty for that is 15 years. The aggravating factors, it seems to the Court are the serious nature of the charge. Of course this was a particularly serious matter as there was a person in the car who was being pushed out of the car by Mr Comey, whose leg was out of the car, who was shouting for help. Mr Comey was trying to push her out and she was unable to jump from the car because she was expecting a baby. The mitigating factors are his plea of guilty, his early plea of guilty and the efforts he has made to rehabilitate himself and he has attended at Coolmine and the favourable urinalysis and reports from the Prison Service and from Merchants Quay. The*

next matter is count No. 3 on the indictment, which is the assault causing harm, and that was on the injured party in Gardiner Lane. And again, the Court is taking into account the aggravating factors, the serious nature of the charge, crime of violence. He was -- she was punched into the side of the face. She was 28 weeks pregnant. The punching persisted and the effect it had on the injured party. The mitigating factors are his plea, his early plea, the efforts he has made to rehabilitate himself and obviously his expression of remorse. The Court has been advised that the penalty for that matter is a maximum of five years imprisonment. The next matter is production of a syringe where the penalty is seven years and the Court is taking into account again the mitigating factors already outlined and production of the syringe in -- as an aggravating factor as it was found on him with a substance in it. The Court has been advised that he has been in custody on these matters and these matters only since the 12th of May 2014 and on each of the counts, the Court will impose a prison sentence of three and a half years' imprisonment with the balance suspended on condition that he enter into a bond to keep the peace, be of good behaviour to his people of Ireland in the sum of €150 for a period of one year and place himself under the supervision of the Probation and Welfare Service for one year from today's date and comply with any other directions as regards attendance at training and employment services, addition services to address his addiction difficulties, engage with the prison service and follow on with any plan they may have had for his post release, engage in anger management work, engage in offence focused work and follow all directions given to him by his supervising probation officer, and give liberty to the Probation and Welfare Service to re-enter the matter before this Court for the purpose of reactivation of the sentence in the present of non-compliance."

### **Grounds of Appeal**

30. In their notice of appeal, dated the 8th of March 2017, the applicant appeals the sentence handed down by the sentencing court on the following grounds:

- a) The learned sentencing judge erred in principle in failing to take adequate account of the evidence adduced of the serious factual background to the commission of these offences. The Court fell further into error in failing to determine where the offences fell on the scale of offending to reflect the nature of the offences and the aggravating factors pertaining to them before applying mitigation.
- b) The learned sentencing judge erred in failing to attach any or any adequate weight to the aggravating factors in the case
- c) The learned sentencing judge erred in attaching undue weight to the mitigating factors in the case .
- d) the learned sentencing judge erred in failing to sufficiently incorporate elements of general deterrence in this sentence having regard to the maximum sentence prescribed by the Oireachtas for the offences.

### **Applicant's submissions**

31. The applicant submits that the sentencing court, in setting a headline sentence of three and a half years for each of the offences, did not reflect the serious factual background to these offences. In that regard, the applicant seeks to emphasise some of the facts of the case as established in evidence.

32. The applicant points in particular to the manner of the respondent's driving. He was initially observed by Gardaí driving the car erratically whilst the passenger door was open. He then collided with parked cars while travelling down a narrow lane. He then proceeded to break a set of traffic lights. The applicant points out that the consequences for the victim, as well as other road-users, could have been catastrophic.

33. Counsel for the applicant also submits that the sentencing court failed to take adequate account of the fact that the respondent assaulted Ms. Zhou numerous times from the point at which he got into the car to the point at which he was apprehended by Gardaí. In considering this issue, the Court is also asked to note that no effort was made by the respondent to allow Ms. Zhou to get out of the car before he drove it away. The applicant submits that, without the early intervention by Sergeant Wogan and Garda Hunt, this incident would likely have continued for a longer time with unknown implications for Ms. Zhou and members of the public using the roads and footpaths in the area.

34. Counsel for the applicant also submits that the sentencing judge failed to take adequate account of several aggravating factors present in the case, particularly the fact that the respondent in unlawfully seizing the vehicle had tried to push Ms. Zhou out of the car as he drove it for a sustained period; and that the respondent had punched Ms. Zhou a number of times during the course of the incident as she tried to get him to stop the car and let her out. Further, the offences were committed during the currency of a part suspended sentence from which the respondent had only been released some two weeks before this incident, and the fact that the respondent has 70 previous convictions, two of which are for robbery, and one of which involved an assault on a car driver.

35. Counsel for the applicant draws the Court's attention to the decision of *People (DPP) v James Kelly* [2015] IECA 114. In that case, Mr. Kelly had pleaded guilty to a charge of false imprisonment which arose when he produced a knife to a young woman who was getting into her car. A charge of unlawful seizure of a vehicle was taken into consideration. A sentence of six years imprisonment with two years suspended was imposed. The period of suspension was seven years. In allowing the undue leniency appeal, this Court had particular regard (at para. 24) to "the associated threats and the fact that the offence was committed while the respondent was on bail for another offence"

36. Counsel for the applicant concedes that the present case is not on "all-fours" with *James Kelly*. Indeed, it is acknowledged that the sentencing court in that case was also dealing with another charge (burglary) for which Mr. Kelly had been on bail at the time of the commission of the false imprisonment offence although a separate sentence was imposed on that offence. However, it was submitted that there are some common features, namely, the violence shown towards the victim, the sustained nature of the incident, and the fact that, whilst not on bail, the respondent in this case was the subject matter of a suspended sentence at the time of commission of this offence.

37. Counsel for the applicant also submits that the sentencing judge gave too much weight to the mitigating factors in the case, particularly his early plea and his efforts at rehabilitation. Regarding the respondent's early plea, the applicant points this Court to the dictum of Murphy J in *People (DPP) v Ryan* (Court of Criminal Appeal, *ex tempore*, 6th March, 2002) to the effect that a guilty plea will not be all that relevant when the offender is "caught in the act of committing the offence".

38. Finally, counsel for the applicant submits that the sentencing judge failed to have sufficient regard to the principles of deterrence (general or specific) and retribution, especially having regard to the fact that the Probation Report had assessed the appellant as being at high risk of re-offending and having regard to his incomplete stay in Coolmine. The Court's attention is drawn to relevant authorities dealing with the deterrence as an objective of punishment, namely *The People (Director of Public Prosecutions) v. M.S.* [2000] IR 592; and *The People (Director of Public Prosecutions) v Black* [2009] IECCA 91.

#### **Respondent's submissions**

39. In response, counsel on behalf of the respondent submits that the sentencing judge was alive to the various aggravating factors in the case, and that she factored these into the construction of the ultimate sentence handed down. The respondent points out that, in relation to the count of unlawful seizure of a vehicle, the sentencing judge noted that the injured party was in the car and that Ms Zhou, being pregnant, was unable to escape and was being pushed out by the respondent. Regarding the count of assault causing harm, the respondent points out that the sentencing judge made reference to the fact that that it was a serious crime of violence, that there were numerous punches inflicted to the side of the injured party's face, and the effect of the assault on her. Finally, in terms of the count of possession of a syringe, it is submitted that the sentencing judge was cognizant of the aggravating factors that the syringe was found on the respondent's person and that there was a substance in the syringe.

40. Counsel for the respondent also points to the fact that the sentencing judge did acknowledge the serious factual background of the case as established in the prosecution evidence, namely that the respondent tried to push the injured party from the moving vehicle; the manner of driving undertaken by the respondent; that the respondent punched the injured party numerous times during the course of the incident; that the injured party could not get out of the moving car on account of her being 28 weeks pregnant, and that the respondent had 70 previous convictions, including two for robbery. Thus, counsel for the respondent seeks to refute the submission made by the applicant that the sentencing judge failed to take adequate account of either the aggravating factors or the serious factual background to the case.

41. Counsel for the respondent also submits that the sentencing judge had proper regard to all of the relevant mitigating factors in the case, namely the respondent's early guilty plea, the expression of remorse by the respondent and the efforts at rehabilitation undertaken by the respondent, as evidenced in the various pre-sentence reports before the sentencing judge. Counsel for the respondent submits that the respondent's efforts at rehabilitation must be contextualised against the extremely difficult background of the respondent. The details of this dysfunctional background have already been set out earlier in this judgment and we do not propose to re-iterate them here. However, given the tumultuous and traumatic life-experiences of the respondent, his counsel submits that, whilst the ultimate sentence imposed could be viewed as lenient, the sentencing judge was within her margin of appreciation in affording the respondent significant mitigation on account of his genuine efforts at rehabilitation, as well as the other mitigating factors present in the case. In this regard, counsel for the respondent highlights some of the case-law which holds that a sentencing judge holds a wide margin of appreciation in selecting the appropriate punishment. In that regard we were referred to *The People (Director of Public Prosecutions) v McAuley* [2016] IECA 173 and *The People (Director of Public Prosecutions) v de Paor & anor* [2008] IECCA 137.

42. The Court's attention was also drawn to decisions of this Court and its predecessor that stand as authority for the proposition that positive efforts at rehabilitation can amount to a significant mitigating factor – *The People (Director of Public Prosecutions) v. Eccles* (Court of Criminal Appeal, *ex tempore*, 8th of October, 2003); *The People (Director of Public Prosecutions) v. Sheridan & Ors* (Court of Criminal Appeal, *ex tempore*, 14th of June 1999); *The People (Director of Public Prosecutions) v Martin Stafford* [2008] IECCA 15; and *The People (Director of Public Prosecutions) v David Fagan* (Court of Criminal Appeal, *ex tempore*, 16th of January, 2009).

43. Further, in response to the applicant's submission that the sentencing judge failed to take account of the fact that the offence before the sentencing court was committed during the course of an active element of a suspended sentence, the respondent submits that the sentencing judge gave full consideration to this issue. Counsel for the respondent points to the fact that the sentencing judge declined to revoke the suspended element of that previous sentence on the 4th of March, 2016, on the basis of the length of time of imprisonment the respondent had served in custody on the older bill (Bill No. 413) and the efforts that the respondent had embarked upon to rehabilitate himself.

44. Counsel for the respondent also pointed the Court to a number of comparators for sentences handed down for false imprisonment and unlawful seizure of a vehicle. We were referred to *The People (Director of Public Prosecutions) v Petrica Lucaci* [2016] IECA 344, in which we imposed a sentence of five years' imprisonment with the final two years and six months suspended. Admittedly in that case, the accused had no previous convictions, had paid substantial compensation and the evidence was that the offending conduct was substantially out of character. We were also referred to *The People (Director of Public Prosecutions) v Bardauskas & ors* (Court of Criminal Appeal, *ex tempore*, 25th of January, 2010) in which a sentence of four years with the final two years suspended was imposed. Significant features of that case was that both co-accused were very young, and that a condition of the part suspension of their sentences was that they should leave the country and return to Lithuania.

45. It was submitted that a sentence of three and a half years, with the balance suspended on conditions after acknowledgment for time having been served, was not outside the margin of appreciation afforded to the sentencing court having regard to sentences previously considered and determined by this Court. It was accepted that the factual circumstances of the cases referred to were not "on all fours" with the current case. However, it was contended that significant mitigating factors do exist in this case that are at least as weighty as those giving rise to the resultant sentences in the cases cited. Indeed, some of the cases to which this Court has been referred, feature significantly serious aggravating factors, including features such as prolonged periods of false imprisonment, threats with weapons and where a significant sentence was previously imposed for a conviction of false imprisonment. It is submitted that taking into account both the aggravating factors and the mitigating factors which feature in the present case, the ultimate sentence was within the sentencing judge's margin of appreciation.

46. We are further reminded by counsel for the respondent that a suspended element to a term of imprisonment remains a significant form of punishment, as recently reiterated in the decision of this Court in *The People (Director of Public Prosecutions) v Clohessy* [2016] IECA 356.

47. It was submitted that the sentencing judge had appropriate grounds (as expressly acknowledged by her) upon which a significant discount could be afforded for mitigating factors and from which a lenient sentence may follow. These grounds included previous successful attempts at rehabilitation by the respondent herein (prior to later relapses) as evidenced by urinalysis report and reports by rehabilitation professionals. Such a factor must be contextualised against the background of the psychological report which was before the sentencing judge which illustrated an acutely troubled history on the part of the respondent, his limited mental capacity and also an entrenched drug addiction from his pre-teenage years.

48. Counsel for the respondent further highlighted that the sentencing judge was dealing with the respondent as someone who had been in custody from the offence date, with the exception of a period of approximately six weeks from August to October, 2016, and had used that time spent in custody actively working towards rehabilitation and displaying favourable progress in undertaking such rehabilitation. Indeed, during the period of his time on bail, the respondent had taken up a place at a residential treatment programme but was, unfortunately, unsuccessful in completing this programme. However, the respondent had continued in his efforts at rehabilitation and the sentencing judge had acknowledged the favourable urinalysis reports, the rehabilitation services' reports and the Probation Reports furnished to her.

49. It was submitted that having regard to the comparators advanced and the evidence which was before the court below as regards the mitigating factors, the ultimate sentence imposed does not constitute a substantial or gross departure from what would be the appropriate sentence in the circumstances.

#### **The Court's Analysis and Decision.**

50. The basis of the Court's jurisdiction to review the sentences imposed on the grounds of alleged undue leniency is not controversial in this case. It is accepted that it derives from s. 2 of the Criminal Justice Act 1993. It was accepted that the law as to the applicable principles to be followed in determining any such application is well settled. The relevant jurisprudence, (in particular *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356; *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390 and *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279), indicates that before a reviewing court can find the sentence to have been unduly lenient, it must be satisfied that the sentence imposed involved "a clear divergence by the court at trial from the norm" that will have been caused by "an obvious error of principle".

51. Moreover, the following particular points were emphasised by O'Flaherty J giving judgment for the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Byrne*:

*"In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.*

*Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J has termed the 'constitutional principle of proportionality' (see *People (DPP) v. W.C.* [1994] 1 ILRM 321), his decision should not be disturbed.*

*Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr Grogan SC, the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.*

*Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."*

52. In *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 36 Barron J. said (at page 359):-

*"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.*

*Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."*

53. More recently in *The People (Director of Public Prosecutions) v. Stronge*, [2011] IECCA 79, McKechnie J. distilled the case law on s. 2 applications into the following propositions:

*"(i) the onus of proving undue leniency is on the D.P.P.;*

*(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;*

*(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;*

*(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*

*(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;*

*(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally*

*(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."*

54. In this case the sentencing judge was obliged to assess gravity in the first instance. She was obliged to do so with reference to the offender's culpability and the harm done, and to locate the offences, in each instance, on the scale or spectrum of potential penalties that might be imposed. In the case of the offence of unlawful seizure of a vehicle the range of available penalties ran from non-custodial options up to a maximum of fifteen years imprisonment. In the case of the assault causing harm the range was from non-custodial options up to a maximum of five years imprisonment, and in the case of possession of a syringe with intent to injure or to threaten or intimidate the range was from non-custodial options up to a maximum of seven years imprisonment.

55. In addressing the issue of the gravity of the offending conduct, best practice required that she should consider the nature, and the intrinsic moral culpability, of the offending behaviour, and the harm done, and make an initial assessment as to where on the scale or spectrum of penalties the offence should be located. Then she was required to identify aggravating and mitigating factors specific to the case and bearing on culpability, and to adjust the notional pointer on the scale up or down accordingly to take account of these and in that way to arrive at a headline sentence.

56. Thereafter, and in a second stage, she was required to discount from her headline sentence to take account of mitigating factors not already taken into account and in that way to arrive at an ultimate sentence figure.

57. Starting with the unlawful seizure, which was the most serious offence, the trial judge correctly identified the range of available penalties. She identified as an aggravating factor "*the serious nature of the charge*" by which we take it she meant that the circumstances of the offending behaviour were particularly egregious. She went on to elaborate on that, pointing to the fact that there was a person in the car, who was being pushed out of the car by the respondent, and whose leg was out of the car, and who was shouting for help. She noted that the respondent was trying to push this person out and that she was unable to jump from the car because she was expecting a baby.

58. The sentencing judge did not mention the punches as aggravating the unlawful seizure, and this was understandable in circumstances where there was a separate charge dealing with those. While the circumstances of the appellant's driving following the unlawful seizure were alluded to, these were not specifically identified as aggravating factors. Neither were the threats to kill uttered by the respondent identified as an aggravating factor. Again the previous convictions were noted, including that the list included convictions for robbery, burglary, theft, criminal damage and unlawful taking, but none of them are identified as an aggravating circumstance. The fact that the offending behaviour occurred during the currency of a suspended sentence was also not treated as an aggravating factor.

59. The sentencing judge correctly identified the respondent's significant and chronic addiction as a mitigating factor. It was indeed a mitigating factor tending to reduce culpability and, given the headline sentence of three and a half years imprisonment that was nominated, we infer that account was taken of it on that basis.

60. We consider that this was a grave crime. Even allowing for some reduction of moral culpability based upon the respondent's addiction difficulties, we cannot see how a headline sentence of just three and a half years could have been justified. Assuming a three-way division of the scale or spectrum into a low range running from non-custodial disposal to sixty months (five years), a mid-range from 61 months to 120 months (ten years) and a high range running from 121 months to 180 months (fifteen years), the headline sentence nominated locates the gravity of the case firmly in the low range. It was not properly to be located in the low range. It required to be placed in the mid-range at least, and the failure to do so was a manifest error of principle.

61. The sentencing judge was required to have regard to all three of the principle objectives of sentencing, namely retribution, deterrence and rehabilitation, and to balance them with care. She was entitled to form the view that rehabilitation should be prioritised over the other two in the circumstances of the case, but she was nevertheless obliged to properly assess the gravity of the case before deciding on how best to give effect to the penal objective of rehabilitation. The fixing of an artificially low headline sentence will only have served to suggest both to the victims in the case, and to the public at large, that this was low range offending, and that the circumstances of this crime were not as serious as they clearly were. Whatever about favouring rehabilitation over retribution in the determination of the ultimate sentence, that fixing of an appropriate headline sentence would have served to promote the objective of deterrence, and particularly general deterrence, and was something that we consider was required in this case, as indeed the applicant has submitted. The failure to determine an appropriate headline sentence led to an ultimate sentence that was clearly outside of the norm in our view, and one that we find was unduly lenient.

### Re-sentencing

62. Before proceeding to re-sentence as of today, it should be recorded that this Court requested, and has been provided with, an up to date Probation Report. This latest report, which is dated the 30th of May 2018, points out that the respondent was co-operative with the preparation of the report and, for the most part, engaged with Probation supervision during the period February 2017 to October 2017. Tolerance was allowed in the latter part of his supervision given his homelessness. It records that the respondent accepts responsibility for his offending.

63. The report points out that the respondent returned to live with his younger sister on his return to the community on the 10th of February 2017. For a while, during March to mid-April 2017, he attended probation appointments but concerns arose at that point about a possible relapse involving a return to the use of un-prescribed Benzodiazepines. Various additional supports were put in place but despite these concerns developed around changing patterns of behaviour and association with negative influences. The respondent was asked to leave the family home and effectively became homeless. He self-reported sleeping rough in May 2017, and that his use of un-prescribed tablets had increased, and he began to miss Probation appointments, although he maintained telephone contact with his probation officer. Ultimately, he got into further trouble with the law as a result of which he was arrested and remanded in custody to Cloverhill prison on the 24th of August 2017. He was granted bail on the 11th of September 2017 and was homeless thereafter until a re-incarceration in Cloverhill prison on the 2nd of April 2018. He has remained in contact with the Probation service and has advised that prior to his return to prison he had been using crack cocaine, opiates and un-prescribed Benzodiazepines.

64. The report further indicates that the respondent appears to be doing well in the structured environment of the prison. However, that he has yet to distance himself from peers raises some question for addiction counselling around his current level of motivation to address problem drug use, and referral to residential treatment would not be supported by that service at this time.

65. The report further notes that the respondent presents with a long history of drug use commencing at age 10 years with a use of cannabis resin. He has a diagnosis of ADHD in the past and has had difficulty maintaining concentration which impacted upon his education. He has a history of trauma arising from a period in the care of the State. Managing anger has been an issue for him in the past. His family are supportive but are also very clear that they can only offer accommodation if the respondent has stabilised his drug use and is working with structured support and recovery services.



66. The Probation service has assessed the respondent as being at high risk of reoffending. The respondent has self-reported that he has a number of matters outstanding before the District Court. Areas need to be addressed to reduce risk of reoffending include his history of offending behaviour, problem drug use, history of unemployment, non-productive use of time prior to his remand, lack of stable accommodation, negative peer influences and poor coping skills. It is considered that there is a clear link between his offending and his problem drug use. He will likely be homeless on return to the community.

67. The report summarises the position by stating that the respondent has very complex needs in terms of his learning capacity, problem drug use and trauma experienced. The service that would best meet his needs does not yet exist, although efforts are being made to link him with services that may partially address his complex needs. The Probation service remains willing to assist him when he eventually returns to the community. Pending that, the respondent is familiar with prison-based services who can assist him and support him at this time, and concerning how to access those services.

68. The Court was told that the respondent faced sentencing before the District Court for an outstanding matter on the 29th of May 2018. On that date he received a sentence of twenty months' imprisonment to date from the 2nd of April 2018, and he is presently serving this sentence in Mountjoy prison.

69. In re-sentencing the respondent we consider that upon an appropriate assessment of the gravity of the offences with reference to the range of penalties available, the appropriate headline sentences should be seven years in the case of the unlawful seizure, three and a half years in the case of the s.3 assault and three and a half years in the case of the possession of a syringe. The respondent is entitled to a discount in mitigation for the fact that he pleaded guilty and to reflect his personal circumstances, including the adversities in his early life, his mental health and his addiction issues. His attempts at rehabilitation, albeit unsuccessful to date, also require to be acknowledged. The Court is in no doubt that his desire to become drug free is genuine, but recognises that achieving this is extremely difficult in the circumstances of the respondent's case. To reflect all of these factors we will discount from the seven-year sentence for the unlawful seizure offence by eighteen months, and by nine months in the case of the three and a half year sentence for the s.3 assault, and by nine months in the case of the three and a half year sentence for the possession of a syringe.

70. The respondent is to receive credit for the thirty one and a half months that he has spent in total on remand in respect of these matters.

71. In conclusion, the net sentences imposed today are five years and six months imprisonment for the unlawful seizure offence, two years and nine months imprisonment for both the s.3 assault and the possession of a syringe, respectively, backdated to the 10th of October 2015.