**THE COURT OF APPEAL**

**Birmingham J.**
**Mahon J.**
**Edwards**

**Record No. 184 & 185 CJA/15**

**IN THE MATTER OF SECTION 2**

**OF THE CRIMINAL PROCEDURE ACT 1993**

**Between/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**V**

**JONTHAN SLATTERY AND WILLIAM SLATTERY**

**RESPONDENTS**

**JUDGMENT of the Court delivered 20th March 2017 by Mr. Justice Edwards.**

**Introduction**

1. The respondents each pleaded guilty to four counts involving various offences contrary to the Taxes Consolidation Act, 1997, as amended, each count of which carried a potential maximum sentence of five years imprisonment. In each case the charges, which related to specified time periods, comprised two counts of knowingly or wilfully delivering an incorrect return in connection with Value Added Tax, one count of claiming a repayment of tax to which there was no entitlement and one count of failing to keep for the period of time specified by law records of all transactions relating to Value Added Tax.

2. On the 18th of June 2015 the respondents were both sentenced to three years imprisonment, to be suspended for a period of three years. The Director now seeks a review of those sentences on the grounds that they are unduly lenient.

**Facts of the case**

3. The respondents, a father and son, were directors of Slattery Ventures Limited ("the company"). The company carried on trade which was subject to VAT and became registered in respect of VAT on the 5th September, 2005. The company owned fast food outlets at a number of locations in Limerick City and County, including at Ballycummin Village, Raheen, Co Limerick and at The Racefield Centre, Father Russell Road, Dooradoyle, Limerick, as well as a retail premises comprising a garage and shop in the village of Clarina, Co Limerick.

4. In 2008, the company was selected for a revenue audit on account of not having registered for the plastic bag levy. On the 11th of February 2008, the Revenue Commissioners issued a letter to the company advising it that it had been selected for a revenue audit.

5. Mr. Tony Ryan, a Higher Executive Officer at the Revenue Commissioners conducted the audit. On the 29th of April 2008 Mr. Ryan met with the respondents. At that point they opted not to make a voluntary disclosure. A number of irregularities were identified by Mr. Ryan.

***"Z Reads"* and Sales returns**

6. First, there were issues relating to the *"z read"* – a feature of modern tills whereby a report is produced detailing the total sales for a particular day or shift. Once a *"z read"* report is produced for a particular day or shift the cash register resets the *"z-read"* counter to zero for the commencement of the next day or shift. Modern electronic cash registers also have a feature known as the Non Resettable Gross Total (NRGT) function which maintains a running total of all sales which can be accessed at any time. However, it is technically possible for a person with the requisite "know how" to disable the NRGT function.

7. The company's record keeping appears to have been chaotic. When asked for the company's records, Mr. Ryan was simply presented with two cardboard boxes filled with these *"z reads"*. On going through them Mr. Ryan discovered a pattern of *"skipping every second z read"* from the till at the Ballycummin premises, resulting in a significant amount of cash receipts not being recorded, incorrect sales figures consequently being entered on VAT returns and less VAT being remitted to the Revenue Commissioners than was in fact due.

8. The cash register in use at the Ballycummin premises was a brand new cash register acquired in early September 2006. For approximately the first seven weeks during which this new cash register was in use, the NGRT function was operating. Thereafter it appears to have been deliberately disabled.

9. In respect of the period from the 11th of September, 2006 to the 30th of October, 2006, during which time the NGRT was operational, it was observed that cumulative sales were €113,212.40 but the *"daily Z readings"* for the same period only totalled €83,626.16.

10. The prosecution case is that the practice of skipping every second z read continued for at least several two-month VAT periods thereafter and that the disablement of the NGRT function was a deliberate attempt to ensure that there was no running total recorded which could be compared with the figures actually returned.

11. In addition, there was exceptionally poor record keeping overall. There were VAT accounting periods where no returns were made for the Clarina premises at all, and there were periods where sales at the Clarina premises were underreported by significant sums, and although a note was put into the records that VAT due for the Nov-Dec 2005 VAT period would be returned in VAT return for the Jan-Feb 2006 VAT period, that never in fact occurred. VAT was significantly underpaid in respect of the Clarina operation.

12. In addition, there was significant inaccurate recording in, and lack of adequate supporting documentation in respect of, the purchases book. The purchases book was initially believed to be overstated by as much €144,343.40. However, documentation subsequently produced by the respondent's accountant suggested a possible eventual under-claim of as much as €29,000. However, regardless of this, no legitimate reclaim could have been made by the company in the periods in question given the concealment of large amounts of sales.

13. A figure of €223,965 representing the estimated losses to the Revenue in the periods covered by the indictment was given in evidence. This breaks down into €112,253 in the case of Mr. Jonathan Slattery based on the returns that he signed, and €111,112 in the case of Mr. William Slattery based on the returns that he signed. The estimated outstanding liability of €223,965 was over and above the sum of €70,000 already recovered by the Revenue Sherriff.

14. The prosecution case is that while the VAT liabilities/ irregularities arising in respect of Racefield premises and the Clarina premises might be explicable, at least in part, by poor record keeping, poor financial management and poor corporate governance, the VAT liabilities and irregularities arising at the Ballycummin premises were more sinister and involved premeditated and deliberate fraud. In regard to the latter, significant emphasis was placed on the fact that substantial monies, including VAT, received by the company were lodged to the respondents' personal bank accounts.

15. Between September 2005 and April 2008, €1,254,267.37 was lodged to the second respondent's personal account. During the same period, €112,966.83 was lodged to the first respondent's personal account.

16. The respondents provided only very limited co-operation in the course of the revenue investigation. They made no admissions at interviews, and did not avail of the opportunity afforded to them to make voluntary disclosures.

17. There was a relatively lengthy period between the initial audit, and the conclusion of the proceedings in the court below. The audit was carried out in 2008, the respondents were not charged until 2012, the respondents pleaded guilty in 2014 and sentencing did not occur until June 2015.

18. In addition, this Court notes a further twenty months was allowed to elapse before this appeal was brought on for hearing.

**The respondents' personal circumstances**

19. At the time of sentencing, the second named respondent, Mr. William Slattery, was aged 62 years, and was a married father of six adult children who had worked all his adult life. His son, the first named respondent, was a 35 year old father of one young child who had a long term partner. Neither respondent had any previous convictions.

20. The sentencing judge noted that the respondents had suffered significant hardship since the audit. The company had gone into liquidation, leaving both respondents personally exposed in respect of outstanding debts. There is a risk of losing a family home – the second respondent's home had been remortgaged to raise funds for the business. The second respondent had been on jobseekers allowance, while the first respondent earned a modest income of approximately €300 per week from work as a barman. It is understood that more recently the first named respondent has secured a somewhat better job as a Sales Representative and that he is presently on a salary of €30,000 per annum.

21. A sum of €35,000 was borrowed by the respondents from friends and was paid over to the Revenue by way of partial restitution in respect of the company's revenue liabilities. Very little, if any of this debt has been repaid and it remains largely extant.

22. It was suggested by counsel in their pleas in mitigation that in addition to financial hardship, the respondents have suffered, and will continue to suffer significant social stigma.

**The sentencing judge's remarks**

23. In passing sentence the sentencing judge, after summarizing the facts of the case, stated (inter alia):

> *"In his summation to the Court Mr. O'Sullivan for the State stated that from the prosecution's point of view there are what are described as three main aspects of this case. Firstly, the wilful failure to remit the VAT. Secondly, knowing and deliberately making false returns. And thirdly, knowingly and wilfully claiming the rebate of VAT. The prosecution concede that the plea in this case is of very substantial value, as these cases are generally long, complex and time-consuming, and it often presents juries with the very difficult task of trying to grasp the rules and regulations in respect of the payment of VAT and the evidence tends to be very much of an accountancy area. Again the prosecution also pointed out that as a result of the plea the question of proving the mental element of the offences can be a difficult issue if the matter had gone to trial. There's also the question of the legal issues and arguments arising from a case of this nature, which again would have elongated the matter further.*
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> *In respect of the two accused, Mr. William Slattery is 62 years of age. He's a father of six adult children, as I understand, that he's always been in employment, and, as I understand remortgaged his family home to start this Slattery Ventures at the start. He also has no previous convictions at all of any description, sort or kind. In respect of Jonathan Slattery, he's 35 years of age, he's no previous convictions of any sort, he has a long term partner and an 18 month old child. And, as I understand that not alone has he had to deal with the Revenue, but there has been judgments in excess of €75,000 against his family home, which I understand is at risk. Insofar as the aggravating factors are concerned, despite what's contained in one of the probation reports, Mr. Slattery senior's matter, this was a deliberate and calculated affair. It is clear from the evidence of Mr. Ryan, and from a close examination of the records of this particular company that there was, as he described, this suppression of accurate information. There is the substantial loss of monies to the Revenue Commissioners and, by extension, the taxpayers in general, amounting to a figure, as I understand, of €223,000. There's the obvious breach of trust as between the taxpayer and the Revenue which is an essential element in our tax code.*
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> *Insofar as the mitigating factors are concerned, there is the early plea of guilty in this case, which, as already stated, the State have said is of enormous value. There's the considerable saving of court time as the case had the potential to be very long and time-consuming, complex and always the possibility of an acquittal. There is the suggestion that both the father and son were more culpable for their ill-equipped -- for their being ill-equipped to deal with such a number of businesses, their lack of business experience or qualification. There is the fact that the Revenue are satisfied that there was no secret accounts, as such, and nothing of that order. There is the cooperation with the Revenue, insofar as the investigation was concerned and full disclosure of the bank accounts. There's also the fact that neither accused has any previous conviction of any sort or kind, or indeed anything since. There is the chaotic nature of the manner in which the*

*businesses were conducted and I think this is underpinned by virtue of the fact that I think Mr. Ryan, again in his evidence, quoted the fact that they were presented with a box full of receipts which were in a chaotic order, if "order" is the correct word to use at all. There is the fact that the companies have gone into liquidation, leaving both accused exposed personally in respect of debts still outstanding. There is the fact that both accused have been disqualified by order of the High Court from acting as directors for the foreseeable future. There is the risk of losing a family home and there's also the fact that homes -- Mr. Slattery senior's home was remortgaged in order to try and keep the business going. There is the complete lack of any trappings of wealth. There is the stigma that these convictions will attract. It appears now that the father, Mr. Slattery senior, is in receipt of jobseeker's allowance and the fact that Mr. Jonathan Slattery is working as a barman since November of 2013, earning approximately €300 per week and I have seen the testimonials that have been handed in in respect of the parties. There is the offer of a figure of €35,000 to the Revenue at this stage, being borrowed from friends, as such.*

*Mr. WHYMS: Judge, I wonder, if I might interrupt, I should have said this earlier. That money has actually been paid.*

*JUDGE: I see, very well, okay. My understanding was that it was in court, but so be it. There is the length of time in this case and again I have to be extremely diplomatic, if that's the correct word, here and I know from my own experience sitting in courts that these matters take a very long time, but the audit in this particular case took place in 2008 for a period 2005. The accused were charged with the offences and returned for trial in May of 2012. There have been several adjournments and the accused both have pleaded guilty to various counts in 2014, May 2014, and the sentencing hearing, as such, took place in March of 2015 with the sentence to be imposed today.*

*In respect of matters, it is now seven years since the audit took place and I can only imagine that this has been a very, very stressful time, albeit through their own actions, but for both accused in respect of matters. Again I don't want it to be seen as any criticism in the system because, insofar as it's concerned, my understanding that there were a number of adjournments granted for the purposes of allowing the defendants' accountant and the Revenue to examine the figures that were there, but nevertheless, it is a substantial length of time and it's something I feel that I can take into consideration as a mitigating feature.*

*I also, this morning, have the benefit of the two probation reports in this particular case and it's interesting to note that the probation service are of the view that their input is no longer required and, in fact, there's no mention in either case that I can see in respect of any risk of reoffending.*

*Comment: insofar as matters of this nature are concerned, what is described as white-collar crime, the Court of Appeal, the Court of Criminal Appeal as it was then, has given a number of very strong judgments suggesting that imprisonment is appropriate and proportionate in cases of this nature. I need only refer to matters such as the DPP v. Murray, the DPP v. Begley, which as the garlic/apple case, and the DPP v. Campbell. However, each case is dependent on its own special circumstances. The appropriate sentence depends not only upon the facts of each case, but also on the personal circumstances of the accused at the time of sentence. The sentence to be imposed is not only the appropriate sentence for the crime, but it is the appropriate sentence for the crime because the crime has been committed by the accused. I have a note here about the €35,000, which I understand had been paid over -- has been -- already been paid over. Insofar as further payments are concerned, the reality is that, at this particular time, there is no realistic prospect of any further compensation being paid, as such. It is a substantial figure and a substantial loss to the Revenue. However, I have to take each case as I find it and in each case, on each count, and that's in respect of -- sorry, Mr. John Slattery is on count 1, 7, 8 and 12. On each of those counts, I'm going to impose a sentence of three years. However, I'm going to suspend it for a period of three years, on condition that he enter a bond and be of good behaviour and keep the peace for that three-year period.*

*In respect of Mr. William Slattery, he's pleaded guilty to counts 13, 17, 19 and 20 and in each of those cases he's convicted and sentenced to three years. Again, however, I'll suspend it for a period of three years on condition that he enter a bond to be of good behaviour and keep the peace during the period; each of the sentences to run concurrently and the bond, in each case, to be €200."*

**The grounds of appeal**

24. The Director's application criticises the sentence imposed in the following respects:

> "The sentencing court erred in principle in imposing the said sentences on the respondent in respect of the said offences in that the said sentences were unduly lenient having regard to the nature, circumstances and gravity of the said offences and, in particular, the sentencing court, when sentencing the respondent, erred in principle in:
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> (a) failing to identify an appropriate starting point at a sufficiently high level to reflect the nature of the said offences and the aggravating factors in the case;
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> (b) failing to reflect in the said sentences the level of culpability of the respondent;
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> (c) failing to reflect in the said sentences the following aggravating factors, namely:
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> i. the fact that the respondent, with his co-accused, was party to the wilful suppression, concealment and destruction of records which they were bound to keep and maintain;
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> ii. the fact that the respondent, with his co-accused, disabled a mechanism which was designed to generate and keep a permanent record of certain tills operated and used by the respondent and his co-accused;
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> iii. the fact that the respondent, and his co-accused, regularly placed sums of money received by them for and on behalf of Slattery Ventures Limited into certain private bank accounts in circumstances where the said funds included value added tax and in respect of which said monies the respondent, and his co-accused, had a fiduciary duty to return same to the Revenue Commissioners;
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> iv. the fact that the respondent failed to avail of the opportunity to make a voluntary disclosure to the Revenue

Commissioners when requested so to do;

v. giving excessive weight to the payment of a sum of money by the respondent, and his co-accused, to the Revenue Commissioners;

vi. identifying delay as a mitigating factor and giving weight and/or excessive weight to the same as a mitigating factor."

**Submissions on behalf of the applicant**

25. The applicant submits that the sentencing judge erred in relying on alleged delays as being a relevant factor and submitted that there was no culpable delay on the part of the prosecution. The adjournments that took place from the time of the return for trial occurred as a result of requests on the part of the respondents.

26. Additionally, the applicant submits that the judge failed to take sufficient account of the level of deliberation and calculation involved. Specifically, the respondents had: deliberately and persistently failed to keep till records; eliminated the reading facility which would have enabled the amount of monies cashed into the till to be identified; and paid substantial sums of VAT into their personal bank accounts. While the applicant does concede that the respondents may have been ill-suited to running a business, it was submitted that that cannot account for the intentional discarding of records or tampering with the recording system. Further, while the trial judge acknowledged that the respondents failed to make a voluntary disclosure, he did not identify this as an aggravating factor.

27. The applicant submits that there was a clear error in principle, in failing to clearly identify all aggravating factors and in misidentifying delay as a mitigating factor. The judge further erred in failing to identify where on the scale of offending the respondents' offence ought to be located. The Director therefore submits that the suspension of the entirety of the sentence was unwarranted.

28. In *The People (Director of Public Prosecutions) v. Begley* [2013] IECCA 32, the importance of incentivising cooperation was highlighted. In that case, the applicant supplied documentation *"chapter and verse."* In the present case, the respondents merely supplied a box of documents. Further, the disabling of the recording system and the destruction of receipts must be viewed as a significant aggravating factor.

29. In *Begley*, the Court of Criminal Appeal held that the applicant in *The People (Director of Public Prosecutions) v. Hughes* [2012] IECCA 85 was *"grossly non-compliant."* Here, the applicants submit that not only were the respondents grossly non-compliant, but the respondents took *"active and deliberate steps toward concealing income"*. Their wrongdoing involved elements of premeditated commission, not mere omission. In *The People (Director of Public Prosecutions) v. Berry* [2009] IECCA 161, Hardiman J. found that the applicant's scheme was "not a very clever scheme" and that records had been reasonably well kept. In that case, having regard to the applicant's good character, the Court held that there had been an error in principle. In *The People (Director of Public Prosecutions) v. Campbell* [2014] IECA 15 the jurisprudence relating to revenue cases was comprehensively reviewed. The appropriate headline sentence should first be assessed having regard to the gravity of the case against which the mitigating factors should then be discounted. While the applicants acknowledge that sentencing does not involve the application of mechanistic formulae, the sentencing judge failed to assess the gravity of the matter and having regard to the particular aggravating factors, this amounts to an error in principle.

30. In *Begley*, the Court of Criminal Appeal advocated against a *"blanket approach"* in tax fraud cases. Hence, the applicant submits, and having regard to the acknowledged variation permissible in such cases, there is in fact a greater onus on the sentencing judge to identify where the offending lies in terms of its gravity having regard to aggravating factors. By way of further support for this contention the applicant draws attention to *The People (Director of Public Prosecutions) v. Richard Molloy* [2016] IECA 239 in which this Court emphasised the importance of a sentencing judge making a proper assessment of the gravity of a case. In particular, the applicant relies on the Court's emphasis on there having been a positive mens rea, the existence of planning and premeditation and the existence of profit, as well as the economic consequences (in that case, counterfeiting currency). The applicant submits that all of these considerations are applicable to the present case, but were not considered by the sentencing judge.

**Submissions on behalf of the first named respondent**

31. The respondent relies on the judgment of McKechnie J. in the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Begley* [2013] 2 IR 188, who, while advocating against a *"blanket approach"*, identified a number of factors that the Court should consider in cases of tax fraud. These are: the fact of some restitution or something of that nature having been made; the fact that in a great many revenue cases no criminal prosecutions occur, and instead are dealt with through civil proceeding to which attach monetary penalties and the mobilisation of shame through the media; the fact that admissions and pleas are crucial to the prosecution of white collar crime; and finally, the fact that incentivising cooperation must always be kept in mind. The respondent submits that all these factors apply to the instant case.

32. The respondent further points out that for this Court to intervene in the learned sentencing Judge's sentence, there must be a clear error in principle. This, he submits, has not occurred. It is clear from *Begley* and *Campbell*, that each case must be treated on its own special facts, and the respondent argues that the sentencing Judge exercised his discretion on the basis of a deep understanding of the complexity of the issues which should not be underestimated or lightly disturbed.

33. The respondent further submits that on a review of the recent authorities, the sentence of three years imposed in the present case is *"very substantial"* in circumstances where an early plea of guilty was entered and the maximum sentence was five years. In *Campbell*, a sentence of 12 months was imposed for a sum in excess of €1 million in circumstances where bank statements were deliberately altered. Meanwhile in *Begley*, a sentence of two years was imposed in circumstances where the product sold was misstated and there was a sum of €700,000 outstanding. The first respondent submits that the applicant's objection to the process by which the sentence was arrived at is *"almost moot and somewhat artificial"* in circumstances where it is unlikely a longer sentence could have been arrived at by an alternative process.

34. As is well established, the issue of a suspended sentence is entirely distinct from the passing of a custodial sentence. The decision to issue a suspended sentence must take place only after a headline custodial sentence has been decided, as accepted in this jurisdiction in *The People (Director of Public Prosecutions) v. Loving* [2006] 3 IR 355. The first respondent submits that his personal circumstances are such that a suspended sentence was entirely warranted. These circumstances include: the payment of €35,000, which is at the limit of what the respondent can afford; the publicity and shame attached; financial consequences in relation monies borrowed and the fact his home is in negative equity and payments on that loan are in arrears, on foot of which the bank is threatening action; the fact that the respondents were not suited to running a business; the fact that the respondents were not

wealthy; the fact that the first respondent has a partner and very young child who he supports with a modest income; and the fact that he has no other previous convictions.

35. Finally, the respondent responds to a number of alleged aggravating factors which the DPP submits were not appropriately considered by the learned sentencing Judge. In relation to the alleged failure to consider the fact that the respondents deposited money into their personal accounts, the first respondent submits that in evidence, it emerged that the situation was more complicated than that. In fact, there were three accounts, one in the name of the company and one in the name of each of the respondents. It is unfair, the first respondent submits, to say that substantial sums due to Revenue were lodged to private accounts, especially considering the respondents gained no personal wealth. Further, the statement that no account was taken of the level of deliberation is, the first respondent submits, incorrect, in fact, the sentencing judge used the word deliberate in his judgment and it was never the respondents' case that all their issues stemmed from mismanagement. He disputes the applicant's assertion that the lack of voluntary disclosure should amount to an aggravating factor, saying that its presence could amount to mitigation but absence should not be taken as aggravation. Finally, the first named respondent submits that reference to a delay was *"largely an observation"* by the sentencing judge, and was not a mitigating factor.

**Submissions on behalf of the second named respondent**
36. The second named respondent relies on a number of authorities to support his submission that in order for this Court to revisit the sentence, the applicant must satisfy the Court that it was unduly lenient outside the range of possible penalties permissible for such offences in all the circumstances of the case. They submit that the sentence must represent a substantial departure from the norm.

37. The second named respondent accepts and adopts all applicable submissions of the first named respondent.

38. The second named respondent submits that while it might be the case that the sentencing judge did not approach the imposition of sentence in the preferred structured manner, it is unlikely that he would have arrived at a higher penalty than three years had he done so. The sentence was not unduly lenient given that: he had no previous convictions at the then age of 62; he had worked all his adult life to support his family and contribute to society; he pleaded guilty; he suffered the shame of significant adverse local publicity; he had made some effort to pay restitution; he made no gain from the business but did suffer significant personal loss; and that the Court was not obliged to treat revenue cases differently to other criminal cases. As in the case of the first named respondent, the second respondent also asserts that poor decision-making arose from gross management inexperience, which can be contrasted to the situation in the *Campbell* and *Begley* cases.

**Analysis and Decision**
39. We agree with the submissions made by counsel for the applicant that this was a case that merited a custodial sentence to be actually served. The criticisms levelled with respect to the structure of the sentence appear justified, at least to a degree, in that there is no clear identification of a headline sentence, nor is there a clear indication of the discount being afforded for mitigation. However given that the available sentencing range ran from non-custodial options up to imprisonment for a maximum of five years it seems reasonable to infer that the three year sentence nominated by the trial judge must have represented his headline sentence, and that he then reflected the available mitigation by suspending that term in its entirety.

40. In answer to a question from the Court, counsel for the applicant conceded that if three years was indeed to be regarded as the headline sentence he could have no complaint on that aspect of the matter, but he stated that he would be vehemently contending that the suspension of the entirety of the term was to give excessive discount for mitigation. We agree that it represented an excessive discount for mitigation, that it represented a clear divergence from the norm and consequently was an error of principle.

41. It therefore falls to this Court to sentence the respondents afresh. We will do so on the basis that the correct headline sentence, in the egregious circumstances of this case which involved, *inter alia*, the deliberate and premeditated fraudulent concealment of VAT liable sales, was three years imprisonment. We accept that there was considerable mitigation and if we were sentencing the respondents at first instance we would have granted a substantial discount, in the order of 50%. Accordingly, we would have sentenced both respondents to a three year sentence with the last eighteen months of it suspended.

42. The question which arises for consideration at this point is whether it would still be appropriate to impose that sentence. We are very concerned at the length of time that this case has taken to come on for hearing before this Court. In circumstances where twenty months has elapsed since the matter was before the court below, it is likely to involve considerable additional hardship for the respondents to now have to go into custody, which they must. In the case of the first named respondent he has secured improved employment, and in the case of the second named respondent who is retired, he is now much further into his retirement.

43. In all the circumstances of the case we will impose the contemplated sentence of three years imprisonment on each of the respondents, but taking into account the additional hardship to which we have referred we will suspend all but final eight months of that sentence upon the respondents each respectively entering into a bond in the sum of €100 to keep the peace and be of good behaviour for a period of eighteen months from today's date.