THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Record No: 24CJA/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

Applicant

V

MICHAEL KAISER

Respondent

JUDGMENT of the Court (*ex tempore*) delivered on the 12th day of July 2018 by

Mr. Justice Edwards .

Introduction
1. On the 16th of December 2016, the respondent to this appeal was convicted by the unanimous verdict of a jury at Naas Circuit Criminal Court of one count of burglary contrary to s. 12(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act 2001; and one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997.

2. On the 20th of January 2017, the respondent was sentenced to concurrent sentences of two years' imprisonment in respect of each offence, with the final six months of both sentences to be suspended for a period of twelve months on the conditions that the respondent keep the peace, be of good behaviour and co-operate with the probation service for a period of twelve months. Both sentences were backdated to the 9th of July 2016 (the date at which the respondent was arrested).

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

Background facts
4. At the sentence hearing on the 18th of January 2017, Sergeant Dara Diffily testified that on the morning of the 1st of July 2016, the respondent and a Mr. Michal Mazurczyk ("the co-offender") were drinking pints of lager in the Ivy Inn, on the Main Street of Naas, Co. Kildare. The Court heard that both men were *"sitting in the area which is ordinarily reserved for those who are eating the carvery lunch… they had a few drinks there; they were a little bit boisterous and a little bit noisy but not so much as they would have to be asked to leave the pub".* Sergeant Diffily's evidence was that at around noon or so on that date, the respondent and his co-offender were told by one of the waitresses that, if they wished to continue drinking, they would have to move from the carvery area to the bar area. They were told that they would not be served any more alcohol until they had done so. At this stage, both the respondent and the co-accused indicated that they wished to have food served to them. The men were subsequently served with food and they began to consume it thereafter.

5. There was CCTV footage shown to the judge and jury at trial, and this evidence was made exhibit one at the sentencing hearing. At the sentencing hearing, the evidence was that it was *"clear from a viewing of the footage that the two men kind of left individually from the area where they were eating before the two of them ultimately left the area together and went towards the door at the back of the Ivy pub towards the car park area…. they [then] moved along a type of a corridor towards the car park area but immediately [took] a right hand turn into a very small alleyway that leads to the back door of the kitchen."* Both men then entered the kitchen in circumstances where they had no permission to do so, rendering them trespassers.

6. Mr. Piotr Pjorczyk was the head chef working in the kitchen area of the Ivy Pub at the time of the incident. Both men were said to have been *"looking for the chef or the boss"*, having asked others in the kitchen where he could be found. The CCTV footage shows that having found Mr Pjorczyk, both men then attacked him. One of them equipped himself with what was described in evidence as a *"squidgy type mop"* and this was used as a weapon. The co-offender could be seen striking Mr. Pjorczyk a number of times, who eventually managed to push the two men back and force them to leave the kitchen area. The CCTV footage further records that as they were leaving the kitchen area, the respondent kicked and punched Mr. Pjorczyk.

7. The respondent and the co-offender then proceeded to exit the back door of the kitchen area and into the corridor leading towards the car park. Garda James Keating was off duty on the day in question, having come to the Ivy Inn to get a carvery lunch. There was a commotion as Garda Keating entered the pub as a result of what had just happened in the kitchen. Upon hearing about the attack perpetrated on Mr. Pjorczyk in the kitchen, Garda Keating walked out to the car park and saw the respondent and the co-offender walking away from him. The evidence was that Garda Keating called the two men back, neither of whom responded, so Garda Keating's next move was to approach them. He took out his Garda identification and indicated to them both that he was a Garda, uttering the words *"Garda"* and *"Police".*

8. The respondent then suddenly lifted his fist and punched Garda Keating to the face, causing him to fall back and hit his head off the ground. He suffered a laceration to his head and a significant amount of blood gushed from the wound. Passers-by observed that Garda Keating appeared very groggy immediately after the incident.

9. Further CCTV footage showed the two men sprinting away from the lane in which the incident took place, down onto the main street of Naas and across the road. Gardaí circulated images of the two men they suspected of having been involved in the incident

and a couple of days later the respondent and the co-offender were located by Gardaí and were arrested. The respondent was taken to Naas Garda Station where he was detained and interviewed while in detention. The respondent was interviewed on three occasions. During the first interview, he denied that it was him on the CCTV footage, as well as denying that he had any involvement in the matter. The second and third interviews produced nothing of evidential value.

10. The respondent was ultimately charged, and was tried upon indictment, and was convicted and sentenced in the terms previously outlined.

Impact on the victims

11. Both Mr. Pjorczyk and Garda Keating furnished the sentencing court with detailed victim impact statements. Mr. Pjorczyk indicated that he is a Polish man who is 29 years old, who has lived in Ireland for three-and-a-half years. He really enjoys his work and would love to open his own place one day. He states that he suffered a fractured bone in his left hand, a cut lip and a problem with swallowing as a result of the assault. His voice was also hoarse following the incident. Mr. Pjorczyk was in a lot of pain for about one and a half weeks and he had to stop working because of the injury to his hand as it was too painful to work with. He subsequently lost his job on the 20th of July 2016 and was then out of work until the 24th of August 2016 at which stage he found a new job.

12. Mr. Pjorczyk has had to learn how to work without the left hand middle finger, something which is very difficult in his line of work, especially as he relies on both hands when working. The pain in his hand remained until the middle of October 2016 and the mobility of this finger is still affected and it pains him if he puts pressure on the knuckle joint. In the immediate aftermath of the incident, Mr. Pjorczyk was a little bit fearful as the men who attacked him had not been arrested and he was nervous that they might try to find him again. He maintained that when his assailants were arrested he felt a bit safer but he does not know who these men are connected with or why they attacked him. He says that he feels safer now as they have been convicted. Financially, the attack resulted in him having to incur between €200-€300 on medical expenses. He was earning €620 per week in the Ivy Inn after tax. His total loss of income was €4,340. He stated that he does not think that this accident has affected him psychologically – he was a bit afraid at the beginning but not anymore.

13. In respect of Garda Keating, he states that he does not remember anything in the immediate aftermath of this incident but he is certain that he was knocked out/concussed as a result. The only thing he does remember is a male passer-by coming to his aid and helping him to his feet and providing him with some kitchen towel. He was bleeding heavily from the wound in the back of his head and also from a wound to his lower lip where he received the punch from the respondent. After composing himself following the incident, Garda Keating contacted Sergeant Dara Diffily, and told him of what had happened. He was then brought to the Accident & Emergency department at Naas General Hospital where he had his head wound bandaged initially before receiving six stitches. Garda Keating claims to have experienced significant pain due to his injuries.

14. In terms of the more long-term consequences of the attack on Garda Keating, it is worth quoting his statement in full in this respect. It reads as follows:

> *"Since that incident, my life has changed dramatically. The first few weeks after the incident were particularly tough as I was not able to eat solids or drink liquids properly due to the persistent pain caused by the lip wound. I also suffered severe head pain as a result of the wound in the back of my head. From this, I suffered from chronic headaches and migraines for a period of months too. The intervening period of weeks and months since the incident consisted of me experiencing serious headaches, migraines, dizziness, blurred vision, forgetfulness, nausea, my eyes became very sensitive to light, drowsiness, low energy levels, balance problems and also terrible neck pain. I also experienced nervousness, anxiety, stress and emotional problems since the incident. All these symptoms made my life unbearable, it's fair to say, over the last six months. My general day-to-day life has been altered drastically. I used to experience flashbacks of the incident on the 1st of July where I was viciously assaulted during the course of my duty as a member of An Garda Síochána, particularly when I used to try to sleep at night which further complicated my sleeping pattern which was already interrupted due to injury. I was prescribed a large dose of medication in an effort to alleviate the pain I was suffering, such as Tylex, Ponstan, Mefac, Propranolol, Neurofen, Solpadine, Excedrin as well as sleeping aids namely Circadin and Amitriptyline. All medicines I took only provided me with short term relief as every day for the last number of months I was subjected to violent headaches and migraines which I can only describe were like daggers or darts above both my eyes and my forehead which were painful, uncomfortable and also which caused me to get sick, nauseous at frequent times also. My eyesight has also suffered since the incident and I've been advised to wear glasses at regular times by an optician. My neck sustained injury too and I have attended numerous sessions of physiotherapy due to the whiplash-type injury in my neck. My physiotherapist and doctor were of the opinion that the neck pain was contributing to the headache/migraines and vice versa. My life changed drastically since that day I was assaulted and I'm not the same man since. I'm still on a course of painkillers from my doctor as well as a Dublin-based neurologist that I was referred to. I find some relief in these painkillers. I've also undergone MRI scans on my head/brain and also on my neck. Reports on both suggested that there were no long term abnormalities on my brain, but that there was soft damage on my neck in the bilateral upper traps cervical para-spinals and also thoracic para spinals. My sporting activities have also suffered too, due to head and neck injury. I've been unable to train properly as I used to before in the gymnasium or by jogging, lifting weights, playing Gaelic football or soccer. My social life has also suffered too as I found myself unable to handle large crowds/noise in venues, locations. My levels of anxiety also rose over the last number of months as a result of being assaulted and I had to attend psychotherapy sessions with a fully accredited psychotherapist. These sessions were most beneficial to me as I was severely traumatised as a result of the incident, I was experiencing flashbacks of the assault. I was having sleepless nights and I had the recurring image of being assaulted by Michael Kaiser on the 1st of July 2016 at Corban's Lane, Naas, Co Kildare. I found the psychotherapy sessions very helpful from a psychological point of view. Since being assaulted, my life has changed seriously. My work life has suffered too as I was off work for a period of six months due to the head and neck injury and the symptoms thereof. It is only in the last week that I have declared myself fit to return to work. My doctors have indicated to me that the symptoms of concussion I was suffering would last six, 12 or up to 18 months. I have returned to work because I want to and I want to get back to normality and get back into a routine that I am familiar with. For the period of time that I was off work, my career has been affected as I was unable to attend multiple training courses with An Garda Síochána. I hope that 2017 will be a better year for me because I did not deserve to get assaulted by Michael Kaiser on the 1st of July 2016. On that date, I was carrying out my duties as a member of An Garda Síochána and I was attempting to investigate an alleged offence when I followed him and another male from the Ivy bar and restaurant to Corban's Lane, Naas, Co Kildare when he suddenly and viciously assaulted me and caused me to sustain a serious head injury. The incident has had a very negative impact on my life medically, psychologically, socially, financially and generally speaking as well as career-wise. I would not wish what happened to me on the 1st of July 2016 at the hands of Michael Kaiser or what I have experienced since on anyone and I truly mean that. I wanted to help people that day, those that were attacked in the kitchen in the Ivy bar and restaurant by following the suspects of crime in the hope of*

cautioning and apprehending them, when I was suddenly and callously assaulted by Michael Kaiser. Unfortunately, I got injured while attempting to carry out my duty as a garda, but I am grateful that I did not receive a more serious head/brain injury. I wish to put the whole incident behind me now and move on and try to get on with my life and also with my career in An Garda Síochána. It has been a harrowing time for me really. I wish to thank my colleagues at Naas garda station and in particular, Sergeant Dara Diffily for the help and support he has given me over the last number of months since I got assaulted."

The respondent's personal circumstances

15. The respondent was twenty-three-years-old at the time of sentencing. He is a Polish national and came to Ireland at the beginning of 2016 for the purposes of securing employment and, in the words of his counsel, *"to start a better life for himself".* He grew up in Poland and completed his education there. He presented as a talented young soccer player up until the age of seventeen.

16. There was evidence that the respondent's family situation in Poland was such that he was, from a young age, *"left to his own devices"*; with his parents seemingly having little interest in his life and expecting him and his brother to bring in their own income and look after themselves. He has a very close relationship with his younger brother, speaking to him on the phone on a daily basis. At the age of 17, the respondent moved to Holland where he worked for 18 months in a factory. He described his time there as very happy. When his contract in Holland finished up, he returned to Poland, before moving to Kildare where he met up with a few of his Polish friends who had already settled in Ireland. In March 2016, he obtained employment in a Kildare Chilling Company. His boss, a Mr. Delaney, described the respondent as an excellent employee who was reliable and *"the type of person that came into work half an hour early to start his shift."* Mr. Delaney also gave evidence that he would welcome back the respondent to work for him once this matter had been finalised.

17. The respondent has no previous convictions. It was submitted in the plea in mitigation that the present offences were out of character for the respondent. His counsel further submitted that the respondent has no problem with alcohol but that the offences of which he was ultimately convicted were committed solely and directly by reason of his consumption of a large amount of alcohol, both on the day of, and on the night before, the incident.

18. The sentencing court was handed in three certificates of achievement obtained by the respondent during the respondent's time in Cloverhill Prison, namely; *"A Certificate of Accomplishment for the Street Children of Bucharest"*; *"A Christmas Sports Challenge in Aid of the Peter McVerry Trust"*, and; a *"Body Improvement Course"* organised by the Red Cross Volunteers Group.

19. Following the respondent's conviction and sentencing in this matter he was imprisoned from the 9th of July 2016 until the 12th of July 2017, whereupon he was released early by the executive and removed from the State on foot of a Removal Order made by the Minister for Justice and Equality. The said Removal Order required him to remain outside of the State for a period of two years from the date of his removal. However, in breach of this requirement, the respondent re-entered the State in October of 2017 and has been here since.

Sentencing Judge's Remarks

20. In sentencing the respondent, the sentencing judge made the following remarks:

"Now, in relation to this matter, this Court has considered all of the materials which were handed to the Court and has considered the nature of the offending, the mitigation and the aggravating aspects to this case. And in relation to the if I could deal now with Mr Pjorczyk first of all and in relation to the aggravating circumstances. The aggravating circumstances with regard to both parties, Mr Kaiser and Mr Mazurczyk are the same essentially in that this was an unprovoked attack on a chef in a kitchen coming up to 12 o'clock, midday on what was described as a pleasant sunny day during the course of the trial in this matter. This man was carrying out his work prepping for lunch when he was attacked. The level of violence is considered by this Court to be an aggravating circumstance. The impact on this man is also considered to be an aggravating circumstance and I have gone through the victim impact report. Alcohol has been raised not as a defence but as an explanation and of course correctly so in respect of how it was raised. Alcohol does not provide a defence in relation to this does not provide a defence in law.

Now, in relation to Garda Keating, the aggravating circumstances in relation to that are the manner in which Mr Kaiser squared up to Garda Keating and punched him, forcing Garda Keating to fall back and sustain an injury to his head. The impact this has had on Garda Keating which I have outlined already. This was a very callous violent behaviour in relation to Garda Keating who had indicated that he was a Garda, that he was police, had called out the word "police". And the behaviour of both parties, this vicious unprovoked attack in relation to the first victim, the chef Mr Pjorczyk, and the vicious unprovoked nature of the attack on Garda Keating are very serious. Both of whom were attacked in that way which was violent and has had a serious impact on them. Garda Keating was on his lunch break at the time and he was carrying out his duty as a responsible citizen. He could have ignored what was happening when he became aware that there had been an assault in the kitchen. But instead he took his duties as a member of An Garda Síochána seriously and despite being off duty, he went to assist and to see if he could apprehend the culprits in relation to this attack and, as I say, he could have ignored what was going on and just gone on with his day. But instead to assist and behave in the manner of an honourable citizen and a person An Garda Síochána can be proud of in the manner in which he carried he conducted himself on the day in question.

Now, by way of mitigation, in respect of Mr Kaiser, it should be noted first of all that mitigation which is the most helpful form of mitigation to victims of particularly violent offences would have been a plea of guilty and he did not plead and he's entitled not to plead, but of course, that means that form of mitigation has been lost to him. In relation to the mitigation, however, the Court has heard that he has that good work record. He was working for Kildare Chilling. The Court heard both during the sentence hearing and during the course of the trial about his employment record. He's an excellent employee. He had conducted very specialised work. He is a person of previous good character. He is a person of previous good character. He co operated with the gardaí but he co operated to an extent. He denied the allegations, which he is entitled to do, and he denied that he was the person on the close circuit television and he denied that it was his jacket which had been seized, the jacket worn during these on the day in question. Now, he is entitled to do that. But in terms of his co operation, his co operation is not as fulsome as the co operation in relation to Mr Mazurczyk and it's important that I identify that at this point."

… …

"Having considered all of these factors and having outlined what I have said in relation to the impact on the victims. In

relation to count number 1 first of all, it should be noted that in relation to burglary, the maximum penalty is 14 years and in relation to the section 3 assault the maximum penalty is five years. In relation to count number 1, which is the burglary count, now with regard to Mr Kaiser, this Court is of the view that the burglary count would attract a penalty of two and a half years and with mitigation that would be a penalty of two years of imprisonment. And I say that in the circumstances which I have outlined already. In those circumstances, this Court is going to impose a two-year term of imprisonment on Mr Kaiser in respect of count 1. And I must consider his need rehabilitation, I am bound to consider rehabilitation and in those circumstances, I will suspend the last six months of that sentence for a 12 month period. I am conscious of the fact and I should have said in his mitigation, that he is a person of previously good character with no previous convictions. In relation to count number 2 on the bill of indictment which is the assault matter, this Court is going to in relation to the assault, I put it to the mid to higher end of the assaulting in respect of an assault causing harm, and I'm placing that, without mitigation, at two and a half years. And I draw a distinction in relation to the assault causing harm where the Court is left in the situation where the maximum penalty is five years. There are incidents which come before this Court of assault causing harm, a section 3 assault, which involve the use of a weapon, perhaps a broken glass, which is used and has been used in a party's face, all of which have been dealt with in this court as section 3 offences. In relation to this particular offence, the facts of this offence, it is a single punch and I've outlined my views in relation to the manner in which it was delivered already. And in those circumstances, I place the assault at two and a half years and similarly, in relation to Count No. 1, the mitigation which would have been most helpful to Mr Kaiser obviously is not available in this situation and that is by way of a plea of guilty. In fact, a trial was run and a trial was contested, fully contested throughout. That is his right, but he loses the benefit of mitigation in doing so. So, I'm placing that at two and a half years and with mitigation two years and, again, I have to consider rehabilitation. So, in respect of counts 1 and 2, I'm imposing a two-year sentence, both of which are concurrent. I will suspend the final six months for a 12 month period on condition that he enter into his own bond of €200 to keep the peace and be of good behaviour for a 12 month period, that he engage with the probation service for a 12 month period post release. And I should say that he keep the peace and be of good behaviour during the period of his incarceration and for 12 months post release, and that he attend all appointments directed by the probation service and he follow any directions given to him by the probation service. And I'm doing so in circumstances where I am very conscious of the need for rehabilitation and of the fact that he has no previous convictions."

Grounds of Appeal

21. The applicant's notice of appeal, dated the 7th of February 2017, proffers five grounds impugning the leniency of the sentence handed down by the sentencing judge in respect of the respondent. They are as follows:

> i) The sentencing judge erred in principle in applying insufficient weight to the aggravating features of the case which resulted in her placing each of these serious offences at an excessively low point on the "notional spectrum".
>
> ii) The sentencing judge erred in principle in holding that the respondent's conduct amounted to co-operation with the prosecuting authorities deserving of mitigation.
>
> iii) The sentencing judge erred in principle in failing to impose any additional punishment on the respondent for the commission of a second serious assault within minutes of his first offence.
>
> iv)The sentencing judge erred in principle in circumstances where the sentences imposed failed to adequately reflect the principles of specific and/or general deterrence.
>
> v) In all of the circumstances the sentences imposed by the sentencing judge, when viewed individually or cumulatively, were unduly lenient.

Applicant's submissions

22. The applicant submits that the sentencing judge, in determining that each offence merited a headline sentence of just two-and-a-half years, under-assessed the gravity of both matters. This, it was submitted, could only have resulted from her failure to give sufficient weight to the various aggravating factors in the case, namely the unprovoked and vicious nature of the attacks and the fact that one of the victims was a member of An Garda Síochána who was attempting (despite being off duty) to apprehend the accused for the earlier offence. Whilst accepting that the sentencing judge was correct in reducing the headline sentence by six months to take account of mitigation, it was the placing of the offence *"at such an excessively low point on the notional spectrum"* that resulted in an unduly lenient sentence being arrived at.

23. The applicant further highlights the following facts in support of the assertion that the respondent only co-operated with the authorities to a very limited degree: the respondent punched Garda Keating in the face, knocking him to the ground; he ran from the scene and did not hand himself into Gardaí; he was apprehended by chance nine days after the incident and denied the offences in interview; he denied being present at the scene (a fact the jury, by their verdict, determined to be a lie); he denied it was him in the CCTV footage despite the extremely high quality of the footage; he then relied on his right to silence during the second and third interviews with Gardaí; he also pleaded not guilty, fully contesting the charges; he did not indicate his acceptance of the verdict of the jury and has not apologised to either victim. He had not expressed any remorse either at the time of the incident, or at the point of arrest or after he had been found guilty.

24. The applicant also takes issue with the failure of the sentencing judge to take one offence into consideration when constructing the sentence for the other offence. i.e. the court sentenced for the burglary offence without regard to the fact that another offence took place a couple of minutes later. Whilst conceding that the sentencing judge was entitled to make each of the sentences concurrent with each other, the applicant submits that the ultimate sentence did not reflect the gravity of the totality of the respondent's behaviour on the day in question.

25. The applicant further maintains that the sentencing judge had insufficient regard to the penal objective of deterrence, both general and specific, particularly in circumstances where the s.3 assault had been on a Garda in the performance of his duty.

Respondent's submissions

26. In reply, the respondent has submitted that the sentencing judge did have sufficient regard to the aggravating factors in the case as she made explicit reference to them, referencing the unprovoked nature of the attack, the level of violence involved and the

impact on the victims. In respect of the burglary charge, the respondent submits that many of the more common aggravating factors were not present in this case and thus the sentencing judge was correct in placing this offence at the lower end of the spectrum. Similarly, in terms of the assault offence, the respondent submits that the sentencing judge properly made a distinction between this section 3 offence and other assaults causing harm where a weapon was involved. Thus, the applicant submits that the sentencing judge properly took into consideration all of the aggravating factors in the case, as well as noting the absence of certain others, in placing these offences on the conceptual scale of gravity. The sentencing judge, it was submitted, clearly and carefully set out the rationale for the headline sentences that she arrived at.

27. The respondent has further submitted that the judge explicitly acknowledged that the respondent's co-operation was not as fulsome as that of his co-accused. It was also submitted that this feature was not a significant factor in the judge's overall consideration of what sentence to impose.

28. The respondent contends that it was well within the discretion of the sentencing judge to impose a regime of concurrent or consecutive sentences and her decision to impose concurrent sentences was not an error of principle. In response to the complaint that the overall circumstances in which both related offences were committed should have been taken into consideration in assessing the gravity of each individual offence, our attention was drawn to the comments of Professor O' Malley in Sentencing Law and Practice, (at. 210), where he stated:

> *"When sentencing an offender for two or more offences committed in the course of the same incident, a court must guard against treating the conduct element of one offence as an aggravating factor of another. "*

29. In respect of the argument that the sentencing judge did not pay sufficient regard to the sentencing objective of deterrence, counsel for the respondent submits that there is no requirement on a sentencing judge to explicitly reference every sentencing objective to which regard is being had. It is implicit in every sentence in which a custodial element is present that the objective of deterrence is part of the rationale. However, deterrence is only one of a number of penal objectives that the court is required to balance and have regard to in every case.

30. It was submitted that the applicant had failed to satisfy the burden that the impugned sentences were outside of the norm, or unduly lenient. The sentence reflected the fact that the sentencing judge had paid due and appropriate regard to all of the mitigating factors present in the case, including the respondent's good work record, his previous good character and the lack of parental involvement in his formative years.

The law in relation to undue leniency reviews

31. The law in relation to undue leniency reviews pursuant to s. 2 of the Criminal Justice Act 1993 is well settled at this stage. 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".*

32. 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."*

33. 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."*

34. 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."

Discussion and Decision.

35. While the charges are cast as a s.12 burglary and a s.3 assault, respectively, they concern in reality two assaults causing harm, albeit that one was committed in circumstances where the respondent had entered as a trespasser and is therefore charged as burglary. To that extent, and also in circumstances where there was no violation of a constitutionally protected dwelling, it would be wrong to regard the assault which is charged as a burglary as being necessarily the more serious of the two simply because it carries a potential sentence of up to fourteen years by reason of the form of the charge. Regard must, of course, be had to the range of available penalties in assessing gravity, but we consider that in this case the effective range of penalties for both offences must in reality be treated as being the same, namely that appropriate to an offence under s. 3 of the Non Fatal Offences Against the Person Act 1997.

36. We have no hesitation in concluding that the headline sentences nominated in this case were significantly outside the norm. Both assaults were serious in terms of their culpability and in terms of significant harm being done. In the case of the assault in the kitchen there is the aggravating factor that a weapon, namely the aforementioned mop, was used. In the case of the assault in the car park, there is the aggravating factor that the victim was a member of An Garda Síochána who had identified himself as such, and who although formally off duty was nonetheless engaged in attempting to apprehend the perpetrator of a crime and therefore performing his public duty. However, we do not find that the imposition of the same sentences for both offences was necessarily an error.

37. The proper assessment of the gravity of these offences would have merited the nomination of headline sentences in the range from three and a half to four years' imprisonment. While a sentencing judge would have some margin of appreciation in respect of the headline figure, we consider that starting at two and a half years was simply too low in the circumstances of this case.

38. On the mitigation side of the equation, we also accept the applicant's contention that there seems to have been excessive reliance on supposed co-operation, at least in the stated rationale for the sentences, in circumstances where a rigorous and critical analysis reveals that the reality was that there was little or no co-operation.

39. By the same token, even though the applicant had not been co-operative, and by virtue of fighting the case (as was his entitlement) did not have available to him the significant mitigation that would have gone with a plea and meaningful co-operation, he was nonetheless entitled to due allowance for his previous good character and positive employment history, and also to have the adversities he had had to overcome in his life taken into account as relevant personal circumstances.

40. On balance, we are satisfied that the effective discount of twelve months determined upon by the sentencing judge was appropriate and that it was adequate to reflect the available mitigation.

41. Overall, we have concluded that the ultimate sentences imposed were too lenient by a significant margin due to the nomination of inappropriate headline sentences, and as they were outside the norm they are properly to be characterised as having been "unduly" lenient.

42. In the circumstances we will quash the sentences imposed in the court below and proceed to a re-sentencing.

43. In circumstances where we are re-sentencing following a finding of undue leniency, it is our usual practice to impose a somewhat lesser, but nonetheless still appropriate, sentence than we might have imposed if we were sentencing at first instance. We will in the circumstances nominate a headline sentence of three and a half years, this being at the lower end of the range we have identified as being appropriate, to reflect the gravity of both offences. In order to take account of the mitigating circumstances in this case we will suspend the final twelve months of those sentences, on the same conditions as were imposed by the court below. Both sentences are to be served concurrently. We direct that the respondent is to receive credit for the time already served by him in respect of these matters.

44. We should add that it is also our usual practice when re-sentencing following a finding of undue leniency, in circumstances where the respondent has been released and now faces re-incarceration, to provide for some further amelioration of the penalty to reflect the additional hardship involved in having to return to prison. However, in circumstances where the respondent has returned to this jurisdiction in breach of the terms of the Minister's Removal Order, we do not find it necessary to make any such adjustment in his case.