**THE COURT OF APPEAL**

**[230/22]**

**The President**
**Edwards J.**
**Kennedy J.**

**BETWEEN**

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

**RESPONDENT**

**AND**

**EUGENE HANRATTY SNR.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 21st day of March 2024 by Birmingham P.**

**Introduction**

**1.** Following a trial in the Dublin Circuit Criminal Court, on 19th October 2022, the appellant was convicted of a count of assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, as amended (the "1997 Act"). On 8th November 2022, he was sentenced to a term of four years imprisonment, with the final year of the sentence suspended. He has now appealed against conviction and sentence.

**Background**

**2.** By way of background, it should be explained that the trial was concerned with events that had occurred on 24th November 2012 at Corragarry, Castleblaney, County Monaghan, at a rural location close to the border with Northern Ireland. The prosecution alleged that on that date, the accused, now appellant, had assaulted a Mr. Martin McAllister. The prosecution version of events was that the injured party, Mr. McAllister, was driving his car, accompanied by his wife, when, at a location close to their home, the car was blocked by another vehicle in which the appellant was travelling. The vehicle was being driven by the son of the appellant. The prosecution alleged that the appellant came over to the car, opened the door, assaulted Mr. McAllister by punching and hitting him, and then proceeded to drag the injured party from the car, punching and kicking him further, thereby causing harm.

**3.** At trial, it was not in dispute that there had been a physical altercation involving the appellant and Mr. McAllister, but the appellant contended that his behaviour was lawful and had arisen from a dispute about duck shooting in the area in which Mr. McAllister was the aggressor. On the defence version, a scuffle had broken out, Mr. McAllister had then fired a pistol into the air, and in response to this, the appellant had punched Mr. McAllister. In the context of issues raised on the appeal, it is of some significance that this was not the first time the appellant had stood

trial in respect of the events of 24th November 2012. The first trial had taken place in 2016 and had resulted in a jury disagreement. The jury in a second trial, which took place in 2017, was discharged after an issue arose about disclosure. We have referred to the defence version, but it is the case that at no stage was a formal defence version advanced. The defence did not go into evidence at the trial which resulted in the conviction that has given rise to this appeal. While we have not been furnished with transcripts from the earlier trials, we have been given to understand that the appellant did not give evidence at either of these trials. The appellant was not interviewed by Gardaí and did not provide them with an account; this is an aspect to which we will be returning.

**4.** On 18th October 2022, in the course of the trial, there was what has come to be described as a *PO'C* application (*DPP v. PO'C* [2006] 3 IR 238). In essence, the *PO'C* application related to what it was contended were significant inadequacies in the Garda investigation. Matters referred to include the fact that the scene was not photographed in daylight, or mapped, and that blood swabs were taken from the scene, but these were never tested. The jacket Mr. McAllister was wearing was not seized by Gardaí at the scene, nor was it handed over to Gardaí there. Instead, it was initially brought back to the McAllister home, and at a later stage, Mr. McAllister's son, Seamus, returned the jacket to the scene where he handed it over to the Gardaí. That jacket was never subsequently forensically tested, and indeed, the defence floated at trial the possibility that the jacket brought to the scene and handed over to Gardaí by the injured party's son may not have been the same jacket as was being worn when the incident occurred. It was said this was of significance, as, had the jacket been seized and forensically tested, that might have recorded the presence of firearms residue, which would have been very significant from the perspective of the defence in support of the suggestion that a firearm had been discharged. A further complaint was that neither the appellant nor his son was ever interviewed by Gardaí. The appellant is a resident of Northern Ireland, but it is said that he farms in this jurisdiction and that it would have been possible to contact him. Instead, this never happened, and his arrest was ultimately sought by way of the European Arrest Warrant procedure. It should, however, be noted that the appellant consented to his surrender to this jurisdiction.

**Grounds of Appeal**

**5.** The grounds of appeal advanced in relation to the conviction aspect of the appeal are paraphrased as follows:

1. That the learned trial judge failed to have sufficient regard to and/or failed to attach sufficient weight or importance, individually and cumulatively, to the numerous failings and shortcomings on the part of the prosecution when considering and ruling upon the appellant's application to withdraw the case from the jury and halt the trial at the conclusion of the prosecution case, and in particular, the fact that:
    (i) The Gardaí failed to conduct any proper forensic examination of the scene.
    (ii) Insofar as an examination was carried on or conducted, the materials gathered were not submitted for forensic examination.
    (iii) Insofar as an examination was carried on or conducted, the material actually retrieved (blood swabs and a cigarette) were lost.

(iv) The scene was possibly misidentified (in terms of its actual location) by the evidence adduced.

(v) A jacket/coat, which may have contained valuable evidence was disregarded by the forensic examiner.

(vi) The failings significantly hampered the appellant in and about the defence of the charge after the passage of a significant period of time since the alleged offence.

(vii) There were irreconcilable differences of account in the prosecution's case as it related to the retrieval, preservation and record keeping of forensic evidence.

(viii) The Gardaí failed, without reasonable explanation, to seek or obtain an account from the appellant in relation to the allegation made against him, in particular, in circumstances where they were in possession of information suggesting the existence of circumstances (the "duck shooting" background and the possibility of a shooting having occurred) other than those complained of by the complainant.

2. That the learned trial judge, having considered the relevant test, failed to withdraw the case from the jury and halt the trial in circumstances where that was warranted.

3. That the hearing of the application and the determination was unsatisfactory in that the subsequent trial judge misapplied the principles laid down in *PO'C* and subsequent authorities.

**Criticisms of the Investigation**

**6.** Notwithstanding that we have already referred to criticisms of the Garda investigation, it is necessary to address the specific criticisms which have been advanced. It was pointed out that the only photographs which were available as part of the prosecution case were photographs that had been taken at night on the occasion of the incident. Gardaí had not revisited the scene during daylight hours with a view to photographing and mapping the area. While maps and photographs are standard in criminal trials prosecuted on indictment, in this case, the incident which has led to the charges had occurred in a public place. Accordingly, it was open to anyone, including the appellant and his advisers, to map and photograph the location where the incident had occurred if that was seen as being of assistance. In any event, as it happened, before the end of the trial, the jury had access to photographs and a sketch. These had been prepared on behalf of the injured party in the context of civil proceedings, had come into the possession of the prosecution and were then disclosed to the defence. It is, though, the situation that a question has been posed as to whether the photographs and sketch from the civil proceedings depict the same scene as that shown in the photographs taken on the night of the incident. It is said this must be at least open to doubt, because a fence, apparently a wooden fence, visible in the photographs from the night of the incident, was not visible in the photos taken for the purpose of the civil proceedings. Be that as it may, there can be no doubt that attention was given to the correct scene on the night of the incident. The injured party and his wife were there when Gardaí arrived on the scene, and the photograph taken on that occasion showed the injured party's car in situ.

**7.** So far as the question of blood swabs is concerned, these, along with a cigarette butt were collected by the scenes of crime officer Garda Gavin McGahan from the incident location. So far as the cigarette butt is concerned, a decision was taken that it was of no value as there had been no suggestion that any of the participants in the incident had been smoking, but also there was no issue about the identity of the participants in the incident. What was in controversy was what form the incident had taken. The blood swabs were placed in a bag which was then placed by the scene of crime officer in the fridge in the divisional storeroom at Monaghan Garda station. They were not available for the proceedings and the Garda witness did not dissent when defence counsel suggested that this was another way of saying that they are missing or that they were lost. Again, the blood swabs would not seem evidentially significant. The wife of the injured party had given evidence that her husband was bleeding at the scene, and there was evidence from the Senior House Officer at Our Lady of Lourdes Hospital in Drogheda who treated Mr. McAllister following his admission to hospital. This was not a case where blood grouping or obtaining a DNA profile with a view to matching it to that of a suspect was ever going to be in issue.

**8.** In relation to the jacket which was being worn by the injured party at the time of the incident, what happened is that an ambulance was summoned by Ms. Mary McAllister. The injured party was tended to in the ambulance by paramedics. It appears they removed the jacket as they were attaching their patient to monitors and they handed the jacket to his wife. On her account, she made her way to her nearby home to obtain a spare set of keys; the keys of the car that her husband had been driving, and in which she had been a passenger, were never located. She paints a picture of having the jacket on her arm. At home, following a discussion with her son Seamus, it was felt appropriate to bring the jacket back to the scene which was being preserved by Gardaí. Seamus McAllister brought the jacket in a plastic bag and handed it to Garda Nicola Dolan. It appears that some days later, though there is an element of uncertainty as to timing, the jacket was drawn to the attention of the scene of crime examiner who placed the jacket, and the bag in which it was contained, into an evidence bag. The jacket was never forensically examined, and as we have already explained, the appellant's contention is that had it been tested, gunshot residue might have been found to be present, and this would have lent support to the defence version of the incident, which involved a pistol being discharged. From the Garda perspective, having spoken to the injured party and his wife, they had no reason to believe that a firearm played any part in the incident and had no reason whatsoever to test for the presence of firearms residue. With the exception of initial reports, which had suggested an individual had been shot and taken to hospital, perhaps in a serious condition, which were quickly dispelled, the first suggestion of a firearm having featured, and indeed, having been discharged, came at the first trial, which was conducted in 2016.

**9.** Perhaps the point on which greatest emphasis is placed is the fact that neither the appellant, nor his son, were ever interviewed by Gardaí, who proceeded, it is said, on the basis that there was only one version of the incident, on the McAllister version. When these issues were raised in the context of the *PO'C* application, the judge ruled in these terms:

> "In relation to the delay point, in my view, the defence have not pointed to any particular impediment to the capacity of the accused to defend the case arising from the delay. He became aware of the allegations against him in 2013 and I will direct the jury in relation to

the impact of delay generally in bringing a prosecution and the difficulties that that can create but I am not granting the application on POC grounds based on delay.

In relation to the failure of the prosecution to arrest and detain the accused for the purpose of interview, that was, in my view, at least in part, due to the fact that the accused was resident in Northern Ireland and was not amenable to arrest with the same ease as a resident of the Republic. And the fact that his arrest for the purpose of charge was effected through the use of a European arrest warrant refutes any suggestion that he was available for arrest in the usual way. The [appellant] has been aware of the allegation against him since he was arrested and charged with the offences in 2013. He has been in possession of the book of evidence and indeed he has heard sworn testimony of the allegations against him in two subsequent trials and he has elected not to put his version of events on record. At any time since his arrest, he could have submitted his account of events through a pre-prepared statement or by voluntarily submitting for interview. The decision cited by [counsel for the prosecution] JD [*DPP v. JD* [2021] IECA 14] confirmed that it is not a right to be arrested for interview and, in addition, I understand that [the appellant] has had the benefit of legal representation throughout the proceedings and has been fully advised, no doubt, of his rights and entitlements.

In relation to the criticisms of the investigation which are manifold, the first being a failure to seek out and preserve evidence, the second being a failure to provide the jury with visual aids in the form of maps and photographs from an official garda mapper and photographer and, lastly, the failure to obtain potentially relevant forensic evidence particularly in relation to the presence of firearms residue on clothing and bloodstains which were present in the car and in the environment, in my view, the shortcomings which have been identified in the prosecution case can be viewed in the contact of a defence which only became apparent in the trial in 2016 when the suggestion of a handgun being produced by Martin McAllister was first ventilated.

Up to that point, the prosecution was composed of uncontroverted evidence of a serious assault by one neighbour on a former neighbour which was based on recognition evidence and supported by medical and photographic evidence. In that context, the shortcomings which have been identified and the relevance of the items to the defence are matters which can be dealt with by appropriate directions to the jury. It is, however, noteworthy that there is no evidence that any of the items in question were requested for the purpose of independent forensic analysis by the defence notwithstanding the continued availability of the controversial jacket. In all of the circumstances therefore, I am refusing the application."

**The Conviction Appeal**

**10.** At the risk of repetition, it is appropriate to address the criticisms that have been made of the investigation. We will deal first with what might be described as the subsidiary criticisms, and then the main issue raised, the failure to interview the appellant, and the appellant's son.

*Subsidiary Criticisms*

**11.** The appellant is critical of the fact that the only photographs in the case were those taken on the night of the incident and of the fact that there were no maps. We have already made the

point that, unlike some other cases where what is in issue is the floor plan of a dwelling, here, the scene of interest was a public place, and it was open to anyone to take photographs or prepare maps if so minded. In the course of the *PO'C* application, counsel moving it referred to the fact that it was known that mappers and photographers take their photographs late, sometimes six months or two years after the crime was committed. He referred to the fact that this can sometimes give rise to difficulties because a scene might have changed, referring to roadworks being completed or instances where buildings have been knocked down. We think the point about the fact that the preparation of maps and the taking of photographs is often delayed is a fair one. In the experience of this Court, it is an issue which is sometimes addressed when prosecution counsel comes to prepare an advice on proofs. It seems to us this is indicative of the fact that it will sometimes be the case that the taking of photographs and the preparation of maps fall more naturally into the preparation for trial phase, as distinct from the Garda investigation phase. We have already given some indication of the fact, and now confirm, that, in our view, the issue about maps and photographs does not provide any basis for stopping the trial.

**12.** The appellant is also critical of the failure by the Gardaí to analyse forensic evidence. It is of some interest that counsel introduced his submissions at trial in that regard by saying:

> "…I appreciate that the court might say, well, why do we need it in circumstances where the identities of the protagonist involved are known and the fact of an assault is not disputed[?] Well, I would say that it could be relevant."

Later, he observed that hair from the appellant or his skin cells or his saliva might easily have been left at the scene, if what Mr. McAllister was saying was correct, that he had been grappled with and assaulted while he was in the car before being dragged out of the car by the appellant.

**13.** So far as the potential for forensic evidence is concerned, a cigarette butt was seized, but a decision was taken, in our view, understandably so, by Inspector Michael O'Donoghue not to conduct any analysis as there was no point. Regarding the evidence in relation to the blood, the trial heard evidence from Garda McGahan. He was the first witness in the case and a trained scene of crime investigator. The evidence was to the effect that, when he arrived on the scene, he observed a particular vehicle, a blue Peugeot 406, parked on the verge at the side of the road. The scene of crime examiner told the jury that he found blood on the driver's door of the car, that there was blood on the boot lid of the car, on the ground on the hedge side of the car and on the inside of the car, and that there was blood on the passenger seat. The witness said he took three swabs in total: the blood on the front passenger door; the blood on the boot lid of the vehicle; and the blood on the ground outside the vehicle. It is true that the swabs were never followed up on. The question has to be asked, what would have been achieved by doing so, and what has been lost by the failure to do so? Again, in circumstances where the identities of all participants in the incident were known, and where there was evidence in relation to that, we fail to see what extra could have been achieved.

**14.** So far as the jacket that was being worn by the injured party at the time of the assault is concerned, we have already referred to the manner in which it came into possession of the Gardaí. We note there was a degree of disagreement between two members of the Gardaí as to their interaction. Garda Dolan was one of the first Gardaí on the scene and one of those who became involved in preserving the scene. Her recollection was that she realised, when back at the Garda

station after having left the scene, that she had not said anything to her colleague, Garda McGahan, who was dealing with the scene of crime, in relation to the jacket, and that she said it to him at that stage and he placed it in an evidence bag at Castleblayney Garda station in her presence. Her firm position was that her engagement with her colleague was on the night of the incident, after her return to the station. Her attention was drawn to notes made on the evidence bag into which it was placed. Her comment was that the notes were not in her writing, and she presumed that it was Garda McGahan's writing. She said it would have to be for Garda McGahan to clarify that; she could not say for certain, and she knew it was not her writing, so she presumed that it was Garda McGahan's. The scene of crime officer was recalled to deal with this and other issues towards the end of the prosecution case at the request of the defence. Garda McGahan's recollection differed to a degree from that of Garda Dolan, in that he said the interaction between them took place at a later stage, when he happened to be visiting the Garda station. Asked about the handwriting on the evidence bag, which he had provided, he said he did not recognise the handwriting and he was adamant that it was not his. It was put to him by the defence that there was evidence in the case that he had made the record on the bag, although this suggestion was not entirely accurate. Later, in the course of this re-cross-examination, it was suggested to him that while he was definite that it was not his handwriting, Garda Dolan seemed fairly certain about that it was his, and Garda McGahan responded, "[s]he was certain that it was my writing?", counsel for the appellant responded "yes".

**15.** The suggested relevance of the jacket is that had it been tested for firearms residue, this would have gone some way towards establishing whether or not a shot had been discharged at the scene. The significance that is now being attached to the jacket involves the application of a significant degree of hindsight. When possession was taken of the jacket, nobody was suggesting that a shot had been discharged at the scene by anybody. Retired Garda John Doherty, who was the initial investigator, whose first role was to go to the hospital in the belief that he would be meeting somebody who had been the victim of a shooting, was disabused of that idea, but it appears that from then on, until the first trial, there was no suggestion of a firearm being discharged. In these circumstances, it would have been surprising if the jacket had been tested; what would have been the point?

**16.** The proposed interest in the jacket is in contrast to the lack of interest in items of clothing taken from the injured party when he was visited in hospital by Garda Doherty, who took a pair of wellingtons, trousers, a shirt and a jumper. Strangely, these do not appear to have been the subject of any great interest. We are bound to say that the focus at this stage on the jacket appears consistent with a strategy to explore the adequacy of the investigation, as distinct from a search for the truth as to what had occurred.

**17.** Another issue raised by counsel relates to the fact that there was a degree of confusion and uncertainty as to the provenance of a suggestion that there was a confrontation between the appellant and the injured party about duck shooting, or indeed, that there was duck shooting near the scene on the occasion when the incident that resulted in the trial occurred. Again, this needs to be put in context. Gardaí responded promptly to reports of an incident and were quickly on the scene. There, they came across an injured party and his wife. The injured party was removed to hospital. At that stage, there was no suggestion that there was a shooting dimension to the

incident which resulted in the injury to Mr. McAllister. It is true that Mr. McAllister referred during cross-examination to the fact that he had engaged with the appellant and another man some three weeks earlier when he taxed them with shooting in a sanctuary area. The injured party in the course of his cross-examination was at pains to stress how diplomatic he had been during the course of the prior engagement. Whether he was or he was not, that incident, some weeks earlier, was of marginal relevance to the events of the night Mr. McAllister sustained injury.

**18.** By the same token, whether duck shooting was taking place, or had been taking place on the night of the incident was of limited relevance, and in truth, might be seen as something of a red herring. We make that observation although we are aware of the fact that in the course of the trial, there was a reference to a report submitted on 25th January 2013 by Detective Sergeant O'Donoghue, who, by the time of the trial, was Inspector O'Donoghue. The report referred to the fact that since the incident, he had visited the scene in the company of Superintendent Gerry Russell and had later met with the injured party, Mr. McAllister. The report states:

> "… Martin McAllister believes that on the date of the assault he heard shots being fired from the other side of the lake beside his house (which is across the border in Northern Ireland).
>
> …
>
> These shots appeared to be coming from a bog area which is a sanctuary and that these were fired to lure him from his house over towards the bog."

*The Main Issue*

**19.** Counsel on behalf of the appellant has been careful to stress he is not making the case that an accused cannot be put on trial when he has not been interviewed. However, he says Gardaí must conduct a full and fair investigation and the course of the investigation must be informed by an appreciation of the facts. Ordinarily, that would require an effort to get the accused's side of the story. The appellant is critical of the approach of the trial judge, which he says wrongly places an onus on an accused to get his side of events across. He says what occurred here was a Garda failure to enquire into what the appellant's version of events was, and that failure on the part of the Gardaí was used to blame, excuse and justify other failures, such as failing to appreciate that there was a controversy as to whether a pistol had been discharged, and in consequence, a failure to conduct any enquiries in relation to that issue. The arguments the appellant advances in this regard are premised on the assertion that the suspects, in particular, the appellant, were at all stages readily amenable to Gardaí. However, we do not believe the evidence was there to justify such a conclusion. It is the case that the appellant gave no evidence at any stage on this or any other topic, so it is a question of seeing what can be arrived at from the evidence of Gardaí.

**20.** The appellant is resident in Northern Ireland and also has a substantial business, Hanratty Oil, based in Crossmaglen. In the course of the *PO'C* application, the following exchange took place between the trial judge and counsel for the appellant:

> "Judge: So, the evidence was that he was operating his businesses in the Republic?
>
> Counsel: His farm.
>
> Judge: His farm?
>
> Counsel: Yes.

Judge: And his fuel business?

Counsel: Yes, correct.

Judge: But he was ordinarily resident in the north?"

However, it appears that while the fuel business may have had a cross-border dimension, there was no specific evidence in that regard, it seems the business was located in Northern Ireland. So far as the farm is concerned, that was an issue that was canvassed by the defence in the course of cross-examination of Garda Doherty, as follows:

"Q: … And just in relation to Mr Hanratty, I mean obviously you learn things as you go on and that's the idea of the investigation, did you know or did you learn at any point in time that whilst he resides or has a residence in the north, that he actually farms in the south?

A: Oh he does, yes.

Q: Yes. So, in fact I can develop that a little bit, I mean I think he is involved in cattle farming?

A: He has a fairly substantial farm, yes.

Q: Yes. And that's in the south?

A: It is.

At an earlier stage in the cross-examination, the witness said he believed someone else may have spoken to the Police Service of Northern Ireland (PSNI) in relation to the matter. This observation was made in the context where Garda Doherty was explaining that he could not simply cross the border into the North and knock on the door of the appellant.

**21.** It seems to us that the evidence in relation to the farm does not go beyond the fact that there was a farm. There was no evidence whether the appellant tended to it in person, or whether he entrusted this task to his son or whether he employed a farm labourer. In particular, there is no evidence whether he was present at the farm constantly, occasionally or at all in the period after 24th November 2012, when the appellant was the suspect in relation to an alleged serious assault.

**22.** That the appellant had a farm in the jurisdiction was an issue that was raised with Garda Doherty, the initial investigator, when he was cross-examined. It must be said that there were some unusual aspects to the evidence of Garda Doherty. The first matter dealt with in the transcript of the trial is a protest by the defence that just before the Court sat, they had received a communication that a witness who had previously given evidence, Garda Doherty, and who was in the Book of Evidence, was not going to be called by the prosecution. There was a view that as the trial proceeded that Garda Doherty might be called by one side or the other. On 17th October 2022, an issue was raised. On that occasion, prosecution counsel explained that Gardaí had made efforts to contact him since the beginning and prior to and during the trial. A witness summons had been issued the previous week, it was served on him, and he was informed that he should have been in Court on the previous Friday and that he should be present on the morning of 17th October 2022. It was explained that in those circumstances, the prosecution application was for a warrant. In raising this issue with the judge, prosecution counsel referred to the fact that he had been informed that, in the course of the second trial, the witness had come to court to say he was in no fit state to give evidence. The evidence of Inspector Kenneth Coughlan merits consideration. He gave evidence that he was aware that a summons had been issued by the Court requiring the attendance of Garda Doherty, and explained that he had made the following efforts since the

summons was issued to execute it. Inspector Coughlan said he was made aware that there was a summons issued for Garda Doherty on Thursday afternoon, 13th October, so, at 2.55pm, he called to Garda Doherty's home, he was not there. At 4pm, he called back, and he met with Garda Doherty who invited him into his home. Garda Doherty said, "I know why you're here". Inspector Coughlan said "[y]es, John, I have a summons, a witness summons for you", to which Garda Doherty said "[f]or when?" and Inspector Coughlan replied "[f]or tomorrow", referring to 14th October, and stressed, "John, you'll have to be there in the Court". Garda Doherty said, "I won't be there. I won't be in a position to attend on the 14th as my wife is away", he was working and had to look after the children. Inspector Coughlan asked him, "[w]ell, could you give an undertaking to be here any other day?". Garda Doherty replied, "I'd have to think about it over the weekend". The Inspector said he again called to Garda Doherty's home again on the Friday evening, but that he was not there, that he was out with his child. The Inspector spoke to an older daughter and asked her to tell her father that he had called. At 7pm that evening, he rang Garda Doherty, and again encouraged him to be in court on the Monday morning, but Garda Doherty said he would be in difficulty on the Monday but might be able to attend on Tuesday or Wednesday. The Inspector said he did not know how long the trial would go on.

**23.** On foot of those efforts, the prosecution application was for a warrant to ensure his attendance at trial on 17th October 2022. The judge indicated that she would issue the warrant with discretion to be exercised. Counsel for the appellant said they had permission from the prosecution to establish some form of contact with this retired Garda and that he might be more disposed to attend court on foot of that communication. Counsel for the prosecution indicated there was an issue which the State took issue with, and put on record that there had been constant contact between the solicitor for the appellant, Mr. Cosgrove, and Garda Doherty, even during the trial. Counsel for the Director said his side were informed that when the summons was issued, Garda Doherty had contacted Mr. Cosgrove, and subsequently the defence side had informed prosecution counsel that Gardaí had called to the Doherty house. Counsel for the Director said Mr Hanratty's solicitors were in constant contact with Garda Doherty, notwithstanding that he was then a witness in the Book of Evidence.

**24.** To complete the picture in relation to former Garda Doherty, we would draw attention to evidence given by Inspector O'Donoghue when recalled at a later stage in the trial. At that stage, the witness was re-cross-examined by counsel for the appellant. Inspector O'Donoghue was asked whether he knew if the appellant was ever asked to give an account of the incident to Gardaí. The witness responded, "Detective Garda Doherty told me, as he was the investigating member, that neither of the suspects were making statements. They were not coming forward to the guards to make statements". Counsel for the appellant's response was to say that might be a response to his question, but his question was, were they ever asked? The witness responded: "I didn't ask them because -- … I wasn't investigating it. [Garda Doherty] informed me that neither of the suspects, Eugene Hanratty senior or junior, are making themselves available to the gardaí, they're not making statements".

**25.** It may be noted that a degree of controversy involving former Garda Doherty arose at an early stage of the trial during the cross-examination of Ms. Mary McAllister, wife of the injured party. Counsel for the appellant indicated he was going to read a report to her which had been

prepared by Garda Doherty, to which she responded "… [t]hat's the guard who hasn't turned up at any of the Court cases from the beginning, yes, I do know him". When challenged, she clarified that he had turned up on one occasion and not on another. She said his evidence was dismissed by the judge as the worst evidence she had ever heard. While the witness had used the female pronoun, it was pointed out to her that both previous trials had been presided over by male judges. There were further exchanges, in the course of which counsel for the Director referred to the transcript of 27th October 2016, a trial presided over by His Honour Judge Martin Nolan. From that transcript, it appears that in the course of giving evidence, Garda Doherty said:

> "… there was a row over Mr Hanratty shooting in a duck sanctuary and Mr McAllister confronted him and there was a verbal altercation and a gun was produced. That's what I was told… Nobody came forward to witness the incident… I made some other enquiries a few days after trying to establish what the story with this thing [was], naturally enough people down the road, they don't intend to come forward but a man did tell me confidentially".

**26.** The presiding judge said:

> "Now, mister, this is disgraceful conduct on behalf of the guard, to come into court and seek to adduce to a jury third- or fourth-hand information. Under no circumstances do rumours go to a jury or theories that are concocted in the dark and basically the person who has this theory won't come to court and tell the jury what they saw themselves."

**27.** Counsel for the Director observed that Garda Doherty was berated by the trial judge and that this justified the comments of the witness. While it appears beyond dispute that the appellant owned a farm in this jurisdiction, there was very limited information about what was the nature or extent of his day-to-day involvement with it, but what is certainly beyond doubt is that Gardaí invoked the European Arrest Warrant procedure with a view to securing the appellant's attendance at trial. As the trial judge did, we regard this as being of significance.

*Discussion and Decision*

**28.** In the course of our judgment in *DPP v. Quirke* [2021] IECA 306, at para. 255, we made the following comment:

> "… As an appellate court, we are constantly called on to review transcripts and it is evident to us that *PO'C*-type applications are now being made with
> greater regularity; indeed, it can be said that they are now being made as of course. We take this opportunity to deprecate such a developing practice. The trial judge to whom a PO'C application is made will stop the trial only if satisfied that there is a real risk of an unfair trial."

It seems to us that those remarks have some relevance to the present case. We cannot believe that this was ever an appropriate case for a *PO'C* application. Not only that, on the basis of our reading of the transcripts, we are struck by the extent to which the defence at trial focused on the quality of the Garda investigation and suggested deficiencies therein. This, rather than the question of whether there was proof of guilt beyond reasonable doubt or whether there was an absence thereof was the focus of attention. We are bound to say that many of the arguments advanced lack reality. We have commented on the individual criticisms and will not repeat what we have had to say. We will simply observe that we have no doubt about the fact that the trial judge

was correct to refuse the application made. None of the arguments advanced against conviction have caused us to doubt the fairness of the trial or the safety of the verdict.

**29.** In those circumstances, we dismiss the appeal against conviction.

**The Sentence Appeal**

**30.** The appellant has also appealed against the severity of sentence. It will be recalled that the sentence imposed was one of four years imprisonment, with the final year of the sentence suspended. The appellant contends that this sentence was excessive in all the circumstances, and it is said that the judge failed to have sufficient regard to the mitigating factors which were present in the case, and which are identified as including: the appellant's age; his previous good character; ill health; 41 letters of recommendation; and the impact of the decade-long prosecution on the appellant. It is said that the judge initially erred by setting a headline sentence at five years and that there was a specific error in treating the appellant's lack of a guilty plea as an aggravating factor.

**31.** The contention that the judge erred in treating the absence of a plea of guilty and the prolonged nature of the prosecution as aggravating factors is based on an interpretation placed by the appellant on certain observations made by the trial judge. The judge had commented:

> "In all of the circumstances, having given due regard to all of the mitigating factors in the case, I am of the view that given the severity of the assault and the absence of a plea of guilty, the prolonged nature of the prosecution and the absence of any expression of remorse, the imposition of a custodial sentence is necessitated."

While the appellant places a particular interpretation on the remarks quoted, that is far from the only interpretation available. The other interpretation, and it seems to us the more likely interpretation, is that the judge was indicating that it was a case where, when one had regard to the mitigating factors present, the custody threshold was crossed. It will very frequently be the situation that a judge, when identifying a headline or pre-mitigation sentence, will initially be of the view that the custody threshold has been crossed. However, it will sometimes be the situation that when the judge comes to adjust the headline or pre-mitigation sentence to reflect the mitigating factors present, this may result in a non-custodial disposal. It follows that one interpretation of what the judge was saying is that if one were to have had regard to the mitigating factors present, to which she had referred elsewhere in the course of her sentencing remarks only, and in circumstances where other mitigating factors, which might arise in another case, such as a plea of guilty, sincere remorse, and the taking of steps to bring matters to an expeditious conclusion were absent, that a custodial sentence was required.

**32.** It seems to us that the decision on the part of an accused person to exercise his constitutional right to go to trial cannot be regarded as aggravating is so deeply embedded in our jurisprudence, it is inconceivable that any judge, certainly a judge as experienced as the sentencing judge, would be unaware of this. While we accept that the remarks of the judge are not entirely free of ambiguity, nonetheless, we are convinced that there is no substance to the suggestion that the judge in fact treated the absence of a plea of guilty as an aggravating factor.

**33.** The appellant is critical of the headline or pre-mitigation sentence set by the judge. He says that the present case can clearly be distinguished from *DPP v. McGrath, Dolan and Brazil*

[2020] IECA 50, where the Court made certain observations about how the task of sentencing for s. 3 assaults under the 1997 Act should be approached. The appellant says that each of the three cases considered together was more serious and there were more aggravating factors present in each of those cases which are absent in the present case. The appellant makes the point that this was not a case which involved the use of a weapon and also makes the point that given the previous relationship between the appellant and the injured party, in that there was a history of contact, the judge was wrong to approach the case on the basis that this was an unprovoked and premeditated incident of assault.

*Discussion and Decision*

**34.** We cannot agree that the judge was in error in this regard. On the account of the incident presented by the injured party and his wife, and it was the only account which was available for consideration by the jury, this was indeed unprovoked and premediated. While at trial, there was reference to the engagement some three or four weeks earlier when the injured party and another man were engaged in duck shooting, by no stretch of the imagination could it be said that this encounter provoked what happened. In recording a guilty verdict, it is clear the jury must have accepted beyond all reasonable doubt the account of the incident given by the McAllisters. On their account, this was indeed an unprovoked and premeditated incident. Just how serious an assault this was and how significant the effects of the assault were, emerges most clearly from the evidence given by the injured party during the course of the sentence hearing. He refers to the physical injuries, multiple broken bones in his face, injuries to both eye sockets, injury to his left eye, resulting in a molecular bleed behind the eye, thereby resulting in permanent loss of peripheral vision on the left. He refers to the fact that he had numerous courses of injections in order to salvage peripheral vision, but without success. He explains how this impinges on his everyday life, reading texts, but in particular, music notation, a matter of particular seriousness for a musician. Understandably, the injured party also refers to the effect of witnessing this incident had on his wife.

**35.** It seems to us that, given the nature of the assault, coupled with the impact of the assault on the injured party, it is entirely understandable that the judge would have decided on a headline or pre-mitigation sentence of five years. Having done that, the sentence was then ameliorated, first by a straight reduction from five years to four years, and then by the suspension of a year of the sentence, leaving a net effective sentence to be served of three years. In the circumstances of the case, the reduction and then part-suspension has to be seen as generous. Certainly, we see no basis for coming to a conclusion that the sentence was unduly severe, or that it fell outside the available range.

**36.** In those circumstances, having dismissed the appeal against conviction, we also dismiss the appeal against severity of sentence.