THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: CJA133/15

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

v

BRENDAN MAHONEY

Respondent

Judgment of the Court (ex tempore) delivered the 4th day of February, 2016 by Mr. Justice Edwards

Background to the Appeal :
1. In this case the applicant seeks a review pursuant to section 2 of the Criminal Justice Act 1993 (the Act of 1993) of a sentence of two years imprisonment with the final one year of the said sentence suspended upon conditions, imposed upon the respondent by Ennis Circuit Criminal Court on the 8th of May 2015 following the respondent's conviction by the unanimous verdict of a jury, at the end of a four day trial, of the offence of sending a certain article by post contrary to s. 55(1)(b) of the Communication Regulations (Postal Services) Act, 2011 (the Act of 2011), on the grounds that the said sentence was unduly lenient.

The relevant statutory provisions
2. Section 55 of the Act of 2011 (to the extent relevant) provides:

> "(1) A person commits an offence if he or she sends by post any postal packet—
>
> (a) …
>
> (b) which encloses any article or thing whatsoever which is indecent, obscene, grossly offensive or menacing,
>
> (c) …
>
> (2) A person who commits an offence under this section is liable—
>
> (a) …
>
> (b) on conviction on indictment, to a fine not exceeding €75,000 or to imprisonment for a term not exceeding 5 years or both."

The facts
3. At the relevant dates, being the weekend of the 30th and 31st of January 2015, a Mr Paul Heaslip, who was (and indeed still is) a member of An Garda Siochána, resided at an address in Kilkee, Co Clare. He was stationed at the time at Kilrush, Co Clare.

4. On the 30th of January 2015 Garda Heaslip, who was away for the weekend with his then fiancée, now his wife, received a telephone call from his landlord, a Mr McNamara, who was also the postman for the area in which Garda Heaslip lived. Mr McNamara informed Garda Heaslip that a parcel had arrived in the post addressed to him (Garda Heaslip) at his Kilkee residence, and being aware that Garda Heaslip was away he enquired as to what he should do with it. Garda Heaslip, who was not expecting any parcel, instructed him to deliver it to, and leave it at, his residence, which Mr McNamara duly did.

5. When Garda Heaslip arrived home on the following day, accompanied by his fiancée, he found the parcel there. He began to open the parcel, and upon doing so immediately perceived an offensive smell coming from it. Garda Heaslip then stopped what he was doing and contacted his colleagues at Kilrush Garda Station. Sergeant Ronan O'Hara, having spoken to Garda Heaslip on the telephone, proceeded immediately to Garda Heaslip's home in Kilkee accompanied by a Detective Garda Downes. They were shown the parcel, which was then removed out of the house to the side entrance for closer examination. Garda Heaslip then fully opened the parcel in the presence of Sergeant O'Hara, Detective Garda Downes and his fiancée, and removed the contents which comprised a decomposing pig's head. A scene of crime examination team was then summoned, and the pig's head and its packaging were brought back inside the house.

6. The pig's head and its packaging were photographed and then the packaging was removed to Ennis Garda Station. Following examination there the packaging was destroyed as constituting a biohazard. The pig's head was appropriately disposed of by Garda Heaslip.

7. At an early stage of the Garda investigation it was established that the parcel had been posted at Prussia Street Post Office in Dublin 7.

8. The Gardai sought and received CCTV footage from Prussia Street Post Office for the date on which the parcel had been dispatched, and isolated a segment which showed the respondent entering the post office with a box that was open and not sealed, joining the queue to be served at whatever counter would come free, and then approaching counter no 2 which was attended by a

Ms Bernadette Slattery. The CCTV footage showed him presenting the aforementioned box for processing at the counter and being issued with a stamp and barcode by Ms Slattery.

9. Ms Slattery gave evidence that, having seen the CCTV footage, she recalled the transaction. She remembered that the man in question had expressed himself as being in a hurry, and she recalled being presented with the box which was closed when she received it, but not sealed. She stated that she had weighed it and issued a stamp for €15.00.

10. Evidence was also adduced from a Mr McCardell of the securities department of An Post, who had viewed the stamp recovered from the packaging examined at Ennis Garda station, and had also reviewed relevant An Post business records. Using reference numbers on the stamp, Mr McCardell had been able to determine the relevant date, the relevant post office, and the counter within that post office, namely counter no 2, that had issued the stamp. He was then able to isolate the relevant transaction and his evidence as to what it had involved tallied with that given by Ms Slattery.

11. There was also evidence that the CCTV footage had further revealed that the box had markings on it, comprising the words "Sriracha Chilli Sauce" in blue print, and a red circular logo incorporating a cockerel. These had matched similar marking on the packaging examined at Ennis Garda station.

12. Later, in the course of the investigation the Gardaí, having identified the respondent as a suspect from the CCTV footage, arrested the respondent at his home at 4, Acorn Apartments, Kilrush. He was taken to Kilrush Garda station where he was detained, and interviewed on four occasions while in detention.

13. The respondent was initially uncooperative, and claimed memory loss. Eventually he admitted being in Prussia Street Post Office on the date in question but contended that the reason he was there was for the purpose of sending a tracksuit and other items to somebody in Australia. He was shown the CCTV footage and responded *"It's not me and its not the box".* He contended that he had paid €90 for his transaction.

14. There was further evidence that in the course of the investigation the Gardai had seized a number of mobile phones belonging to the respondent. Upon examination of these phones it was found that, at a relevant time, texts had been sent to a third party or parties in the following terms:

> *"Did you hear about the flying pig?"* and
>
> *"Get on the net. Evening Herald story about pig's head. Also look up sit board, also the Irish Independent site, gahad"*

15. When these were put to the respondent during an interview he responded *"I don't know. Anybody can pick up phones."*

16. The sentencing court heard evidence concerning the ostensible motivation for the crime. Sergeant O'Hara stated, in answer to a question as to *"What was behind all of this?",* that *"Mr Mahoney was around the area, associating with people that were of an interest to us, and, on one particular day, another agency within our organisation was working in the area and I detailed Garda Heaslip to accompany this agency out and they met with Mr Mahoney in a vehicle and Mr Mahoney was spoken to and Mr Heaslip was seen to be in the company of these people and it would seem to me that Mr Heaslip might have been associated with these people or with this agency."*

17. The respondent did not give evidence at his trial.

18. Having been charged with the offence the subject matter of these proceedings the respondent had applied for, and had been granted, bail pending his trial. However the respondent absconded to Spain in breach of his bail conditions. It was then necessary for the prosecuting authorities to secure his rendition on foot of a European arrest warrant for the purpose of enabling his trial to proceed.

The personal circumstances of the respondent

19. The respondent was born on the 28th of March 1967, and so was aged 48 at the date of sentencing. The sentencing court heard that he is a single man and unemployed. He has a daughter in her late 20's who is employed in the catering business and living in Dublin. He is originally from Dublin, but has relations in west Clare and had moved to Kilrush within the year immediately preceding the offence.

20. The respondent had in the past worked as a barman in Spain, as a tyre fitter, as a truck driver and in a hardware store. He left school at a young age without qualifications.

21. The respondent has 46 previous convictions covering the period from 1983 to 2013. A large number of them were for road traffic offences that were dealt with summarily in the District Court. However, he also had convictions for being intoxicated in a public place, assault, soliciting or importuning for the purposes of prostitution, larceny, robbery and malicious damage. For these offences he had received various sentences comprising fines, suspended prison sentences and actual prison sentences ranging from three months to 10 months.

22. There was also a suggestion of a four year sentence having been imposed for the robbery conviction but the evidence before the sentencing judge appears to have been equivocal in that regard. Though the robbery conviction was referred to by the prosecuting Garda in his evidence at the sentencing hearing he did not allude to the sentence imposed. However, the sentencing judge had been handed up a list of the respondent's previous convictions which indicated that a four year sentence had been imposed but which also suggested (although the position was not entirely clear) that it had possibly been suspended. However, the sentencing judge ultimately determined that regardless of what sentence had been imposed it would not, in the circumstances of this case, have any bearing on the appropriate sentence to be imposed by him.

23. Counsel for the respondent informed the sentencing judge that his client had a number of (unspecified) personal problems, and that his client's intention was to return to live in Spain once he had served any sentence imposed upon him.

24. Following the respondent's conviction by the jury, his counsel informed the court at the sentencing hearing, which took place immediately afterwards, that his client accepted the jury's verdict and would not be appealing his conviction. It was further stated by counsel that the respondent wished to apologise for his crime. Following a ten day adjournment for the purpose of enabling the judge to reflect on what sentence was appropriate, and just before sentence was pronounced, counsel for the respondent sought, and was granted, leave to place on the record a written apology from the respondent.

The impact on the victims
25. Evidence was adduced concerning the impact of the crime on Garda Heaslip and his wife. The sentencing judge heard that there were serious consequences for Garda Heaslip from the start. Prior to the crime he was a determined young guard and very efficient. He was trying to start off his life with his then fiancée (now his wife) and they had moved into rented accommodation in Kilkee. This was Garda Heaslip's first garda station after exiting Templemore. He wanted to stay in west Clare, but as a result of this incident his wife was in fear to go to work on her own, or to be in the house on her own, so Garda Heaslip found he had to be with her almost all the time. This resulted in Garda Heaslip being out of work on *force majeure* grounds for a period of time. He and his wife ended up having to leave the accommodation that they were in, and his wife had to leave her teaching job within the area. Garda Heaslip had to request a transfer from the area, and is now stationed elsewhere. The respondent's crime caused untoward stress to both victims, who were a young engaged couple about to embark on married life, and hoping to start off a family.

The sentencing judge's remarks
26. In the course of sentencing the respondent on the 8th of May 2015, the sentencing judge said:

> *"I propose now to give judgment in this matter. I have considered what you've said at this stage and accepted it. Mr Brendan Mahoney on the 29th of April 2015, you were found guilty by a jury of your peers on a single count on indictment bill number CE26/2012, that on the 26th of January 2012 within the State sent by post a packet which was menacing, to wit a pig's head, contrary to section 55.1B of the Communication Regulations (Postal Services) Act of 2011. This verdict was unanimous. A person found guilty of sending a certain article by post contrary to section 55.1B of the Communication Regulations (Postal Services) Act of 2011 shall be liable on conviction and indictment to a term of imprisonment not exceeding five years and/or a fine not exceeding €75,000 or both. In considering the appropriate sentence which I have to impose I have listened carefully to what your counsel has said on your behalf. I've considered also the principles enunciated by the superior courts which I'm bound to consider before passing sentence. The cardinal principles governing sentences are a) punishment, b) deterrence and c) rehabilitation. The relevant principles to be considered, which I have done in this case, is that the sentence must be proportionate to the crime, in other words a grave offence must be reflected by a severe sentence. Therefore, I must assess the seriousness of the offence to which you have been found guilty by the jury. I must assess the particular circumstances, which is you in this case, Mr Brendan Mahoney, I have to consider whether there are any mitigating factors or aggravating factors. I have to consider whether you've shown any remorse or displayed any appreciation of your wrongdoing. I should also have to consider your past record, if any, and also the likelihood of you committing such an offence again. I also have to consider your cooperation, the extent of it with the gardaí throughout investigation of the offence. Now, in considering what the appropriate sentence should be in this case, I am of the view that punishment in itself should not be the main criteria of such sentence. The rationale underlying sentences should be that of proportionality. The punishment, therefore, must be proportionate to the gravity of the offence and the culpability of the offender, which is you. Other goals such as rehabilitation or restitution may also be pursued but tangible objectives such as general deterrence should not be used to increase the sentence beyond what is proportionate to the offence. Therefore a sentence should reflect the comparative gravity of the offence. The Supreme Court has already indicated that an appellant Court or a trial judge should not appear to be laying down any standardisation on tariffs or penalty for cases in that each case is different and the facts are different as such. Sentencing in criminal cases is entirely within the discretion of the trial judge and the penalty to be imposed should appropriately meet all the circumstances of the case, and needless to say very few criminal cases are particularly similar. Therefore the Court should not appear to be laying down standardisation on tariff of penalties for the cases.*
>
> *In relation to the seriousness of the offence which you were found guilty of, Sergeant O'Hara in evidence described the nature of the offence, which I do not propose to elaborate on in any further detail other than to say that the item sent in the post to Garda Paul Heaslip at his place of residence was a split pig's head. Both Garda Heaslip and his fiancé, as a consequence, were profoundly affected at the sight of the pig's head when the box which contained the article was opened by him. The article had a menacing effect on both Garda Paul Heaslip and his fiancée N, now his wife …. The article was sent in the post to Mr Heaslip apparently sometime after he had cause to speak to the accused, Brendan Mahoney, about a matter. The communication took place at a time when Mr Heaslip was carrying out his duties as a member of the Garda Síochána. Sending a split pig's head in the post to a member of the Garda Síochána is a serious offence and cannot be treated lightly by the courts. The Garda Síochána are the protectors of law and order in our State and without their dedication, bravery and commitment to their job we would have a lawless society resulting in anarchy. They have a difficult job to do and sending menacing articles in the post is entirely unacceptable and consequently this court must treat such wrongdoing as serious. In these circumstances, I believe a message must go out from the court that this conduct of this nature cannot be treated lightly by the courts. Therefore the sentence to be imposed in this case must be seen to be a deterrent to others who may consider engaging in such unlawful activity. Having said that, I am fully conscious at the same time that I must bear in mind that such deterrents should not be used to increase the sentence beyond what is proportionate to the offence. The sentence, therefore, will reflect the comparative gravity of the offence.*
>
> *The aggravating factors in this case it appears to me the nature of the offence itself. While indicating that you do not propose to appeal the verdict of the jury, your reluctance to apologise for your actions and lack of remorse for your conduct was noted at the sentencing hearing as such, but I now take cognisance of what your counsel has said on your behalf and in relation to the remorse which you have now displayed, and your apology to the victims, Mr Heaslip and his wife. Your past criminal record is an aggravating factor where you have 48 previous convictions. Also a factor in this case which I cannot ignore is your failure to honour your bail term resulting in additional expense and loss of time to the State. Menacing a member of the Garda Síochána in my view is a serious and aggravating factor as such.*
>
> *Mitigating factors is, I understand and I have been told by your counsel that you have personal problems which might explain your conduct but does not excuse it as such. I'm conscious that you have no education or skills, I'm also conscious that you're anxious to work abroad and plan to immigrate after the conclusion of this case thereby minimising the risk of reoffending in this State again. In relation to your background, I'm told by your counsel that you're 40 years of age, single. You have a daughter, 20 years of age, who resides in Dublin. You were working in a bar in Spain when you were arrested and extradited to Ireland to face this charge. You worked as a truck driver in the past and also in a hardware store. I'm told that you're not afraid of work and you have little or no education and have no qualifications, which would obviously minimise the choice of work which you can take up. You did work, however, for long periods of time and your preference at this stage is to go abroad and that there is bar work available for you at this particular time.*
>
> *You have been in custody since the 8th of January 2015 in Spain until your release on the 5th of March. Since then you*

have been on remand in this jurisdiction awaiting trial and now sentence. You were subjected to harsh conditions, I understand, while in custody abroad. Your incarceration abroad and now in this jurisdiction was brought on by your failure to honour your bail terms, they having been relaxed at your request to a holiday abroad for a period of two weeks only with members of your family. I'm told that you have personal problems, which I've already mentioned, and that you were reared in Cabra in Dublin. Your long term plan is to permanently live abroad and that you have the security of a job should you return to Spain. You were born, I understand, on the 23rd of March 1967 and have a poor criminal record dating back to May 1983. You committed your first offence, as I understand from the dates submitted to me, at the age of 16. You have 11 convictions for public order offences, seven for being intoxicated in a public place, nine road traffic offences, two for assault, two for burglary and three for theft, along with a number of other summary offences. Sentences ranged from fines, suspended prison sentences and actual prison sentences ranging from three months to 10 months. There is one reference to a four-year sentence for an offence committed for robbery on the 12th of October 2010. I'm not sure whether that is an accurate description as such but it has no bearing on eventually what my ultimate penalty which I propose to impose. The record of these convictions should be attached to this judgment as such. I have no choice but to impose a prison sentence in this case. On the single count I propose to impose a sentence of two years. I am however prepared to suspend a portion of that sentence on certain conditions …"

The applicant's submissions
27. It is contended that the sentence imposed represents a substantial departure from the norm, caused by the following alleged errors of principle.

28. It has been submitted that the sentencing judge erred in principle in failing to fully consider the range of penalties open to him or to fix the tariff for the offence within that range before considering the mitigating factors, such as they were.

29. Furthermore, it was submitted that it is a well-established principle of sentencing that a grave or serious offence is reflected by a severe sentence. In this case the sentencing judge characterised the offence as being (a) serious (b) one that cannot be treated lightly by the courts and (c) that the case was such that the sentence to be imposed must be seen to be a deterrent to others who may consider engaging in such unlawful activity. The applicant has submitted that in the circumstances of this case the sentence imposed failed to reflect the sentencing judge's pronounced view of matters and in the circumstances in imposing such a sentence he erred in principle.

30. In addition, it was submitted that in imposing sentence a sentencing judge should be mindful of all of the relevant principles of sentencing. He should ensure that the sentence that is imposed is proportionate to the seriousness of the crime as well as to the circumstances of the offender. While the judge must take account of all relevant mitigating factors, there were few mitigating factors in this case with the exception of the apology tendered to Garda Heaslip and his wife on behalf of the respondent at the last possible moment. It was submitted that the sentencing judge attached too much weight to the limited mitigating circumstances in this case.

The respondent's submissions
31. In reply counsel for the respondent contends that the sentence imposed was in no way unduly lenient. While echoing many of the submissions of the applicant concerning the applicable sentencing principles, and in particular the need for a sentencing judge to impose a sentence that is proportionate, and that takes account of the seriousness of the crime and the personal circumstances of offender, he contends that far from being unduly lenient the sentence is arguably unduly severe if anything. In making that argument, counsel for the respondent must be taken as recognising that his client has not appealed the severity of his sentence, and that in the context of a review pursuant to s.2 of the Criminal Justice Act 1993 this Court has no entitlement to interfere with the sentence imposed in the court below unless it is satisfied that the sentence imposed was unduly lenient.

32. Counsel for the respondent has also drawn the court's attention to the corresponding offence in the England and Wales, which is created by section 1(1)(b) of their Malicious Communications Act 1998. We were also referred to *Connolly v Director of Public Prosecutions* [2008] 1 W.L.R. 276, which is apparently the only reported case of a prosecution under that section. In *Connolly* the accused was convicted under section 1(1)(b) of the 1988 Act for posting pictures of aborted foetuses to pharmacies selling abortion pills, articles which were considered by the Court to be malicious or grossly offensive. The evidence was that in one instance a woman whose relative had recently given birth to a stillborn child opened the post, which was extremely distressing for her. The accused in that case was prosecuted summarily and was punished by the imposition of a fine. Counsel for the respondent acknowledges that the English legislation is different to that in this jurisdiction in as much as the maximum sentence for the offence in England is two years where conviction takes place on indictment, whereas it is five years here.

33. Finally, the Court was informed that in this jurisdiction there are no judgments either reported or unreported, concerning sentencing under s.55(1)(b) of the Act of 2011.

Discussion and Analysis.
34. The relevant principles that must guide this Court in the conduct of a review such as the present, are well established.

35. The jurisdiction to review a sentence on the grounds that it was unduly lenient derives from s. 2 of the Act of 1993, as amended, which (to the extent relevant) provides:

> 2.—(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Appeal to review the sentence.
>
> (2) An application under this section shall be made, on notice given to the convicted person, within 28 days, or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine, from the day on which the sentence was imposed.
>
> (3) On such an application, the Court may either—
>
> (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or
>
> (b) refuse the application.

36. In terms of the general principles governing such reviews, the leading authority is *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2 of the Act of 1993, and in it, O'Flaherty J giving judgment for the court, sets out a number of principles and considerations relevant to the conduct of such reviews. He said:

> "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."

37. Since then, the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R.356. In that case Barron J. stated:

> "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 of 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."

38. This Court has considered the full circumstances of this case, and the trial judge's remarks at sentencing, and it is not satisfied that it discloses any manifest error of principle resulting in a sentence that was unduly lenient in the sense of being a clear divergence from the norm.

39. Of course, in the absence of comparator judgments, there is no norm in the narrow sense of that word against which to measure the sentence imposed in this case. While the English case of *Connolly* is interesting, and we are grateful to counsel for the respondent for referring us to it, we consider it is of little assistance in circumstances where the offence in that jurisdiction carries a different range of penalties, and the actual prosecution the subject matter of the case was proceeded with summarily.

40. However, we do not consider that in referring to a divergence from the norm, the Supreme Court, in *The People (Director of Public Prosecutions) v. McCormack*, intended that the word norm should applied and understood in the narrow sense of being a usual situation referable to comparators. Rather, we believe the norm spoken of refers to what might be predicted to be the result, within a reasonable margin of appreciation, of a faithful application to the facts of the individual case of the appropriate sentencing principles, whether or not there are any useful comparators.

41. Turning then to the first criticism that is made of the sentencing judge's approach. It is complained that he failed to fully consider the range of penalties open to him or to fix the tariff for the offence within that range before considering the mitigating factors. Having carefully considered the trial judge's remarks we are satisfied that this complaint is not borne out by a consideration of the sentencing judge's remarks. First, he refers with specificity to the maximum available penalties, namely *"a term of imprisonment not exceeding five years and/or a fine not exceeding €75,000 or both"* in the case of a conviction on indictment, and by clear implication accepts that the penalties open to him must range from wholly non custodial options to the maximum of a combined fine of €75,000 and a custodial sentence of imprisonment for five years. Secondly, he recites in great detail his understanding of the applicable principles that must govern the general approach to sentencing, which we are satisfied were correct and comprehensive. Thirdly, the sentencing judge clearly assessed the seriousness of the case as meriting a custodial sentence of two years before application of mitigating factors. He then suspended the final year of the sentence to generously reflect what, it must be accepted, were the sparse mitigating circumstances in the case.

42. We see nothing to criticise in any of that. The judgment of the sentencing judge is thorough, detailed and comprehensive and we are satisfied that it discloses no error of principle in terms of the judge's understanding of the correct general approach to arriving at a just and proportionate sentence, or in terms of how the judgment was structured.

43. The second complaint is that the sentencing judge failed to adequately reflect in his sentence the seriousness of the case. It is accepted by the applicant that the sentencing judge purported to characterise the offence as a serious one, but it is suggested that the headline sentence that he decided upon of two years imprisonment before taking account of mitigation failed to properly reflect that characterisation. We cannot agree. The sentencing judge approached the matter properly. It is clear from his judgment that he weighed and assessed the respondent's moral culpability and also had due regard to the harm done.

44. This Court would perhaps quarrel with the correctness of his characterisation of certain factors as being aggravating, but notwithstanding this does not consider that the actual headline sentence arrived at was inappropriate and outside the range of what might reasonably have been expected even if every aspect of the analysis had been impeccable. He was entitled to take, and duly took, account of the fact that the intended victim had been a member of An Garda Siochána, as being an aggravating factor. However, we consider that he was incorrect in expressing that *"the nature of the offence itself"* was an aggravating factor. That could not be so, because the essence of the offence is that the article is indecent, obscene, grossly offensive or menacing. The fact

that the article in this case was in fact grossly offensive or menacing could not therefore aggravate the offence *per se.* Nevertheless the degree to which it was calculated to, and in fact did, cause actual offence or menace, was clearly a relevant factor in terms of assessing moral culpability, and it was therefore capable of affecting the calibration of seriousness. Something done as an ill-considered prank is manifestly less culpable than something done with malicious and mendacious intent, and *vice versa.* It seems likely to this Court that the judge's choice of words was merely infelicitous and that what he in fact meant was that the malicious and mendacious intent behind the offence aggravated it. If, as we believe, that was what he had intended to convey, we would agree with him.

45. We would also disagree with the sentencing judge that the respondent's past criminal record was correctly to be characterised as an aggravating factor. While this Court has held in the past that previous convictions for the same type or very similar types of offence can sometimes be treated an aggravating factor, the preferred view is that previous convictions (other than those for the same or very similar types of offences) do not aggravate an offence. Rather, the better view is that they should be taken into account on the other side of the scales leading, depending on the number and seriousness of them, to progressive, and in some cases total, loss of the mitigation that is normally afforded for good character. However, regardless of how previous convictions are in fact treated, it is likely to make little difference to the bottom line sentence actually to be imposed in the case of most offenders, and we consider that it certainly would have made no difference in this case. As O'Donnell J has said in *The People (Director of Public Prosecutions) v. Bryan O'Byrne* (unreported, Court of Criminal Appeal, 17th December 2013):

> "The exercise of placing an offence on the scale of severity and then considering aggravating and mitigating factors is not a mechanical process to be slavishly followed. Its principal function is to assist the sentencer in considering and giving weight to all the appropriate factors in the case, and where necessary, facilitating a review of that sentence. It is not particularly important therefore under which heading a particular factor is assessed, but it does become important to avoid unintentional double counting."

46. We are satisfied that overall the trial judge carefully assessed the seriousness of the offending conduct in this case, with reference to moral culpability and harm done, and that his assessment of it as meriting a headline sentence of two years imprisonment was well within any margin of appreciation that must be afforded to him in any review of that process. In the circumstances, his said assessment cannot be said to constitute a clear divergence from the norm.

47. Turning finally to the complaint that he afforded too much weight to the mitigating factors in the case, we agree that in suspending half of the headline sentence he was generous in that regard. The key issue, however, is whether he was excessively generous in that regard to such an extent as to render the bottom line sentence unduly lenient, in the sense of constituting a clear divergence from the norm. This was not a case in which there was no mitigation at all. There had been a clear expression of remorse, and the tendering of an apology, albeit very late in the day. While the accused had a large number of previous convictions, account had already been taken of those as an aggravating factor on the other side of the sentencing equation, and the sentencing judge, to avoid double counting, was therefore obliged to ignore them in terms of their having any potential adverse effect on the available mitigation. In addition, there was certainly evidence that the respondent had, despite limited education, and a modest start in life, a good work ethic and that he had been gainfully employed in a variety of jobs and employments over the better part of his life. Moreover there was some indication, albeit somewhat vague, that the appellant had a number of personal problems and issues that had weighed, and continued to weigh, heavily upon him. Taking all of this into account, and bearing in mind that the sentencing judge at an early stage of his sentencing remarks had referred specifically to the need for the sentence to be proportionate and, in that context, to have regard, *inter alia*, to the sentencing goal of rehabilitation, we are not persuaded that the sentencing judge fell into error in the exercise of his discretion as to what allowance to make for mitigation. We reiterate our view that the allowance made was generous, and in fact very generous. It was perhaps at the outer limit of what might have been justified in the circumstances of the case. However, we do not consider that it fell outside the considerable margin of appreciation that the trial judge enjoyed.

48. Overall then, we are satisfied that the sentence imposed was not unduly lenient and the Court dismisses the application.