



THE COURT OF APPEAL

Edwards J.
Hedigan J.
McCarthy J.

246CJA/17

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

JARLATH HIGGINS

Respondent

JUDGMENT of the Court (ex tempore) delivered on 5th October 2018 by Mr. Justice Edwards.

1. On the 4th of May 2017, the respondent to this appeal pleaded guilty in Dundalk Circuit Court to; one count (count no. 1) of criminal damage contrary to s. 2 of the Criminal Damage Act 1991, and; two counts (counts nos. 3 & 6) of dangerous driving contrary to ss. 53(1) and 53(2)(b) of the Road Traffic Act 1961, as amended ("the Act of 1961").

2. On the 18th of October 2017, a "full-facts" sentence hearing took place. On this date, the respondent was sentenced to two years' imprisonment, fully suspended on conditions, coupled with a three year driving disqualification, in respect of count no.1, and five months' imprisonment, fully suspended on conditions, coupled with a two-year disqualification from driving in respect of counts nos. 3 and 6. Counts nos. 2, 4 and 5 were taken into consideration and all sentences were ordered to run concurrently.

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

Background facts

4. At the sentence hearing, Sergeant Kevin Toner gave evidence of the incidents forming the subject matter of the present case. In the early hours of the 18th of November 2015, a Garda checkpoint had been set up just north of the Tain Bridge, Dundalk, Co. Louth. There were two Garda patrol cars and four Gardaí at this location at the time: Garda Kenneth Burke, Sergeant Nigel McAnaw, Garda Padraig Kelly and Garda Aidan Brady. The first of these patrol cars ("Garda car A") was occupied by Garda Burke, as the driver, and Sergeant McAnaw, as the observer. The second of the two vehicles, ("Garda car B") was in the charge of Garda Kelly, as the driver, and Garda Brady, as the observer. Garda car A was at the side of the road with the blue lights activated.

5. At 12:47 a.m. on the day in question, the respondent, who was driving alone in a silver Renault Megane, approached the checkpoint heading North. Garda Brady was in full uniform, standing and signalling at the respondent to stop. As the respondent's car approached the checkpoint, he accelerated towards Garda Brady who was forced to clear from the path of the oncoming vehicle which, as was established in evidence, appeared to those present to have been driven intentionally at Garda Brady, before accelerating at speed in a northerly direction. Garda Car B immediately pursued the respondent. Having noted the registration of the respondent's car, Garda car B activated its blue lights and sirens, making it clear that the vehicle was being followed. At this stage, Garda car A, being driven by Garda Burke, was second in line following the respondent's vehicle.

6. Both Gardaí in Garda car B observed the respondent's car to continue driving at speed on a portion of the inner relief road in Dundalk, beyond the Racecourse and up towards the Red Cow Roundabout. The evidence was that the "*respondent's vehicle was observed to proceed, straight ahead, effectively through the roundabout....in a sense that it headed off out of the roundabout in the same direction in to which it entered the roundabout*". At this stage, there was an attempt made by Garda Kelly to over-take the respondent and, in this attempt, Garda car B came alongside the pursued vehicle. The evidence was that the respondent then intentionally "*sought to evade capture by swerving his vehicle to the right of the marked patrol car, striking it while in transit twice on the front left side of the car.*" The respondent then proceeded to drive his car into the right lane of the dual carriageway, with Garda car B subsequently moving into the left lane, subsequent to which the respondent struck Garda car B for the third time, this time on the right rear of the patrol car, causing both cars to slide into a concrete bollard in the middle of the dual carriageway.

7. At this point, Garda Brady attempted to get out of the car to approach the respondent, but the respondent put the car into reverse, thus heading the wrong way down the dual carriageway. Garda Kelly shouted at Garda Brady to get back into the patrol car, as he feared that the respondent may attempt to drive the car at Garda Brady, who was in a vulnerable position at that stage. The respondent continued to drive in reverse, before proceeding forward in the direction of the Ballymascanlon roundabout, in the left hand lane. At this stage, Garda car A was in the left hand lane in pursuit of the respondent. The respondent's vehicle then struck the nearside of Garda car A. Garda car A then slowed down as it approached the roundabout, before being struck again by the respondent's vehicle on the front left hand side of the car.

8. Subsequently, the respondent lost control of the vehicle and slid across a couple of lanes as it entered the Ballymascanlon roundabout. Garda Burke described this movement as "*violently fishtailing*". Having passed through the roundabout, the respondent took the Faughart exit, followed by Garda car B, who attempted to overtake the respondent again. The evidence was that, once again, the respondent's car deliberately collided into the driver side of Garda car B, causing both vehicles to go into a spin. Both vehicles then came to a halt on "*the wrong side of the road at the flyover above the M1 motorway*". Garda car A then arrived at the scene and, at this stage, both Garda cars were able to block the respondent's vehicle from moving, at this stage in the townland of Navan. The respondent, while he initially continued to rev the engine aggressively, was ultimately restrained and, while he tried to escape, the Gardaí ultimately succeeded in restraining him.

9. The respondent was ultimately arrested, detained and brought to Dundalk Garda Station; where the view was taken that the respondent had consumed alcohol. Thus, the decision was taken not to interview the respondent on this occasion. However, the respondent was ultimately charged, entered a plea and was sentenced in the terms already outlined.

Impact on the victims

10. None of the Gardaí involved in the incident outlined above, most particularly Garda Brady, furnished victim impact reports to the sentencing court. However, at the sentence hearing, evidence was adduced, mostly in the form of a two page report from Sergeant James Walsh, outlining the harm caused to the patrol cars, and indeed some of the injuries suffered by Garda Brady. In respect of Garda car A, the report indicated damage to the car, including scraping and displacing of the front near side, as well as damage to various components behind the bumper. This damage amounted to €1,255. The report also indicated damage to the off-side doors and sill, the off-side rear wheel arch, the off-side front window being broken, and the off-side end of the rear bumper being scraped, as well as damage to the near-side wing being scraped, both near-side doors being dented inwards, as was the near-side rear wheel with scrapes on the near side of the rear bumper

11. Evidence was also adduced that, as a result of the incident, Garda Brady has had a disc removed from his neck and a plate put into his neck, a titanium plate, and at the moment is still suffering back and neck injury. He has been out of work since the 18th of November 2015 and, on the date of the sentence hearing, was still meeting with consultants regarding his injuries and was unsure as to a return date to work. It should be briefly noted, although (I think!- Liam) nothing turns on it, that under cross-examination, Sergeant Toner confirmed that the respondent had not been put on notice of any evidence as to ongoing injuries arising out of the incident, that the book of evidence referred to as *"back pain and shoulder pain injuries"*; that there was no medical report available in respect of those injuries, and; *"that the dangerous driving offences before the Court are dangerous driving simpliciter, rather than causing serious harm or anything of that nature"*.

12. Whilst Sergeant Walsh's report did not indicate the extent of damage caused to Garda car B, Sergeant Toner adduced evidence at the sentence hearing that there was extensive damage done to the undercover of the engine - panels; brackets; bumpers; the whole front facing of the car had to be removed. This damage amounted to €6,262.

The Respondent's Personal Circumstances

13. Before the sentencing court there was a Probation and Welfare Service Report, dated the 3rd of October 2017, and a Psychiatric Report from Dr. Geraldine Lyster, dated the 27th of January 2017. From these reports, and defence counsel's plea in mitigation, the following picture of the respondent's personal circumstances emerges.

14. The respondent was born on the 17th of March 1970, making him 47 at the time of sentencing. He is a single man, residing with his mother in Dundalk Co. Louth. He was born in England, and his family moved to Ireland when he was 12 years old, moving to Galway initially, then onto Belfast, before finally moving to Dundalk. His father passed away in 2008. He has one brother and one sister and it appears he has a good relationship with his family members. These pro-social factors, coupled with his lack of criminal history lead to the conclusion on the part of the Probation Report that the respondent was at low risk of reoffending.

15. The respondent attended Dundalk Institute of Technology ("DKIT") where he received certificates in Sales and Marketing, IT Technician, Business Studies, Digital Marketing and Media. The Probation Report indicates that the respondent has a good employment history – he is currently working full-time for "Pay-Pal" in Dundalk as a Customer Support Specialist.

16. Both reports indicate that the respondent suffers, or at least suffered, from stress and anxiety. It appears that the respondent was subjected to a traumatic stabbing incident in 2003, resulting in him being prescribed anti-anxiety medication and sleeping tablets as a result of this incident. Subsequent to the incidents forming the subject of the present case, the respondent attended his local GP, where he was found to be suffering from bruising to his body and a severe laceration to his left-lower limb, which ultimately became infected and required treatment at Lourdes Hospital. In the aftermath of the incident, the respondent was referred to psychiatric services by his GP in February 2016, where he reported a history of feeling very anxious and low mood. He attended counselling intermittently throughout his life, and for some time following the incident. However, the psychiatric report indicates that the respondent *"is not clinically depressed, and not suffering from clinical anxiety. His thought content is positive and his outlook towards the future is positive."* The respondent is also suffering from other physical health issues and, at the time of sentencing, was being treated for a stomach ulcer, diverticulitis.

17. The respondent has no previous convictions and has not come to the adverse attention of the authorities since the incident. Indeed, in the plea in mitigation, defence counsel characterised this incident as *"a moment of madness"* and a *"standalone incident"*. It seems that the respondent had consumed alcohol prior to the incident and that his actions were borne out of a desire to evade the Gardaí. During her plea in mitigation, defence counsel indicated to the court that the respondent instructed her that, since the incident, he has put himself under a self-imposed driving ban.

18. It would appear that the respondent has used alcohol to deal with stressful incidents in his life i.e. the death of his father and the stabbing incident. The psychiatric report noted that he had previously been found to have Alcohol Dependence Syndrome. The Probation Report noted that the respondent was drinking heavily in the aftermath of the present offence but that he has indicated that his use of alcohol is now under control.

Sentencing Judge's Remarks

19. Over the course of sentencing the respondent, the sentencing judge made the following remarks:

"It appears that when the guards then approached Mr Higgins, he was certainly in a very aggressive humour and his behaviour to the guards was extremely aggressive. It appears that at the particular time that he had consumed alcohol and, on seeing the guards, his actions were simply to evade the guards. Obviously, but I think it's only correct that I should say that the courage by all the guards, but in particular Garda Brady and Garda Padraig Kelly, in putting -- in particular Garda Brady initially, standing in front of the patrol car, you almost put your health, your safety and indeed your life at risk in the course of your duty and Garda Brady, certainly, in the course of his duty, put himself at risk, severe risk, by standing where he was to stop the car. Then again, he was the driver of the car, together with Garda Padraig Kelly. The risks that they took to apprehend Jarlath Higgins were simply extremely courageous; in the course of their duty, they took extraordinary steps of bravery to apprehend the driver of this car, being Jarlath Higgins, and eventually did so, but in the course of the incident Garda Brady did in fact suffer serious injuries, and my understanding from the evidence, that he's still out of work, and Garda Kelly who had also suffered some injuries, but this was due to the bravery that they displayed constantly during the course of the incident that Mr Higgins is now before the Court.

Mr Higgins has now reached 47 years of age. He's never come to the attention of the guards prior to this incident. He's

a person of a very good work history and it's extraordinary why such a person, who had behaved law abiding, an excellent person, behaved in the manner on the date in question. There's -- Sergeant Toner's been extremely fair in respect of Mr Higgins, he says that he had alcohol consumed and maybe this was the reason, seeing the patrol car, that he didn't want to be stopped by reason of having consumed alcohol. Indeed it would have been a lot better, safer for everybody concerned, and indeed himself, if he simply stopped and suffered the consequences for having consumed alcohol; at least nobody would have been hurt. He would have not exposed or put the guards in risk of serious danger and he would not have caused material damage to the garda cars if he had acted responsibly. In the circumstances, I think, very fairly, Sergeant Toner said that his reaction on the seeing the guards was completely disproportionate. He may have panicked. He certainly overreacted and his reactions were disproportionate, he should have simply taken the obvious and sensible steps - when you see a garda checkpoint, you simply stop. And, had he done so, there would have been consequences had he been tested for alcohol, but the other consequences that flowed from his conduct would not have arisen.

In respect of count No. 1, the maximum custodial prison sentence, that's the criminal damage, is 10 years, and I must decide where does this count lie in respect of the maximum sentence. I'm satisfied it would be in the middle -- in the middle downwards. In respect of count No. 3, the dangerous driving, the maximum custodial prison sentence is -- and of course a disqualification at the discretion of the Court, having regard to the circumstances of the criminal damage in respect of count No. 1. In respect of count No. 2, the dangerous driving, the maximum custodial prison sentence is six months and/or an endorsement, as in the first case, and I think the maximum endorsement would be two years, having regard to the particulars in respect of such an endorsement.

Then I must have regard to his personal circumstances. He's now aged 47 years and Mr Higgins was originally born in England and he moved to Ireland when he was about 12 years. He started in Galway, then to Belfast and finally to Dundalk. He went to DKIT where he received certificates in sales and marketing, IT technician, business studies and digital marketing and media. He appears to have a very good employment history and is working full time for a company in Dundalk. He is a customer support specialist and it appears that he has a good working relationship with his colleagues. It appears that he had issues with his stress and anxiety and he attended a consultant psychiatrist in the Louth Hospital after this offence, which would appear to be directly linked to this offence. He has been on medication for stress-related symptoms and was prescribed tablets he said in the past. He's not taken Xanax for some time. And back in 2003 he himself was the victim of a very serious incident. He had used alcohol as a coping mechanism at various points in his life and he drank excessively when his father died in 2001, and also drank after this offence occurred. He also has other health issues and is currently being treated for a stomach ulcer, diverticulitis.

In mitigation, there are pleas of guilty. He accepts responsibility for the offences. He accepts that he -- and acknowledges that he drove dangerously and put the lives of the others at risk, meaning the lives of the guards, in particular Garda Brady and Garda Kelly. In respect of his alcohol, it appears that he wasn't in a position to give a clear recall of the extent of his behaviour, or his non-compliance with the guards when being requested to stop, and other matters that occurred on the night. It appears that he has taken positive steps in respect of his alcohol. He has reduced his alcohol intake and is not driving -- is not drinking to excess. I'm also informed that since the date of the incidents that he has not driven. And he was seen by the -- Dr Geraldine Lister, consultant psychiatrist, who he said -- who has indicated in her very helpful report, that his mental stress, mental state at present, that -- in respect of that mental state, the progress is good, that's in respect of the incident on the 18th of November 2015. So, she's extremely positive and she said that he suffered stress reaction and anxiety-depression reaction, as a consequence of the incident on the 18th of November 2015. However, it appears that he has improved dramatically, and the future is bright. He has no previous convictions. He's not -- doesn't -- hasn't come to the attention of the guards since the date of these offences, and he's assessed at low risk of reoffending in the future."

The aggravating factors of the case is the serious nature of the offences; the manner of the dangerous driving and it's - - the degree of fault. In respect of Mr Higgins's driving, there was a high degree of fault in respect of his driving. The driving was extremely dangerous in the circumstances and I've already referred to the manner of his overtaking; the striking of the passenger side of the car being driven by Garda Brady. Then he went to the outside lane and then resulting in both cars coming to a stop. The driving was indeed at the highest level of dangerous driving in the particular circumstances outlined in relation to the dangerous driving offence. And indeed, the risk that he exposed both Garda Brady and Garda Kelly to, in respect of the dangerous driving, and also of course, in respect of the criminal damage. But in respect of that dangerous driving then, in respect of the criminal damage, the manner of the criminal damage it was caused by the manner of the driving, which was dangerous driving. It was caused by an intentional and deliberate act on the part of the accused, Jarlath Higgins, in crashing, colliding into the car, the patrol car, in respect of the criminal damage and indeed the amount of criminal damage and the circumstances and, of course, again, the risk that he exposed Garda Brady and Garda Kelly to in the circumstances directly in respect of the manner of the criminal damage and the amount of criminal damage, and the effect of the offences on both Garda Brady and Garda Kelly, and in particular Garda Brady who seems to have ongoing problems and matters. But I have to be careful, just in respect of the offences, but there are consequences for both Garda Brady and Garda Kelly directly as a result of the offences and directly as a result of Jarlath Higgins's behaviour in respect of the driving of his car on the date in question.

And then in respect of count No. 1 and count No. 3, I must have regard to the serious nature of the offences and to the aggravating factors and, indeed, they are substantial aggravating factors, and to have regard to the mitigating and the personal circumstances and they are, indeed, positive mitigation and personal circumstances in respect of the accused, Mr Higgins. In respect of count No. 1, I'm going to impose a two years custodial prison sentence, two years to run from today's date. And I will impose -- well, I'll just leave it -- and there will be a disqualification. In respect of count No. 3, I'm imposing a five months custodial prison sentence, both from today's date, both sentences to run concurrently. I will, in the circumstances, suspend both the sentences on the following terms: that Mr Higgins enters into a bond before this Court, the bond being €200, to be of good behaviour for a period of two years from today's date. In addition, in respect of count No. 1, I'm imposing a three years period of disqualification. In respect of count No. 3, two years disqualification, both periods to run concurrently and both periods to run from today's date, and the particulars to be endorsed on his driving licence or record, whichever is applicable in the circumstances. In respect of the issue of the damage to the patrol cars, that it's an undertaking that I want to get from Mr Higgins in respect of the suspended sentence is that, having regard to what -- if the insurance policy can cover the damage, then it's very good for him, once the State will be properly compensated for the damage, that is the most important, that the State should be compensated in respect of the damage. If, however, in respect of insurance policies, and certainly in my time I'd have pretty comprehensive knowledge of insurance policies, if there is an issue having regard to the type of offences - I'll just leave it that - that indemnity will not be provided, then that Jarlath Higgins undertakes to this Court, as part of the suspended sentence,

that he will discharge the full amount, being €7,500 in respect of the criminal damage to the patrol cars.

.....

In respect of -- this is the -- in respect of the aggravating factors in respect of count No. 6, so what I have referred to in respect of the criminal damage or circumstances are identical to the dangerous driving in respect of count No. 6 in the aggravating factors. And then in respect of count No. 6, the maximum custodial prison sentence is six months and/or two years and the two-year disqualification and I'm satisfied with being the higher level in respect of the maximum sentence. So, in respect of count No. 6, I'll impose a five month custodial prison sentence and a two-year disqualification, the five months to run concurrent from today's date, to run concurrently with the other sentences. And the disqualification of two years to run equally concurrent with the other -- with the concurrent disqualifications and the bond will apply in respect of counts 1, 3 and 6, but all the sentences are being suspended, the two years, five months and five months on the following terms: that he enters a bond of €200 to be of good behaviour for a period of two years from today's date.

I mean, the reason why I'm incorporating all the offences because they're interlinked, and the probation period should cover all the matters because they're interlinked with each other. I'm not going to separate them, because I think it's important that the behaviour should cover all these matters in the future, hopefully having regard to his behaviour today, if it should arise. Then in respect of the amount of money, I don't have to vary that. I'm just simply restating what I stated in respect of the compensation, but it's important to be in a position, and it should be ascertained, I've no doubt, within three months what is the position on foot of the policy. And if it is if the insurers are not in a position to indemnify in respect of the criminal damage to the cars, then I direct that the sum should be paid within 12 months of today's date. But that only arises if there's no indication or confirmation that there will not be indemnification in respect of the damage. And I am not going to look into a crystal ball at this stage; I expressed my views on it. Hopefully there will be no difficulty, but there may be a difficulty."

Grounds of Appeal

20. In their notice of application, dated the 10th of November 2017, the applicant sets out twenty three grounds in support of their application for a review of the sentence handed down in the court below. They are as follows:

- i. The sentencing judge erred in imposing an unduly lenient sentence in all the circumstances, being a sentence of 5 years imprisonment entirely suspended. The maximum sentence for this offence is 10 years.
- ii. Further or in the alternative, the sentencing judge erred in purporting to identify features within the evidence which when viewed in an overall context were wholly insufficient as to merit the exercise of the discretion to suspend the sentence imposed.
- iii. Further or in the alternative, the sentencing judge erred in that having purported to identify features within the evidence which led to the imposition of the said sentence, gave excessive weight to the matters urged upon him as mitigating factors in and about the imposition of the sentence of 5 years suspended
- iv. The sentencing judge erred in determining that 5 years suspended was the appropriate sentence having regard to its place on the spectrum of seriousness of offences of this kind.
- v. The sentencing judge erred in that he imposed a sentence that was disproportionate in that it gave insufficient weight to the aggravating features of the offence and gave excessive weight to the mitigating factors bearing in mind the maximum sentence available for the offence.
- vi. The sentencing judge erred in that he failed to have adequate regard for the aggravating circumstance which gave rise to the deliberate targeting by him, in and about the driving of a motor vehicle, of what he knew to be Garda patrol cars, and thus the criminal damage caused.
- vii. The sentencing judge erred in imposing an unduly lenient sentence in all the circumstances, being a sentence of 5 months imprisonment entirely suspended. The maximum sentence for this offence is 6 months.
- viii. The sentencing judge erred in that he failed to have adequate regard for the specific aggravating circumstance which included his endangering persons whom he knew to be present at the locations of such driving, and whom he knew to be Members of An Garda Síochána.
- ix. The sentencing judge erred in that he failed to have adequate regard for the specific aggravating circumstance which gave rise to the deliberate targeting by him, in and about the driving of a motor vehicle, of a person whom he knew to be a member of An Garda Síochána acting in the course of his duty.
- x. The sentencing judge erred in that he failed to have adequate regard for the general aggravating circumstances arising from his driving, which included his disregard over a substantial period and over a substantial distance for the safety of other road users in general as he sought to avoid apprehension by Members of the force.
- xi. The sentencing judge erred in being unduly lenient regarding the matter of an appropriate sentence when arriving at the totality of the period of incarceration to which the Respondent was to be subjected, the Court having failed to give any or any sufficient reasons for the suspension of the entirety of the sentences in question, or in the alternative gave reasons which in their application were insufficient and a departure from apt sentencing norms and principle.
- xii. In respect of each of the said counts, the sentencing judge erred in attaching undue weight to mitigating factors in the case and in particular to the personal factors relating to the Respondent.
- xiii. In respect of each of the said counts, the sentencing judge erred in law and in fact in failing to have apt regard to the range of sentences appropriate to such offences in his approach to sentencing.
- xiv. In respect of each of the said counts, the sentencing judge erred in law and in fact in failing to assess each offence

as being at the very highest level of offending in all the circumstances, which included the deliberate targeting by the Respondent, in and about the driving of a motor vehicle, of what he knew to be Garda patrol cars in circumstances where he thereby placed the safety health and lives of a number of members of an Garda Síochána, and property of An Garda Síochána in grave danger.

xv. The sentencing judge erred in that he gave excessive weight to the mitigating factors in the case, to include: the plea of guilty offered in the case, the degree of co-operation offered by the Respondent to the investigation of the case, and the fact that the Respondent had no previous convictions.

xvi. The sentencing judge erred in that , having given excessive weight to the pleas of guilty offered in the case and in that he gave excessive weight to the degree of co-operation offered by the Respondent to the investigation of the case, he failed to have any or any adequate regard for the fact that the Respondent was "caught red handed".

xvii. The sentencing judge erred in that he failed to take into account the balance of the Counts on the Indictment as he was required to do either properly adequately or all.

xviii. The sentencing judge erred in failure to have any or adequate regard to the requirement of deterrence, both in general terms and in his failure to have adequate regard for the fact that this Respondent was in the circumstances of his offending displaying contempt both for the Garda Síochána as a force, and the individual Members involved with and affected by his offending.

xix. The learned Trial Judge erred in the imposition of such a lenient sentence as was not in the public interest in all the circumstances which includes the public interest served by the Garda Síochána performing their duties as in the instant set of circumstances and the sentence imposed would clearly not act as a deterrent to other persons and the prevention of further crimes.

xx. In respect of each of the said counts, the sentencing judge erred in law and in fact in failing to have any or any proper adequate or timely regard to the range of sentences appropriate to the said counts, and in so doing had excessive regard to the totality principle.

xxi. In respect of each of the said counts, the sentencing judge erred in law and in fact in failing to have any or any proper adequate or timely regard to the range of sentences appropriate to the said counts, and in so doing failed to have proper or adequate regard to his discretion to impose consecutive sentences, or in the alternative a consecutive element to his sentencing.

xxii. In respect of each of the said counts, the sentencing judge erred in law and principle in failing to have any or any proper adequate or timely regard to the range of sentences appropriate to the said counts, and in so doing invited and thereafter had excessive regard to an undertaking in respect of future restitution.

xxiii. In respect of each of the said counts, the sentencing judge erred in law and principle in failing to have any or any proper adequate or timely regard to the range of sentences appropriate to the said counts, and in so doing structured a sentence featuring undertakings in respect of future restitution in the context of suspending all sentences.

Applicant's submissions

21. The applicant submits that grounds nos. (i) –(vi) are applicable to count no. 1, i.e. the criminal damage count. In this regard, the applicant concedes that there were certain mitigating factors in the case (the applicant's lack of previous convictions and good behaviour; low risk of re-offending). However, it is submitted that the gravity of the offending merited the imposition of an immediate custodial penalty in all of the circumstances, whilst acknowledging that the Court in its discretion might see fit to impose a suspended *element* to such a sentence. The applicant submits that each of these offences is at the higher end of the spectrum of seriousness, particularly with regard to the fact that both members of an Garda Síochána were involved and thus some custodial element to be served is required.

22. Grounds nos. (vii) – (x) are applicable to counts nos. 3 & 6., i.e. the dangerous driving counts. Firstly, the applicant submits that Counts 3 and 6 represent successive counts of dangerous driving and, thus, that the second in time ought to have attracted a minimum penalty of four years disqualification, it being a second offence in time within a period of three years of the first offence, pursuant to s. 26 of the Act of 1961. That in and of itself ought, the applicant submits, might have led to the imposition of an overall penalty inclusive of a four year disqualification period.

23. Further, the applicant submits that the offending in respect of each of counts nos. 3 & 6 is at the higher end of the gravity spectrum, having regard to the fact that it was committed over a significant period of time, with a number of persons being put in such danger; danger that actually resulted in physical injury to two members of An Garda Síochána. Thus, the applicant submits that the offending behaviour was deserving of an immediate custodial penalty to be served, as opposed to wholly suspended as occurred in this case. In support of this proposition, the applicant draws this Court's attention to the English decision of *R v Gibbons* (1991) 13 Crim App. R479, whereby a prison sentence of eighteen months was upheld in circumstances where the appellant pleaded guilty to taking a vehicle without consent and reckless driving (high speed through four sets of traffic lights with the police chasing and then crashing into another van). Whilst conceding that the aggravating factor in *Gibbons*, namely the taking of a vehicle without consent, was not present in the present case, counsel for the applicant submits that in the present case there was the additional aggravating factor of a car driven at members of An Garda Síochána and driven in circumstances where significant damage was done to Garda vehicles.

24. In their written submissions, counsel for the applicant makes discrete submissions in respect of some of the remaining grounds which, they submit, are applicable to all three counts. In respect of ground no. (xvii), namely the complaint that the sentencing judge failed to adequately take the remaining counts (nos. 2, 4 & 5) into consideration, the applicant submits that the sentences imposed did not reflect the overall gravity of the offending conduct, including the three further counts, none of which were the subject of a *nolle prosequi*.

25. Grounds nos. (xviii) and (xix) centre on the complaint that the sentencing judge failed to properly satisfy the penal objective of deterrence in passing sentence on the respondent, citing the dictum of Walsh J in *The People (Director of Public Prosecutions) v O' Driscoll* [1972] 1 Frewen 351 at p. 16, in this regard.

26. Ground no. (xxiii) is related to the sentencing judge's exploration of his power to make an order of compensation. During the sentence hearing, the respondent enquired as to whether or not the respondent was going to re-compensate the State for the damage done to the Garda cars. Ultimately, the applicant submits, the sentencing judge placed undue emphasis on his ability to make an order of compensation; with the consequence that he failed to reflect the gravity of this particular offending conduct via the imposition of a more serious penalty. Having received information regarding the compensation figures for the two vehicles, €7,500, the sentencing judge then immediately proceeded to locate the gravity of the criminal damage offending, without carrying out such an exercise for the dangerous driving offences. This error of principle, it is submitted, was further compounded by the fact that, at the time of passing sentence, the sentencing judge did not know the actual punitive effect that the order of compensation would have on the respondent – as he was unsure as to whether the €7,500 was going to be covered by insurance, an independent third party or by the respondent himself. This uncertainty, it is submitted, exacerbates the unduly lenient nature of the sentence. The applicant also takes issue with the fact that the Director was not asked as to whether the compensation order was an acceptable course of action.

27. Finally, the applicant has submitted that the Court could have made an ancillary disqualification order in respect of count no. 6, pursuant to s. 27 of the Act of 1961.

Respondent's submissions

28. In response, the respondent's written submissions is split into six separate retorts to the applicant's 23 grounds of appeal. Firstly, in respect of the criminal damage count, the respondent argues that the sentencing judge was correct to place this offence in the mid-range for criminal damage offences, and that having regard to the significant and important mitigating factors such as; the plea of guilty; the respondent's psychiatric history, and; his lack of previous convictions, that it was not unduly lenient to fail to impose an immediate custodial sentence on the particular facts of the case.

29. In respect of the dangerous driving counts, counsel for the respondent argues that, in circumstances where the maximum sentence for dangerous driving is six months, it could not be considered to be unduly lenient to impose a five month suspended sentence where there was a plea of guilty and no previous convictions.

30. In respect of ground of appeal no. (xvii), the respondent submits that the sentencing judge heard all of the facts of the case on a full facts basis, and that the sentencing judge noted that all the offences were interlinked and should not be dealt with separately.

31. In response to the applicant's complaint that the sentencing judge failed to satisfy the penal objective of deterrence, the respondent submits that the quote relied upon by the applicant in *O'Driscoll*, actually serves to re-inforce the respondent's argument that the sentencing judge was required to, and indeed did, take into account not only the aggravating factors surrounding the gravity of the offence, but also the personal circumstances of the offender in reaching a proportionate sentence under Irish sentencing law.

32. Further, the respondent submits that the sentencing judge was concerned that the State would not be out of pocket as a result of the actions of the respondent, and that he did not make a compensation order but rather imposed a suspended sentence. It is submitted that there was no error in principle and indeed he was correct to be concerned that the State would be indemnified for any loss.

33. Finally, in respect of the argument that the second conviction for dangerous driving should have attracted a higher disqualification period of a minimum of four years, the respondent argues that, in circumstances where both counts arise out of the same incident, the second count is not a second or subsequent offence, and thus the higher consequential disqualification does not apply. Indeed when the learned sentencing judge imposed sentence on the second dangerous driving count he specifically noted that the offences were interlinked, that sentences should be concurrent and no submission to the contrary was made by the appellant. Further, regarding the argument that the judge could have imposed an ancillary disqualification order pursuant to s. 27 of the Act of 1961, the respondent submits that an ancillary disqualification was addressed by the learned sentencing judge who disqualified the respondent from driving for three years on the criminal damage count.

Discussion and Decision

34. The law in relation to undue leniency appeals is by this stage so well settled that it is unnecessary to review it in any detail. The Court is not entitled to intervene in a case where a sentence is merely lenient, or even very lenient. The sentence must be unduly lenient before we can intervene, and that means that the sentence imposed must represent "*a clear divergence by the court of trial from the norm*" that will have been caused, in most cases, by "*an obvious error of principle*".

35. In assessing whether there has been a deviation from the norm close attention should be paid to the reasons given by the sentencing judge for imposing the sentence at issue and great weight should be attached to those reasons as it is that judge who has received, evaluated and considered at first hand the evidence received and the submissions made in the course of the sentencing hearing. The process is one of review, and whether this Court agrees or disagrees with the sentence imposed is neither here nor there. The only relevant question is "was the sentence that was imposed unduly lenient?"

36. The complaints levelled at the sentence imposed fall into two broad categories. In the first place it is suggested that the pre-mitigation sentences selected were too light having regard to the gravity of the offences. Secondly, it is suggested that the sentencing judge discounted by too much to reflect mitigation, and in particular in wholly suspending the headline sentences. It is necessary to assess whether the complaints on either or both counts are made out; and, if they are, what were the consequences of that in terms of the proportionality of the sentences that were imposed. Did it result in the imposition of sentences that were duly lenient in the sense already spoken of, or merely lenient but within the range of the sentencing judge's legitimate margin of appreciation?

1. Dealing in the first instance with the criminal damage charge, the sentencing judge properly noted the available range of penalties, and expressly referenced the fact that the maximum penalty was imprisonment for up to ten years. He was required to assess the gravity of the offence with reference to culpability (taking into account both aggravating and mitigating factors bearing on that) and also the harm done, and then to locate the case on the scale or range of available penalties. He assessed the gravity of the case as being somewhat below the mid point on the scale, what he characterised as the "*middle downwards*". In doing so he rehearsed in his judgment the circumstances in which the damage was caused. There is no doubt that when in considering the intrinsic moral culpability of the offending conduct, i.e., whether it was committed intentionally, recklessly or negligently, that he was satisfied that it was intentional. He expressly stated that "*[i]t was caused by a deliberate and intentional act*". He took account of aggravating factors including that the criminal damage was caused in the course of a prolonged episode of dangerous driving, and during hot pursuit of the respondent's vehicle by Gardai when there was an attempt to evade them, the fact that the respondent had alcohol consumed, the respondent's aggressive humour and behaviour and the aggressive nature of his driving, the failure to stop when signalled to do so, the striking of Garda vehicles on a total of four occasions, including twice as Gardai attempted to overtake him when he was on the inside lane, once when he was in the outside lane and once on the approach to the Ballymack roundabout, and

the disproportionate reaction of the respondent to the possibility of being stopped at the Garda checkpoint. He did not isolate any mitigating factors bearing on culpability, and in truth there were none. The sentencing judge also took account, as he was required to do, of the harm done, and in particular that damage was caused to two separate Garda vehicles amounting in total to €7,500. He was concerned that restitution should be made by the respondent if possible, and received an indication that there was some possibility that the respondent's motor insurance policy would cover it, but also a possibility that the insurer might repudiate having regard to the circumstances of the case. The court was informed of the respondent's willingness to make restitution on the criminal damage charge one way or the other. The sentencing judge ultimately concluded that the gravity of the criminal damage offence meriting a pre-mitigation or headline sentence of imprisonment for a period of two years. However, he expressed himself conscious of the need to reflect mitigating factors and personal circumstances, and chose to do so by suspending that two-year sentence in its entirety. In doing so the sentencing judge attached conditions to the suspension of the sentence requiring full restitution to be made either from an insurer on the respondent's behalf, or by the respondent personally. It is clear that count no 2, being a second count of criminal damage was taken into consideration, in circumstances where the judge's focus on possible "full" restitution related to the cumulative damage figure for both Garda vehicles damaged.

2. We will come back to the appropriateness of suspending the entire sentence. Before doing so, we must consider whether the two-year headline sentence determined upon was appropriate to reflect the gravity of the offending conduct? It was considerably less than the middle of the range. Admittedly, the sentencing judge's characterisation of the case meriting location at "*middle downwards*" lacked precision. It does seem to us, however, that the adequacy of the actual pre-mitigation figure is the important thing, rather than how the sentencing judge labelled or characterised the gravity of the offence. Was the figure nominated adequate to reflect the actual gravity of the offence? We disagree with the submission of the applicant that the criminal damage offence "*is at the higher end of the spectrum.*" While acknowledging that the overall context in which it occurred cannot be disregarded, we consider that the offending conduct that comprised the criminal damage was properly to be located below the mid-point on the range. We believe that it would have been within the judge's legitimate range of discretion to have assessed the gravity of the case as meriting a sentence of between two years' imprisonment and four years and imprisonment. Accordingly, we consider that while a two-year pre-mitigation sentence would have been at the very lenient end of the judge's margin of discretion, it was nevertheless within it.

3. Turning to the mitigation side of the metaphorical sentencing equation, the sentencing judge referenced the plea of guilty, the fact that the respondent is 47 years of age and yet had no previous convictions, his very good employment history, and the fact that he was, but for this single episode of offending, in the words of the judge "an excellent person" who had been "*law abiding*" up to that point. The judge accepted that the offending was completely out of character, and indeed unexplained but susceptible to the inference that in circumstances where the respondent had drunk taken that he had panicked on encountering the Garda checkpoint ahead, and that he had overreacted in a grossly disproportionate way, to the prospect of being stopped and possibly detected as having been driving under the influence. The respondent had acknowledged his offending and accepted responsibility for it. He had been co-operative once he had sobered up, he was remorseful and had evinced an intention to address his tendency to drink to excess. He was considered to be at low risk of re-offending. He was willing to make restitution. He also had not driven since the incident

4. There was therefore considerable mitigation to be taken account of. The sentencing judge felt that it was sufficient to allow her to suspend the entirety of the two year sentence she had nominated. The applicant contends that she was wrong in so concluding. This was a case, it is contended, that required the imposition of a custodial sentence to be actually served, although, it was acknowledged, "*the Court in its discretion might see fit to impose a suspended element to such a sentence*". In making that submission the applicant says that a custodial sentence to be actually served was necessary in the interests of deterrence, both general and specific.

5. A sentencing judge has a considerable discretion in regard to whether or not to suspend a sentence in whole or in part. The appropriate balancing of the penal policy objectives of retribution (including censure and denunciation), deterrence, and rehabilitation in the circumstances of the particular case also calls for the exercise of judicial discretion. An appellate Court should not lightly interfere with the exercise of such discretion, save where the judge has manifestly exceeded his/her legitimate margin of appreciation in that regard. It has long been recognised that a first time offender, who has lived a good portion of their lives without acquiring a criminal conviction, deserves to be treated with leniency. This is all the more the case when the person has been of positive good character. There will, of course, always be cases where even a first time offender must spend some time in actual custody, and the applicant maintains that this is such a case. However, we are not persuaded that that was necessarily so in the circumstances of this case. The need for specific deterrence was slight given that the respondent is considered to be at low risk of re-offending providing he addresses his tendency to drink alcohol to excess, which it is said he is doing. As for general deterrence, it has been said many times that a suspended sentence is a real sentence. A person such as the respondent who was previously of good character now has a criminal record. Although the sentenced person is not required to spend time in actual custody in respect of all or part of the sentence term, providing the conditions are adhered to, such a sentence still serves to communicate to the community at large that the offending conduct is deplored by society, and that offenders must expect to face punishment and censure. The circumstances of this case are such that it would be manifest to everyone that **but for** the respondents lack of convictions and previous good character, coupled with the other substantial mitigating circumstances in his favour, he would have been required to serve two years' imprisonment. However, we consider that it was legitimately within the discretion of the sentencing judge to suspend the entirety of that term in the circumstances of the case.

6. In all the circumstances we have not been persuaded that the sentence for the criminal damage offence was unduly lenient.

7. Turning to the sentences imposed on the charges of dangerous driving, broadly the same considerations arise. The sentencing judge approached the exercise of sentencing in the same way, although there were different considerations bearing on culpability, and in particular some different aggravating factors. The sentencing judge referenced that alcohol had been consumed; that the driving was aggressive, that there had been dangerous overtaking, that other vehicles had been struck, that control had ultimately been lost of the respondent's vehicle causing it to crash; that the driving was "*at the highest level of dangerousness*"; that it went on for quite some time, that health, safety, and even lives , of persons, including members of the Gardai, had been put at risk; and that actual injury had been caused to both Garda Brady and Garda Kelly, and that Garda Brady had been left with "ongoing problems". The Court also was required to take into consideration the offences comprising counts 4 and 5, being two other instances of dangerous driving. While we accept that the sentencing judge does not expressly reference these when nominating his sentences for the dangerous driving offences, we are on balance satisfied that he did have them in mind and did take them into account, having regard to how he dealt with the criminal damage charge that was also to be taken into consideration.

8. The mitigating circumstances were essentially the same as in the case of the criminal damage charge, with the exception of restitution. There was no proposal to pay restitution for the injuries caused to Garda Brady and Garda Kelly.

9. The maximum available penalty was six months' imprisonment on each of counts 3 and 6, with the possibility of consecutive

sentences. The sentencing judge assessed the gravity of each offence with reference to the range of penalties available and nominated a headline sentence of five months' imprisonment. We are satisfied that this was an appropriate headline sentence being towards the high end of the range and that it was within the range of the judge's discretion. The sentencing judge made the sentences concurrent and we would agree that while consecutive sentences would have been possible the circumstances of the case did not call for consecutive sentencing. We would again uphold the suspension of the five months nominated as the headline sentence in reflection of mitigation, as being within the judge's legitimate range of discretion, albeit that it resulted in a very lenient ultimate sentence. We are satisfied, however, that it was not an unduly lenient sentence.

10. We do not agree with the contention in counsel for the applicant's submissions that it would have been appropriate to have treated the plea on the second dangerous driving charge as a second or subsequent offence of dangerous driving. The reality is that the offending conduct took place during a single prolonged event, albeit that several discrete incidents of dangerous driving took place in the course of it. It was in truth a continuum. Moreover, the pleas to both dangerous driving counts were entered during the same arraignment and therefore the convictions were recorded on the same occasion.

11. As the sole issue for the Court was whether the sentences actually imposed were unduly lenient we do not consider it necessary or appropriate to engage with the applicant's complaints in relation to an alleged failure to consider the making of a compensation order, or the alleged failure to make an ancillary disqualification order in respect of count no 6. There is no power in s.2 of The Criminal Justice Act 1993 to do anything other than to quash an actual sentence which is unduly lenient, and to re-sentence for the same matter.

12. We therefore refuse the relief sought by the applicant for the reasons we have stated.