**THE COURT OF APPEAL**

**Record No. 129CJA/2017**

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

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPELLANT**

**- AND–**

**PAUL McGILLIAN**

**RESPONDENT**

**JUDGMENT (ex tempore)of the Court delivered on the 26th day of February 2018 by Mr. Justice Mahon**

1. The respondent pleaded guilty and was convicted at Donegal Circuit Criminal Court in respect of the offences of reckless endangerment, dangerous driving, drink driving, driving without insurance and driving without a valid driving licence. On the 4th May 2017 at Letterkenny Circuit Criminal Court the respondent was sentenced to a term of imprisonment of three years in respect of the endangerment offence and to a period of disqualification from driving for five years in respect of the dangerous driving offence. The three year prison sentence was suspended in its entirety on certain conditions.

2. The appellant seeks to review the sentences imposed on the respondent on the ground that they were unduly lenient pursuant to s. 2 of the Criminal Justice Act 1993.

3. Section 2 of the Criminal Justice Act 1993 provides as follows:-

> *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 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."*

4. The offences were committed on the 25th July 2015 at approximately 3 a.m. in the morning. Gardaí received a report to the effect that a silver sports car was spinning its wheels on the main street of Letterkenny, County Donegal. When an attempt was made to stop the vehicle it drove off at high speed. The vehicle was located one hour and a half later driving at high speed and, again, gardaí were unable to stop it. Shortly afterwards, the vehicle was observed on garda cameras in Letterkenny. It was cornered in a lane, and when Garda Kilcoyne approached the driver's side of the vehicle, the respondent attempted to exit the lane. When he found himself blocked, he drove the car in reverse at speed and aggressively making contact with Garda Kilcoyne's right upper leg. He then drove his vehicle at a garda car forcing five members of An Garda Síochána to jump out of its way. Eventually gardaí used a baton to break the window of the car. The respondent attempted to assault gardaí and he had to be restrained and handcuffed. He was removed from the vehicle. He continued to be aggressive and violent.

5. When tested for alcohol the respondent was found to be in excess of the drink driving limit. It transpired that he had no insurance or a drivers licence, and was in fact disqualified from driving at the time the offences were committed.

6. The respondent had eighty five previous convictions, seventy four of them in Northern Ireland. Many of them were for dangerous driving, drink driving, assaults on police officers and thefts. He was also convicted of a sexual offence resulting in a twelve month prison sentence. Some days later the respondent attended at the garda station and apologised for his behaviour. He has a clean record since then. Indeed, by all accounts the respondent has turned his life around in the time since these offences were committed and now has an impressive employment record and is a valued employee of a major multi national company.

7. The grounds on which this application seeks to review the sentence are as follows:-

> (i) The learned sentencing judge erred in law and in fact in failure to attach appropriate weight to the aggravating factors;
>
> (ii) the learned sentencing judge erred in law and in fact in attaching undue weight to the mitigating factors in the case;
>
> (iii) the learned sentencing judge erred in law and in fact in imposing a fully suspended sentence having regard both to his determination that the offence was at the upper range of the scale and having regard to the overall circumstances of the

case, and

(iv) The learned sentencing judge erred in law and in fact in imposing an unduly lenient sentence in all the circumstances.

8. It is submitted on behalf of the appellant that the aggravating factors in the case include the following:-

- The fact that the respondent had numerous and relevant previous convictions;
- the fact that the respondent was driving while intoxicated and disqualified;
- the fact that the respondent persisted in his driving despite numerous attempts made to stop him;
- the fact that the respondent caused a serious injury to a number of An Garda Síochána acting in the course of his duties with a view to protecting the public;
- the fact that the respondent's activities continued over a relatively lengthy period on the night in question;
- the fact that the respondent continued to act aggressively after the incident and had to be restrained and was not cooperative with the gardaí, and
- the fact that the respondent refused to give a blood or urine sample when requested.

9. The mitigating factors, it is submitted, include the following:-

- The plea of guilty;
- the expression of remorse;
- the fact that the respondent had previously succeeded in turning his life around and gaining employment and enjoying some success in such employment;
- the fact that the respondent was a father of two young children;
- the testimonials offered on behalf of the respondent, and
- the offer of compensation of €1,000 to the victim.

10. The learned sentencing judge explained the reasons for the sentence he imposed in the course of a lengthy sentencing judgment. He described the injuries sustained by Garda Kilcoyne as very serious and made reference to his victim impact statement. He described the case as *serious enough* and *difficult*. He placed it *somewhere towards the higher end of the (gravity) scale*. He described in detail the extent to which the respondent had reformed himself since the date of his offences, including his impressive employment built up in the interim. He deemed the appropriate headline sentence to be five years before reducing that to three, and then suspending that term entirely. He explained his reason for suspending the three year sentence in the following terms:-

> *" …I propose to approach this case on not incarcerating the defendant and giving him a lengthy suspended sentence on certain terms and conditions. I hope I am doing the right thing in relation to it. I know that its - and it is not intended to be any form of compensation for what happened on the day, but I just think that if I throw him under the bus, if I put him in jail, I will seriously unravel his life and that of his family, and on balance, I don't think this is the right way to go. I wish I could offer some comfort to the guard because I am very cautious of risks that the guards take on our behalf in society, I really am and I am not just saying that, and they do need protection. I have jailed people in relation to this offence before without any difficulty, but I am just conscious of this particular case being the odd one out, as it were, and what I propose to do is to impose a three year sentence and I am going to suspend it for three…"*

11. The onus of establishing that a sentence is unduly lenient firmly rests with the appellant. The judgment of the Court of Criminal Appeal in *DPP v. Stronge* [2011] 5 JIC 2301 provides a useful summary of the legal principles which govern an appellate Court's review of a sentence in these circumstances. It stated:

> *"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are:-*
>
> *(i) the onus of proving undue leniency is on the D.P.P.;:*
>
> *(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;*
>
> *(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;*
>
> *(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*
>
> *(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of such court is quite different: on a s. 2 application, it is truly one of review and not otherwise;*
>
> *(vi) it is necessary for the divergence between the sentence imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified, and finally*
>
> *(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that*

*judge who receives, evaluates and considers at first hand the evidence and submissions so made.*

*The relevant cases are D.P.P. v. Byrne [1995] 1 ILRM 279, D.P.P. v. McCormack [2000] 4 I.R. 356 and D.P.P. v. Redmond [2001] 3 I.R. 390."*

12. It is the appellant's case that the learned sentencing judge having correctly identified the seriousness of the offending erred in failing to incorporate an immediate custodial element in the final sentence.

13. In essence, the respondent argues that the learned sentencing judge was within the ordinary bounds of his discretion when he took the decision to suspend the entire of the prison sentence imposed for the reasons clearly articulated by him in the course of his sentencing judgment. It is contended that the learned sentencing judge, having clearly identified correctly the seriousness of the respondent's offending, including the effect on the injured victim, was entitled in the particular circumstances of this case to show leniency by suspending the entire three year term, and thereby give the respondent the opportunity to prove himself worthy of the chance being afforded to him.

14. It is undoubtedly the case that the sentence imposed in the court was very, very lenient.

15. Two features present in the case particularly require emphasis. Firstly, Garda Kilcoyne was severely injured and has suffered significant levels of pain and discomfort and inconvenience as a consequence. The injury has impacted on his personal and professional life in a very real way, and he has had to abandon a previously active sporting life. These are life changing issues. Garda Kilcoyne sustained injury, not because of any accidental or even negligent behaviour, but because of the respondent's attempt to escape at all costs and if necessary strike him in so doing. The respondent knew that he was seriously endangering the life of a garda officer doing his duty. This aspect of the case alone makes a sentence involving some element of custody almost inevitable.

16. Secondly, the respondent has what can only be described as an appalling history of repeat offending of a type particularly relevant to the offences with which the court is now dealing including, it must be said, offences involving assaults on police officers in Northern Ireland.

17. It is of course also the case that there were, and are, strong mitigating factors present in the case. The learned sentencing judge was clearly and understandably impressed at the turnaround in terms of behaviour and attitude evident on the part of the respondent, and clearly, based on how the respondent has by all accounts reformed and rehabilitated himself, he had good reason to exercise leniency when deciding on sentencing. It is absolutely understandable that he found the case *a very difficult case indeed*, and this court would also express a similar sentiment. It is certainly the case that the learned sentencing judge strongly felt that a custodial sentence would be a retrograde step and risked undoing the significant rehabilitation that had taken place, paramount of which was the excellent employment record the respondent had achieved. This is reflected by what can reasonably be described as his employee's strong expression of support for him and their acknowledgement of his value as an employee. The combination of factors including a dysfunctional background in his earlier years, a large number of previous convictions, some quite serious, and stretching back over many years, the seriousness of these offences, and the severe impact on Garda Kilcoyne on the one hand, and the respondent's quite remarkable rehabilitation since the offences were committed, and his decision to, as it were, settle down and maintain worthwhile employment, on the other hand, makes the case unusual and one that calls for considerable leniency.

18. However, offending involving the driving of a car at one or more members of An Garda Síochána who were simply doing their duty in the interest of public safety must, and will, require a custodial sentence of some duration, however short, save in the most exceptional circumstances. The additional factors here of the existence of numerous previous convictions and driving while disqualified serve only to increase that observation.

19. In these circumstances the court is satisfied that the sentence imposed in the court below was not simply very lenient, but was unduly lenient. There are not then, nor are they now, such exceptional circumstances in existence as would justify a non custodial sentence. Had the court below imposed a three year sentence and had then suspended the final twelve months of that term, this court will not have seen fit to interfere with that outcome. Such is an indication as to what an appropriate sentence ought to have been in this case.

20. However, this court must now re-sentence the respondent in circumstances where he has had to face sentencing on two occasions and now has to face going into custody after a period of freedom. These factors have, by their very nature, an added punitive effect for the respondent, and the court will make an allowance for same in the sentence it will now impose.

21. In arriving at what it believes is the appropriate sentence in the circumstances just outlined, and having full regard to the various mitigating factors and the commendable extent to which the respondent has by all accounts turned his back on criminality and reformed his life, the sentence now imposed by this Court is one of three years imprisonment with the final two years of that term suspended on similar terms to those directed in the court below.