THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

309CJA/2016

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

P. McC.

Respondent

JUDGMENT of the Court delivered on the 3rd of October 2018 by Mr. Justice Edwards.

1. The respondent to this appeal pleaded guilty in Dublin Circuit Criminal Court to two separate Bills of Indictment, namely:

> • Bill No. 835/2016 - involving one count of burglary contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001; one count of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991; and one count of dangerous driving contrary to s. 53(1) of the Road Traffic Act 1961 (as inserted by s. 4 of the Road Traffic (No. 2) Act 2011.
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> • Bill No. 833/2016 - involving one count of unlawful use of a mechanically propelled vehicle contrary to s. 112 of the Road Traffic Act, 1961, as amended; one count of assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997; one count of driving a mechanically propelled vehicle without holding a driving licence contrary to s. 38 of the Road Traffic Act 1961; and one count of use of a mechanically propelled vehicle without insurance, contrary to s. 56(1) and (3) of the Road Traffic Act 1961, as amended.

2. On the 11th of November 2016, a "full facts" sentencing hearing took place in respect of the offences on these two Bills of Indictment and the respondent was sentenced to a cumulative term of three years detention, comprised as follows:

> Bill No. 835/2016
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> (i). Detention for three years on each of count nos. 1 and 2 (the burglary and criminal damage), to run concurrently *inter se* and to date from the 22nd of June 2016, with the final two years suspended on certain conditions (particularised later in this judgment).
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> (ii). Detention for 3 months on count no. 3 (the dangerous driving count), plus certain various ancillary and consequential orders including a three year period of disqualification from holding a driving licence. This sentence was also to run concurrently with the sentences on counts nos. 1 and 2, and to date from the 22nd of June 2016.
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> Bill No. 833/2016
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> (i). Detention for three years on count no. 1 (the unlawful use of a MPV);
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> (ii). Detention for three months on each of counts Nos. 2 and 4, (the assault and no insurance charges, respectively);
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> (iii). The sentences on counts nos. 1, 2 and 4 were to run concurrently inter se and were all to date from the 22nd of June 2016;
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> (iv). The final two years of the sentence on count no. 1 were suspended on certain conditions (again, particularised later in this judgment);
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> (v). count no. 3 was taken into consideration.

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

Background facts

(Bill No. 835/2016)

4. At the sentencing hearing, Garda Gerard Smith gave evidence that, on the 13th of April 2016, a Ms. Bernadette Howard was at home in her house on Weston Drive in Lucan. She parked her car outside her house at about 8.30 pm. The evidence was that Ms. Howard was awoken during the night by the doorbell ringing at about 3.50 am. It was her neighbour who informed her that he believed her car had been stolen, as he had been on the road and had seen someone, who he initially thought to be Ms. Howard, putting a plasma TV into her car. Upon realising that it wasn't Ms. Howard, the neighbour rang the Gardaí.

5. Subsequently, Ms. Howard checked the house and realised that it had been broken into whilst she was asleep. She reported that

her television had been taken, an LG Smart TV 3D valued at €1,000, along with a black X-box valued at €400 had also been taken. In addition, her purse had been rifled through and the contents were spread all over the garden. A debit card and US$120 made up of $20 bills were missing from the contents of her purse. Her car keys were also missing, as were keys to her parents' house. Ms. Howard also noticed that her car was not parked where it had been. The evidence was that, as she was talking to her neighbour, Ms. Howard saw her car approaching and that it was being followed by another car, a blue Yaris. The cars were being driven at a high speed and in an erratic manner as they were being pursued by a Garda car.

6. Garda Smith's evidence was that he had received a call from Ms. Howard's neighbour, Mr. Corrigan, at approximately 3:55am reporting the suspected burglary, following which he proceeded in a patrol car to the relevant address. Upon arriving in Ms. Howard's estate, Garda Smith came across both Ms. Howard's car, which was a Volkswagen Polo, and another car, a Hyundai. Ms. Howard's car was being driven by a Mr. Keane Doherty ("the co-offender") and the respondent was driving the Hyundai. Garda Smith activated the blue lights and siren on his vehicle and positioned the patrol car so as to block the road leaving the estate. The Polo car crashed into the front of the patrol car, causing the engine to cut out, momentarily. Subsequently, both the Polo and the Hyundai cars mounted the path and managed to get around the patrol car. A couple of minutes later, Garda Smith managed to restart his car and he then proceeded to pursue both cars. Upon doing so, Garda Smith observed both cars about to exit the estate at a high speed and with a number of other Garda cars now in pursuit, one of which also appeared to have suffered damage during the pursuit.

7. Upon joining the pursuit, Garda Smith observed both cars driving at a high speed towards Celbridge, ignoring traffic signals at the junction of Stacumny Lane and Celbridge Road. The pursuit lasted for approximately five kilometres, during which *"both vehicles were driven in a dangerous fashion…. [at] very high speeds, [with] no regard for lanes or traffic signals or lights"* As Garda Smith approached Celbridge Village, he observed that the respondent had driven straight through the parapet wall of a bridge and into the river Liffey. The evidence was that the car that the co-offender had been driving *"had followed through the gap that had been created by [the respondent]'s vehicle"*, and that it also ended up in the river.

8. Ultimately, both the respondent and the co-offender were recovered safely from the water by Gardaí. Both men were arrested and detained. The respondent was conveyed to Lucan Garda Station where he was detained under s. 4 of the Criminal Justice Act 1984. He was interviewed during the course of that detention. When asked how he ended up in the river Liffey before being arrested, the respondent replied *"I stuck a car into it getting chased by you and only for the bridge I would have got away".* When asked where the car came from, the respondent stated *"I don't know. I fished the keys through a letter box".* When asked if he took anything else from the house, he stated: *"The young fella who was with me took the Polo. We took nothing from the house".* When asked if he knew the car was stolen, he stated *"Of course I did".*

9. The respondent was charged and was prosecuted on indictment with the offences the subject matter of Bill No. 835/2016, to which, as has already been stated, he pleaded guilty.

(Bill No. 833/2016)

10. The incidents forming the subject matter of this Bill of Indictment occurred two days after the incident the subject matter of Bill No. 835/2016, and while the respondent was out on bail in respect of the charges proffered in respect of the earlier incident. Garda Graham Doolin gave evidence that, on the 15th of April 2016, Mr. Terrence Kennedy, an 80-year-old man was returning from the Tesco in Ballyfermot. He pulled up at 11am outside his house and got out of the car to open the gate to the driveway. The respondent approached Mr. Kennedy on a bicycle and jumped off the bicycle and got into the car. Mr. Kennedy tried to open the door to get the respondent out of the car. However, the respondent pushed him to the ground with the car door and shouted something at him.

11. Having received a report of the incident, Garda Doolin and his colleague, Garda Sheerin, immediately attended at the scene, where they noticed Mr. Kennedy being helped off the ground by a passer-by. A search of the area proved unfruitful. The respondent had been seen on CCTV leaving his grandparents' home nearby shortly before the offence and heading in the direction of Mr. Kennedy's house. He was also seen in the vicinity of where the car was subsequently abandoned. A search warrant was obtained and the respondent's house was searched and clothes were found in the house similar to those that had been worn by the perpetrator - according to the description given by Mr. Kennedy. The respondent was arrested at 11.55am, just under an hour after the offence had occurred. The evidence was that the respondent had said *"I smoked you"* to one of the arresting Garda, apparently referring to the fact that, unbeknownst to them, the Gardaí had passed the stolen car being driven by the respondent while on their way to the scene, leading the respondent to the impression, at least temporarily, that he had outwitted the Gardaí and that he would be able to complete his getaway. The respondent was conveyed to Ballyfermot Garda Station where he was detained under s.4 of the Criminal Justice Act 1984. During interview, the respondent denied involvement in the incident but stated that he could not remember what had happened as he had *"blacked out"* in circumstances where he had taken 40 Zimovane tablets. The respondent was subsequently seen by a Dr. Khan, who certified him unfit to be interviewed, with the result that the interviewing process was postponed for six hours. The respondent was ultimately charged with the offences on Bill No 633/2016, pleaded guilty and was sentenced in the terms already outlined.

Impact on the victims

12. Ms. Howard opted not to provide the sentencing court with a victim impact statement. Mr. Kennedy did provide the court below with a statement, in which he states that he is in his 80's and has lived in the area for the duration of his life. He has had trouble with his shoulder since the incident and his blood pressure was high *"from the shock of it all".* He is also on extra medication because of stress, and the incident caused damage to the car of about €6,000. Mr Kennedy now feels nervous coming out of the house and doesn't feel safe since the incident.

Respondent's personal circumstances

13. The respondent was born on the 27th of December 1998, making him one month shy of his eighteenth birthday at the time of sentencing. At that stage he was already in detention for an unrelated theft offence. Prior to going into detention, he was living in [a named place in a Dublin suburb] with his mother and 11-year-old sister. However, the Probation Report ("the Report") before the sentencing court, dated the 8th of November 2016, indicated that the family were subsequently evicted from the family home *"due to the [the respondent's] behaviour in the area, questions about who exactly was residing in the house and an incident where shots were fired into the house".* At the date of the Report his mother was engaged in attempting to challenge the eviction order. The respondent's main source of familial support is his mother. However, the Report noted that *"his behaviour towards her can be controlling and abusive."* He enjoys a good relationship with his sister and grandparents. The respondent was estranged from his father, but had received some visits from him since being initially remanded in Oberstown and ultimately detained in Wheatfield in respect of the present offences.

14. The respondent attended school until he was 14, at which time he was expelled for being disruptive in class, disrespectful towards

teachers and for involvement in fights with other pupils. He was previously suspended in 5th class of primary school for disruptive behaviour and was assessed for ADHD in first year of secondary school, although it is unclear if a diagnosis was ever made. The respondent then attended an educational course in Dublin for young people who have left school early due to behavioural difficulties. He was expelled from this course after three months for similar disruptive behaviour. He appears to have been home-schooled and passed his junior certificate. He was referred to the Youthreach centre at Sherrard Street, Dublin 1 by the Probation Service, but refused to attend the appointment. Whilst in Oberstown, the respondent initially engaged well with the education services but *"his behaviour became increasingly challenging and he was removed from the main group."* As of the date of his sentencing, the respondent had not engaged with the educational opportunities in Wheatfield and did not *"wish to use his time in detention for any positive activities; he is anxious to get a date for release and then just 'keep (his) head down' until that date".*

15. The respondent has very serious substance misuse issues. He began inhaling aerosols and petrol at the age of eight. He began smoking cigarettes at 11, cannabis at 13 and taking cocaine and benzodiazepines at 15 years of age. The respondent reported to have begun abusing alcohol from the age of 16 years, drinking up to a litre of vodka a day if he was unable to access illicit drugs. In early 2016, the respondent attended a local addiction counsellor and was accepted onto a residential treatment programme in the Aisling Centre in Kilkenny in March 2016. However, the respondent was asked to leave the centre after two days due to aggressive and abusive behaviour towards staff. The Report noted that the respondent claimed to have been drug free for the seven months that he was in Oberstown and Wheatfield. However, the report also noted that *"his only motivation to agree to addressing his substance misuse issues is a possible reduction in the length of his sentence".*

16. The Report further records that the respondent has demonstrated *"very limited victim empathy or remorse"*, and *that "while substance abuse is one of the main risk factors in [the respondent's] offending behaviour, his volatile behaviour while drug free and in detention is very concerning".* However, it was accepted by Garda Doolin in evidence at the sentence hearing that the respondent *"presents very very differently when he is not under the influence of substances."*

17. The Report concludes that the *respondent "is in the very high risk of re-offending in the proceeding 12-month period. Risk factors identified are his history of offending behaviour, lack of parental control/supervision, substance misuse, absence from education/training, aggressive behaviour, refusal to engage with services/supports, anti-social, pro-criminal attitudes. A positive factor is the support of his mother. On [the respondent's] release from detention it is essential that he addresses the risk factors contributing to his offending behaviour, especially substance misuse and absence from education/training. When interviewing [the respondent] for this report, he initially stated that he would engage with relevant services, but then subsequently stated that he had no interest in doing so, other than reducing the length of his sentence. As [the respondent] is unmotivated to address the relevant risk factors, it is unlikely that further Probation supervision would have any positive impact at this juncture."*

18. The respondent's counsel at the sentence hearing, whilst not taking issue with the bona fides of the author of the Report, submitted that her instructions were at odds with what was stated in respect of the respondent's motivation to address his issues. His counsel stated that *"he is somebody who instructs me in absolutely unequivocal terms that he has addressed and is addressing, and it's going to be a constant struggle for somebody such as himself, the drug addiction that he has suffered."* Urinalysis was directed on the date that the respondent entered his guilty plea, however, the results of this analysis were not before the court on the date of the sentence hearing. The respondent gave evidence himself at the sentence hearing, during which he stated that he had been drug-free since entering custody in respect of the offences for which he was about to be sentenced. He also gave evidence that, on the occasion that he met with the Probation Officer who was the author of the report, he was in a really bad humour as he had been *"on 23 and a half hour lock up for the last two days. So I wasn't even in the humour to be talking to anybody."* He also stated that upon returning to the community in the future, *"I just want to stay clean and go back to the family life with my ma and not make it hard on my ma anymore and have a -- try and get a job or something, or a FÁS course."*

19. The respondent has 11 previous convictions, all of which were dealt with in the Children's Court. His list of previous convictions is comprised of two convictions for public order offences, one for possession of stolen property, one for a s. 2 assault, two for committing criminal damage, one for possession of a knife, two for trespass offences, and two for theft offences.

Sentencing Judge's Remarks

20. In the course of sentencing the respondent, the sentencing judge said the following:

> *"Now, in this case the Court is met with six counts, a number of which are quite serious counts and that's one of the difficulties in the case. The case is left [sic] -- the Court is left to balance the mandatory principles in section 96, the fact the accused is a young man of 17 years of age coming before this Court in respect of what are quite serious offences. The Court accepts that Mr McC has not been engaging in criminal activity since he was a very young child but, in the last number of -- two years has come before the Court on a number of occasions. The Court accepts that these matters were dealt with by the District Court but the flavour of the offences are somewhat similar to the flavour of these offences, although the Court does take into account that these offences are of a more serious nature than the previous offences and that is one of the difficulties in terms of dealing with Mr McC. Unfortunately, he's not a young man who has followed an education or a training path and he left school at a young age and that is one of the difficulties in the Court. The Court obviously has to bear in mind his capacity for rehabilitation in view of the fact that he is so young*
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> *Now, in respect of the first offences, by way of aggravation of the burglary counts, that is aggravated by the fact that there was a stolen car used in the course of that and, while Mr McC denied being the person to burgle the property and Garda Smith accepted that, nonetheless he was part and parcel of a joint enterprise in that regard, and that has to be an aggravating factor. The Court also takes into account the manner in which they left the scene that night in stolen vehicles and Mr McC was the driver of one of those vehicles and certainly the manner of driving described by the gardaí was most dangerous to the public and to ordinary people going about their business at that hour of the morning, and Mr McC is lucky that neither himself nor members of the public were not more seriously injured in the circumstances and the fact that the offence, the driving offence, is aggravated by the fact that it continued for five kilometres along the road and culminated in the car being driven into the River Liffey and causing damage as well to the bridge involved, and also causing the driver behind him effectively to go through that gap, which occurred as a result of that -- of his car going through the bridge. All of those matters are aggravating factors in terms of the offending. The fact that he has previous convictions also aggravates the offending.*
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> *The Court has to and is indeed mandated to take into account the youth of Mr McC at the time, and while he was under the influence of drugs, this is not a mitigating factor, but it does explain the context of some of the -- or all of the offending, which unfortunately comes before this Court all too often where a young man is out of control on drugs.*
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> *The Court obviously takes into account his guilty plea, and the Court takes into account the fact that he has addressed*

some of the issues behind his offending, that he is now drugs free and the Court accepts that he is drugs free and accepts his motivation in that regard, because he did strike the Court as sincere in that regard. The difficulty for the Court is how he will conduct himself upon release from prison and the Court obviously has to ensure that there's a structure put in place to ensure that he addresses not alone the drugs issue, but the underlying issues dealing with this -- which underline these offences.

In terms of the burglary, I haven't had a victim impact report from the victim, Ms Howard, but it's clearly a dreadfully difficult situation for any person to be woken in the middle of the night and told that their car has been stolen and then to go on to realise that other items from the house had been stolen. That's a very distressing thing for anybody to deal with. In respect of parity of sentence, the Court has to assess Mr McC involvement, and clearly it's he who -- it was his driving that caused the damage to the bridge and, while Mr D [co-offender] was an adult at the time of sentencing, he was also very young and still a minor at the date of the offence and the Court bears that in mind.

In terms of count 1, the Court considers that this offending comes within the mid-range, the lower end of the mid-range of offending in respect of burglary, and as I said it's aggravated by the fact that a stolen car was used so it brings it within the mid-range. Had the matter gone to full trial, I would have considered a four-year sentence to have been the appropriate sentence. In terms of the criminal damage, that comes within the higher end of the mid-range of sentence and the Court would have considered a four-year sentence to have been the appropriate sentence.

Taking all matters into consideration, in particular the fact that the Court is obliged by section 96 to take into account that the penalty imposed should cause as little interference as possible with the child's legitimate activities and pursuits and should take the least restrictive form that is appropriate in the circumstances, the Court considers that a three-year sentence, two years of which I will suspend in respect of counts 1 and counts 2 on the first bill to run concurrently to be the appropriate sentence. The sentence then is to be suspended on condition that Mr McC remain under the supervision of the probation services, that he fully co-operate with them and follow all directions of the probation service; that he undergo urine analysis as directed by the probation services and undertake all counselling as directed by the probation services; that he keep the peace and be of good behaviour for the period of two years, and this sentence is suspended for two years from the date of release.

…….

Now, in respect of the second bill then, I'll just start with the lesser offence first then, in respect of the driving, the dangerous driving, I'm going to impose a three-month sentence and a three-year ban. That's in respect of count 3. Now, in respect of the other two counts, clearly the aggravating factor in respect of the theft of the car, the unlawful taking, is the fact that there was a degree of violence used on an elderly man, an 80-year-old man, Mr Kennedy. The Court has had the benefit of the victim impact report from Mr Kennedy. As a result of this he's been on extra medication due to the stress caused to him. He's nervous coming and going to his house and he doesn't feel safe, and I think that encompasses any elderly person's worst fear is not to feel safe and to interfere with an elderly person's sense of security aggravates any type of offending, including this offending.

The Court accepts that the accused has expressed remorse in respect of Mr Kennedy, but nonetheless the Court has to take into account the effect on Mr Kennedy. There were medical effects as well. His blood pressure was very high afterwards and he collapsed sometime later due to blood pressure, and the degree of violence meted out on an 80-year-old man - he was knocked to the ground - aggravates the offending, and the Court has to mark the sentence where there's a degree of preying on an easy target. I suppose the easy target -- on an elderly victim. The fact that the accused was on bail in respect of the previous offences aggravates these offences.

By way of mitigation, the Court takes into account that the accused has pleaded guilty. He has expressed remorse in respect of Mr Kennedy and indeed he did that in the probation report as well. It seems that this offence was not pre-planned; it seemed to be more an opportunistic offence, and the Court takes that into account. However, the Court in particular takes into account the youth of Mr McC at the time; he was 17 years of age, and again a minor at the time.

In respect of count 1, the Court considers that this comes within the mid-range of offending for offences of this type and Court is going to impose a sentence of three years, two years of which are suspended on the same conditions as the previous sentence.

The fact that there was an assault on an elderly person in terms of count 2, that has to be marked by a sentence and the Court imposes a three-month sentence in respect of the assault, and the Court has already indicated its sentence."

Grounds of Appeal

21. The applicant initially advanced five grounds in support of her contention that the sentences handed down by the sentencing judge were unduly lenient. They are as follows:

i) The sentencing court gave insufficient weight to the aggravating factors in the case.

ii) Without prejudice to the generality of the foregoing, the sentencing court had inadequate regard to the fact that the offences committed by the respondent, the subject of bill DUDP833/2016, were committed while he was on bail in relation to the offences committed by the respondent the subject of bill DUDP835/2016.

iii) The sentencing court gave excessive weight to the mitigating factors in the case.

iv) Without prejudice to the generality of the foregoing, the sentencing court gave excess weight to the fact that the respondent pleaded guilty.

v) Without prejudice to the generality of the foregoing, the sentencing court gave excess weight to the fact that the respondent was a child.

22. Both sides filed helpful written submissions addressing these complaints. The matter was then part heard before this Court on the 6th of July 2017, and in the course of that hearing it became apparent that there was serious disagreement between the parties

concerning the jurisdiction and ability of this court to re-sentence the respondent in the event of it being satisfied that the sentences imposed in the court below were unduly lenient. This was because the respondent had by that stage attained his majority, and it was argued on his behalf that a person over the age of eighteen cannot be sentenced to detention. By the same token, it was further submitted, as the respondent was a minor at the time the offences were committed, the Children Act 2001 ("the Act of 2001") would preclude this Court from imposing a sentence of imprisonment on him at any re-sentencing, even though he has by now attained his majority. There is, according to the respondent, a lacuna in the law which would in effect emasculate the ability of this Court to do anything other than to declare that the sentences had been unduly lenient. It would not, however, be possible to quash the sentences with a view to replacing them with a more severe sentence as there are no viable sentencing options to which recourse could be had for that purpose.

23. A subsidiary issue was also raised by this Court of its own motion, concerning whether, and if so how, s.11 of the Criminal Justice Act 1984 might apply in the event of a re-sentencing, in circumstances where the respondent was a minor both at the date of the commission of the offences in question, and at the date of his sentencing, but had attained his majority in advance of a possible re-sentencing.

24. This Court considered that the issues that had been raised both by the respondent, and by the Court itself, were significant, and potentially far reaching in their implications, and in the circumstances adjourned the hearing to allow the parties to file supplementary legal submissions on the issues that had emerged. This was done, and the hearing was resumed and concluded on the 17th of July 2018.

25. The issues raised as to jurisdiction and re-sentencing options would clearly be moot in the circumstances of this particular case if we were of the view that the sentences in quest were not in fact unduly lenient. Accordingly, before embarking on any consideration of those issues, it is necessary to express a view on the merits of the undue leniency review. To that end, it may be helpful to briefly outline the parties' respective submissions on the substantive application.

Applicant's submissions
26. Whilst proffering the five grounds outlined above in seeking to impugn the sentences imposed, the applicant's written submission focuses largely on the principle of parity and discrepancies between the sentences imposed upon the respondent for the offences on Bill No. 835/2016 and those imposed upon his co-offender. The co-offender was sentenced to two-and-a-half years, with the final eighteen months suspended, to run concurrently with a District Court sentence. This sentence was appealed to this Court by the DPP on the grounds of undue leniency. This Court found the co-offender's sentence to have been unduly lenient and replaced the sentence with one of two-and-a-half years, with the final 21 months suspended, but made it consecutive to the sentence that had been imposed in the District Court.

27. The applicant concedes that the respondent and his co-offender have several distinguishing features between them, particularly; the fact that the co-offender had 33 previous convictions at the time of sentence, including five for burglary and seven for offences contrary to s. 112 of the Road Traffic Act 1961 (as amended). Moreover, the co-offender had attained his majority by the time he was sentenced. In contrast, this respondent was approximately six weeks shy of his eighteenth birthday on the date of his sentencing and, therefore, was still subject to the provisions of the Act of 2001.

28. However, the applicant submits that the sentencing judge fell into error in imposing an unduly lenient sentence in failing to give due weight to the fact that the respondent had committed the offences forming the subject matter of Bill No. 833/2016, whilst the respondent was out on bail in respect of Bill. No. 835/2016. It is also submitted on behalf of the applicant that too much weight was given to the guilty pleas where, in respect of Bill No. 835/2016, the sentencing judge held that if the matter had gone to trial the appropriate sentence would have been four years and in circumstances where the sentence handed down following a plea was three years with the final two years suspended. Counsel for the applicant also submitted that the s.112 offence on Bill No. 833/2016 had a significant effect on the victim and was not given proper weight as an aggravating factor. The applicant also argues that the gravity of the offences on Bill No. 835/2016 was not properly assessed, and that too much weight was given to the provisions of s. 96 of the Children Act 2001, in circumstances where there was no evidence of the respondent being in education or training at the time of sentence.

Respondent's submissions
29. In response, the respondent submits that the applicant has not, with either submissions of law or fact, discharged their onus of proof to show that the sentence imposed upon the respondent was unduly lenient in line with the well-established principles set out in the jurisprudence. Further, the respondent submits that there were several specific factors personal to the respondent which justified the imposition of a largely suspended sentence, namely; an early guilty plea; the respondent's minor age at both the commission of the offences and the sentencing hearing, and thus the application of section 96 of the Act of 2001; the accepted evidence of the respondent's intoxication during the commission of the offences in question; the respondent's difficult personal circumstances including serious substance abuse; the respondent's drug free status at the time of the sentencing hearing; the nature of the respondent's previous convictions in comparison to those of his co-offender, and; the respondent's expression of remorse and willingness to engage with the relevant services to become fully integrated within the community again.

30. The respondent also disputes the contention of the applicant that insufficient weight was given to the aggravating factors in the case, as throughout the judgment there are numerous explicit references to the aggravating factors in the case, including the fact that he was out on bail for the first set of offences when he committed the second set of offences.

31. In terms of the parity argument, this Court's attention was drawn to a number of decisions that stand as authority for the proposition that the parity principle is subservient to the principle that all sentences imposed must be proportionate to the gravity of the offence and the personal circumstances of the offender - *The People (Director of Public Prosecutions) v Daly* [2012] 1 IR 476 at 504-505; *The People (Director of Public Prosecutions) v M* [1994] 3 IR 306 at 316- 317 per Denham CJ)

32. Finally, the respondent drew this Court's attention to a recent decision of this Court which re-affirmed, lest there be any doubt about it, that there is a punitive aspect to a suspended sentence - *The People (Director of Public Prosecutions) v Christie* [2017] IECA 110.

Were the sentences unduly lenient?
33. The law in relation to undue leniency appeals is well settled and has been re-iterated by us in numerous previous judgments. There was no dispute about it in this case and accordingly it is unnecessary to set it out again for present purposes. It is sufficient to say that a sentence will be regarded as being unduly lenient if it represents a clear divergence from the norm.

34. This Court is of the firm view that the sentences were unduly lenient, notwithstanding the imperatives set forth in s.96 of the Act

of 2001. The cumulative sentences of three years detention, the final two years of which were suspended, represented a clear divergence from the norm in our view. They manifestly failed in our view to sufficiently reflect the gravity of the offending conduct, and that was an error of principle.

35. There is also the consideration, although it is a secondary one, that the sentencing judge in fact had no power to part-suspend the sentences of detention that she imposed upon the respondent. However, the sentencing judge is not to be criticised in that regard, because at the point at which she sentenced the respondent, she did not have the benefit of this Court's judgment in *The People (Director of Public Prosecutions) v A.S* [2017] IECA 310 (Edwards J, 28th of November, 2017, with Birmingham J [as he then was] and Mahon J, nem diss) in which it was held that, as a consequence of the enactment of the Act of 2001, neither a statutory nor common law power to suspend a sentence of detention exists at present. The respondent has submitted, correctly in our view, that while the present sentences would be amenable to appeal by the respondent on that account for jurisdictional error, they are not so amenable to appeal by the applicant. It follows that the only basis on which this Court can interfere at the behest of the applicant is if the sentences were otherwise unduly lenient. In that regard, we do not agree with a further submission by the respondent that we are precluded by the existence of the ostensible jurisdictional error from considering the undue leniency issue at all.

36. On the contrary, this Court being of the view that the sentences at first instance were otherwise unduly lenient, we consider the legally inappropriate sentencing structure adopted at first instance is capable of being addressed on any re-sentencing, providing that a re-sentencing is possible.

37. It follows from our finding that the sentences in question were unduly lenient, that the question of potentially quashing the original sentences and re-sentencing the respondent appropriately now arises for consideration. The question is: does this Court in fact have the necessary jurisdiction and powers to do so in circumstances where the applicant has attained his majority since he was sentenced at first instance? It is necessary at this point to consider the supplementary written submissions that have been filed, and amplified in oral argument, by counsel for each of the parties.

Supplementary submissions on behalf of the applicant

38. The Court required the parties to exchange further submissions in respect of the following two issues:

> (i). The jurisdiction of this Court pursuant to section 2(3) of the Act of 1993 to impose a new sentence upon a respondent who was sentenced to a period of detention as a child but who attains his majority prior to the appeal being heard;
>
> (ii). The relevance, in the context of the present appeal, of section 11 of the Criminal Justice Act 1984

39. It was submitted that the central issue in relation to (i) revolves around s. 2(3) of the Act of 1993 which provides for the options available to the Court on a s. 2 appeal. They are as follows:

> "(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."

40. The respondent was sentenced by the sentencing judge to detention. Imprisonment was not an option as s.156 of the Act of 2001 prohibits imprisonment of a child. Section 156 of the Act of 2001 provides: *"No court shall pass a sentence of imprisonment on a child or commit a child to prison"*. Therefore on a literal reading of the section, the Court of Appeal cannot impose a sentence of imprisonment on the respondent if the sentence is deemed unduly lenient because imprisonment is not *"a sentence which could have been imposed on him by the sentencing court".*

41. Section 142 of the Act of 2001 (as amended) provides for the making of detention orders by a sentencing court. The section reads as follows:

> *"142.—A court may, in accordance with this Part, by order (in this Part referred to as a "children detention order") impose on a child a period of detention in a children detention school specified in the order."*

42. There appears to be no statutory power to impose a detention order on a person who is not a child. Therefore, on a literal interpretation of the legislation, the Court of Appeal cannot impose a detention order on the respondent who is no longer a child.

43. Section 155 of the Act of 2001 provides for a situation where a child is the subject of a detention order but turns 18 while in detention. It provides in certain circumstances that a person could remain in the child detention school after turning 18 for up to six months. It does not, however, provide for imposing detention orders on adults.

44. Therefore on a literal interpretation of the section, the Court of Appeal would have no power to imprison the respondent, nor detain him in the event of a finding of undue leniency. Furthermore, the legislation covering community service orders and fines all contain imprisonment in default provisions which could not have been imposed by the sentencing judge. Counsel for the applicant has in effect conceded that if s.2(3)(a) of the Act of 1993 is to be interpreted literally, the Court of Appeal cannot re-sentence the respondent so as to substitute an appropriate sentence for the existing unduly lenient sentence. However, the applicant maintains that s.2(3)(a) of the Act of 1993 can be given a purposive construction, which would enable this Court to re-sentence the respondent to an appropriate term of imprisonment.

45. Before unfolding the applicant's argument as to the legal basis on which the relevant provision might be afforded a purposive construction, it ought to be noted that the applicant points out that an identical issue would potentially arise in an appeal by a defendant against the severity of his/her sentence, if detention was imposed at first instance before the appellant had attained his/her majority, and they had attained majority by the time of any proposed re-sentencing consequent upon success in the appeal. In this instance the relevant provision is s.3(2) of the Criminal Procedure Act 2003, which provides:

> *"On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial."*

46. It is further desirable before examining the argument in support of a purposive interpretation to review what the applicant says are the jurisdictional parameters within which this Court must act. The applicant acknowledges that unlike the Court of Criminal Appeal, the Court of Appeal is not a creature of statute but has a constitutional basis. Article 34.4.1° of the Constitution now provides for a Court of Appeal:

> *"The Court of Appeal shall–*
>
> > *(i) save as otherwise provided by this Article, and*
> >
> > *(ii) with such exceptions and subject to such regulations as may be prescribed by law,*
>
> *have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."*

47. Under s. 7A(3) of the Courts Supplemental Provisions Act 1961 (as inserted by s. 8 of the Court of Appeal Act 2014), the Court of Appeal enjoys the jurisdiction of the former Court of Criminal Appeal:

> *"(3) Subject to section 78(1) of the Act of 2014, [which relates to extant appeals which were then before the Court of Criminal Appeal] there shall be vested in the Court of Appeal all jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Court of Criminal Appeal."*

48. Section 7A(8) provides that the *"jurisdiction vested in the Court of Appeal shall include all powers, duties and authorities incidental to the jurisdiction so vested".* Therefore, the applicant submits, the Court of Appeal enjoys powers incidental to the jurisdiction vested but no inherent original jurisdiction in relation to criminal matters.

49. It was acknowledged in the applicant's submissions that the Court has described a broad jurisdiction for itself in relation to its jurisdiction in appeals from the High Court, e.g., in *Kelly v UCD* [2017] 3 IR 237. However, the Constitution provides only for appellate jurisdiction from courts other than the High Court (such as the Circuit Criminal Court) to the extent *"prescribed by law".* Therefore, it was submitted, there is no basis to look for a general jurisdiction to make an order other than that allowed for in the Act of 1993. Rather, the Court of Appeal's power in that respect is identical to that of the former Court of Criminal Appeal.

A Possible Purposive Construction?

50. The applicant has submitted that it is well established that penal statutes can be the subject of a purposive interpretation in some circumstances.

51. In *Director of Public Prosecutions v Moorehouse* [2006] 1 I.R.421, Kearns J. noted (at p.444, para 70) the general presumption that penal statutes must be construed strictly but went on to observe that: *"That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result."*

52. Counsel for the applicant cited the case of *Director of Public Prosecutions (Gda Ivers) v Murphy* [1999] 1 I.R. 98 as illustrating Kearns J's point. This case involved a construction of s. 6(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, which introduced the giving of evidence of arrest, charge and caution by way of certificate. This provision obviated the need for prosecuting gardaí to come to court to give oral testimony in order to make a formal complaint before the District Court and allowed it to be done by way of certificate evidence in their absence. However, the subsection was expressly stated to apply only to *"a person, who has been arrested otherwise than under a warrant".* The precise terms of the provision were as follows:

> *"Where a person, who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member and stating that that member did, at a specified time and place, any one or more of the following namely -*
>
> > *(a) arrested that person for a specified offence,*
> >
> > *(b) charged that person with a specified offence, or*
> >
> > *(c) cautioned that person upon his or her being arrested for, or charged with, a specified offence,*
>
> *shall be admissible as evidence of the matters stated in the certificate."*

53. The accused was arrested and brought to Store Street Garda station where she was charged with offences under the Larceny Act, 1916, as amended. She was brought before the Dublin Metropolitan District Court where evidence of arrest, charge, and caution was given by way of certificate pursuant to s. 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997. The accused's solicitor submitted that since neither of the two certificates provided under s.6(1) contained any averment that the arrest was *"otherwise than under a warrant"*, and since s.6(1) did not permit a certificate to provide evidence of such fact, the court must satisfy itself that the accused had been arrested other than under a warrant. If this submission was correct it would have had the effect of frustrating and nullifying the clear intention of the section, which was to obviate the need for prosecuting gardaí to attend court.

54. The District Judge sought the opinion of the High Court on the following questions of law:-

> (i) Does the proper interpretation of s. 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, require the District Court to be satisfied that a person has been arrested otherwise than under a warrant prior to admitting in evidence the certificate referred to therein?
>
> (ii) If the answer to question (i) is in the affirmative, does the proper interpretation of s. 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, require oral evidence of the nature of the arrest to be given, prior to or at the time the certificate is given in evidence?

(iii) If the answers to questions (i) and (ii) are in the affirmative, does the District Court have jurisdiction to make any further order in criminal proceedings where a certificate was admitted in purported compliance with s. 6(1) of the said Act of 1997, in circumstances where no evidence of the nature of the arrest was given?

55. In the High Court, McCracken J. held that the primary rule in construing a section of a statute was to interpret it in accordance with the plain and ordinary meaning of the words used, and that s.6(1) was quite clear in requiring proof that the accused had been arrested otherwise than under a warrant as a condition precedent to the admissibility of the evidence contained in the certificate. He answered questions (i) and (ii) of the case stated in the affirmative, and question (iii) in the negative.

56. On appeal, a five judge bench of the Supreme Court unanimously, although for differing reasons, allowed the appeal answering the first question in the negative and deeming it unnecessary in the circumstances to answer the other two. In her judgment Denham J., as she then was, was prepared to apply a purposive interpretation of the provision, stating:

"The learned trial judge applied the literal rule of interpretation. There is authority that this should be applied even if the result be absurd. Thus Esher L.J. said in R. v. Judge of City of London Court [1892] 1 Q.B. 273 at p. 290:-

> *'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.'*

However, this approach is ameliorated by the golden rule which was described by Blackburn L.J. in River Wear Commissioners v. Adamson [1877] 2 App. Cas. 743 at p.764 as:-

> *'I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.'*

Such an approach enables the court to consider the entirety of the Act or section when the literal interpretation produces an absurdity. This choice was described by Henchy J. in Nestor v. Murphy [1979] I. R. 326 as at p. 327:-

> *'To construe the subsection in the way proposed on behalf of the defendants would lead to pointless absurdity.'*

The third rule of construction, the Mischief Rule, may also be considered. This rule was described in Heydon's Case (1584) 3 Co. Rep. 7:-

> *'And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), four things are to be discerned and considered:*
>
> *(1) What was the common law before the making of the Act?*
>
> *(2) What was the mischief and effect for which the common law did not provide?*
>
> *(3) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?*
>
> *(4) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico .'*

This rule is now more commonly called the purposive approach. In Pepper v. Hart [1993] A.C. 593 Griffiths L.J. stated at p. 617:-

> *'The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation. . .'*

I would concur with this approach. However, no method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State. The rules are applied to interpret the acts passed by the legislature and in so doing afford the respect appropriate from the judicial organ of government to the legislature.

The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take.

Section 6 was introduced by the legislature to enable evidence of arrest, charge and caution be given by certificate if the accused is arrested otherwise than under a warrant. This obviates the necessity of the arresting guard being in court. However, if the arresting guard has to be in court to give evidence that the arrest was otherwise than under a warrant before the certificate is professed in evidence, there is the absurd result that the garda is required to be in court to prove that his presence is not required!

Section 6 is a part of a preliminary process which brings an accused to court and gives jurisdiction to the court. There are a number of ways by which an accused may be brought before the District Court. In general it is not necessary to except other procedures when taking a particular process. I am satisfied that s. 6 may be construed in this fashion too. It is not necessary to negate other processes to utilize this vehicle. The section is an enabling section. The words 'who

has been arrested otherwise than under a warrant' are descriptive and not a matter requiring oral evidence before the certificate is admissible.

The District Court is entitled to assume that the certificate has been issued in accordance with law and it is admissible of the facts contained therein. If any issue on the certificate arises oral evidence may be given in accordance with s. 6(4) and if any other issue arises it may be taken at the hearing of the action or as the District Judge determines.

In reaching this conclusion, in construing the section in light of the full process, it is an important factor that the purpose of the legislature in passing the section was to enable a certificate to be utilized to avoid the necessity of the arresting guard giving oral evidence of arrest, charge and caution, thus the section is rendered absurd if that same guard is required to give evidence that it was not an arrest by warrant. The intention of the legislature was to avoid the necessity of the garda attending court at this stage of the process.

Also, it is the essence of the matter that there is no question of the trial of the action being on certificate. The procedure is not restricting the accused's rights in any way. The District Judge has discretion to request oral evidence on arrest, charge and caution under s. 6(4) of the Act of 1997, if justice so requires. In addition, the District Judge has the duty to ensure due process at all times. There is no impingement on the accused's rights by a failure to have evidence at this initial stage that the arrest was otherwise than under warrant.

On a purposive interpretation of the statute, s. 6(1) does not require an oral history before admitting the certificate as evidence of the matters stated therein. I would uphold the appeal and answer the first question of the consultative case stated in the negative. That being the case, it is not necessary to answer the other two questions."

57. Counsel for the applicant submits that the traditional aversion to a purposive interpretation is rooted in an abhorrence of the notion that a penal sanction could be created where a literal interpretation did not allow for one – e.g. *The People (Director of Public Prosecutions) v Roberts* [1987] 1 I.R. 268. However, it was submitted, the provision at issue in the present case, which establishes a right of appeal (or, more correctly, the right to seek a review) in respect of a decision of a court of first instance, does not create a penal sanction.

58. It was submitted that a reading of the Act of 2003 as a whole does not allow for an interpretation which suggests the DPP's right to seek a review is to be confined to a particular class of cases, such as cases where the defendant is an adult on both the date of sentence and on the date of any re-sentencing on appeal, and cases where the defendant is a child on both the date of sentence and any re-sentencing on appeal. The long title states that it is *"an Act to enable the Court of Criminal Appeal to review unduly lenient sentences".*

59. Similarly, a reading of the Criminal Procedure Act 1993 does not seek to limit the right of appeal to people who are either an adult on the date of both sentencing at first instance and re-sentencing following an appeal, or who are a child on both dates. There is nothing in a reading of the Act as a whole which seeks to exclude from children a right of appeal where they are sentenced close to their eighteenth birthday.

60. It was submitted that the number of litigants potentially affected is significant because it is common in the case of child offenders close to their eighteenth birthday for their cases to be expedited in order to allow the child enjoy the protections afforded by the Children Act 2001 when being sentenced. It was submitted that it would be an absurdity that the right of appeal of such a child against an unduly severe sentence would be abolished by a strict interpretation of the relevant statute.

61. We were referred to the fourth edition of Bennion's *Statutory Interpretation* where the author opines (at p. 831):

"The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to indicate virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief."

62. This quotation was approved by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Yusef* [2008] 4 I.R 204, at p.210.

63. It was submitted that the plain meaning of the section is to ensure that the appellate court cannot impose a sentence greater than that imposed in the court below. It was therefore submitted that the court should apply a purposive interpretation to section 2(3) of the Act of 1993 to allow the Court of Appeal to impose a sentence "being a sentence which could have been imposed on him by the sentencing court concerned if it were dealing with the respondent as he now stands."

64. It was further submitted that this interpretation is consistent with the plain intention of the Oireachtas and decisions of the Superior Courts which provide that, when imposing a sentence afresh having found an error in principle, the appellate court will deal with the circumstances of the offender as he is then rather than on the date of sentencing at first instance.

Section 11 of the Criminal Justice Act 1984

65. Section 11(1) (as substituted by s. 22 of the Criminal Justice Act 2007) of the Criminal Justice Act 1984 ("the Act of 1984", as amended) provides as follows:

"*(1) Any sentence of imprisonment passed on a person for an offence—*

(a) committed while on bail, whether committed before or after the commencement of section 22 of the Criminal Justice Act 2007, or

(b) committed after such commencement while the person is unlawfully at large after the issue of a warrant for his or her arrest for non-compliance with a condition of the recognisance concerned,

shall be consecutive on any sentence passed on him or her for a previous offence or, if he or she is sentenced in respect of two or more previous offences, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment

in respect of those consecutive sentences shall not exceed 2 years."

66. The applicant has submitted that, as this clearly only applies to a sentence of imprisonment, the sentencing judge was correct in proceeding on the basis that she was not obliged to impose consecutive sentences.

67. However, s.11(4) of Act of 1984 goes on to provide:

> *"Where a court—*
>
> > *(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail,*
> >
> > *and*
> >
> > *(b) is required by subsection (1) to impose two or more consecutive sentences,*
>
> *then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."*

68. The applicant submits that while a strict interpretation of this provision did not bind the sentencing judge (because it was clearly referable to the imposition of a sentence to which sub-section (1) applies, i.e., a sentence of imprisonment), nevertheless it reflected the position at common law which was that the fact that an offence was committed while on bail ought, in general, to be treated as an aggravating factor in the assessment of the gravity of the offence, regardless of what penalty was being contemplated, and not just in cases where a sentence of imprisonment was capable of being contemplated. This was logical because gravity must of necessity be considered before sentencing options are examined. It was submitted on behalf of the applicant that in the circumstances the sentencing judge, although it was not mandatory for her to do so in circumstances where the statute did not apply, was nevertheless entirely correct in treating the commission of the offences while on bail as an aggravating factor.

69. Moreover, it was submitted, if this Court is disposed to accept the applicant's submission that it should apply a purposive interpretation to section 2(3) of the Act of 1993 so as to allow, upon a re-sentencing, the imposition of a *sentence "which could have been imposed on him by the sentencing court concerned if it were dealing with the respondent as he now stands"*, then it follows that both s. 11(1) and (4) of the Act of 1984 (as amended) would apply to such a re-sentencing.

Supplementary submissions on behalf of the respondent

70. Counsel for the respondent has submitted that no support can be found in Irish law for what the applicant proposes. We were referred to the position pre the enactment of the Interpretation Act 2005 ("the Act of 2005"), which was based on the common law *principle against doubtful penalisation*. This principle (which the respondent contends was preserved and bolstered by the exclusionary condition in s. 5(1) of the Act of 2005 which excludes from the ambit of the section any provision that relates to the imposition of a penal or other sanction) was characterised by Kearns J in *Director of Public Prosecutions v Moorehouse* [2006] 1 ILRM 103 as *"a well established presumption in law that penal statutes be construed strictly".*

71. We were also referred to *Mullins v Harnett* [1998] 2 ILRM 304, in which O'Higgins J quoted with approval from pp. 239 and 240 of *Maxwell on the Interpretation of Statutes*, as follows:

> *"the strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction".*

72. It was submitted that this chimes with the primary requirement in Irish law that Courts should give effect to the plain and unambiguous language of the Oireachtas. The search for the *"purpose"* of the section which is advocated by the applicant fails to acknowledge that the words themselves, plain and clear, are the best explicator of that intent and the first consideration on this issue. It was suggested that what the applicant argues for is a legislative intent, unexpressed in the words of the section, but desired nonetheless by the prosecution authorities.

73. It was submitted that this precise scenario was dealt with by Blayney J in *Howard v The Commissioner for Public Works* [1994] 1 I.R. 101, at 153, in the following terms:

> *"It is clear from this that the first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain. It seems to me that that condition is not satisfied here. The meaning is perfectly plain. In the first place, it is provided that permission is required for any development which is not exempted development, and secondly, it is provided in s. 84 that where a statutory authority wishes to undertake the construction or extension of any building it must comply with the terms of that section. What is being suggested is that it is a necessary implication from the terms of s. 84 that the Commissioners should be relieved from complying with section 24. But this conclusion does not result from any difficulty in interpreting section 84. It results from forming a conclusion as to why s. 84 was included in the Act. In other words, it results from coming to a conclusion as to the intention of the legislature without that intention being expressed in the section itself. It seems to me that this amounts to speculation, particularly as, if it had been intended to exempt statutory authorities from having to apply for planning permission for the construction or extension of any building, it would have been a simple matter to provide that development by them should be exempted development."*

74. Blayney J went on to quote Craies on Statute Law in the following terms:

> *"A general proposition that it is the duty of the Court to find out the intention of Parliament . . . cannot by any means be supported' said Lord Simonds in 1957. Some fifty years before in Salomon v. Salomon & Co. Ltd. [[1897] A.C. 22, 38] Lord Watson had said: '"Intention of the legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the*

legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication' After expounding the enactment, it only remains to enforce it, notwithstanding that it may be a very generally received opinion that it 'does not produce the effect which the legislature intended,' or 'might with advantage be modified'. The meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

75. Blayney J concluded, at p 154, with an excerpt from *Maxwell on the Interpretation of Statutes* in terms subsequently approved of by Kearns J in the Moorehouse case cited earlier:

> *"…, but where , as here, the provisions of the sections are quite clear the Court is obliged to give effect to them even if the effect of doing so may not appear to be entirely reasonable.*
>
> > *'Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to leave the remedy (if one be resolved upon) to others'"*

76. Counsel for the respondent has submitted that what the Director argues for is not accurately presented as a purposive approach but more correctly amounts to a doctrine of rectifying construction of the statute. It was urged upon us that this is an approach which, even leaving aside the penal context upon which the discussion is premised, has always been deprecated in Irish law as a usurpation of the role of the Oireachtas. In this context we were referred to *Bula Ltd (In Receivership) –v- Crowley* [2002] IEHC 4 where Barr J observed(at 863) that:

> *"It was submitted that both sections are clear and unambiguous in their wording and must be interpreted in accordance with the plain ordinary meaning of the words used, however harsh, incongruous, contrary to common sense or even absurd the result may be. It is for the legislature to remedy any error or unintended consequence emerging from legislation. I have no difficulty in accepting that, subject to long established tenets of construction, words in a statute should be construed in accordance with their plain, ordinary meaning. The Court has no function in remedying error in circumstances where legislation, though clear in its terms, is found to be defective."*

77. It was submitted that the observation of Kearns J in the *Moorehouse* case (set out at para 49 above), on which the applicant places great reliance, was *obiter dictum*. In the *ratio decidendi* of *Moorehouse*, Kearns J in fact found that the purposive interpretation argued for by the Director in that case would go well beyond mere interpretation. He observed (at p. 126):

> *"Quite clearly, to give s.13 this extended meaning would of necessity involve judicial rewriting of the statutory provision, which is clearly impermissible."*

78. Kearns J went on to address how such a statutory provision must be interpreted, stating (again at p.126):

> *"However, I would be of the view that the charge in this particular case, and the conviction recorded in respect thereof, is one which is not provided for by the section and thus by virtue of the requirements to construe such statutes strictly, the answer to [the] sic first question in the case stated must be 'no'."*

79. The respondent's side makes the point that the decision in *Moorehouse* pre-dated the coming into effect of the Act of 2005 which was commenced on the 1st January 2006.

80. "Section 5(1) of the Act of 2005 states:

> *5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would*
>
> *fail to reflect the plain intention of—*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or*
> >
> > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

A possible purposive construction?

81. It was submitted that whilst s.5(1) of the Act of 2005 does not explicitly speak in terms of purposive interpretation, it appears to set out the circumstances in which such an approach would be appropriate and in doing so excludes any provision which *"relates to the imposition of a penal or other section"*. It was submitted that even in the absence of the specific exemption of penal statutes from the section, the requirement for obscurity, ambiguity, absurdity or plain failure to reflect the intention of the Oireachtas, would mean that no such approach could be taken here without a judicial rewriting of the legislative provision. In any event, it was contended that that is not an argument which arises in the present case as section 2(3) plainly, the respondent suggests, relates to the imposition of a penal sanction.

82. The respondent seeks to distinguish the case of *Director of Public Prosecutions (Gda Ivers) v Murphy*, on which the applicant relies, on the basis that it was decided prior to the enactment of the Act of 2005. It was further submitted that even if that were not so, the Court in that case was dealing with a wholly different situation and a section which did not relate to the imposition of a penal sanction in all but the most oblique way. The section was described by the Supreme Court as *"an enabling section"* and the words at issue were held to be *"descriptive"* by the Court. It was submitted that, in contrast, we are concerned with the terse and unambiguous language of s. 2(3) of the Act of 1993. The respondent maintains that the section is plain in its meaning and with respect to the jurisdiction which it does and does not grant. It is said that the section is utterly fundamental in that it provides jurisdiction to this Court to impose sentence afresh in cases where it has quashed an earlier sentence on grounds of undue leniency.

83. The respondent submits that the applicant's position is that because no attention appears to have been paid by the legislature to the issue of appeals against, and reviews of, sentences imposed on children; and the situation of children transitioning into adulthood who are sentenced at first instance as child offenders, but who are adults at the time of any required re-sentencing in consequence of an appeal or review; and to the interplay between the very different concepts of detention and imprisonment, particularly in that situation; that this Court should itself draft a new section to deal with this frailty.

84. Furthermore, it is suggested, the applicant appears to proceed on the basis that sentences of detention imposed upon children and sentences of imprisonment imposed upon adults are really just two sides of the same sentencing coin. The respondent contends that any consideration of the Act of 2001 makes it clear that this is not the case and that, were this Court minded to embark on a redrawing of the legislative provisions governing prosecution appeals of child sentences, this would involve the Court engaging in a substantial and nuanced legislative task that it is not the function of the courts to perform, but rather one for the legislature to perform.

S.11 of the Act of 1984

85. The respondent agrees with the applicant's submission that if the Court accepts the proposition that it enjoys a statutory power to re-sentence the respondent to sentences of imprisonment, then the provisions of section 11 would apply.

86. However, the respondent says, it is in bringing the applicant's position to its logical extension that one sees clearly the folly of the overall approach, i.e., that having been sentenced at first instance by the sentencing judge to concurrent sentences of detention, the respondent is now in a position, through no fault of his own, where he must receive mandatory consecutive sentences for precisely identical offences, notwithstanding that they were committed when he was a child. This has the effect that an accused person must necessarily receive a longer aggregate sentence where a final sentence is imposed on appeal, than had the final sentence been imposed at first instance. *Prima facie* this would offend the principle encapsulated in the Latin maxim *nullum crimen sine lege, nulla poena sina lege*, which literally means *"no crime without law, no penalty without law".* It embraces the idea that a person may not be convicted in respect of conduct which was not an offence at the time of its commission, and more relevantly in the present context, that a person must not be subject to a heavier penalty than one that could have been imposed when the offence was committed. Moreover, this is in circumstances where the Act of 2001 makes it clear that a sentence of detention ought only to be imposed as a last resort. It is acknowledged by the respondent that the applicant does nod in the direction of the principle of totality but the respondent submits that what would be required to avoid this pointed unfairness would stretch the concept of totality out of all recognition in order to provide a makeshift cure.

87. The respondent says that if lacuna there be in the statutory scheme for sentence appeals, then it is for the Oireachtas to remedy it.

The decision in Director of Public Prosecutions v A.S.

88. Finally, the respondent places heavy reliance on this Court's decision in *Director of Public Prosecutions v A.S.*, cited earlier. The respondent maintains that the clear statement of the Court in A.S. - that the Act of 2001 was intended to provide a new system of juvenile justice - makes it abundantly clear that, insofar as that Act failed to provide for the complex interaction between child sentencing and the statutory appeals system, that is an omission not amenable to resolution by the Courts.

The Court's decision on the statutory interpretation issue

89. We have given careful consideration to the arguments on both sides, but ultimately find ourselves in agreement with the submissions on behalf of the respondent.

90. In the first instance, the wording of s. 2(3) of the Act of 1993 is clear and unambiguous. The jurisdiction of the Court in re-sentencing following a finding of undue leniency is limited to the imposition *of "a sentence which could have been imposed on him [i.e., the respondent to the undue leniency application] by the sentencing court concerned".* This was a case that called for a custodial or carceral sentence, notwithstanding that the respondent was legally a child at the time that he was being sentenced. On the basis that a custodial or carceral sentence was called for, the only sentences of that variety that could have been imposed by the court below was either a sentence of detention in a child detention centre *simpliciter*, pursuant to s.142 of the Act of 2001; alternatively, a detention and supervision order pursuant to s.151 of the Act of 2001. S. 156 of the Act of 2001 prohibits the imposition of a sentence of imprisonment upon a child. A sentence of detention in a child detention centre *simpliciter* for a period of three years was in fact imposed, although the position was complicated by the purported partial suspension of two thirds of that sentence.

91. In circumstances where this Court is required to re-sentence, it is confined to the imposition of *"a sentence which could have been imposed on him by the sentencing court concerned".* The difficulty, however, is that the respondent is no longer a child and it is not possible to sentence an adult to detention in a child detention centre, or for that matter to a period of detention and supervision. If s.2(3) of the Act of 1993 is to be interpreted literally, there is therefore no legal means of re-sentencing the respondent to a custodial sentence.

92. We do not consider that this is an absurd interpretation. It is an inconvenient interpretation, certainly, and has far reaching implications, but it is not absurd. Even if in principle it were possible to afford a provision such as s. 2(3) of the Act of 1993 a purposive interpretation based upon inferring the true intention of the legislature, the circumstances of this case would preclude engagement in any such exercise. This is because the Act of 1993 predates the Act of 2001 by approximately eight years. As Professor Dermot Walsh points out in his textbook, *"Juvenile Justice"* (Thomson Round Hall: 2005), at paras 1-09 to 1-10, it was not until 1995 that the heads of a Children Bill were prepared. The bill was eventually published as the Children Bill, 1996, but did not survive the lifetime of the government that introduced it. Following a general election and the formation of a new government, it was replaced in modified form by the Children Bill 1999, before being eventually enacted in yet further modified form as the Children Act, 2001.

93. It could not seriously be contended that the legislative framers of the Act of 1993 could have had in mind legislation that had not yet been introduced, much less enacted, when they drafted s.2(3) of the Act of 1993. It was of course for the legislature when enacting the Act of 2001, to ensure that it was reconcilable with the Act of 1993, and other legislation governing criminal appeals such as the Criminal Procedure Act 1993. This could have been done by including relatively straightforward amendments to the relevant provisions of the Act of 1993 and the Criminal Procedure Act of 1993, respectively, in the Act of 2001. However, the legislature did not do so (presumably due to the fact that the potential difficulty that has now arisen was not adverted by anybody in a position to suggest such amendments), and the consequence of failing to do so is the present conundrum. However, the existence of such a conundrum would not justify this Court in disregarding the separation of powers and in engaging itself in judicial legislation. This Court cannot re-write the clear terms of s.2(3) simply because later legislation was enacted which has the effect of rendering it in effect nugatory in particular circumstances. The fix that is required is a legislative one, not a judicial one.

94. Quite apart from all of that, although the Act of 1993, and the particular provision at issue, do not operate to create a penal sanction in the narrow sense of that expression, the legislative scheme they give effect to is undoubtedly penal in nature. They operate to fundamentally recalibrate the system of appeals/reviews that had existed from the foundation of the State up to that point. Up until the enactment of the Act of 1993, there was simply no provision in law for the Director of Public Prosecutions to request the review of a sentence on the grounds that it was unduly lenient. The change effected by the Act of 1993 was undoubtedly going to be to the potential prejudice of persons to whom the Act would apply; and so, the argument has been advanced that it ought to be afforded a strict construction on the basis of long standing common law rules of statutory interpretation, and in particular the principle against doubtful penalisation according to which nobody should suffer a detriment by application of a doubtful law. The principle against doubtful penalisation has been recognised as applying not just to detriment in the sense of a penalty or a sanction imposed by the criminal law, but as applying to any form of detriment which is required to be inflicted, whether criminally or civilly by a court, or administratively by some other person or entity, in consequence of an enactment. To succeed, such an argument would require a judicial finding that the common law principle of doubtful penalisation survived the enactment of s.5 of the Act of 2005, and that s.5 simply reflects and gives statutory recognition to the longstanding common law rule. However, it must also be acknowledged that a counter argument is possible to the effect that, because the excluding proviso in s.5 refers only to *"the imposition of a penal or other sanction"*, it is ostensibly narrower in its scope than the pre-existing common law canon of construction based on the principle of doubtful penalisation, and that the wider pre-existing rule has been supplanted by the narrower statutory rule. This is not the first time that the issue of the implications of s.5 of the Act of 2005 for the pre-existing common law rule against doubtful penalisation has arisen for judicial consideration, although the issue has not be definitively determined to date . See the discussion in that regard in *Minister for Justice and Equality v Vilkas* [2018] IECA 33 at paras 91 to 93 of the judgment.

95. We do not consider that it is necessary for us to resolve this controversy in circumstances where, even if s.5 of the Act of 2005 has supplanted the pre-existing common law rule, the other conditions necessary for s.5 to apply so as to permit a purposive interpretation simply do not exist. The provision is not ambiguous. Neither is the provision absurd. Moreover, in circumstances where the Children Act 2001 was not even in contemplation at the time of the enactment of the provision at issue, no clear intention on the part of the Oireachtas is capable of being inferred as to how it should operate in the context of the new system of juvenile justice that has since been put in place.

96. Accordingly, in circumstances where we are satisfied that s.2(3) of the Act of 1993 is not capable of being afforded the purposive interpretation that the applicant contends for, we consider that we are unable to proceed to a quashing of the respondent's existing sentence or to a re-sentencing of him; notwithstanding that we are satisfied that the sentences imposed by the court below were unduly lenient.

97. Since it is not possible for us to proceed to a re-sentencing on the present state of the law, the issue as to how s.11 of the Act of 1984 might apply to a case such as the respondent's on a re-sentencing is moot, and it is unnecessary for us to express any view on it.

98. In circumstances where this Court's hands are tied by the need to respect the constitutional separation of powers, it falls to the legislature to address the lacuna in the law that has been identified as soon as possible.