THE COURT OF APPEAL

Edwards J.
Whelan J.
McCarthy J.

Record No: 8CJA/19

IN THE MATTER OF AN APPLICATION PURSUANT TO

SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

KIERAN MURRAY

Respondent

Judgment of the Court delivered on the 1st day of July, 2019 by Mr. Justice Edwards

Introduction
1. The respondent in this case came before the Dublin Circuit Criminal Court on the 18th of December 2018, and pleaded guilty to counts 10, 12, 13, 14, 15, 17, 18, 19 and 20 on the indictment.

2. Count no. 10 related to violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act, 1994; counts no.'s 12, 13 and 14 respectively related to assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997; count no. 15 concerned unauthorised use of a firearm (namely a Taser, which qualifies as a firearm for the purposes of the statute), contrary to s. 2 of the Firearms Act, 1925 as amended; count no 17 related to burglary contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001; counts no.'s 18 and 19 related to false imprisonment, contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997 and count no 20 related to possession of an article in a public place with the intention to unlawfully cause injury to, incapacitate or intimidate, contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990.

3. The respondent was sentenced along with his co-accused on this indictment, Aoife Molloy, on the 20th of December 2018.

4. The sentences imposed on the respondent were as follows:

- Count No. 10 – violent disorder – three years imprisonment with the final two years suspended;
- Count No. 12 – s. 3 assault on Iulian Molcalaut – two-and-a-half years imprisonment with the final 18 months suspended;
- Count No. 13 – s. 3 assault on Daniel Pantireanu – two years imprisonment with the final year suspended;
- Count No. 14 – s. 3 assault on Razvan Molcalaut – one year imprisonment;
- Count No. 15 – unauthorised use of a firearm (the Taser) – one year imprisonment.
- Count 17 – burglary (entering the home of Szymon Szymajda as a trespasser with intent to commit an offence) – two years imprisonment with the final year suspended;
- Count 18 – false imprisonment of Szymon Szymajda – two years imprisonment with the final year suspended;
- Count 19 – false imprisonment of Paulina Golebiewska - two years imprisonment with the final year suspended;
- Count 20 – possession of an article with intent (a broken bottle) – one-year imprisonment.

5. As they related to the same overall event, the sentencing judge specified that these sentences were to run concurrently. Accordingly, the respondent received various concurrent sentences ranging from imprisonment for three years, to two and a half years, to two years and to one year; with all sentences above one year suspended in part. The net outcome for the respondent was that he was that he would be required to serve one year in prison.

6. The applicant contends that the sentences imposed on the respondent were significantly outside the norm and unduly lenient, and she asks this court to quash them and to substitute higher sentences.

Background Facts
7. On the 19th of July 2015, one of the injured parties, Iulian Molcalaut, was hosting a barbeque at his home on the South Circular Road to celebrate his stag party. During this barbeque, at about 21.50, Mr. Molcalaut, and his friend Daniel Pantireanu, left in order to purchase some additional drinks in a nearby Spar shop. On the way to the shop, but while still close to Mr Molcalaut's home, the two men encountered a girl and two somewhat older men who were standing at the front of a house on the corner of the South Circular Road and Bulfin Road. Mr Molcalaut and his friend engaged in conversation with the girl, the precise details of which are unclear.

There was evidence that Mr Molcalaut had at one point said to the girl "*You're a pretty girl, but I could be your grandfather*", and that there had also been commentary on the girl's tattoos. Their remarks were apparently not well received, and this is what the trial judge said caused the incident to "*flare into life*".

8. After leaving the Spar shop, the two men sought to return to Mr Molcalaut's flat by the same route, and on the way the same girl they had previously encountered came out of the garden of the house on the corner of the South Circular Road and Bulfin Road. According to Mr Pantireanu she ran out to them screaming "*what did you say about granddad?*" and then started shouting a man's name and urging him to come over. Mr Molcalaut and Mr Pantireanu sought to proceed on their way. However, they were followed by a group of males and females. This group suddenly attacked the two men. Mr Molcalaut stated that the next thing he could remember was that the bottles of Hennessy that they had just purchased were on the ground. He heard a male laughing and recalls him coming at him with a Taser. He could see the electricity from the Taser and could also hear it. He thought that this assailant, who the prosecution contended was the respondent, also had a bottle in his other hand. Mr Molcalaut said to him "*Put down the Taser, don't use it, It's very dangerous. If you want to fight, fight like a man*".

9. Mr Molcalaut recalls an older man, who was familiar to him from the area, then urging them to "*Run, run for your lives.*"

10. The next thing Mr Molcalaut recalls is his friend Daniel Pantiereanu being attacked on the ground. Mr Molcalaut then saw the respondent attack his brother Razvan who had come out to see what was going on. As the respondent attacked Razvan he was pushed away from him and at that point Mr Molcalaut told his brother to go in home. Mr Molcalaut told Gardai that he could see blood on his face.

11. Mr Molcalaut himself received significant injuries and stated that at one point somebody had hit him with a bottle on the front of the head. He said he could feel the skin hanging down from his head. He fell to his knees and was then stabbed in the back. He felt something hot on his back, and he reached around to his back with his hand and could feel blood. He then fell on his side and was punched and kicked at that point. He also felt blows to his front area but was not sure if these were stabs. After the incident he was found to have two stab wounds to his chest. He was helped to his feet by his brother and his friend. He recalls falling again, trying to phone his father, and thinking that he was dying. However, he managed to make it back to his flat with the assistance of his brother and his friend. The Gardai and an ambulance were called. He was then taken by ambulance to hospital.

12. Mr Pantiereanu's account of the incident was that as the girl came running out of a garden and was shouting at a man to come over. This man – who on the prosecution's case was the respondent – came at them with a Taser in his right hand and a bottle of Vodka in his other hand. He said that this man did not say anything but came straight at him and went straight for his neck with the Taser. He stated that "*I could hear the noise and see the light. The taser didn't really hurt but he hit me with the bottle of vodka and I blocked with my right hand*". At this point the girls in the attacking group had gotten Iulian Molcalaut on the ground and Razvan Molcalaut had come out. He stated that "*the girl with the short hair*" tried to stab him. On the prosecution's case this was Sarah Lawlor. Razvan received injuries to his head from the knife. The respondent then smashed the glass bottle he was holding over Mr Pantiereanu's head. Following this Mr Pantireanu kicked the respondent and attempted to do so a second time. However, on this second attempt the respondent evaded the kick and proceeded to stab Mr Pantireanu in the face with the broken bottleneck. Mr Pantiereanu at this stage fell to the ground, where he continued to be subjected to further attacks. He received two one-inch lacerations to his head, above his right and left ears, one facial wound revealing subcutaneous tissue and muscle, and lacerations to his left ring finger. His wounds were later tended to at the hospital, but he discharged himself and left without receiving a full medical assessment. While he was on the ground having been stabbed in the face, Mr Pantireanu recalled the girl, now believed to be Sarah Lawlor, holding a knife over Iulian Molcalaut and saying to him "*I will fucking stab you*".

13. The sentencing court heard that in the course of the subsequent Garda investigation the top of a broken 'Finlandia' vodka bottle was found at the scene, which contained traces of both the respondent and Mr Molcalaut's DNA on it. In addition to this, the DNA of both men was found on the taser, and Mr Molcalaut's blood was present on the respondent's clothes.

14. Mr Iulian Molcalaut had stab wounds to his back and chest – not inflicted by the respondent – which required operating on in St. James' hospital under intensive care. The injuries inflicted upon him by the respondent from the broken bottle were small cuts on his head and a large cut to the side of his face, however he avoided any injury to his facial nerve. His then imminent wedding had to be postponed due to the extent of his injuries.

15. The incident had occurred in the street directly outside the home of a Mr Szymon Szymajda, and his partner Paulina Golebiewska at 722 South Circular Road. Their home was in a building divided into flats and they lived in an upstairs flat. Mr Szymajda had witnessed the incident from his flat and he told Gardai that there were about eight people fighting in the street on the occasion in question, three of whom he recognised, and one of whom was Aoife Molloy, who lived in the same building as him in the flat downstairs. It emerged that following the incident, the respondent had fled to 722 South Circular Road and had presented himself at the door of Mr Szymajda's and Ms Golebiewska's flat, knocking on their door to seek admittance. Mr. Szymajda told Gardai that he recognised the respondent, having met him two weeks previously in Aoife Molloy's flat. The respondent informed Mr. Szymajda in a whispered voice that he had to hide from the police, and he started to push the door open. Mr. Szymajda, who was somewhat in fear of the respondent, ended up letting him in as he was concerned that he might still have a weapon and did not want a physical confrontation with him. Mr. Szymajda and his partner told the respondent that they did not wish to become involved and that they did not want trouble. They described the respondent as looking fearful and stated that he told them he was "*not going back to prison*", although the sentencing court later heard evidence that in fact the respondent had never served a custodial sentence. The respondent refused to leave and was moving about a lot while in the flat. The occupants were concerned that he appeared to be nervy and unpredictable. As a precautionary measure, Mr Szymadia discretely removed some kitchen knives that were on open view and hid them in a drawer. His wife made a sign, writing: "*Help us, he's in here*", and placed it on the window, which attracted the attention of gardai who by that stage had arrived at the scene on the street where the violent disorder had occurred, and were in fact in the front garden of the flats building speaking with Ms Molloy and Ms Lawlor, who were both present there.

16. Gardai subsequently entered Mr Szymadia's and Ms Golebiewska's flat and arrested the respondent, who was reportedly in an intoxicated state. Ms Molloy and Ms Lawlor were also arrested, and all three were taken to Pearse Street Garda station, where they were detained and interviewed. Nothing of evidential value emerged from the interviews with the respondent and with Aoife Molloy. Sarah Lawlor made certain admissions concerning her own actions on the night in question.

The injuries to and impact on the victims

17. The sentencing court heard that the Book of Evidence had contained a statement from a Dr. Geraldine McMahon who was the consultant on duty in the accident and emergency department at St. James's hospital when Mr. Iulian Molcalaut was brought there by ambulance. She stated, inter alia, that the examination revealed a stab wound to the mid-sternum area and a second large wound to the right lower posterior chest wall. He underwent thoracotomy and laparotomy and was transferred thereafter to intensive care. The

patient had reported an alleged assault in which he was struck with broken glass over the back of his head and the side of his face. There were small cuts on his head. On his face there was a large gaping wound measuring 3 cm x 4 cm x 1 cm which had an exposure of subcutaneous tissue and muscle, but the facial nerve was thankfully clinically intact. He was then referred to the plastic surgery department.

18. The sentencing court heard that Mr. Daniel Pantireanu who presented to the same hospital was noted to have two lacerations to his head and a laceration to his left ring finger. The was no reported loss of consciousness and the cuts on his finger were cleaned and dressed. The first head wound was a one inch cut above the right ear and the second was a one inch cut above the left ear. The court was told that this injured party did not remain in the hospital for formal medical assessment.

19. None of the injured parties opted to make a victim impact statement or to give evidence at the sentencing hearing as to the effect of the incident on them.

The Applicant's Personal Circumstances
20. Garda Altendorf under cross-examination accepted that the respondent had never been to prison; that his Taser was the size a mobile phone and that it may have only carried a very low voltage as it caused no injury to Mr Pantireanu. Garda Altendorf also agreed that the respondent had not been the instigator of the incident; rather his aid had been requested by another. When seeking refuge in the apartment, the respondent had told the occupants that he had been defending his girlfriend but that this would not be believed by the gardai. Garda Altendorf further accepted that the respondent had not been aggressive with the occupants, although he had made use of his body weight to push past them in order to hide behind the door.

21. The court heard evidence that the respondent has 22 previous convictions. They are as follows:

- Five for burglary;
- Seven for simple possession of controlled drugs;
- Three for possession of controlled drugs for sale or supply;
- One for possession of ammunition;
- One for assault;
- Three public order offences; and
- Two road traffic offences.

Only one of these was for an offence of violence, namely a s. 2 assault dating from 2002 when he was 16 years of age. Garda Altendorf described this incident as arising from "*some youths messing around*". It was accepted that his past burglary convictions coincided with the untimely death of his brother by drug overdose. Garda Altendorf accepted that his conviction for an offence committed between the 16th and 17th of May 2016 (i.e., committed after the present offences and recorded in the Circuit Court on 30/10/18), along with the present offences, occurred at a period when the respondent had separated from his long term partner with whom he had an infant child aged 6 months at the time of the sentence hearing. Garda Altendorf accepted that they had recently reconciled; that the respondent's partner was a sobering influence upon him; and that despite the chaotic lifestyle that he had been living at the time of the offence, he had since settled down. Garda Altendorf affirmed that the respondent had not come to the adverse attention of the gardai since 2016.

22. The sentencing court was presented with various testimonials and a positive Probation Report in respect of the respondent. An earlier Probation Report has identified the respondent's unemployment, absence of routine and purpose in his daily life, and his drug use as being significant risk factors for reoffending. The probation officer was able to report that there was evidence that the respondent had taken significant steps to address these risk factors. He had managed to become drug-free after undergoing a residential drug treatment program and subsequent engagement with community support services provided by the Community Lynks Addiction Support Project. When most recently assessed he had a track record of clear urinalysis. It was confirmed that the respondent attends community Lynks for 19.5 hours weekly and while there had accessed counselling support and had engaged in group therapy to address his drug misuse. Further, the was evidence that the respondent, being drug-free, had sought to explore the training and employment opportunities made available to him through the Community Lynks project. He had aspirations to secure employment as a courier and had completed and passed his driving test, in circumstances where the cost of driving instruction and the driving test were funded by the Community Lynks project. There was also evidence that the respondent was giving more consideration to the needs of others, primarily, his partner and children. He became a very hands-on father and was immersing himself fully in the lives of his children, by supporting them in their schooling and encouraging them in their sporting interests and other prosocial activities. In addition, it was considered that the respondent being drug-free and with a greater clarity of mind now had an improved capacity for introspection and that he now understood that his behavior on the occasion of this incident had been unacceptable. The respondent had been able to reflect on the harm it caused to the victims of his actions and presented as congruent when expressing remorse. The report confirmed that the respondent had attended his appointments with the probation service and that he had engaged meaningfully during supervision meetings. It was acknowledged that the respondent was still in the early stages of recovery and that continued engagement with addiction services was required to reduce the likelihood of further offending and the possibility of further harm to members of the community. In these circumstances, and notwithstanding the seriousness of the offenses, the probation officer indicated a willingness to undertake probation supervision of the respondent, should the court consider it appropriate to order it.

23. Evidence was also given to the court below by addiction counsellor Mr Thomas Curtis. He told the court that the respondent had volunteered with Merchant's Quay for two months before undertaking residential drug treatment himself at the High Park Rehabilitation Centre. The respondent then engaged with the Community Lynks Project for post treatment support during which time he had done everything that was asked of him and made manifest progress. Mr Curtis said:

> *"He's really changing in a sense, is a family man, he loves his family, he doesn't associate with many people outside. He is working on his future, like. Because of his criminal records there's not many jobs open for him so one of the things he wanted to do was, you know, get a van and do couriering and so as part of that we had to get his licence. And so a couple of weeks ago he got his licence. We regularly take urines, he is clean of alcohol and any illegal drugs."*

24. Mr Curtis testified that in therapy sessions, the respondent had been candid about the effects of the death of his brother. He was

also attending group meetings twice weekly as well as regular Narcotics Anonymous meetings. Mr. Curtis concluded that he was most pleased with the respondent's continued abstinence and progress over the past 21 months of involvement with the Community Lynks Project.

25. In the plea in mitigation made on behalf of the respondent, it was submitted that the respondent's actions were not premeditated, that he had been called to help without knowledge of the causal circumstances; that he was highly intoxicated, and that he was physically quite restricted due to his arm being in a cast at the time. The respondent was said to be remorseful. At the time of the sentence hearing he was on a more hopeful path, moving from drug addiction and mourning his brother's death, to reconciling with his girlfriend, having a six-month-old baby, and engaging actively in rehabilitation aftercare and counselling, as well as attempting to gather new skills to increase his employability.

Sentencing Judge's Remarks
26. In imposing the sentences identified earlier in this judgment on the respondent, the sentencing judge, having described the offending conduct and the harm done, remarked:

> *"In relation to Kieran Murray, the aggravating factors are the serious nature of the offences. I take into account the offences of violent disorder, the section 3 assaults, the possession of the Taser, the burglary, the false imprisonments, and the producing a broken bottle. Whatever was said or what was not said, it was not in any way an excuse for him to become involved. Whatever he believed had transpired, whatever he was told had happened, there was no excuse for his involvement, and there was no excuse for his involvement in the manner in which he became involved.*
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> *In relation to Mr Murray, I take into account the injuries to the injured parties, particularly the injuries caused by this accused as set out in the medical reports. I take into account that he struck two of the injured parties with a broken bottle. He also used a Taser, so he'd armed himself with these implements and he used them. I take into account the obvious effect on the victims and, in particular, the physical effects, but there are no victim impact reports.*
>
> *The mitigating circumstances: I take into account: his age, he's 33; his personal circumstances, he has three children, he lost a brother to drugs. I take into account he wasn't the one who used the knife. I take into account, in relation to the false imprisonment, it was in the nature of coercing, or verbally forcing, or pushing the door open, but it wasn't of the serious nature of other false imprisonments this Court has had to deal with. I take into account that this offence occurred in July 2015 and he hasn't had any charges since 2016. I take into account the -- in relation to his plea of guilty, it's a plea in similar circumstances to his co-accused, and I take that into account. I take into account his involvement in the matter. I take into account the probation reports; there are two probation reports. He's at moderate risk of reoffending, and the report of the 14th December indicates that he has made significant improvement in his engagement in recent times. He's passed a driving test, which is part of the plan to become a courier. I take into account that he is drug-free. He hasn't been coming to the attention of the Gardaí.*
>
> *I take into account the evidence of Mr Curtis, and in relation to the burglary count, I take into account the case of Casey v. Casey of the Court of Appeal in relation to sentencing guidelines, and in relation to dealing with people sentencing people for burglary that the previous convictions are something which can be aggravating. In this case, I've considered that issue, and the following matters are relevant. It is a burglary count that I have to sentence on, but there is some overlap between the burglary and the false imprisonment. Two of his burglary convictions are not previous convictions, they're not previous to this conviction. There is one burglary conviction, therefore, in 2011, but that was dealt with by way of fine only, and there is one which is dealt with under section 1.1 of the Probation of Offenders Act, and I think the law indicates that I do not take that into account."*
>
> *…*
>
> *"… in relation to Count No. 10, which is the violent disorder count, I'm satisfied the appropriate headline sentence is a sentence of five years. On Count No. 10, I'm imposing a sentence of three years' imprisonment.*
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> *In relation to Count No. 12, which is assault on Iulian Molcalaut, I'm satisfied the appropriate headline sentence is four years, and on that count I'm imposing a sentence of two-and-a-half years, concurrent to the sentence on Count No. 10. So, I'm imposing a sentence of two-and-a-half years concurrent.*
>
> *On Count No. 13, which is assault causing harm to Daniel Pantireanu, the headline sentence would be a sentence of three-and-a-half years. I'm imposing a sentence of two years concurrent to the other sentences.*
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> *On Count No. 14, which is an assault on Razvan Molcalaut, the headline sentence would be two years. I'm imposing a sentence of one year concurrent to the other sentences.*
>
> *On Count No. 15, which is having in his use a firearm, the Taser, I'm imposing a sentence of one year concurrent to the other sentences.*
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> *In relation to count 17, the burglary, I'm satisfied the appropriate headline sentence would be a sentence of three years. I'm imposing a sentence of two years concurrent to the other sentences.*
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> *In relation to count 18, which is the false imprisonment count, I'm imposing a headline sentence of three years -- I'm sorry, I'm satisfied the appropriate headline sentence is three years, and I'm imposing a sentence of two years concurrent to the other sentences.*
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> *In relation to count 19, which is also false imprisonment, I'm satisfied the appropriate headline sentence is three years, so I'm imposing a sentence of two years concurrent to the other sentences.*
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> *In relation to count 20, possession of the broken bottle, I'm imposing a sentence of one year concurrent.*
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> *Now, that gives a total sentence of three years, and in view of the rehabilitation of Mr Murray, in view of the probation reports, in view of his Trojan efforts to rehabilitate himself, I am going to suspend the final two years of the sentences for a period of two years. So, I'm suspending the final two years for a period of two years on his entering into his own bond in the sum of €200 to keep the peace and be of good behaviour in prison, and on his release to keep the peace and*

be of good behaviour for two years. And secondly, on his release he is to be under the supervision of the Probation Services for two years and he is to comply with the conditions set out in the report, which are: he is to attend all appointments with the Probation Services and adhere to the directions of same; No. 2, he is to engage with any other suitable services, such as training, employment services, addiction treatment options, as directed by the Probation; No. 3, he is to advise the Probation of any change in his contact details, such as change in address or telephone numbers. And again, I'm giving liberty to the Gardaí and Probation to re-enter the matter if appropriate".

How the co-accused were dealt with.
27. The respondent's co-accused on this indictment, Aoife Molloy, received a three-year sentence of imprisonment on the violent disorder count, which was wholly suspended for a period of three years, with other counts relevant to her being taken into consideration. The sentencing judge had earlier nominated a five-year headline or pre-mitigation sentence. Significant features of Aoife Molloy's case were that she had committed the offence while on bail. She had certainly pleaded guilty but had not been otherwise co-operative in the sense of having offered material assistance to the investigation or by making admissions. She also had ten previous convictions including relevant convictions for having produced an article in the course of dispute, violent disorder and assault causing harm. These relevant convictions arose out of the same incident, which had occurred on a LUAS tram. An intoxicated man had made disparaging remarks to a group of girls on the tram which included Aoife Molloy. Ms Molloy had then produced a beer bottle and had struck the man over the head with it, breaking the bottle and lacerating his scalp. Ms Molloy was subsequently sentenced to four years imprisonment, with the final two years suspended. In respect of the present matter the sentencing judge said that he was suspending the entirety of the sentence in view of her rehabilitation, and in view of the fact that she didn't use the same level of violence as the respondent.

28. A second co-offender, namely, Sarah Lawlor, had been separately indicted and prosecuted and her case had already been dealt with by a different Circuit Court judge by the time the respondent and Ms Molloy were being dealt with. She had pleaded guilty to causing serious harm contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997. Her plea was offered on the basis of acceptance that she had been part of a common design to commit the said offence, but where it was maintained, and indeed accepted by the prosecution, that her personal participation had principally involved bringing knives to the scene. In circumstances where she had pleaded guilty, was a first-time offender, had been co-operative with the investigation and had other mitigating circumstances (unspecified but described by Garda Altendorf in his evidence as being "unusual") she had received a sentence of three year's imprisonment that was wholly suspended for a period of four years.

Applicant's Submissions
29. Counsel for the applicant submitted that the sentencing judge erred in identifying the same headline sentence of five years in respect of both the respondent and the co-accused, Aoife Molloy; and further erred in fixing the same sentence of three years for both, as their roles and levels of culpability differed substantially.

30. The sentencing judge identified the following aggravating factors:

- The serious nature of the offences;
- The injuries sustained by the injured parties;
- That the respondent had armed himself with and used a taser;
- That the respondent struck two of the injured parties with a broken bottle; and
- The effects on the injured parties.

However, the applicant believes that there were several further aggravating factors that ought to have influenced the sentence, namely:

- That, in the course of the violent disorder of which the respondent was part, two of the injured parties continued to be attacked after they had fallen to the ground;
- That the respondent had smashed a bottle over the head of one of the injured parties; and
- That to evade arrest the respondent had invaded a couple's home.

31. As to the sentencing judge's identification of the respondent's lack of knife usage as a mitigating factor, the applicant submits that this does not constitute actual mitigation and is rather the absence of an aggravating factor.

32. The applicant submits that, given the nature and level of the respondent's offending, a sentence of three years with two years suspended was unduly lenient.

33. The applicant submits that the aggravating factors present attracted insufficient weight. The applicant further submits that undue weight was attributed to the mitigating factors and personal circumstances of the respondent. The applicant takes particular issue with the weight given to the guilty pleas in circumstances where they were made on a trial date.

34. The applicant submits that due to their undue leniency, the sentences lacked any element of deterrence in respect of the respondent or the general public.

35. The applicant submits that the sentencing judge failed to have adequate regard to all of the circumstances that arose in this case, and that this was an error of principle leading to the imposition of a penalty that was outside of the norm and unduly lenient.

Respondent's Submissions
36. The respondent disputes that the applicant has identified any error in principle which would justify interference with the sentence on the grounds of undue leniency and says that her submissions do not warrant the imposition of a higher sentence.

37. We were referred by the respondent to the applicable principles for a court in considering an appeal under s. 2 of the Criminal Justice Act 1993 (the Act of 1993), as set out in *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279. There, the

Court of Criminal Appeal stated:

> *"(1) Since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called in question was unduly lenient.*
>
> *(2) The Court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand……he may detect nuances in the evidence that may not be as readily discernible to an Appellate Court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced…… his decision should not be disturbed.*
>
> *(3) …It is unlikely to be of help to ask if there had been imposed a more severe sentence, would it have been upheld on appeal by an Applicant as being right in principle? And that is because……the test to be applied under the section is not the converse of the inquiry the Court makes when there is an appeal by an Applicant. The inquiry the Court makes in this form of appeal is to determine whether the sentence was unduly lenient.*
>
> *(4) It is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."*

38. We were reminded that the meaning of "undue leniency" was further considered by this court in *DPP v. Thomas McCormick* [CCA 18th April 2000]. Per Barron J.:

> *"In the view of the Court, undue leniency connotes a clear divergence by the Court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle. Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."*

39. The respondent has submitted that the applicant has not discharged this burden. On the contrary, says the respondent, the sentencing judge sufficiently justified the sentence he imposed, having considered and referenced the relevant principles. It was submitted that the case cannot be separated from its context and the sentencing judge considered the personal circumstances of this accused, including his guilty plea, his family situation and his significant progress towards his rehabilitation in arriving at a sentence.

40. While it was technically correct for the applicant to say that the pleas were entered on the trial date, the intention to plead guilty had in fact been intimated to the prosecution well in advance of that.

41. The respondent submitted that the applicant had not demonstrated that the sentencing judge had erred by imposing a sentence that amounted to an obvious error in principle. Whilst the appellant did obtain a partially suspended sentence, his personal circumstances and mitigating factors had to be taken into account, and no serious breach of sentencing principles occurred – something that is required before this court is permitted to interfere with the sentence imposed.

42. A sentence that is simply lenient is insufficient to warrant intervention on a review under s.2 of the Act of 1993. In *The People (Director of Public Prosecutions) v Clarkin* [2003] 2 JIC 1001, the court held that:

> *"What the Director of Public Prosecutions has to show is that the sentence was unduly lenient. It may well be said that it was a lenient sentence, and it may well be that if any of the member of this court had been the trial judge a custodial sentence would have been imposed. However, that is not the test. A trial judge is entitled to be lenient if he considers that it is just to do so in all the circumstances of any particular case, and in the present case the learned trial judge spelt out the reasons for his leniency and we can see no error in principle in applying those reasons to the present case and in suspending the sentence on the respondent"*

43. Addressing the complaint made by the applicant that the sentencing judge failed to adequately differentiate between the co-offenders, and that a more severe sentence was justified in the respondent's case, the respondent says that that complaint is not made out on the evidence. The respondent submits that in cases where there are three co-accused involved in a violent incident the court must have regard to the principle of parity in sentencing.

44. Moreover, while the principle of parity does not preclude a sentencing judge from imposing a lighter sentence on a co-accused, the respondent submits that this court must take account of the trial judge's decision to impose two wholly suspended sentences in respect of the co-accused whereas he ultimately imposed upon the respondent a sentence that was custodial in nature, despite his efforts at turning over a new leaf. It is suggested to be of significance that the applicant did not seek a review of the sentences imposed on either of the co-accused.

45. The law is clear that principle of parity in sentencing does not preclude the imposition of a lighter sentence in the case of a co-accused, where the difference in sentences can be justified. In support of this we were referred to the following passage from Keane C.J's judgment in *The People (Director of Public Prosecutions) v Duffy* [2003] 2 I.R. 192 200:

> *"There appear to be two reasons underlying the principle that an appellate court will interfere where there is a significant and unjustifiable disparity between the sentences imposed on two or more persons involved in the same criminal offence. The first, identified by Finlay C.J. in The People (D.P.P. v Conroy) (No. 2) [1989] I.R. 160 is the substantial sense of grievance at unfair treatment which may be caused by apparently unequal sentences. It could be added that the appellate court should only take into account a grievance which, objectively viewed, could be reasonably entertained by the accused person: a person who has received what appears to him/her to be a severe sentence may be unable or unwilling to recognise that the disparity between that sentence and a lighter sentence imposed on his/her co-accused, is, in the particular circumstances, justifiable. The second reason is the harmful effect on public confidence in the administration of justice resulting from a significant disparity in the sentences which seems incapable of being justified: see R v Fawcett (1983) Cr. App. R. (S) 158."*

46. We were also referred to *The People (Director of Public Prosecutions) v. Daly* [2012] 1 I.R. 476, in that regard.

47. It was submitted that in light of the applicable principles the trial judge's decision to impose some element of a custodial sentence upon the respondent while completely suspending the sentences in respect of the co-accused could probably be justified. The considerably more serious offence committed by Ms Lawlor was no doubt mitigated by her clean record and the manner in which she met the case by making certain admissions in interview with gardai.

48. Nevertheless, it was submitted, the respondent was the only party involved who received a custodial sentence despite significant progress towards his rehabilitation from drugs and substance abuse. His behaviour following the incident, and track record of achievement to date in attempting to turn away from crime, deserved to be rewarded with a significant discount. The fact that the applicant has not sought to review the sentences imposed in respect of the co-accused, and that therefore these completely suspended sentences must be seen appropriate in the circumstances of those cases means that they provide a useful comparator of appropriateness against which the respondent's sentence must be judged.

Discussion and Decision

49. The most serious offense for which the respondent required to be sentenced was the offense of violent disorder. The range of potential penalties for this runs from non-custodial disposal up to imprisonment for a maximum of 10 years. In the first instance a headline sentence required to be nominated that reflected the gravity of the offending conduct as measured by the respondent's culpability and the harm done. This headline sentence had to be set with reference to the spectrum of available penalties. It was uncontroversial in the circumstances of the case that, whatever about the ultimate sentence, the headline sentence would inevitability require a custodial element, having regard to the gravity of the case.

50. In arguendo at the oral hearing in this appeal, and at the invitation of the court, counsel for the applicant suggested that the gravity of the offending conduct in this case required location of the headline sentence in the upper part of the mid-range. This suggestion was offered taking account of the additional aggravating factors specifically identified by the applicant as seemingly not having been considered, or sufficiently taken into account, by the sentencing judge. As the available range runs from 0 to 120 months (i.e 10 years), a three-way division of the range leads to a low range from 0 to 40 months (i.e. 3 yrs. and 4 months.); and mid-range from 41 to 80 months (i.e. 6 yrs and 8 months); and an upper range from 81 to 120 months (i.e. 10 yrs). The upper part of the mid-range would therefore be somewhere between 61 and 80 months. The actual headline sentence nominated by the sentencing judge was one of five years (i.e. 60 months) or the exact centre of the midrange. We consider that while that may have been at the most lenient end of the sentencing judge's range of discretion in fixing a headline sentence it was certainly not an error of principle to have done so.

51. It is appropriate at this point to address the respective arguments of the parties based on the principle of parity. We do not accept the complaint of the applicant that the sentencing judge was wrong to have nominated the same headline sentence for the respondent and for Aoife Molloy, and that a more severe headline sentence should have been imposed in the case of the respondent. The first thing to be said is that they were engaged in a common design. Secondly, while it was true to say that the respondent's individual participation was more culpable than Aoife Molloy's, this disparity was offset by the existence of two significant aggravating factors in Aoife Molloy's case that did not exist in the respondent's case. In the first place her offences were committed while on bail, whereas the respondent's offences were not. Secondly, Aoife Molloy had relevant previous convictions, and specifically for using a bottle as a weapon while committing violent disorder. Having relevant previous convictions aggravated the culpability of Aoife Molloy's offending in this case. While the respondent also had previous convictions, they were not relevant previous convictions in the sense of being the same or very similar to the offences for which he was being sentenced. The respondent's previous convictions, although doing him no credit, would only have engaged the progressive loss of mitigation principle and could not justifiably be regarded as aggravating his culpability.

52. In so far as the respondent has submitted that there were enough differences in the personal circumstances of the respondent and his co-accused to have justified different ultimate sentences, we agree with that. We make no comment on the correctness or otherwise of the ultimate sentence imposed on Aoife Molloy as her case is not before us. The same is true of the case of Sarah Lawlor. Moreover, Sarah Lawlor was sentenced for a different and more serious offence, albeit arising out of the same incident, and so the parity principle could not be engaged by the sentence that she received.

53. Of course, we are not concerned at the end of the day solely with the headline sentence imposed on the respondent, but rather with the sentence ultimately imposed on him. The main focus of the applicant's complaints was really on the amount by which the sentencing judge discounted for mitigation, namely by two years or 40% of the nominated headline sentence, and the suspension in addition of a further two years of the post mitigation sentence to incentivise the respondent's continued rehabilitation.

54. It requires to be stated that the circumstances of the present case were bad. The incident itself was disgraceful, and significant harm was caused to the injured parties. As the sentencing judge said, regardless of what perceived provocation might have precipitated the incident it was not justified. An incident of this sort would normally call for the imposition of a custodial sentence in circumstances where the accused was not a first-time offender, and even in the case of a plea. That having been said, an accused with exceptionally strong mitigation and personal circumstances might still hope to avoid a very long custodial sentence, and we could not foreclose on the possibility that in rare cases a wholly suspended sentence might be justified. The sentencing judge considered that a custodial sentence to be actually served was indeed required in the present case, but the respondent nevertheless received a generous discount in mitigation, and a generous part suspension of what remained so that he would ultimately only have to serve one year provided that he kept to the terms of the part suspension. The applicant's case is that the sentencing judge went too far in that regard.

55. We should say in passing that we accept as having substance the submission made to us on behalf of the respondent that, while it was technically correct for the applicant to say that the pleas were entered on the trial date, in circumstances where the intention to plead guilty had in fact been intimated to the prosecution well in advance of that, the value of the pleas should not be treated as being greatly diminished. Violent disorder cases are not the easiest cases to prosecute, and we believe that the fact that there were pleas of guilty must be regarded as having been helpful. Moreover, the victims in the case did not have to face cross-examination or be tested in their evidence. We accept therefore that the pleas should not be regarded as having been of only limited value.

56. The jurisprudence on undue leniency reviews indicates that great weight should be afforded to the reasons given by the sentencing judge at first instance for having imposed the sentence under review. There had been pleas of guilty; there was remorse; a history of personal tragedy in the respondent's life which had precipitated him into drug use and involvement in crime all of which he had overcome; and a considerable track record of achievement towards rehabilitation. We consider that the discounts given by the sentencing judge for the mitigating factors in the case were perhaps generous but were within the range of his discretion. The sentencing judge was clearly impressed with the respondent's efforts at rehabilitation to date and wanted to reward them. It was

legitimate that he should do so. The discount of 40% on the headline sentence was generous but it was not disproportionate in our view.

57. We agree with the applicant that the sentencing judge was not correct in treating the fact that the respondent did not use a knife as being a mitigating circumstance, and that this was an error of principle. However, it does not seem to us that this error, in and of itself, is likely to have influenced the level of discount for mitigation by very much. It was not, without more, an error of such moment as to justify any intervention by this court.

58. This brings us to the matter of the suspension of two thirds of the post mitigation sentence of three years. This was the component of the sentence to which the applicant had the greatest objection. However, once again we must have regard to the principle that great weight must be afforded to the reasons of the judge at first instance. The sentencing judge was clearly impressed with the evidence concerning rehabilitation to date and was anxious to see it continue both in the respondent's interests but also in the public interest. It is suggested that insufficient regard was had to deterrence. There are two aspects to deterrence. One is specific deterrence and the other is general deterrence. Both forms of deterrence and rehabilitation are desistance strategies. If the respondent could be directed away from crime by a measure intended to secure his rehabilitation, then the objective of ensuring his desistance would be achieved and there would be no need for specific deterrence. The need for general deterrence would remain but that was capable of being addressed by the nomination of an appropriate headline sentence. We are satisfied that the headline sentence of five years imprisonment, albeit that it was on the lenient side of what might been nominated, was sufficient in that regard.

59. The sentencing judge was very anxious to ensure that the respondent would continue along the path he had begun. In other cases, we have deprecated the suspension of excessive periods for rehabilitative purposes where there has been a lack of concrete evidence of an intention to rehabilitate, or of any realistic program to be followed in that regard. There were no such deficits in this case. We would agree with the sentencing judge that the evidence with respect to the respondent's efforts to date was most impressive. We have no hesitation in saying that it was legitimately within the sentencing judge's range of discretion to suspend as much as he did of the post mitigation sentence in the circumstances of this case. We find no error in principle.

60. In all the circumstances of the case we are satisfied that the sentences imposed in this matter were not outside of the norm and unduly lenient. We would dismiss the application.