THE COURT OF APPEAL

Record No: 119/2021

Edwards J.
McCarthy J.
Kennedy J.

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

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

V

DAMON BUGGY

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of February 2023 by Mr. Justice Edwards.

Introduction

1. The present application is brought by the Director of Public Prosecutions (i.e. "the applicant") pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of two sentences imposed on the respondent on the 30th of May 2022 by His Honour Judge Patrick Quinn at Naas Circuit Criminal Court on the grounds that they were unduly lenient.

2. The respondent had been returned for trial to Naas Circuit Criminal Court. On the 7th of October 2021, he entered a guilty plea in respect of count no. 1, which involved a charge of assault causing harm, contrary to s.3 assault of the Non-Fatal Offences Against the Person Act, 1997 ("the Act of 1997"), but on the basis that he had not used a knuckle-duster while carrying out that assault. This plea was not acceptable to the applicant who subsequently sought a trial date in respect of count no. 2, which involved a charge of producing an article capable of inflicting serious injury, to wit a knuckle duster, in the course of a dispute and in a manner likely unlawfully to intimidate another person, contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 ("the Act of 1990"). A jury was empanelled on the 15th of March 2022 at Naas Circuit Criminal Court sitting in Drogheda before Judge Quinn, and on that same date the jury unanimously convicted the respondent on count no. 2 after deliberating for approximately ten minutes.

3. The sentencing hearing was held on the 30th of May 2022, on which date the sentencing judge imposed on the respondent a sentence of 2 years' imprisonment, conditionally suspended in its entirety for a period of 4 years, on Count No 1, and; a concurrent sentence of 12 months' imprisonment, again conditionally suspended in its entirety for a period of 4 years, on Count No 2.

4. The applicant contends that in the circumstances of the case these sentences represented a substantial departure from the norm and were unduly lenient.

The evidence as to the circumstances adduced at the sentencing hearing

5. At the sentencing hearing on the 30th of May 2022, Garda Louise Cusack gave evidence in relation to the background to the respondent's offending. The Garda confirmed that the offences occurred on the 23rd of December 2018, on which date a Mr. Michael Mallon (i.e. "the victim") was socialising with friends. The victim had been drinking and ended up at an Abrakedabra fast food restaurant in the Poplar Square area of Naas town, County Kildare with his friends. There, the victim observed a friend of his being assaulted by another male whose identity was unknown to the victim. Having followed the unknown male outside the restaurant, the victim was punched a number of times to the face and head. The physical altercation caused both parties, the victim and his assailant, to fall to the ground.

6. The assailant was later identified by a Ms. Niamh Robertson, a bystander, as the respondent. Ms. Robertson observed the respondent on top of the victim delivering punches to his head. She observed that the two males were separated by a group of onlookers. The victim was bleeding heavily from a number of wounds which resulted from the fracas, and he was subsequently attended to by ambulance personnel and brought to Naas A&E.

7. Garda Cusack was assigned as the investigating member and was furnished with CCTV footage from the scene of the offending by her colleague, a Garda Marr. This CCTV footage was shown both at the sentencing at first instance and also at the hearing of the appeal before us. It provided video recorded evidence of the physical altercation between the respondent and the victim. At the 3:12am point on the CCTV footage, it depicted the respondent taking a knuckle-duster from his pocket and placing it on his left hand. It subsequently depicted the respondent punching the victim's head numerous times. Isolated stills from the CCTV footage, which stills were exhibited in the book of evidence, included a still in which the respondent could be seen striking the victim, his left hand enclosed in a fist and a shiny object clearly placed across his fingers. In the live footage, and in another still taken from that footage, the recording captured the victim's inability to stand without the assistance of his friends.

The impact on the victim

8. Garda Cusack confirmed that the victim, who had given evidence at trial, did not wish to submit a victim impact report. She further confirmed that the victim had found the proceedings *"quite stressful"*, which is the reason why he did not wish to submit a victim impact report.

Medical evidence as to physical injuries suffered by the victim

9. The victim was attended to by medics shortly after the physical altercation. He had gone to Naas A&E and he also subsequently attended with his GP, a Dr. Collins. In his evidence given at trial, the victim described how he had got 12 stitches and 2 staples to the wounds inflicted on his head. He described how both of his eyes were swollen and bruised, and how his left eye was nearly completely closed due to the swelling, and how the right-hand side of his face was very swollen and sore. The victim described how he was released from A&E at about 7:00am on the morning of the 24th of December 2018, having stayed in hospital overnight. The victim described how following the incident he found it hard to eat and swallow food and that he had found the pain in his head had gotten worse over the following two days. Shortly after Christmas, the victim returned to Naas A&E as he could not bear the pain anymore, the pain having gotten so bad. At Naas General Hospital, doctors took an MRI of his head and informed the victim that he had been heavily concussed and that his right eardrum had burst. The victim indicated that he continued to be afflicted by pain in his face and head following his release from hospital. The victim had taken photographs of his visible injuries and had furnished Garda Marr with those photographs. These were produced before the court below and again before us.

10. Garda Cusack then read to the sentencing court the medical report provided by a Dr. Choi Lam, which was read to the jury at trial. In it, Dr. Choi Lam described the presentation of the victim at A&E on the 23rd of December 2018 with a history of being recently assaulted, and which had resulted in the victim suffering from a burst eardrum on the right side and worsening right-sided headache. In the medical report, the pain as experienced by the victim at 2:00am the morning of the 24th of December 2018 was scored as a 9 out of a possible 10. The medical report described how a CT scan of the victim's head showed a subcutaneous haematoma in the right frontal area. There were no fractures or intracranial bleeding. The medical report described how the victim was directed home having been administered a prescribed pain medication, namely Difene. This medication had *"settled"* the pain, and the victim was asked to attend at an outpatient's clinic on the 5th of January 2019.

11. The medical report described how the victim returned to the hospital at a later stage, following the return of a similar pain on the right-hand side of his face and with a severe sharp headache. The victim was diagnosed with a head injury and was given a care plan for pain management. The medical report principally detailed the second occasion on which the victim had attended at the hospital in Naas, and no mention was made of the 12 stitches and 2 staples that the victim had received on the first occasion. However, photographs of these stitches and staples were evidenced in a booklet of photographs with which the court was furnished, which graphically depicted injuries to the victim's head, including to his left ear ear, to his left temple, to his left forehead extending into his hairline, and to his left eye area.

Garda interview of the respondent

12. Garda Cusack confirmed that she had some difficulty in locating the respondent, as he proved elusive and his exact whereabouts could not be initially ascertained. Gardaí

eventually made contact with the respondent having obtained his telephone number by his aunt who resided at an address in Bagenalstown, Kill which was recorded as his last known address according to enquiries with the Department of Social Welfare. The respondent was due to have attended at Naas Garda Station on the 3rd of April 2020, a meeting which had been arranged. However, the respondent did not attend this meeting, and would not answer his phone. Gardaí eventually traced the respondent to his employer, which company furnished the gardaí with a contact number for the respondent. The respondent was invited to attend at Naas Garda Station to give a voluntary cautioned statement, which meeting the respondent did attend on the 21st of May 2020.

13. Garda Cusack described how on that date the respondent was interviewed and outlined events to gardaí. Having been asked if he would like a solicitor to be present at the interview, the respondent declined. At the outset of the interview, the respondent indicated that *"he had no idea"* what the interview was related to. Interviewing gardaí asked the respondent to recall an incident in the early hours of Christmas Eve 2018 at the Abrakedabra restaurant in Poplar Square in Naas. The respondent indicated that he could not recall any such incident, asking *"Was this New Year's Eve?"*, saying that he did not think that he was living around in Naas at that time and that in and around Christmas of 2018 he had moved to Celbridge, County Kildare. Gardaí then read a statement by the victim to the respondent and the respondent said that could not remember anything at all. The respondent was also shown the CCTV footage of the incident and he indicated that he recognised himself as the assailant. Following his viewing of this footage, the respondent said: *"I do remember getting in a scuffle with someone but I don't remember giving anyone a battering for no reason. It probably was with a Naas lad or something."* The respondent clarified that, by the use of the word *"scuffle"*, he specifically was recalling that the victim had come running to him and that it was a case of self-defence, which view he argued was supported by the CCTV footage he had just seen.

14. When asked what was the item that he pulled out of his pocket, the respondent replied, *"I don't know, probably a lighter."* When asked what had caused the fight between him and the victim, the respondent replied that he *"couldn't tell you"*. When it was put to the respondent that he was the assailant punching the victim, the respondent conceded that that was correct but *"he [the victim] was on top of me. I couldn't just stand there."* Interviewing gardaí pressed the respondent once again on the question of what item he had pulled from his pocket, in response to which the respondent simply replied *"nothing"*, saying that he used nothing other than his fist to hit the victim which the respondent said could be *"clearly"* seen in the CCTV footage, implying that it was a closed fist. When it was put to the respondent that the punches delivered to the victim's head and face were *"clear strikes"* and that the victim had received deafness to his ear, 10 stitches on his head and two separate injuries as a result, the respondent remarked *"[h]e came after the wrong person"*. The respondent insisted that the gardaí's suggestion that there was a knuckle-duster involved was mere *"opinion"* and that in any event *"the footage was too blurry"* to tell.

The respondent's personal circumstances

15. Garda Cusack confirmed that the respondent was born on the 18th of November 1996, making him 25 years of age at the time of sentencing. Garda Cusack confirmed that the respondent had one previous conviction for possession of an article, the offending occurring approximately 2 years prior to the events of the present case on the 11th of January 2017. That conviction, the date of which was the 5th of December 2018 or approximately three weeks prior to the incident giving rise to the charges in the present case, was for possession of a knife. For that offence, the respondent received a community service order of 100 hours in lieu of a three months' custodial sentence. Garda Cusack was unable to inform the sentencing court of the circumstances under which the respondent was convicted of this earlier offence.

16. It was submitted to the sentencing court that the respondent was remorseful. His counsel asked the court to note that in the probation report the respondent is recorded as accepting that he was the aggressor, and it was said that he wished to apologise both to the court and to the victim. Counsel further indicated that the respondent accepted the finding of the jury in relation to the knuckle-duster.

17. The respondent was supported in court at the sentence hearing by two of his aunts, his grandmother, and his partner. His counsel described how the respondent has *"a strong family unit behind him, notwithstanding the fact that he lost both parents"*. Counsel described how the respondent's father, a heroin addict, passed away through opiate addiction when the respondent was 10 years of age. He then described the respondent's mother as having "drifted away into the system" and informed the court that the respondent did not have any contact with her and had not had for *"several years"*. The respondent, his counsel noted, had spent *"the vast majority of his life up until the age of 18"* in foster care but that for a two-year period between the ages of 14 and 16 the respondent had managed to get back with his grandmother. As such, the respondent had, in his youth, spent time with various foster parents and foster families, and had moved from home to home. The respondent had no relationship with his younger siblings, his counsel stating that *"[h]e hasn't ever had that opportunity"* but that the family members with whom the respondent is in contact are *"very supportive"* and had provided the court with some testimonials to assist the court in forming *"a rounded view of Mr Buggy"*. Counsel also informed the court that an aunt, to whom the respondent was very close, passed away relatively close to the time of the offending.

18. It was conceded on behalf of the respondent that he had *"alcohol issues"*, that he was *"abusing and overusing alcohol"*, which had played out in the incident involving the victim. It was submitted that *"[h]e was in a bad place at the time using various substances, had anger issues and was in with a crowd of friends, who he's no longer in company with"*. It was submitted that the respondent now had his alcohol issues *"under control"*, and that he had not taken a drink since Christmas Eve of 2018 when the incident occurred.

19. The respondent's counsel submitted that the respondent had been progressing himself in terms of education and was in employment with a civil engineering company, rising up

the ranks from an entry-level position in construction to a foreman, a *"position of responsibility"*. A testimonial from the civil engineering company was submitted pointing to the respondent's prospects, and stating that the company holds the respondent *"in good stead"* and that they *"are very happy with his progress"*. Counsel submitted that this was *"testament to a young man with very challenging personal and social circumstances that he's actually got to that position in terms of employment."* Later on, at the sentencing hearing, counsel on behalf of the respondent submitted that the effect of a custodial sentence *vis-à-vis* the respondent's employment would be such that he would lose his job. He further indicated that the respondent was *"paying his own way"* in life, renting a property in Celbridge, County Kildare and financially contributing to his family members from his wages. It was submitted that the respondent *"is becoming a productive member of society, and contributes in that regard."*

The Probation Report

20. In the probation report, compiled by a Mr. Dermot Lavin, Probation Officer, and signed the 27th of May 2022, it is indicated that the respondent had accepted full responsibility for the s. 3 assault but continued to dispute that he produced an article during the altercation. The respondent acknowledged his wrongdoing and accepted that he was the aggressor in the incident and that the victim had received injuries. The respondent indicated a willingness to offer compensation to the victim.

21. The probation report detailed that the respondent is known to the Probation Service since 2018, he having been referred to the Probation Service previously in relation to his previous conviction for possession of a knife. The respondent's risk of reoffending was assessed as being moderate, and prevalent risk factors for him included substance misuse, violent offending, and his unstable family background.

22. The probation report noted that the respondent resides at a private rented property at an address in Celbridge, County Kildare. It detailed a *"turbulent"* upbringing involving much of his adolescence being spent in the care of the state. The probation report noted that the respondent had spent a period residing in Carlow, where he is originally from, with his parents. He is the eldest child of 4 siblings. The report noted that the respondent's father had struggled with addiction and had passed away when the respondent was 10 years old. The report also understood that the respondent's mother also struggled with heroin addiction at that time, to such an extent that Tusla had deemed her *"incapable of adequately caring for her children"*. The report described how the respondent had spent a number of years in foster care, initially with an aunt for a brief period and then with various families in counties Leitrim and Longford. The report detailed how the respondent recalls having *"a reasonably pleasant"* time in foster care but that he does not retain contact with any of his foster families. The report described how the respondent does not have a positive relationship with most of his family but that he remains in contact with his grandmother whom he visits regularly. The report described the respondent as being in a 3-year relationship with a female from Celbridge.

23. The probation report further describes the respondent as having been educated to at least a Junior Certificate level, having completed those examinations while attending at a

secondary school in Longford. Upon leaving school, the respondent trained as a hairdresser/barber and worked in that field for a number of years before starting a job with a civil engineering firm. The report detailed that the respondent had progressed in the civil engineering industry, having attained the rank of foreman. His counsel submitted at the sentencing hearing that the respondent's *"actually living quite a steady life with his partner, and his job, and trying to keep his head down, and keep himself above water."*

24. The probation report described the respondent as having used cannabis *"on a consistent basis"* since his early teenage years and that for a period in his late teens / early twenties, the respondent also used cocaine *"on a regular basis"* but that he had ceased to use cocaine in recent times having distanced himself from friends who use the drug. Nevertheless, the probation report described the respondent's continued use of cannabis as being *"of concern"*; the respondent described daily use of cannabis and a weekly expenditure of €100 on the drug. The report noted that the respondent has recognised that his use of cannabis is problematic and that, upon reflection, he had expressed an intention to seek assistance in addressing his drug problem.

25. The probation report concluded by describing certain desirable conditions in the event of a community-based sanction, including inter alia attendance for therapeutic intervention in relation to substance misuse and attendance for anger management as directed.

26. It was subsequently clarified at the sentencing hearing that the respondent does now accept the jury verdict in relation to the s. 11 offence, and is no longer disputing that he struck the victim with a knuckle-duster.

The issue of compensation

27. At the sentencing hearing, the respondent was willing to offer €1,000 as a figure of compensation to be made available to the victim as a *"token of remorse"*. This was described by the sentencing judge as *"insulting"* in circumstances where the respondent comes to court as somebody who is a drug addict and is making no effort to remain off cannabis, where he comes to court as somebody who used a knuckle-duster and inflicted fairly serious injuries on an innocent man who was *"completely faultless in relation to the matter."* The sentencing judge later described the proposed sum of compensation as not a reasonable offer and as *"adding insult to injury"*. The sentencing judge accordingly did not see any advantage to an adjournment to allow the respondent to put that sum of money together. Nevertheless, as will be seen below, the sentencing judge imposed as a condition of the suspended sentence that the respondent had to pay €2,500 to the victim within two years of the date of sentence.

Sentencing Judge's Remarks

28. The sentencing judge considered the present case to be a *"borderline"* one in terms of whether a custodial sentence to be served was required, observing that, notwithstanding the respondent's past and the prospect of him putting it behind him, the respondent nevertheless came to the court with an ongoing drug use problem. In relation to the s. 3 assault count, the sentencing judge nominated a headline custodial sentence of 4 years' imprisonment, which figure fell at the higher end of the available range, reflecting the use

of a knuckle-duster in the course of committing the assault and the injuries inflicted on the victim, namely the stitches, the burst eardrum, the deafness and the other injuries described in evidence.

29. Mitigating factors considered by the sentencing judge included: the respondent's remorse; his acceptance of the jury's verdict; his overcoming of his alcohol addiction; his employment status as a foreman; his distancing from his circle of friends, and; that the probation report, notwithstanding the respondent's continued use of cannabis, talked about putting him under supervision into the future. From the headline sentence, the sentencing judge deducted 2 years, amounting to a 50% deduction from the headline sentence, to account for the respondent's background resulting in a two years' custodial sentence which the sentencing judge deemed *"appropriate"*.

30. The sentencing judge further imposed, in relation to the s. 11 production of an article offence, a custodial sentence of 12 months' imprisonment, to run concurrent with the custodial sentence imposed in relation to the s. 3 assault, the lesser sentence being subsumed by the greater sentence which was, in effect, a global sentence intended to reflect the totality of the offending.

31. The sentencing judge then considered whether the global sentence of 2 years' imprisonment should be suspended. He considered the continued use of cannabis as the main concerning factor in that regard but also had regard to the fact that there was some evidence that the respondent had come to Garda attention following the incident and the fact that he had a previous conviction for the possession of an article. Ultimately, he exercised his discretion in favour of suspending the entirety of the sentence.

32. The sentencing judge, in deciding to suspend the global 2 years' custodial sentence, remarked:

> *"It seems to be that sometimes people, if they get a break in life, they might take it and the way I look at it, if I suspend the two years' imprisonment on conditions, then if there's a breach of those conditions, I'm back to square one and I can impose the sentence of imprisonment. If there's no breach of those conditions, it seems to me that somebody can go on and lead a useful life and make something of their life into the future and put all their past behind them. [...] it's a win/win from a Court's perspective in a case like this."*

Conditions attaching to the suspended sentence

33. The sentencing judge, in suspending the global 2 years' custodial sentence for a 4-year period, attached certain strict conditions which included *inter alia*:

    1. That the respondent places himself under the probation and welfare service;

    2. That the respondent attends all appointments with the probation service;

    3. That the respondent informs the probation service of any change in his address or contact details;

4. That he attends for therapeutic intervention in relation to substance misuse;

5. That he attends for any anger management intervention as may be directed by the probation service;

6. That the respondent is to be completely free of cannabis and all intoxicants for the four-year period of suspension and that his performance in this regard will be reviewed by the probation service including by way of regular testing to ensure that he is free of cocaine, cannabis and alcohol.

7. That the respondent pays a compensatory sum of €2,500 to the victim within two years of the date of sentencing (30th of May 2022). (According to the transcript, this condition was imposed on the basis that the money paid is the respondent's and not his family's).

Notice of Appeal:

34. In a Notice of Application for Review of Sentence, the Director advances the following grounds:

"1. The Learned Sentencing Judge erred in principle in imposing a sentence that did not adequately reflect the nature of the charges and the consequences of the acts of the Respondent and their effect on the victim.

2. Further, or in the alternative, the Learned Sentencing Judge erred in principle by applying insufficient weight to a number of important aggravating factors surrounding the commission of the offences including:

i) The use of a knuckle duster by the Respondent in what was an entirely unprovoked assault on the victim, in the early hours over the Christmas period and in a public place;

ii) The Respondent's previous conviction imposed for an offence of possession of a knife in a public place, imposed shortly before the Respondent committed this offence.

3. Further, or in the alternative, the Learned Sentencing Judge erred in principle in the manner in which he structured the sentence imposed by applying undue weight to the mitigating factors such that were present which resulted in him failing to adequately reflect the seriousness of the offending behaviour before him."

Parties' Submissions

Applicant's Submissions

35. It should be stated at the outset that the applicant does not contest the 4-year headline sentence nominated by the sentencing judge. Rather,

"The overall contention being made by the DPP in the within appeal is that the ultimate determination to fully suspend the two year period of imprisonment was

without any real evidential foundation, and accordingly afforded undue weight to the mitigating factors."

36. The applicant submits that the suspension of the two-year period of imprisonment did not reflect the sentencing objectives of deterrence, both general and specific, nor did it reflect the actual nature of the offences and the consequences of same upon the victim. As such, the applicant submits that the ultimate sentence which was imposed *"deviated from the norm for such offending to such a degree that it was unduly lenient"*.

37. The applicant submits that the ultimate sentence was result of the cumulative effects of starting at the higher point on the scale of sentencing for this offence, deducting 50% from the headline and then further suspending the remainder in its entirety. This 50% deduction, the applicant submits, *"in and of itself amounts to a very generous discount for mitigation."*

38. Reviewing the mitigating factors as identified by the sentencing judge, the applicant submits that in respect of the respondent's remorse, while the respondent is entitled to credit for entering an early plea to the s. 3 assault, this was more than reflected within the 50% discount from the headline sentence of 4 years. However, in assessing this plea, the respondent submits that the following should also be borne in mind: the respondent's lack of cooperation and denials to gardaí; gardaí's difficulty in locating the respondent; the fact that the respondent produced a weapon during the assault, and; that it was only at the sentencing hearing that the respondent finally accepted the jury's verdict in relation to count no. 2.

39. In relation to the respondent's personal circumstances, the applicant submits that the respondent relied at sentencing upon testimonials by two of his aunts and his grandmother to the effect that he had a positive relationship with family, notwithstanding that the probation report before the sentencing court indicated that the respondent did not enjoy such a relationship with most of his family. The applicant further notes that the probation report placed the respondent in the moderate category of risk with prevalent risk factors including substance misuse, violent offending, and unstable family background. The applicant notes that the respondent offered no explanation for having committed the offence beyond his alcohol abuse, and that while the respondent had asserted that he had not taken a drink since the time of the offending, Garda Cusack in her evidence confirmed that the respondent had come to Garda attention for public order and drunkenness since. The applicant submits that *"[i]n any event it is difficult to see the consistency of any suggestion of gross intoxication with the deliberate act of arming himself in advance with the knuckle duster."*

40. In relation to the objective of incentivising rehabilitation, the applicant draws the Court's attention to the authority of *DPP v. Coughlan* [2019] IECA 173 in which this Court (Edwards J.) held that *"a real prospect of rehabilitation"* is required before an intervention *"going the extra mile"* to suspend a sentence on the grounds of *"rewarding progress in one's rehabilitation to date and/or to incentivise future rehabilitation"* can be justified. The applicant submits that in the present case, the sentencing judge went the *"extra mile"* by

generously discounting from the headline sentence but that there was no sound evidential basis for fully suspending the sentence. In particular, the applicant points to: the absence of material before the sentencing court outlining the respondent's current substance status other than self-reporting that he had ceased the use of alcohol and cocaine; the respondent's ongoing cannabis use; that the respondent had come to Garda attention; that the respondent had contested the production of an article count notwithstanding CCTV evidence depicting the respondent in possession of and using a knuckle duster during the assault, and; that the respondent had a relevant previous conviction.

Respondent's Submissions

41. The respondent submits that the application of, first, the aggravating factors in arriving at the headline sentence of 4 years and, second, of the mitigating factors in determining the discount from that figure was clearly set out in the reasoning of the sentencing judge. Furthermore, the respondent submits that the issue of whether to suspend the resulting sentence or not, or only part thereof, was determined by the sentencing judge by reference to certain mitigating factors (namely, the respondent's acceptance, albeit a belated one, of the jury's verdict, his progress in battling alcohol addiction, the respondent's employment and that he is making good progress there) and to certain aggravating factors (namely the respondent's continued use of cannabis, that the respondent had come to adverse Garda attention since the incident and that he has a prior conviction for possession of an article). The respondent submits that the sentencing court had evidence in the form of references from his employer confirming his progression and his promotion to the role of foreman, as well as testimonials from certain family members attesting to his family background. The respondent submits that in considering whether to suspend sentence, the sentencing judge considered both aggravating and mitigating factors and, in fact, applied different factors to this question than were originally applied in determining the length of the sentence. The respondent submits that the sentencing judge's decision to suspend the sentence for an extended period, rather than imposing an immediate custodial sentence, prioritised rehabilitation over deterrence, was entirely within the discretion afforded to the sentencing judge, and involved the imposition of strict conditions designed to counter the risks of the respondent re-offending.

42. In relation to the applicant's first ground of appeal, the respondent considers the applicant's reliance on the *"effect on the victim"*. The respondent submits that the effect on the victim is difficult to quantify in circumstances where no victim impact statement was tendered to the sentencing court, and was not tendered for reasons which, by the prosecution's own admission, were not related to the offending. Moreover, the respondent submits that it is apparent from the remarks of the sentencing judge that the medical reports and details of the injuries inflicted upon the victim were fully taken into consideration when setting the headline sentence.

43. In relation to first part of the applicant's second ground of appeal – insufficient weight afforded the use of a knuckle duster by the respondent in the assault – the respondent

submits that the production of an article was itself an entirely separate offence for which the respondent was separately tried and convicted. Moreover, the respondent submits that the sentencing judge specifically referred to the use of the knuckle-duster in setting the headline sentence "at the upper end" as one of 4 years. The respondent submits that to claim any further account of the use of the knuckle-duster would fall foul of the *"double-counting"* phenomenon warned against by O'Malley *et al*.

44. In relation to the second part of the applicant's second ground of appeal – insufficient weight afforded to the respondent's previous conviction – the respondent submits that this was considered as an aggravating factor by the sentencing judge when deciding whether to suspend sentence or not and that there was evidence tendered at the sentencing hearing that the respondent had suffered a bereavement close to the material time and that he kept company with a group of people from whom he has subsequently distanced himself.

45. In relation to the applicant's third ground of appeal – undue weight afforded to mitigation, insufficient weight afforded to aggravation – the respondent submits that the sentencing judge was entitled to apply his discretion in the manner in which he did, and that the transcript makes it very clear that the sentencing judge adopted a detailed and considered approach in weighing matters before him. The respondent submits that the respondent had lost the benefit of an early plea on count no. 1 by contesting count no. 2 and that the applicant cannot rely on the jury's swift determination of the respondent's guilt in relation to count no. 2. In this regard, the respondent draws the Court's attention to a principle originally enumerated by the Victoria Court of Appeal in *R. v. Gray* [1977] V.R. 225 and approved by the Australian High Court in *Siganto v. The Queen* (1998) 194 C.L.R. 656 that *"It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having present a time-wasting or even scurrilous defence."* The respondent also submits that the fact that count no. 2 was contested can be placed in additional context: that the respondent professed confusion as to the circumstances of the incident in the Garda interview, and that the respondent was significantly under the influence of alcohol the night of the offending which had resulted in memory gaps.

46. The respondent submits that the sentencing court had carefully considered a multitude of mitigating factors along with aggravating factors in electing to impose a lengthy period of suspension for the stated reason to allow the respondent to remain under observation and under threat of a custodial sentence. The multiple conditions of suspension of sentence were each carefully calibrated to apply to the specific circumstances of the respondent, allowing him the opportunity to progress his rehabilitation through employment, counselling and refraining from substance misuse but all under threat of imprisonment if he failed to do so.

47. In relation to the fourth and final ground of appeal – that the sentence imposed failed to adequately reflect the principles of specific and / or general deterrence – the respondent submitted that the sentence imposed was entirely within the range that might be

considered appropriate or reasonable for the offence and the offender. The sentencing judge, in imposing carefully selected conditions of suspension, as well as an unusually long period of suspension being double the sentence actually imposed, was not only correct, the respondent submitted, but acted well within the range of possible outcomes that should not be disturbed as being so far outside the accepted range as to amount to an error in principle. The respondent submitted that the goal of rehabilitation is of equal and often greater prominence in determining the appropriate sentence for a particular offender, and that this path weighed heavily on the mind of the sentencing judge when carefully considering the totality of the offence. The respondent draws this Court's attention to *O'Malley* paras. 35-09 to 35.10. The respondent also submits that the proportionality of the sentence as against the respondent's personal circumstances is also a material consideration, and he relies upon the dicta of this Court in *People (DPP) v. McCormack* [2000] 4 I.R. 356 in that regard.

48. The respondent submits that the suspension of a sentence cannot be considered in isolation to constitute undue leniency, as a custodial sentence can still be imposed. He relies on and draws this Court's attention to commentary in *O'Malley* at para. 22-19 in that regard:

> *"Part-suspension of sentence amounts to some mitigation but it must always be clear that it is not the same as a discount or reduction. The offender who breaches any of the specified conditions during the operational period will become liable to serve the suspended portion. If this should happen, the offender may be said in retrospect not to have received any real credit for mitigating factors."*

The respondent submits that the approach adopted by the sentencing judge, in first computing all the custodial sentence by setting a headline tariff and then accounting for mitigating and aggravating factors all before deciding whether to suspend the resulting custodial sentence, was correct having regard to approach described in *R. v. Mah-Wing* (1983) 5 Cr. App. R. (S.) 347 (which was endorsed in *People (DPP) v. Loving* [2006] IECCA 28).

49. The respondent submits that the lengthy period of suspension and the imposition of carefully selected conditions of suspension (which included conditioning the respondent to remain substance free for the duration of the period of suspension) was designed to address the purpose of protecting the community by assisting in the rehabilitation of the offender (as per *R. v. Zamagias* [2002] NSWCCA 17, para. 32). In this regard, the respondent draws this Court's attention to *O'Malley* at para. 6-03 wherein it is observed that rehabilitation and deterrence serve a common goal, that of crime reduction.

The Court's Analysis and Decision

50. Following the hearing of this application two days ago we indicated that we were of the view that while sentence in this case was lenient, perhaps very lenient, we were not persuaded that it was unduly lenient in the sense which the jurisprudence requires to be demonstrated by the applicant, namely that the sentence which was imposed represented

a substantial departure from the norm. We said that we would give our reasons later, and we now do so.

51. We regard it as significant that there is no quarrel on the part of the Director with either the headline sentence of four years, or indeed the straight discount for mitigation of two years leading to an initial post mitigation sentence of two years. For our part, we think she was right in accepting the propriety of the headline sentence and the said discount.

52. Counsel for the applicant has made it clear that the Director feels that where the sentencing judge did fall into error was in going further and then suspending the initial post mitigation sentence of two years in its entirety. The jurisprudence on undue leniency appeals, which has not been the subject of any controversy in this case, stresses that considerable weight should be attached to the stated reasons of the sentencing judge at first instance. We have therefore carefully considered the stated reasons of sentencing judge.

53. Having done so, we are satisfied that his sentencing judgment is cogent in its reasoning and that he makes it clear that he was deciding, in what he considered to be an appropriate case, to prioritise rehabilitation amongst the available, and in some respects competing, sentencing objectives. It seems to us that this was a legitimate exercise of his sentencing discretion. We are satisfied that in doing so he had regard to the public interest. Sentencing is not always about retribution, censure and condemnation, although they play their part. The encouragement of desistance is equally important, and sometimes more important. Moreover, desistance can be promoted either through deterrence, both specific and general, or through rehabilitation or the incentivisation of reform. If, in an appropriate case, an offender can be successfully encouraged and assisted to desist from offending in the future and to live a prosocial life, that is very much in the public interest. A custodial sentence to be actually served is not always required. The censure of society, and society's deprecation of offending conduct can, in appropriate circumstances, be marked by the setting of an appropriate headline sentence while at the same time the court can still facilitate reform and rehabilitation in the public interest by having recourse in the second stage of sentencing to a non-custodial sentencing option, such as the suspension of the sentence, or a portion thereof, upon appropriate conditions. It is very much a matter within a sentencing judge's discretion to determine, in the circumstances of the case before him or her, and bearing in mind the dual proportionality requirement to take account not just of the gravity of the offence but also to take account that the offence was committed by the offender in question in his or her particular circumstances, whether the custody threshold has been exceeded, and whether the offender requires to be subjected to actual deprivation of liberty, or a more merciful approach taken. In making that determination a sentencing judge must of course have regard to established sentencing principles and practice, and appellate guidance where it is available. There remains, however, considerable scope for the exercise of principled discretion. We consider that this was one such case.

54. In the present case the sentencing judge at first instance, in deciding to suspend the two-year post mitigation sentence that he had determined upon, upon stringent conditions, observed *"[i]f there is no breach of those conditions, it seems to me that somebody can go on and lead a useful life and make something of their life into the future and put all their past behind them."* Equally, however, he also observed that if there was to be a breach of conditions he would have the option of requiring the respondent to serve the full term of two years that had initially been suspended. In the circumstances, he concluded, *"it's a win/win from a court's perspective in a case like this."*

55. In the course of his submissions, counsel for the applicant placed reliance on this Court's judgment in *The People (Director of Public Prosecutions) v Coughlan* [2019] IECA 173. That was a case in which we emphasised the desirability that a court, which was considering suspending a sentence either in whole or in part, should have evidence to support a real prospect of rehabilitation, and we spoke of the desirability of there being a track record of achievement in that regard. In this case, however, there was in our view an evidential basis to support the court's intervention. We regard it as remarkable that the respondent, who has had immense adversities in his life, has managed nonetheless to overcome these to the point of being able to secure gainful employment with a civil engineering company, and to be progressing up the ladder of promotion in that employment to the point where he is now occupying a position of responsibility, namely the role of a foreman. That is no small achievement given his background and situation. We have been impressed, as clearly the sentencing judge at first instance also was, by the fact that his employer speaks so highly of him. It is true that he has not conquered all of his demons. His continuing use of cannabis is a matter of considerable concern, although the probation report indicates that *"he appears to have reflected on his drug use and gave a commitment to positively address same."* The regime constructed by the sentencing judge takes appropriate account of that, inasmuch as one of the conditions attaching to the suspension of the sentence was that he must attend for therapeutic intervention in relation to his substance misuse. We also think that it is significant that the sentencing judge included a further condition requiring him to attend for anger management intervention if required to do so by the probation service. There has been no application by the probation service to re-enter the matter arising from any concern that he is not keeping to the conditions of his probation.

56. There was also concern expressed at the sentencing hearing and reiterated before us that, although he has acquired no further convictions, he has come to some adverse Garda attention since the offending in this case, inasmuch as he is said to have been involved in public order incidents. His counsel sought to allay the concern of this Court and of the court below by suggesting that all of his offending/bad behaviour, i.e., the previous conviction for possession of a knife, the offences the subject matter of the present proceedings, and his subsequent involvement in public order matters, were all connected to a grief reaction associated with the death of the aunt with whom he was said to have been particularly close, following whose death he had sought solace in drugs and alcohol for a time, but it is said that he has moved beyond that. Certainly, the fact that he has secured good employment, and was and continues to be doing well in that

employment and is spoken of so highly by his employers as in the testimonial provided to the court, provided and still provides a basis for believing that that may be true.

57. The applicant also places reliance on the fact that he appears to have been given a chance in the past inasmuch as the sentence imposed upon him for possession of a knife, just weeks before the present offences were committed, had not involved custody but rather community service. It was urged that the fact that he offended again so soon after receiving a non-custodial sanction could hardly have inspired confidence in the sentencing judge that if he was given a further chance that he would take it. We do not lightly dismiss the concern that the applicant raises in this context. However, in fairness to the respondent, the precise circumstances in which he was found in possession of a knife are not known. Moreover, as previously alluded to, counsel for the respondent was stressing that there was a temporal relationship and a circumstantial nexus between that incident, and the present offending, and some subsequent involvement in public order incidents, on account of the aforementioned loss of the aunt to whom he was close and seeking temporary solace in substance abuse. We do not believe that such counter-indications as might have existed to the taking of a chance on this respondent were so strong as to have rendered it unjustifiable to do so. There is always a risk for a sentencing judge when he gives an offender a chance that the chance may not be accepted and that indeed it may be spurned. The sentencing judge has to weigh the pros and cons and exercise his best judgement in that respect. Ultimately it is a question of judgment and we are not prepared to gainsay or second-guess what was in our view a legitimate exercise of judicial discretion in this case. There was an evidential basis for doing what the sentencing judge did, and he provided cogent reasoning for doing what he did. While another court might not have shown the same level of leniency, that is not the test. As the eminent sentencing scholar, Prof Thomas O'Malley S.C. has observed:

> *"Experienced judges and other decision- makers may well make different choices in similar cases. Each choice may seem perfectly defensible when evaluated against the aims that were being pursued and the manner in which the particular facts were interpreted and prioritised. But wisdom and experience on their own, whatever their other virtues, seldom manage to produce results that are universally accepted as right – even by the equally wise and experienced."*
>
> O'Malley, T (2017) "Judgment and Calculation in the Selection of Sentence", 28 *Criminal Law Forum* 361 – 389.

58. It requires to be demonstrated that the sentence was a substantial departure from the norm. We are not persuaded that that is so.

59. In conclusion then, we believe that this was a very lenient sentence, but it was not an unduly lenient sentence. It was also unquestionably a compassionate and merciful sentence, but one capable of being justified on the evidence. It is important to state that the fact that the sentencing judge saw fit to adopt such an approach in no way diminishes or undermines the suffering of the victim at the hands of the respondent, which the sentencing judge fully acknowledged and which he very much took into account, and

appropriately so, in locating the headline sentence in the high range for such offences. However, as Denham CJ has pointed out in *The People (DPP) v. M* [1994] 3 I.R 306, *"[s]entencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant"*, and that *"[s]entencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation..* The same learned judge again emphasised in *The People (DPP) v. M.S.* [2000] 2 I.R. 592 (601- 602) that, *"[s]entencing is a complex decision. It may involve aspects of retribution, deterrence, protection, reparation and rehabilitation"*. The unenviable job of a sentencing judge is to try to find the appropriate balance and that balance may vary from case to case according to the circumstances. In this instance the sentencing judge saw fit to communicate the necessary censure of the offender's undoubtedly disgraceful behaviour by the setting of a substantial headline sentence while at the same time he sought to promote the offender's rehabilitation and reform in the overall interests of society by ultimately having recourse to a non-custodial option. His approach was a considered and carefully calibrated one and, as we have stated, we are satisfied that it was within the range of his discretion.

60. It remains to be seen whether this respondent was worthy of the chance that he has been given but it has been emphasised to him both by the sentencing judge at first instance and by this court that he is extremely fortunate in avoiding having to serve a prison sentence on this occasion and that if he spurns the second chance that he has been given on this occasion there will be little prospect of him being treated leniently again in the future.

61. The Director's application is refused.