UNAPPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Edwards J.

McCarthy J.

Donnelly J.

Neutral Citation Number: [2020] IECA 294

Record No: 19/2016

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

MUIRIS FLYNN

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 30th of October 2020.

Introduction

1. On the 30th of April, 2019, the respondent came before Roscommon Circuit Criminal Court and pleaded guilty to Counts No's 1, 2, & 3 on the indictment, being a count of dangerous driving causing serious bodily harm, contrary to s.53(1) and (2)(a) of the Road

Traffic Act, 1961 as substituted by s.4 of the Road Traffic (No 2) Act, 2011; a count of driving while exceeding the lawful alcohol limit, contrary to s. 4(4)(b) and 4(5) of the Road Traffic Act, 2010; and a count of driving without insurance, contrary to s. 56(1) and (3) of the Road Traffic Act 1961, respectively.

2. On the 8th of October 2019 the respondent was sentenced to imprisonment for four years on Count no 1, to date from the 11th of October 2019 with the final thirty months of the said sentence suspended. He was further sentenced to imprisonment for four months on Count No 2, to run concurrently with the sentence on Count No 1 and to date from the 11th of October 2019. The respondent further received the following disqualifications from driving, namely eight years to date from the 8th of October 2019 on Count No 1; three years to date from the 8th of October 2019 on Count No 2; and three years to date from the 8th of October 2019 on Count No 3. It was further ordered that the details of all three convictions and disqualifications be endorsed on the respondent's driving licence.

3. The applicant now seeks a review of the said sentence imposed on Count No 1 claiming that it was unduly lenient.

Factual Background

4. The court heard evidence from Garda Martin McTiernan that on the 24th of September 2017, at 9:30 AM, he received a report that a person had been seriously injured in a road traffic accident involving a cyclist at Doon, Boyle, County Roscommon. On arrival at the scene at 9:40 AM he noted that the weather conditions were dry but that the road surface was wet. There were two vehicles ahead of him on the road. He further noted that there were two females in cycling clothing lying face down on the road and roaring in pain. Their bicycles were smashed upon the road and there were bits of debris all over the road. An ambulance crew was in attendance and the witness went to the aid of the women on the ground in the first instance.

5. Garda McTiernan subsequently became aware of the presence of third female, who was also wearing cycling gear, at the scene and he established that her name was A O'C(1). Ms. O'C informed him that the two cyclists who were injured were her sister Ms. A O'C(2) and their friend Ms. C.C. She related that they were out cycling when her sister and their friend were struck from behind at speed by him maroon coloured Ford Focus, registration number 03LS611.

6. Ms. A O'C(1) pointed out a young male who was also at the scene as being the driver of the Ford Focus. He was standing beside C.C who was lying face down the road. Garda McTiernan spoke to the male who confirmed that he had been the driver of the vehicle in question. He gave his name as Muiris Flynn. Garda McTiernan made a demand for production of his driving license and certificate of insurance. In doing so he noticed a smell of alcohol from Mr. Flynn's breath and noted also that his eyes were glazed. He conducted a roadside breast test and the result was a fail. Garda McTiernan then arrested Mr. Flynn and he was conveyed to Carrick on Shannon Garda station. At Garda station Mr. Flynn provided to breath specimens which were analyzed using an Evidenzer machine. They each yielded a reading of 80 µg of alcohol per 100 mL of breath. This was nearly four times the legal limit for an unspecified driver, the limit being 22 µg of alcohol per 100 mL of breath. As the reading was above 67 µg of alcohol per 100 mL of breath it would attract a mandatory three-year disqualification from driving. Arising from the evidence provided by this breath analysis the respondent, Mr. Flynn, was charged with an offence contrary to s. 4 of the Road Traffic Act 2010.

7. The respondent produced what initially appeared to be a valid policy of insurance. However, subsequent inquiries with the insurance company indicated that the policy did not cover him on the occasion in question. The policy of insurance, which was current, had been issued in respect of a vehicle that he had previously owned but had disposed of it prior to the

accident. The maroon Ford Focus belonged to his father. While the policy would have covered him to drive any vehicle not belonging to him if he had retained ownership of the vehicle to which the policy related, he was no longer covered by it in circumstances where he had ceased to be the owner of that vehicle. The respondent offered the explanation to Gardaí that after he had transferred ownership of the vehicle to which the policy related to his girlfriend, he had simply overlooked requesting his insurer to transfer the insurance cover which his motor insurance policy offered to his father's old car. i.e., the maroon Ford Focus, which he would now be driving.

8. A statement was taken from Ms. A O'C(1) in which she described the clothing being worn by her sister and her friend. Her sister's gear was bright, white in colour with yellow fluorescent socks half way up her legs. Her friend Ms. C. was wearing a fluorescent orange jacket.

9. The accident had happened after a bend leading on to a long straight stretch of road. It was a narrow country road governed by an 80 km/h speed limit. According to Ms. A O'C(1) the three cyclists were proceeding in single file on the left-hand side of the road near the verge and were a good distance from the bend behind them when suddenly the sound of car tires skidding on the road could be heard coming from behind them. She was at the back of the group and glanced over her shoulder and saw the respondent's car skidding uncontrollably. It appeared to be going extremely fast and to be out of control. When she looked back front of her she saw another car, silver grey in colour, coming towards them in the opposite direction. In those circumstances unless the skidding car behind them could stop in time it was going to collide with them or collide head-on with the oncoming car. Ms. A O'C(1) could feel the draught from the respondent's car as it passed close by her, narrowly missing her. However, then it collided directly with Ms. C.C's bicycle flinging her body straight up into the air in the process, before proceeding on to collide in turn with Ms. A

O'C(2)'s bicycle, again flinging the rider's body into the air and in the direction of the embankment at the side of the road. The car continued skidding for some distance after it had collided with the two cyclists.

10. As Ms. A O'C(1) went to the aid of her two injured fellow cyclists the respondent got out of his vehicle. Ms. A O'C(1) recognized him as being Muiris Flynn, and he looked at her with his arms outstretched and gestured in an apologetic manner and mouthed the word 'sorry'. Ms. A O'C(1) asked him if he had been drinking, because she could get a smell of alcohol from him, and he said 'Yes' and nodded his head.

11. A statement was also taken from a Ms. M.M. who was a passenger in the silver grey vehicle that had been traveling in the opposite direction to the cyclists. She described observing three cyclists citing in single file on the opposite side of the road coming towards her. She then saw a small dark red card from over the hill, and she said to her husband, *"Oh my God, he's going too fast"*. Ms. M then related that, *"I saw the driver of this car drive onto our side of the road, then saw this car swerve and skidded back onto his side of the road."* She felt that the car was out of control at that stage. She saw it mount the grass verge on his side of the road and saw the car crash into the cyclists.

12. The court heard that a forensic collision inspector had examined the scene in the aftermath of the accident. He located two tires skid marks on the left-hand side of the road which travelled towards and in onto the grass verge. He measured the inner tires skid mark at 5.4 m in length on the road surface and a further 36.3 m along the grass verge. The road itself was 5.3 m in width from yellow line to yellow line. The road was straight in character with a slight incline. He computed that the minimum speed of the vehicle driven by the accused at the start of the skidmark on the road surface was 59.9 km an hour, which was under the legal speed limit.

13. The respondent was arrested on the 14th December 2017 for the offence of dangerous driving causing serious bodily harm and was conveyed to Castlerea Garda station where he was detained and interviewed. Nothing of evidential value emerged from those interviews. However, he subsequently pleaded guilty on the 30th of April 2019, which was the second arraignment date in these proceedings. This was accepted to be an early plea although not a plea at the earliest possible opportunity. He did not plead guilty on the first date that the matter was before the court because his legal team was still awaiting an engineer's report.

The impact on the victims

14. Medical reports detailing the physical injuries suffered by C.C and A O'C(2), respectively, as initially assessed were read into the record. In addition, victim impact statements were received from both of those injured parties. A O'C(1) did not provide a victim impact statement or give evidence in relation to the impact on her. The court below was required in the circumstances, and indeed this court will be similarly required should it necessary for us to proceed to a resentencing, to have regard to the provisions of s. 5(4) of the Criminal Justice Act 1993 as substituted by s. 4 of the Criminal Procedure Act 2010, which provides:

> "Where no evidence is given pursuant to subsection (3)" [i.e, concerning the impact on a victim] "the court shall not draw an inference that the offence had little or no effect (whether long-term or otherwise) on the person in respect of whom the offence was committed or, where appropriate, on his or her family members."

15. It is convenient to deal in the first instance with their respective physical injuries as disclosed in the medical reports.

C.C

The court was furnished with a medical report from Dr Kieran Cunningham, Consultant in Emergency Medicine at Sligo University Hospital, dated the 28th of December 2017, which stated:

> *"At the scene, the ambulance service found Ms. C. in the middle of the road complaining of pain in her back and left hip. She was immobilised with a cervical collar and vacuum mattress, and transported to the Emergency Department of Sligo University Hospital. She was in a lot of pain and given morphine and fentanyl on route.*
>
> *On arrival in the Emergency Department, Ms. C. was alert and her vital signs were reported as pulse of 72 beats per minute, blood pressure 145 over 83 and respiratory rate of 30 per minute, the Glasgow coma scale of 14 out of 15. She had an obviously deformed left leg with poor peripheral perfusion, and had abrasions on her chin, lower back and left leg.*
>
> *Ms. C. was managed according to standard Advanced Trauma Life Support protocols and was given transexamic acid, tetanus toxoid and further morphine and intravenous fluids. An x-ray of her pelvis confirmed a dislocated left hip, and this was reduced under intravenous sedation. I then organised CT scans of her head, neck, chest, abdomen and pelvis. The scans of her brain, neck, chest and abdomen were clear. CT of the spine showed a comminuted burst fracture of T12, and a minimally displaced fracture of her right L1 transverse process. A moderate left iliopsoas muscle hematoma was also noted.*
>
> *Ms. C was then admitted to hospital … . Her case was initially discussed with the spinal unit in the Mater Hospital. She was accepted for surgery and was put on the*

waiting list until a bed became available. She remained in Sligo Hospital and her spinal fracture was treated with a brace, and she was maintained in full spinal precautions. She required regular painkillers during her stay, and had further scans of her spine. On the 4th of October of 2017, a bed became available in the orthopaedic unit in the University College Hospital, Galway, and Ms. C. was transferred there for her spinal surgery under the care of Mr Aiden Devitt.

Injuries sustained:

1. *Left hip dislocation requiring relocation in the Emergency Department under procedural sedation.*
2. *Unstable fracture of the 12th Thoracic Vertebra requiring transfer to University College Hospital Galway for spinal surgery.*
3. *Stable fractures of transverse process of first and second lumbar vertebrae on the right.*
4. *Soft tissue injuries"*

A O'C(2)

Dr Cunningham also provided a report, which was dated the 5th of January 2018, in respect of A O'C(2), which stated:

"[Ms O'C] was immobilised by the ambulance service with a cervical collar and vacuum mattress, and transported to the Emergency Department of Sligo University Hospital. She was given some Paracetamol, and Ibuprofen en route for the pain.

On arrival at the Emergency Department, she was alert and her vital signs were recorded as a pulse of 72 beats per minute, blood pressure of 100 over 68, with a respiratory rate of 20 and a Glasgow coma scale of 15. She was complaining of pain

in her back, right upper abdomen, both knees and right ankle. She had abrasions on her forehead, face, both legs and hematoma at the back of her head.

Ms O'C was managed according to standard Advanced Trauma Life Support protocols and was given transexamic acid, tetanus toxoid and further morphine and intravenous fluids. I then organised CT scans of her head, chest, abdomen and pelvis. The scans confirmed significant pelvic fractures, with a displaced fracture of her right sacral wing and bilateral pubic rami fractures. There was an associated retroperitoneal haematoma and a fracture of the right transverse process of the fifth lumbar vertebra. The CT scan of her brain showed a focal area of high density in the left internal capsular area. The abdominal CT scan showed an area of enhancement on the posterior aspect of the liver and significant soft tissue haematoma on the left flank. Ms O'C also had x-rays of her left shoulder and right ankle and these were clear. An x-ray of her right leg and knee showed a transverse fracture of the proximal shaft of the right fibula.

Ms O'C had a lot of pain in her abdomen, and her blood pressure was low. She received fluids for this and was also seen by [an orthopaedic surgeon]. As her most serious injuries were orthopaedic, she was later admitted to the intensive care unit for ongoing monitoring under the care of [a consultant orthopaedic surgeon]. She remained in the intensive care unit on strict bed rest until her transfer to the orthopaedic ward on the 28th of September 2017. Her case was discussed with the pelvic orthopaedic surgeons in Tallaght Hospital, and she was transferred there for pelvic fracture surgery on the 3rd of October 2017.

Injuries sustained:

1. *Major pelvic fracture with displacement of the right sacral wing and bilateral pubic rami fractures. Subsequently transferred to Tallaght hospital for surgical fixation.*
2. *Associated Retroperitoneal Hematoma with significant blood loss requiring blood transfusion while in ICU.*
3. *Fracture of the right transverse process of the 5th lumbar vertebra.*
4. *Blunt abdominal injury with significant pain. Area of enhancement seen on the posterior aspect of the liver on CT scan possibly due to bruising.*
5. *Minor head injury with focal area of high density in the left internal capsule noted on CT possibly due to bruising.*
6. *Undisplaced fracture of the proximal 3rd of the right fibula.*
7. *Soft tissue injuries with abrasions to the face, forehead, and both lower limbs."*

16. In her victim impact report, A O'C(2) describes how she had had a first baby just ten weeks prior to the accident. She described her physical injuries and how she received special treatment for her broken pelvis at Tallaght hospital. Her pelvis was pinned back together during surgery, following which she was confined to a wheelchair for ten weeks. She had an external fixator, around her pelvis and open wounds on her skin where the frame attached to her bones. She was greatly distressed at being unable to feed her baby or to hold her for any length of time or to do any of her daily care or even to play with her. Further, she was unable to care for herself and relied on her mother and husband for assistance. Her mood was really low during this time. She had to sleep alone on her back for five months, and for three months she was unable to get in and out of bed herself. Ms. A O'C(2) is a physiotherapist by profession and knows the importance of rehabilitation. She worked hard at her rehabilitation and by the February following the accident she was able to walk unaided which meant that

she could finally carry her baby she walked daily to try to get some fitness and to get more energy. It was hard, painful and uncomfortable but she persevered with. She has returned to cycling which she had loved but is much more cautious now. She does not cycle on secondary roads and fields the collision has left her and more nervous, apprehensive cyclist. Although she has competed in races since the accident she does not have the fitness she used to have. Ms. A O'C(2) was off work for a year and when she returned to work she could only do so in a less physically demanding position than she had previously had, and working limited hours. She has struggled with the demands of her work and has not yet returned to her previous level of work. She has since had a second baby but found the pregnancy and recovery post baby to be much harder as a result of her injuries. She says that pain, altered sensation, physical limitations, negative emotions and physical scars are all there to remind her every day of what happened.

17. A lengthy victim impact statement from Ms. C. was read into the record. She was not well enough to do so herself. In summary, she describes her recollection of the accident and her great distress and significant suffering in the immediate aftermath of it. She describes the treatment and care she received in Sligo University Hospital and following her subsequent transfer to Galway University Hospital, where it was initially planned that she would undergo an operation to address her T12 fracture, and her disappointment when it was subsequently determined that she was not medically suitable to undergo the planned operation. She describes her pain and physical debility at this time, and the distressing feature that she had become incontinent due to her injuries. She was discharged from Galway University Hospital after ten days as an in-patient there and went to live with her mother a short distance away, as she was not physically able for the journey back to Carrick on Shannon, or to look after her children or to lift them. She was unable to stand at this point in time for more than two or three minutes.

18. Ms. C. described how her elderly recently widowed mother had effectively become her carer, and how she only saw her husband and children and weekends. She described how distraught both she and they were at the separation, and her guilt for not being physically able to cope with them when she did see them and for the separation. Her independence was lost as she needed help with everything from getting up out of bed, to toileting, to dressing and with all aspects of hygiene. She was unable to shower for months. All this had a negative impact on the relationship with her husband and her family. She feels that her husband and herself have drifted apart, and that her children have developed a separation anxiety. She essentially grieves for her children, particularly her little girl who was only a toddler and who she could not lift, cuddle or change. She feels that her identity has been taken away from her and that she has gone from being an independent young woman both physically and financially to a now dependent woman who relies on the generosity of others.

19. Ms. C. describes how she had been a secondary school teacher prior to the accident and had loved her job. She had had ambitions to progress in her career further and had applied for a post of responsibility. She feels that that has all been taken away from her. It is her goal to return to work but believes she has a lot more healing to do physically and psychologically before she would be able to achieve that goal. Ms. C. describes how sport and fitness had always been a huge part of her life. However, the injuries that she sustained in the accident have prevented her from returning to sport and she is denied the physical, psychological and social benefits benefits that participation in sport can give you.

20. Ms. C. relates that she eventually returned home during the January following the accident and was very unsettled due to the disruption to their family routines consequent upon her physical injuries. She also states that psychological scars still haunt her. She is left with the deformity of her spine. Her back is bent inwards and she very self-conscious of it. She has numerous scars on her body and has ongoing pain in her back, neck and shoulders.

She has daily dizzy spells and headaches which can lead to a feeling of heavy arms which can last for hours at a time. She has increased sensitivity of her scalp and experiences tinnitus. She has difficulty in concentrating and her memory is impaired. She suffers from chronic sleep disturbance. She has bilateral knee pain and continuous to have bladder incontinence which requires her to wear sanitary protection. She has significant restriction of movements and can only stand for about ten minutes before being required to sit down. This inhibits her ability to attend her son's football matches, and other social events. Her days are filled with medical and therapeutic appointments in an effort to progress her recovery. She has been in receipt of extensive physiotherapy. She is also attending counselling for post-traumatic stress disorder and is on antidepressants. She is unable to drive long distances and must be driven to her appointments. She has had to take out a loan to pay for child care and the family has experienced financial difficulty due to the loss of her income and the fact that they are now solely dependent on her husband's income. Her husband has had to obtain work many miles away, leaving Ms. C. to have to cope with their three children while still recovering herself from her injuries. She feels there is no escaping from the accident and she cannot see life with herself, her husband and her children as ever being the same again.

The respondent's personal circumstances

21. The respondent was born on the 18th of July 1989 and accordingly was aged twenty-eight at the time of the accident. The evidence before the court below was that he was an electrician with Irish Rail and had no previous convictions. The court was supplied with numerous very positive testimonials concerning the respondent testifying to his personal integrity, his kind and caring disposition, his good work ethic, and his participation in sporting activities, community activities and charitable work.

22. Although for understandable reasons they were not willing to accept it, the respondent offered an apology for his actions to all three victims through his counsel. He expressed deep

regret for the decision that he made that morning to drive. He acknowledged that it was careless and reckless of him to get behind the wheel of a car in the condition that he was in. He maintained that it is a morning that will stay with him for the rest of his days and that, while he could not change what he had done, he wished to assure them that he will never make the same mistake again. He stated that he could not imagine what he had put them through, and their loved ones, but hoped that they might achieve recovery in the fullness of time and eventually be able to proceed, however painfully and slowly, with their lives. This apology was accepted by the sentencing judge as being a genuine expression of remorse.

23. The sum of €12,000 was offered as a token or gesture intended to reflect the respondent's remorse in these criminal proceedings. The victims did not feel able to accept this.

The sentencing judge's remarks

24. The sentencing judge said that he had no doubt that the respondent did not set out with the intention of harming anyone on the date in question. However, there had been a want of care, and serious consequences had followed, and the legislature had said that that was a crime. He referred to the injuries to both Ms. C. and Ms. A2 O'C, to the fact that their injuries had each been "life-altering", and to the fact that neither had yet achieved a full recovery.

25. The sentencing judge alluded to the fact that a number of comparators had been placed before him by defence counsel in the course of his plea in mitigation. These had included *The People (Director of Public Prosecutions) v Kelly* [2015] IECA 250*; The People (Director of Public Prosecutions) v Power* [2016] IECA 326; and *The People (Director of Public Prosecutions) v Kearney* [2016] IECA 394. The sentencing judge, while saying that he would consider those, stated that he would also have to have regard to the case of *The People (Director of Public Prosecutions) v O'Shea* [2017] IESC 41, which required him to look at the culpability of the offender and assess the level of it. In that regard the respondent's

decision to drive when he knew and had to have known that he was still affected by alcohol indicated a high level of culpability which, in the judges view, tended to move the matter into the higher ranges of penalties available for an offence of careless driving causing serious injury.

26. The sentencing judge was further of the view that the respondent's culpability was added to by the fact that he was not able to stop his vehicle safely within the distance that he could see to be clear. This was so, notwithstanding that the respondent was driving 20 km below the applicable speed limit. The accident was not caused by sudden emergency which the respondent could not have anticipated. The three victims were lawfully cycling along the roadway in a safe manner as was their entitlement. The judge said, *"I have no doubt that Mr Flynn's speed wasn't appropriate for the situation that he faced coming around the bend, and whether he was under the speed limit are not that doesn't mean that his speed wasn't excessive in the circumstances that applied on the roadway on the day; including the damp, it was a damp day, with all the effects that has for braking distance and those kinds of matters"*

27. In the judge's view a further aggravating feature was the vulnerability of the three cyclists and the respondent's inability, because of the manner of his driving, to react appropriately to their presence when there was another car coming in the opposite direction.

28. The sentencing judge accepted that there had been no pattern of reckless or careless driving, and that the respondent had no previous convictions for any type of road traffic offence or indeed any offence. The was no evidence that prior to the accident he was driving in some extremely dangerous way. Further, he had stayed at the scene and had offered such assistance as he could. He had also expressed remorse. He had not sought to lie about the circumstances of the accident, nor had he attempted to flee the scene, nor had he sought to make himself immune from Garda investigation.

29. In the sentencing judge's view a headline sentence of four years imprisonment was appropriate in the circumstances of the case in respect of the offence of dangerous driving causing serious injury. He then proceeded to examine what mitigating circumstances existed in the case. He noted the early plea, the absence of any previous convictions, the fact that Mr. Flynn had been of positive good character and a productive member of society prior to the accident, and his co-operation with the Garda investigation. He further noted the apology and said that the respondent was entitled to some credit for the fact that he had expressed remorse and had offered a gesture of remorse, albeit that these were wholly disproportionate to the amount of harm suffered by the two victims, and that the victims had, understandably, not felt able to accept them. Although it had been urged upon him that the respondent's relative youth and immaturity was a relevant mitigating factor, the sentencing judge was not prepared to have regard to that. Taking all relevant mitigation into account the sentencing judge was disposed to suspend the last thirty months of the four-year headline sentence that he had nominated, so that *"the effective sentence will be 18 months' imprisonment"*. The sentencing judge then went on to impose the lesser sentences mentioned at the beginning of this judgment in respect of the other counts on the indictment and to impose the disqualifications and endorsements also previously referred to.

The grounds on which review is sought

30. The applicant's Notice of Application seeking a review pursuant to s. 2 of the Criminal Justice Act 1993 of the sentence of four years imprisonment with thirty months suspended imposed in respect of the offence of dangerous driving causing serious injury is sets forth the following grounds:

1. The sentencing judge erred in principle by fixing the 'headline indication' at a point on the spectrum which was inconsistent with the gravity of the offence.

2. The sentencing judge erred in principle by applying insufficient weight to a number of important aggravating factors surrounding the commission of the offence including the fact that:
    a) the offence involved driving while exceeding the lawful alcohol limit by almost four times;
    b) the offence involved driving while there was not in place a valid policy of insurance;
    c) the offence involved driving at an excessive speed having regard to the nature and condition of the road; and
    d) the offence resulted in very serious consequences to injured parties in circumstances of the high degree of culpability on the part of the respondent.
3. The sentencing judge erred in principle in the manner in which he structured the sentence imposed by applying undue weight to the mitigating factors present which resulted in him failing to adequately reflect the seriousness of the offending behaviour before him.
4. The sentencing judge erred in principle in circumstances where the sentence imposed failed to adequately reflect the principles of specific and/or general deterrence.

Submissions

31. Quite lengthy written submissions have been filed on behalf of the applicant. In large measure these simply rehearse the evidence, isolate aggravating and mitigating factors and reiterate the complaints made in the grounds of appeal. Much emphasis is placed on the extent of the harm done to Ms A O'C(2) and Ms. C., respectively, and on the respondent's culpability, in circumstances where the applicant contends that the headline sentence

nominated failed to adequately reflect the gravity of the case. The applicant complains that the sentencing judge inappropriately located the headline sentence (in respect of which he nominated a figure of four years' imprisonment) at "the lower end of the mid-range", on the basis that the range runs from non-custodial disposals up to a maximum of ten years' imprisonment. The applicant contends that in all the circumstances of the case a higher headline sentence was warranted, and she seeks to support this case by reference to comparators offered in the final pages of the document.

32. We were referred to *The People (Director of Public Prosecutions) v. Moran* [2019] IECA 5, a case which concerned an appeal against the severity of a sentence of six years' imprisonment with the final year suspended following a guilty plea to an offence of dangerous driving causing the death of a motorcyclist. The collision occurred after the appellant had pulled into the hard shoulder to make a phonecall. Once completed, the appellant swung to his right in an attempt to perform an illegal "u-turn" and drove into the path of the deceased's motorcycle. He left the scene on foot but was later found by Gardaí and arrested. He was almost three times over the lawful alcohol limit. He had one previous conviction, which was for drink driving. The appellant, when interviewed, made some admissions and pleaded guilty at the earliest opportunity. The appellant had a good work history. He suffered from an alcohol addiction and had made efforts at rehabilitation. He was remorseful and suffered significant psychological difficulties as a result of the collision. He was assessed as being at low risk of re-offending by the Probation Service. The Court of Appeal held that the headline sentence of eight years' imprisonment was at the higher end of the sentencing Judge's margin of discretion and considered that the discount of two years and suspension of one further year was perhaps generous but appropriate.

33. We were also referred to the case of *The People (Director of Public Prosecutions) v. Murphy* [2018] IECA 368, which concerned an appeal against the severity of a sentence of

six years' imprisonment with the final year suspended following a guilty plea to dangerous driving causing serious harm to a pedestrian's six-month-old son who was being pushed in a buggy. The collision occurred in circumstances where the appellant was driving away from a theft, had smoked cannabis, failed to remain at the scene, and was disqualified from driving. He had 184 previous convictions, including 14 for road traffic matters, including two for hit and run offences and one for careless driving. The baby suffered a fractured skull and was, at the time of sentencing, was being reviewed on a regular basis by the neurological team. The appellant made full admissions in interview, was sent forward on a signed plea, did not apply for bail, had a history of drug addiction, and had availed of services in prison including drug treatment and education. The Court of Appeal considered that the headline sentence of six years' imprisonment indicated in the Circuit Court was too low and one of seven and a half years was appropriate. The mitigating circumstances, however, were such the sentence imposed was appropriate.

34. Another case to which our attention was directed was *The People (Director of Public Prosecutions) v. Kearney* [2016] IECA 394, referenced earlier in this judgment as having been cited to the court below. That case concerned an appeal against the severity of a sentence of three years' imprisonment following a guilty plea to dangerous driving causing serious injury to a pedestrian. The collision occurred in circumstances where the appellant was attending an event at a hotel, had intended to stay overnight, but left due to an argument with her boyfriend. She was driving while almost three times over the legal alcohol limit and failed to remain at the scene. The injured party suffered a moderate brain injury and was left with a scar from her neck to her shoulder. The appellant had a good work history, a small number of road traffic convictions, including three for speeding and one for driving without insurance, was deeply remorseful and was fully cooperative following arrest. She had a history of mental illness which had resulted in two periods as an inpatient in a psychiatric

hospital. The Court of Appeal considered that the failure of the sentencing Judge to consider suspending part of the sentence was an error in principle. Having received significant additional material in relation to the appellant's progress in custody, the final nine months of the sentence were suspended.

35. Yet another case to which we were referred was *The People (Director of Public Prosecutions) v. O'Rourke* [2016] IECA 299 which involved an appeal against the severity of a sentence of seven years and six months' imprisonment following a guilty plea to dangerous driving causing serious harm to the driver of another car and the death of her four-year-old son who was a passenger. The collision occurred in circumstances where the appellant crossed to the wrong side of the road, colliding with the other car, while travelling at 86kph in an 80 kph zone. There was no evidence of braking and the appellant appeared to the injured party to be slouched over his wheel shortly before the collision. He was driving while three times over the legal alcohol limit. He left the scene of the collision on foot before being intercepted by Gardaí while still walking away. The appellant made admissions to Gardaí on the night that he was the driver, but would not comment when interviewed in detention six weeks later. He had no previous convictions. He was subsequently diagnosed with post-traumatic stress disorder which was taken as indicative of remorse. He had taken steps to stop drinking alcohol. He had a good work history and thirteen positive testimonials were handed into court in respective of him. The Court of Appeal found there was an error in principle and sentenced the appellant to eight years' imprisonment with the final two suspended.

36. Reference has already been made to *The People (Director of Public Prosecutions) v Power* [2016] IECA 326 to which the court below was also referred. The concerned an appeal against the severity of a sentence of seven years' imprisonment with the final year suspended following a guilty plea to dangerous driving causing serious harm to a pedestrian. The appellant was driving while three times over the legal alcohol limit, was uninsured and

disqualified from driving at the time. The harm caused to the injured party was comparable in terms of its gravity to the harm caused to Ms. C. The appellant had 51 previous convictions, most of which were for road traffic matters, and one of which was for drink driving. The appellant remained at the scene of the collision and tried to assist the injured party. He made full admissions when interviewed and pleaded guilty at the earliest opportunity. The Court of Appeal held that the headline sentence of seven years imprisonment was appropriate given the very serious injuries caused, the fact that the appellant was three times over the limit and was disqualified at the time of driving. The suspension of one year, was considered to be sufficient credit for the mitigating factors in the case, given the sentencing judge's margin of appreciation.

37. The concluding section of the applicant's submissions succinctly encapsulates her case:

1. The index offence was one involving a very high degree of culpability on the part of the respondent and resulted in catastrophic consequences for Ms. C.C and very serious consequences for Ms A O'C(2). The headline indication failed to reflect this.
2. While relevant mitigation was relied on by the respondent that warranted a reduction of the sentence, it was not sufficient to warrant the reduction of the immediate custodial part of the sentence to eighteen months' imprisonment.
3. In all the circumstances the sentence imposed of four years' imprisonment with the final two and a half years suspended was unduly lenient and failed by a significant margin to reflect the gravity of the offence.

38. In replying submissions, it is accepted on behalf of the respondent that the sentencing judge fixed a headline sentence at the lower end of the midrange. It was submitted that the midrange embraces a spectrum of between four and six years. It is accepted that the

sentencing judge had the option of setting the headline sentence at five, or even six years towards or at the upper end of the midrange, but equally it was within his range of discretion and margin of appreciation to locate it where he did. The respondent makes the point that the sentencing judge was a highly experienced circuit judge and that great deference must be afforded to his judgment and reasons. The sentencing judge had placed the respondents driving while intoxicated front and centre of his analysis and did not seek to shy away from it. By the same token it was, it was argued, the sole grossly aggravating feature in terms of the respondent's behaviour and manner of driving on the occasion in question. While it was true that the sentencing judge had also been critical of the respondent's speed, and was of the view that it was excessive in the circumstances prevailing on the day, it remained the fact that the respondent had been well under the speed limit. The respondent seeks to distinguish all of the cases relied upon by the applicant on the basis that there were additional serious aggravating features in each which were not present in the case at hand.

39. The respondent in turn also offers several comparators. We were referred to *The People (Director of Public Prosecutions) v Fleming* [2017] IECA 242, in which the respondent had been drinking with the deceased and a friend. His car was heard driving at speed and moments later a loud bang was heard. He was described as being *"out of his head"* on drink and drugs. He was unfamiliar with the car. He had seven prior convictions, including two for road traffic offences. A term of four years' imprisonment with the final year suspended was imposed at first instance. The Director sought to review the sentence on grounds that the headline sentence of four years was unduly lenient. The application failed on grounds that the headline sentence fell within the available range and did not constitute an error in principle. In particular, the court, per Birmingham P, reiterated that:

> *"There is no doubt that the sentence imposed was a lenient one, indeed a very lenient one. Equally, there can be little doubt that a more severe sentence would likely have*

been upheld. This Court has time and time again made the point that the fact that it would have been minded to impose a different sentence had it been called upon to impose sentence or that individual members of the Court would have been minded to impose a different sentence if called on to do so does not provide a basis for intervention. The question is whether the sentence imposed falls outside the available range and so constitutes an error in principle, always bearing in mind that the trial judge must be afforded a significant margin of appreciation. Here, the very experienced Circuit Court judge who was called on to sentence was facing a particularly difficult, indeed tragic situation. Three young men had gone out to socialise together. Really bad dangerous driving, with all of the aggravating features referred to, had resulted in the death of a young man bringing devastation upon his family. One of the two young men who survived the crash had taken his own life and the judge was now called on to sentence the sole survivor. Undoubtedly, there would be many who would say that as the person who had caused this situation by the manner in which he drove the car, Mr. Jackson Fleming should face the full rigours of the law. Others would take the view that there was scope for leniency and that a lenient sentence here was a humane one".

40. We were also referred to *The People (Director of Public Prosecutions) v Nestor* [2018] IECA 255. In that case, the Director sought to review the imposition of a fully suspended sentence of four years' imprisonment with provision for 240 hours of community service in circumstances where there were three victims of the respondent's dangerous driving, one of whom, a civilian, died and the other two of whom, on-duty Gardai, were severely injured, one of them to a life altering degree. The collision occurred when the respondent collided with the victims who were standing alongside a lit-up Garda vehicle with its blue lights flashing on the hard shoulder. The respondent was found to have blood alcohol

level of 272 mgs per 100 ml of blood in his system, five times the permitted limit. He was arrested at the scene. There was a guilty plea. The tragedy took a serious toll on the respondent's mental health and he lost his job on foot of this complication. He had no prior convictions. Despite the absence of additional aggravating features, the Circuit Court judge fixed a headline sentence of six years' imprisonment, which was reduced to four years with mitigation, before suspending the sentence entirely. The Court of Appeal found the sentence to have been unduly lenient, and in re-sentencing the respondent affirmed the 6 year' headline and the discount of 2 years for mitigation but went on to substitute a suspended period of 18 months for the entirety of the balance of the four year post-mitigation sentence which had been suspended at first instance. However, as eight months had passed since the entirely non-custodial sentence had been imposed at first instance on the respondent, giving rise to a potential disappointment factor, an additional allowance was then made for this by the suspension of a further six months of the effective thirty-month sentence.

41. It was submitted that the *Nestor* case has parallels with the index case in that the aggravating factors were the degree of intoxication involved and the consequences for the three victims, one of whom died. However, there were no other aggravating features. There was no evidence of prolonged bad driving before the collision. The respondent lost control of his car when confronted by the sight of a police car on the hard shoulder. The Court of Appeal imposed a net ultimate sentence of two years imprisonment (or thirty months when the additional allowance for disappointment is factored out) even though the headline sentence had been fixed at six years. In the respondent's submission, in the case at hand, even had the sentencing judge identified a headline sentence of six years, as opposed to four years, he would still have had the option of exercising his discretion to discount by two years [1/3rd] for mitigation and suspend a further two years, arriving thereby at a net/effective sentence of two years, just six months more than actually imposed.

42. Finally, we were referred to *The People (Director of Public Prosecutions) v Ryan* [2017] IECA 31 on the question of whether a further custodial sentence for a first-time offender would satisfy the requirements of justice or serve the public interest. In the *Ryan* case that question was answered in the negative following an application by the Director to review a fully suspended 3 year sentence which was imposed upon a young man (about to turn 18) when he drove a car at an excessive speed, and at night time with no lights on, through the junction of Clanbrassil Street with South Circular Road in Dublin 8, whilst also intoxicated and uninsured, such that he collided with another car which enjoyed the right of way and then collided with a pedestrian who suffered life altering injuries. He then fled the scene before being apprehended shortly afterwards near St. James's Hospital. There was an early plea of guilty in the case and the respondent's youth, previous good character and favourable testimonials were taken into account in mitigation of the offence. He was disqualified from driving for four years. This court was referred to paragraphs 18 & 19 of the judgment of the Court of Appeal where the court held that it would not be in the public interest nor would it serve the interests of justice to send the respondent to prison. Instead, it re-imposed a sentence of three years' imprisonment which it then suspended fully for 3 years on terms.

Up to date information provided on the usual contingent basis

43. We are told that as a result of going into custody in 2019, the respondent lost his position of 11 years standing with Irish Rail as a maintenance electrician who was based in Claremorris, Co. Mayo. He has, however, succeeded in obtaining new employment, again as an electrician. He has also lost his driver's licence, having been disqualified by the learned sentencing judge for 8 years, twice the minimum period of disqualification. It was submitted that for a 31 year' old man living in a rural area, a disqualification for 8 years must be acknowledged to be a significant additional punishment.

44. The court has also received a statement from the respondent which addresses his experience of prison and which confirms that whilst held in custody, he attended a course organised by "Merchants Quay" on alcohol awareness as it affects driving. He has also engaged with the prison psychological services. It appears that he has found the prison experience to be frightening and sobering. He is contrite and relieved to be at liberty since August 2020, when he was released on temporary release. His official release date, but for the fact of his temporary release, would have been the 24th of November 2020.

Discussion and Decision.

45. We are grateful to counsel on both sides for the assistance that they have provided.

46. The law on undue leniency appeals is at this stage very well established and uncontroversial. The relevant jurisprudence (in particular *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R.356; *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390 and *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279), indicates that before a reviewing court can find the sentence to have been unduly lenient, it must be satisfied that the sentence imposed involved *"a clear divergence by the court at trial from the norm"* that will have been caused by *"an obvious error of principle"*.

47. Moreover, the following particular points were emphasised by O'Flaherty J giving judgment for the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Byrne*:

> *"In the first place, 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'.*
>
> *Secondly, 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; even where the victims chose not to come to court as in this case - both women were very adamant that they did not want to come to court - 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: what Flood J has termed the 'constitutional principle of proportionality' (see People (DPP) v. W.C. *[1994] 1 ILRM 321), his decision should not be disturbed.*

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because … the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, 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."

48. In *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 36 Barron J. said (at page 359):-

"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 those 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."

49. More recently in *The People (Director of Public Prosecutions) v Stronge* [2011] IECCA 79, McKechnie J. helpfully distilled the case law on s. 2 applications into the following propositions:

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each

court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally -

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

50. We are of the view that the sentence in this case was lenient to the point of being unduly so, and that it represented a substantial departure from the norm. Gravity is to be assessed with reference to both the offender's moral culpability and the harm done. The offender's culpability in this case was very significant and the harm done was very significant.

51. In so far as his culpability was concerned, he drove his motor car when he could not have failed to appreciate that his driving ability was impaired, and significantly so. His breath, when tested, disclosed alcohol levels that were almost four times in excess of the permitted limit. He was therefore very substantially morally culpable on that account alone.

52. In addition, he drove while uninsured. While he has offered some explanation for being uninsured, the explanation offered does not excuse it; and that fact that he was uninsured when he caused this accident, in which both Ms A O'C(2) and Ms. C. were seriously injured, was unquestionably a further aggravating factor in terms of his culpability.

53. As regards the speed factor, in circumstances where he was in technical compliance with the open speed limit of 80 kilometres per hour, we are not prepared to treat the speed factor as necessarily aggravating the offence. Unlike his driving under the influence, and also

his driving without insurance, both of which were condemnable factors extrinsic to how he controlled his vehicle, and therefore added to his overall moral culpability, the speed factor was an intrinsic part of the manner of his driving on the occasion which is characterised by the prosecution as having been dangerous. He was certainly negligent in failing to have adequate regard to the prevailing conditions (a factor no doubt contributed to by the fact that his judgment was impaired by the alcohol in his bloodstream), and in not moderating his speed accordingly, such that when faced with an on-coming vehicle, and having insufficient room to bring his vehicle to a controlled halt within the distance ahead of him that he could see to be clear as required by the Road Traffic General Bye-laws, he was forced to brake violently thus precipitating his entry into a skid and the loss of control of his vehicle. However, we think that rather than being specifically aggravating, his ill-advised speed having regard to the prevailing conditions ought instead to be properly regarded as an intrinsic part of the dangerous driving component of the charge.

54. On the issue of the harm done, both Ms A O'C(2) and Ms. C.C sustained truly egregious and life altering injuries.

55. Although the range of available penalties open to the sentencing judge for the principal offence in this case theoretically ranged from non-custodial disposal up to imprisonment for ten years, we consider that such was the gravity of the respondent's offending conduct that in no circumstances could a non-custodial headline sentence ever have been realistically contemplated. In our view, an appropriate assessment of the gravity of this case based upon a synthesis of the twin ingredients of culpability and harm done would mandate that the headline sentence should be a substantial custodial one, and that it should be located towards the high end of the mid-range on the spectrum, in a situation where that spectrum extends from zero custody to imprisonment for up to ten years (or one hundred and twenty months) and assuming a division of that spectrum into three equal parts to provide for

a low range, a mid-range and a high-range. Accordingly, the low range would extend from zero to three years and four months (i.e., forty months); the mid-range would extend beyond that to six years and eight months (i.e., eighty months); and the high range beyond that again up to the maximum of ten years (i.e., one hundred and twenty months).

56. In the present case, it was not enough that the sentencing judge should have located his headline sentence in the mid-range. He needed to be more discriminating than that. In a three-way division of the ten -year spectrum, there is the potential within any of the notional ranges for up to a $33^{1}/_{3}$ % differential between the low end of the range and the upper end of the range. The margin of discretion available to a sentencing judge in fixing a headline sentence would not extend to plus or minus $33^{1}/_{3}$ %. It would be significantly less than that, and accordingly it does not follow that simply by virtue of having selected the correct notional range a sentencing judge will be operating within his/her range of discretion. A greater level of discrimination is required.

57. In suggesting that the headline sentence should be located at the high end of the mid-range, we also feel it important to re-iterate certain remarks of Birmingham P in *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121, with reference to the use of indicative ranges as a tool in the structuring of a sentence. He said:

> *"The Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."*

58. We do not believe that the headline sentence of four years' imprisonment nominated by the sentencing judge in this case was within the range of the sentencing judge's discretion. We consider that a headline sentence of six years imprisonment would represent the norm for offending of this gravity, and the judge's range of discretion might have allowed for perhaps deviating by a year either way, even if leaning towards the severe end of the range of discretion would have meant ending up at the low end of the high range. In that context we feel it important to re-iterate certain remarks of Birmingham P in *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121, with reference to the use of indicative ranges as a tool in the structuring of a sentence. He said:

> *"The Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."*

59. However, a headline sentence of four years was simply too low in the circumstances of this case, and to have located it at that point was an error of principle. We are re-inforced in our view by the comparators to which we have been referred on both sides. While they represent an insufficiently representative sample to enable us to say conclusively that they are indicative of any trend, we do discern that a significant proportion of them, sharing with this case the aggravating factors of the offender having driven while significantly intoxicated, and causing either death or life altering injuries, gave rise to headline sentences of six years or more (*Moran* 8yrs, *Murphy* 7½yrs, *O'Rourke* 8 yrs, *Power* 7 yrs, *Nestor* 6 yrs; with the cases of *Kearney* 2 yrs, *Fleming* 4yrs and *Ryan* 3yrs ostensibly representing outliers). It is

necessary to state that in the most if not all of cases attracting headline sentences of in excess of six years there were multiple additional aggravating factors, such as having relevant previous convictions, leaving the scene, driving while disqualified, having no insurance, and exceeding the designated speed limit, to name but some. However, in the absence of a properly representative survey we confine ourselves to saying merely that the headline sentence of four years nominated in the present case would appear to be out of kilter (by leaning too much in the direction of leniency) with the headline sentences nominated in the majority of the comparators to which we were referred, even allowing for inevitable differences in facts; and we have been prepared to take modest comfort from that.

60. Turning then to the issue of the discount for mitigation, counsel for the applicant, when responding to a question from our bench, agreed that the DPP's main complaint was with respect to the headline sentence but stated that her client was nonetheless continuing to maintain that the effective discount for mitigation was also excessive. The sentencing judge adopted the expedient of using a partial suspension of the headline sentence to reflect mitigation, and in doing so afforded an effective discount of 62.5% in respect of the amount of actual time in custody that the respondent would have to serve (providing he adhered to the conditions attaching to the partial suspension). The applicant maintains that that level of discount was overly generous and that this also represented an error.

61. We acknowledge that there were significant personal mitigating factors in this case which required to be reflected. The respondent had pleaded guilty, he was a first-time offender, he was of previous good character, up until the commission of these offences he had been a positive contributor to society and to his community, he had a good work record and he was accepted by the court below as being genuinely remorseful. However, it is also clear to us that the sentencing judge went beyond what was merited by mitigation alone and did so in the interests of also incentivising the respondent's reform and/or rehabilitation. We

do not see that more than a 50% discount would have been merited based on mitigation alone. Accordingly, the additional 12.5% discount would have represented "going the extra mile" (as it is sometimes colloquially referred to) in the interests of also incentivising the respondent's reform and/or rehabilitation. A sentencing judge will always have a discretion to do that in an appropriate case and providing there was enough evidential basis for it an appellate or reviewing court will be slow to interfere. The question for us is whether the sentencing judge went too far?

62. Before addressing this, it may be useful to re-iterate certain commentary which we have previously made concerning the use by a sentencing court of the suspended sentence option to "go the extra mile" in what it may deem to be an appropriate case.

63. In the case of *The People (Director of Public Prosecutions) v D.W.* [2020] IECA 145, we said:

> "*52. The type of circumstances that might merit the imposition of a suspended sentence would include cases in which the sentencing judge considers that a proportionate response to the particular offence requires that it be marked by the imposition of a custodial sentence, so as to communicate the necessary degree of censure and societal deprecation of the crime, but that it is not essential that the offender should have to suffer all (or, in an appropriate case, any) of the hard treatment associated with the sentence imposed. In such a case the fact that a custodial sentence has been imposed, even if submission to actual incarceration for all or any of the relevant period is not required, is considered sufficient, coupled with the prudential incentive of the required bond and the condition or conditions associated therewith, to appeal to the offender in question as a moral agent and influence him/her towards future desistance. It may be particularly useful used in that way, in cases involving*

first-time offenders, in cases where the need for custodial disposition at all is considered marginal, and also in cases where there is an evidence-based earnest to reform or rehabilitate. In relation to the former the suspended sentence has been characterised as:

> ‘an almost ideal punishment for generally law-abiding persons who have committed a serious out of character crime. The prison sentence can express strong censure while the suspension spares unnecessary expense to the state and unnecessary damage to the low-risk offender and his or her loved ones.’
>
> *(Reform and Punishment: The Future of Sentencing (2002) Rex S., and Tonry M., (eds) Chpt 1, 12, Cambridge: Willan Publishing)*

64. Most recently, in a judgment delivered earlier this week (on the 27th of October 2020) in the case of *The People (Director of Public Prosecutions) v Fagan* [2020] IECA 290, we further said:

> *“93. There is well established jurisprudence which it is unnecessary to rehearse as to the importance of rehabilitation and reform as a penal objective in general, and to the effect that the prioritisation of those objectives may be justified in an appropriate case, but that it will not be justified in every case. We have said many times that for a court to metaphorically “go the extra mile” in showing leniency to an offender in the interests of promoting rehabilitation and reform and incentivising continued progress in that regard there requires to be a sound evidential foundation for doing so. In practice, what is required is evidence both as to a genuine desire to reform and rehabilitate and a track record showing concrete steps already taken that regard. There is no doubt that in the present case there was an evidential foundation such as would have*

allowed the sentencing judge to show considerable leniency in furtherance of the objective of promoting and incentivising rehabilitation and reform.

94. However, even where there is a basis for showing considerable leniency in furtherance of those objectives, there may be normative limits on the extent to which that can be done, having regard to the gravity of the crimes involved."

65. The *Fagan* case was a severity appeal involving a chronic drug addict who was a recidivist robber who engaged in robbery to fund his drug habit. In circumstances where, notwithstanding an appalling past record, he was accepted by the sentencing judge as now being determined to turn his life around, and where he could be shown to have taken serious steps while in custody to address his drug dependency, he had been shown a considerable degree of leniency by the sentencing judge. Despite this the respondent was disappointed with the extent of the leniency shown to him, in circumstances where the sentencing judge had put back his sentencing for fifteen months, during which time he had remained in custody, having already spent eight months on remand, claiming that he had been given an expectation that his time in custody would be treated as time served and that any unserved balance of the appropriate sentence to be imposed would be immediately suspended as of the sentencing date so as to enable him to enter residential treatment there and then. For various reasons the sentencing judge had not felt able to go that far when the matter resumed before her, and while the respondent did receive a partially suspended sentence it was not as lenient as he had been expecting in that it did not facilitate his immediate release. That is simply by way of background. For the purposes of the case before us today, it is sufficient to state that the remarks quoted above were made in the context of a consideration of whether, and after taking the time spent by the appellant in custody into consideration, the sentencing judge might justifiably have suspended the unserved balance of the headline sentence nominated by

her in the interests of the appellant's reform and/or rehabilitation, notwithstanding the respondent's bad record and the overall gravity of the respondent's offending. In circumstances where there were *"normative limits on the extent to which that can be done, having regard to the gravity of the crimes involved"*, the court's decision in that regard turned on the proportion of the headline sentence represented by the time deemed to have been served.

66. In considering how the sentencing judge in this case approached mitigation (including showing extended leniency in that context) it is useful to reflect on the competing demands that he faced. A sentencing judge must decide in every case as to how best to balance the concurrent, but sometimes conflicting, penal objectives of retribution, deterrence (general and/or specific), incapacitation and rehabilitation/reform. The appropriate balance is a matter of discretion. In a case such as the present, involving offending of significant gravity, it is a *sine qua non* that the sentence must involve some retributive component, which might include a (possibly significant) custodial element and/or other punitive measures, although retribution need not necessarily be the dominant objective. The penal objective of deterrence, of which there are two facets, namely general deterrence and specific deterrence, may also be important and may require to be afforded some priority. In this case the Director of Public Prosecutions contends that deterrence should have received greater prioritisation than it did. Prioritisation of the objectives of rehabilitation and/or reform may also be worthy of serious consideration, particularly in the case of a first-time offender, who represents a low risk of re-offending, and who may be able to make a positive contribution to society and to his community in the future. The sentencing judge in this case afforded them considerable priority. The objective of incapacitation is also potentially relevant, and in the context of most driving offences is capable of being addressed by a disqualification. There may sometimes be cases where a disqualification may not be sufficiently effective on its own to incapacitate

(e.g. in the case of a recidivist joy-rider) but nothing of that sort arises here. A very significant disqualification, beyond what was legally required as a mandatory consequential measure, was imposed in this case representing a legitimate additional or secondary punishment of the respondent, in addition to having incapacitatory effect.

67. Both deterrence (general and specific) and rehabilitation/reform share the characteristics that they are aimed at behaviour modification. The former, which can be traced back to the philosophy of Bentham, seeks to achieve behaviour modification through coercive effect; while the latter can be traced to the rise of positivism in penology from the mid-19th century onwards leading to the penal welfarism model that dominated British, and to a somewhat lesser extent Irish, penology for much of the 20th century, and arguably is still influential today (notwithstanding the resurgence in popularity of retributivist ideas, and particularly those of neo-classical retributivism). The objective of rehabilitation/reform seeks to achieve behaviour modification through supportive interventions, mechanisms and/or treatments. It is based on the idea, borne of positivism, that individuals may not always be responsible, or wholly responsible, for what they do, and that their actions are not always the outcome of their own choices, but rather may be amenable to treatment or rehabilitation in some fashion.

68. Some sentencing research has questioned the effectiveness of either behaviour modification strategy, and indeed for several decades the dominant narrative amongst penologists was that “nothing works”, either in terms of providing deterrence or promoting rehabilitation / reform. However, more recent studies have begun to question that narrative. Whatever about the science of it, whether one is speaking in terms of psychology, behavioural science or social science, it cannot be gainsaid that in the public mind there is an intuitive belief that deterrence can and does work. Accordingly, we have no doubt that a strong case exists for the promotion of general deterrence in a case such as the present, at

least at the intuitive level. We think the case for specific deterrence, although there is one, is less compelling in circumstances where we perceive that on the evidence the likelihood of re-offending by the respondent is low.

69. A further factor is that the objectives of retribution and deterrence can often be served by the same sentence, as they in effect represent different sides of the same coin. A sentence imposed from retributive purposes will frequently also have deterrent effect, while a sentence imposed primarily for its deterrent effect may nonetheless represent a significant punishment.

70. As regards the objective of rehabilitation/reform the evidence does not suggest that the respondent had any specific problem that required positivistic intervention in the sense of treatment. For example, although he was very drunk on the occasion there was no evidence of alcoholism or that the respondent has a general problem with drink. Therefore, this is a case of an offender whose reform required to be promoted rather than his rehabilitation.

71. The respondent presented at sentencing as ashamed and contrite. It is clear that he himself has suffered some serious consequences of his own actions (e.g., a significant criminal conviction, losing his liberty and having to go to prison, social stigma, losing his job with Irish Rail, to mention but some), and although all of these things pale into insignificance when compared with the suffering that Ms O'C and Ms C. have had to endure, and continue to have to endure, they are relevant in terms of how they may have shaped his attitudes and insights, and may bear on the prospects for his reformation.

72. As Denham J memorably put it 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".* Rather, as Walsh J stated in the Court of Criminal Appeal in *The People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351:

> *"The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him insofar as possible to turn from a*

criminal to an honest way of life and indeed the public interest would best be served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal."

73. What the law required was that the sentencing judge should impose a sentence on the respondent that was proportionate in two respects. First, the sentence needed to properly reflect the gravity of his crime (assessed by reference to his culpability and the harm that he had done to his victims), but secondly, the sentence was also required to be proportionate having regard to the personal circumstances of the respondent, viewed both from his perspective and that of what would best serve the interests of society. It was of significance in the latter regard that the respondent was a first-time offender, that he had been of previous good character and that he had previously been a positive contributor to society and to his community.

74. While the respondent certainly required to be proportionately punished, and while that punishment needed to be such as might deter him, but more particularly others, from driving while intoxicated, it was also desirable that he should be assisted, incentivised and encouraged to reform. His reformation would involve not merely resolving never to re-offend, but aiming to become once again a positive contributor to society and to his community, and being facilitated in that. While we have said that where a judge is contemplating showing extended leniency in the interests of promoting rehabilitation, it is desirable that he/she should have evidence of some track record of progress towards addressing whatever the underlying problem might be (e.g., alcoholism, drug addiction, anger management issues, gambling, mental health issues, to name but some), in order to justify going the extra mile, that requirement is less applicable in the case of the promotion of

reformation because “treatment” in the positivistic sense is not required. Of course, it goes without saying that the person in question should not have re-offended since the index offence (and there has to be a track record in that sense), but reformation is more about influencing the offender as moral agent, and about encouraging appropriate attitudes and insights, and so what a judge considering extended leniency as an incentive to ongoing reformation needs to be satisfied about is that the offender has learned or is in the course of learning his/her lesson and that there are realistic grounds for optimism that he/she may henceforth live a good and crime-free life. Although it is early days, this respondent’s continuing genuine remorse, and how he has behaved since being afforded temporary release in August 2020, including obtaining new employment, do speak to a determination on his part to reform.

75. Having considered the circumstances of the present case we do not consider that the sentencing judge was in error in the extent to which he discounted for mitigation and sought to incentivise reform, when the discount is considered in isolation. His approach to mitigation was undoubtedly a very generous one, and he perhaps went to the limits of his discretion, but we are not satisfied that he strayed outside the range of his discretion in the circumstances of the present case. The level of discount afforded, even allowing for “going the extra mile” to incentivise reform, was therefore not inappropriate in the circumstances of the case when the discounting is viewed in isolation. However, because the headline sentence that had been nominated was inappropriately low, normative limits (in terms of what was proportionately required in terms of an ultimate sentence having regard to the gravity of the offence) were breached when that headline sentence was discounted to the extent that it was, resulting in an unduly lenient overall sentence. To put it another way, in circumstances where the headline sentence was inappropriately low, the sentencing judge’s scope for “going the extra mile” in the interests of reform had been eroded.

Re-sentencing

76. In circumstances where we are satisfied that the ultimate sentence imposed on the respondent for the offence of dangerous driving causing serious injury was unduly lenient in the sense of being a substantial departure from the norm, we are obliged to quash the sentence imposed by the court below and re-sentence the respondent. Moreover, we must do so in the circumstances that pertain today rather than those that obtained on the day of his original sentencing. We are therefore entitled to take into account developments and circumstances arising since his original sentencing.

77. We are satisfied that the offence of dangerous driving causing serious injury as committed by the respondent merited substantial punishment to reflect the gravity of the offending conduct. The respondent was highly culpable and he caused immense harm. His conduct requires to be censured and deprecated on behalf of society, and it is appropriate that he should have to endure not merely censure but should suffer meaningful hard treatment as part of his sentence. It is also desirable that, within the limits of what is proportionate, his punishment should further serve to deter both himself and others from offending in a similar way in the future. Further, we are also the view that where the potential exists, as we believe it does, for him to contribute positively again to society and to his community, it is also appropriate that his reform should be incentivised and facilitated.

78. To give effect to all of that, we intend to have recourse to a combination of sentencing options, to include a substantial custodial term (part of which will be suspended), a substantial fine and the secondary punishment associated with a substantial disqualification.

79. We will deal in the first instance with the custodial element of the sentence that we are structuring. We will nominate a headline sentence of six years imprisonment rather than the headline sentence of four years imprisonment nominated by the sentencing judge in the court below. We further consider that the mitigating circumstances in this case as identified

earlier in this judgment (ignoring for a moment any question of possibly showing extended leniency to incentivise and promote the respondent's reform) require us to discount from the headline sentence by 50%, leaving a net sentence of three years' imprisonment before consideration of any possibility of showing extended leniency. We will return to that.

80. We will further impose a fine on the respondent of €20,000, with six months' imprisonment in default. We do so, taking into account the evidence before the court below that the respondent had accumulated the sum of €12,000 (which was offered to the victims as a gesture of his contrition, but which they felt unable to accept), and moreover that he has secured alternative employment. Accordingly, we are satisfied that the sum nominated is not beyond his means. Nevertheless, it is substantial and discharging it may not be easy for the respondent. It is not intended to be. It is part of his punishment. He will, however, be facilitated by being allowed a reasonable time within which to pay it, and we will hear submissions from counsel regarding what might be appropriate in that respect, and the potential applicability of s.6 of The Fines (Payment and Recovery) Act, 2014.

81. Further, we will reimpose the disqualification of eight years imprisonment in respect of the offence of dangerous driving causing serious injury. The disqualification of eight years is to date from the 8th of October 2019, as in the case of the disqualification imposed by the court below. In doing so we acknowledge that this goes substantially beyond what was required to be imposed as a consequential order. Although incapacitatory in its effect, the disqualification is also imposed for its punitive effect. One's possession of, and entitlement to exercise, a driving license is a privilege and not a right. The privilege may be forfeited as a punishment in an appropriate case and we think that this is such a case. In imposing this aspect of the respondent's punishment, we are conscious that it will impact adversely on his social and working life. Nevertheless, we consider it a proportionate measure to include as

part of framing an appropriate overall response to his culpability and the devastating harm that he has caused.

82. It is necessary at this point to return to the issue of possibly showing some extended leniency in the interest of incentivising and promoting the respondent's reform. We are satisfied that there is a basis for doing so. The question is to what extent are we justified in doing so.

83. If it were the case that we were sentencing at first instance we would have been minded to suspend a year of the post mitigation three year sentence that we have imposed, to that end. However, we are conscious that the respondent was in custody from the 11th of October 2019 until a date in August 2020 when he was granted temporary release, and accordingly has to date served the equivalent of more than a thirteen-month sentence (when standard remission is considered). Moreover, even if he had not secured temporary release he would be due for release within weeks of the date of this judgment, on the basis of the sentence imposed at first instance. It is of some significance that he was adjudged to be suitable for temporary release and that the executive saw fit to grant him temporary release and we must take that into account. In circumstances where he is at liberty having been granted temporary release we have little doubt that he would find it difficult to have to return to prison at this point, if that is required, given the hope and expectation induced by his initial sentence and subsequent temporary release. This added factor is sometimes to be encountered where, following an undue leniency review, a respondent who is by then at liberty faces the spectre of having to return to prison. We can appreciate that it might be even more acutely felt where the person concerned had been released early having achieved temporary release, and in the case of this accused having regard to the evidence provided at the appeal hearing that he has found the experience of being imprisoned to be frightening and sobering. That having been said, rarely will an appellate court attach major importance to this consideration

at a re-sentencing, and we are certainly not prepared to do so in this case. Carceral punishment inevitably involves hard treatment that is not confined to mere deprivation of liberty. The experience is intended to have salutary effect. Accordingly, while we do take cognisance of this added factor, we feel we can attach only very modest weight to it.

84. It is also, however, also relevant that during the time that he has been at liberty he has not re-offended in any way and has conducted himself in a manner entirely consistent with his expressed desire to reform, including obtaining new employment from an employer who speaks highly of him. It begs the question whether at this point the interests of justice and of society would be served in requiring him to return to prison? It is partly because of how he has behaved, and the fact that he has secured new employment, that we believe we have an expanded range of practicable sentencing options, compared with that which was available to the court below. Additional punishment involving a substantial fine, in addition to any custodial period that we see fit to impose, has become a practicable option for us to incorporate in the sentence, but we consider that it is only practicable providing the appellant can maintain the employment that he has recently taken up. If he goes back to prison at this point he may lose that new job. On balance, we believe that the interests of justice and the promotion and incentivisation of his continued reform would best be served by not requiring him to return to prison, notwithstanding our view that the original sentence was unduly lenient.

85. Accordingly, because we have arrived at that view, and because combining a substantial fine with a custodial period already part served provides a means of facilitating that, while at the same time ensuring that the respondent is subjected to a greater overall punishment than was imposed at first instance, we are prepared to suspend the unserved balance of the net custodial sentence of three years that we have imposed upon him. We will do so on the same conditions as applied to the suspended portion of the sentence imposed by

the court below. The revised custodial sentence is to date from the 11th of October 2019, as in the case of the custodial sentence imposed by the court below.

86. The court sees no reason to interfere with the sentences imposed by the court below for the offences of driving under the influence and driving without insurance.

87. For the avoidance of doubt all sentences are to run concurrently.