UNAPPROVED
No Redaction Needed

THE COURT OF APPEAL

Record No: 253 CJA/19

Neutral Citation Number: [2021] IECA 30

Edwards J.
Kennedy J.
Donnelly J.

BETWEEN/

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

APPELLANT

-and-

DEREK LENNON

RESPONDENT

JUDGMENT of the Court delivered by Ms. Justice Donnelly on the 8th day of February, 2021

1. This is an undue leniency appeal brought by the DPP against the respondent, Mr. Lennon, in respect of the four-and-half-year sentence of imprisonment he received for assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. The remaining five counts on the indictment were taken into consideration by the sentencing judge. The other counts on the indictment comprised two counts of witness intimidation, one count of criminal damage wherein the accused damaged the CCTV cameras at the victim's home, production of an article capable of inflicting serious injury, namely a wooden plank, and threatening to kill or cause serious harm.

2. All counts pertained to the same victim. The first offence of witness intimidation took place on the 2nd October 2018 while the remaining five offences were committed on the 13th November 2018.

Factual Background

3. The victim was a witness to a motorcycle collision involving the respondent. The respondent was prosecuted for a road traffic offence in respect of this incident. At the hearing in the District Court, the victim was required to give evidence. The respondent was convicted and he lodged an appeal and recognisance in relation to his conviction.

4. The *de novo* appeal was before the Circuit Court and was listed for hearing on the 3rd October, 2018. The victim was therefore required to give evidence.

5. On the 2nd October, 2018, the victim, shortly after arriving home at approximately 11pm, heard a bang against the porch door and a clang of metal off the ground. Upon opening the porch door, the victim saw a figure in the corner of his eye moving away from him. He also observed a motorcycle parked on the path outside his driveway. The Gardaí were contacted and they identified the motorcycle in question as belonging to the respondent. The respondent lived approximately three minutes' walk from the victim's home. The Gardaí found a piece of metal that looked like a part of a door lock in the driveway.

6. Later that evening, the respondent was brought to a garda station for questioning. The respondent denied being involved in witness intimidation and stated that he had been to a friend's house near the victim's home and had to wheel his motorcycle as it did not start.

7. The respondent was released without charge. The victim did not attend the Circuit Court on the 3rd October, 2018 due, he said, to fear.

8. The second incident occurred on the 13th November, 2018. The victim was at home with his wife and their lodger. While in bed, at 11:50pm, the victim heard banging noises. The house alarm then went off and he jumped out of bed and ran down the stairs. The victim opened the front door and saw a person walking out of the driveway. The victim asked his wife and their lodger to stay upstairs. The victim looked out again and saw the respondent standing outside the house. In order to hear what the respondent was saying, the victim opened the sliding door and asked the respondent what he wanted. The respondent replied "[y]ou know

who it is. Come here. I want to talk to you […] Come here, or you will be fucking sorry". The victim then realised it was the respondent. The victim went out barefoot to the respondent and he noted that the respondent was holding a two-by-four plank. The aggression of the respondent increased as he told the victim if he did not come with him he would regret it. The respondent told the victim to tell his wife that it would be okay and to tell her not to call the guards. The victim went back inside to get his jacket and shoes and told his wife and their lodger to stay inside.

9. The respondent then told the victim that he had a six-year-old child and that he needed his licence for courier work. He said the victim had "caused him a lot of trouble" and said "you won't be testifying". The victim asked if he was threatening him and added that he better not be threatening him. The respondent made reference to breaking the victim's legs, to which the victim retorted that the respondent would be the one with the broken legs. The victim was terrified at this point. Further threats were made and the victim then stated that "I wasn't going any further" and the respondent replied "we will see about that". At this stage, the respondent lunged forward with the plank. The victim raised his left arm to protect himself and the respondent hit him on the arm. The victim described that the respondent really put everything into this. Following that, the respondent struck the victim several times. During the struggle, the respondent said "you are dead now. You made a big mistake and you are going to pay for this." The respondent continued the assault and punched the victim a number of times as they both held parts of the plank. The respondent made a further assertion which the victim recounted as "[h]e said I'd better come with him, and that I didn't know who I was dealing with."

10. A Garda car passed at this juncture and the respondent went behind a car in a nearby driveway. The respondent became aggressive towards the Gardaí when they alighted the

vehicle a Garda's jacket was ripped at the scene. When the respondent was in the process of being arrested, he was shouting at the victim not to say anything to the Gardaí.

11. Evidence was given that the CCTV cameras at the victim's home were damaged, the value of same amounted to €684.25.

12. The victim was taken to hospital by ambulance and suffered lacerations to the nose and was given stitches. The injuries sustained will result in permanent scarring on his face. He had swelling and bruising around his eye and was tender around his cheekbones and had a mark over his proximal forearm. A separate dental examination revealed the impact of the blows to the head, and also resulted in structural damage to the teeth amounting to €1,635.

13. During his interview with the Gardaí, the respondent denied the allegations of assault, threats, criminal damage and witness intimidation which were put to him and claimed that the plank of wood was "subject to a grappling match between Mr. Fitzgerald and I." The appellant submits that the respondent's account was self-serving and divorced from reality.

14. The respondent did however plead guilty on an arraignment date. The respondent has been in custody since the 15th November, 2018 after he had been charged.

15. The victim impact report was read out and the appellant submits that the impact on the victim was considerable. The victim had "lost confidence in certain aspects of his life" and was suffering anxiety attacks for which he obtained counselling, paranoia, difficulty in sleeping, mood swings, heightened stress along with the adverse consequences for him in living in the community in question where some neighbours no longer wished to be associated with him. His wife is anxious if she has to stay in the house alone.

16. The respondent has 72 previous convictions. There were 7 convictions for criminal damage, 3 convictions for assault causing harm, 2 convictions for assault, 2 convictions for arson, 1 conviction for false imprisonment, 2 convictions for robbery, 20 convictions under the Criminal Justice (Public Order) Act, 1994 and 18 convictions for road traffic matters.

Sentence Hearing

17. The sentencing judge stated the respondent behaved deplorably and found that the respondent had *"planned to intimidate the injured party and make that injured party's life miserable."* The sentencing judge said the second incident was *"pretty serious"* involving a serious assault and the damage of cameras. The sentencing judge took into account his previous convictions which involved violence and that the respondent had a long history of offending.

18. In mitigation, the sentencing judge took into account the respondent's guilt plea and letter of apology but noted that he was not sure if the respondent could reform himself by reason of his previous misbehaviour and that there was an *"intemperate side to his nature."* The sentencing judge held as follows:-

> *"I have no doubt he deserves a custodial sentence, and a pretty substantial custodial sentence, and what I'm going to do is I am going to impose on Mr Lennon a term of imprisonment of four and a half years on Count No. 2, and that's the assault on the 13th November. I am sentencing globally in relation to all of the counts, and I'm going to take all the counts into account. If I was asked for a headline sentence, I would say between six and seven years in relation to all of the counts, but this is a global sentence on Count No. 2 of four and a half years. That is to be backdated to the 15/11/18, when he first went into custody*."

19. In addition to the above, the respondent in its submissions outlined the other mitigating factors put forward to the sentencing judge, namely the fact that the respondent is a father to a seven year old son, the fact that he was intoxicated on the night in question and was deemed unfit for interview by Dr. Moloney for a six hour period. It was put forward in mitigation that the respondent had a drink problem and had been sober for four years prior to October and November, 2018. The respondent suffered from depression and had taken prescribed medication for the past seven years. However, at the time of the offences had been abusing

Benzodiazepines, Dalmane and Zimovane combining them with alcohol. Neither the Urinalysis, Governor's Report or Education Report that had all been ordered were before the Court. Certificates were handed into the Court in respect of his use of time in both Cloverhill and Wheatfield Prison where he was moved to as a remand prisoner. The respondent outlined to the Court that he had completed a mindfulness course and a FETAC Level 3/QQI in maths, communications and health and fitness. He also worked as a cleaner in Cloverhill and works in joinery in Wheatfield. The respondent attended AA in Cloverhill and is a drug free prisoner in Wheatfield. He was also one of the organisers of a charity run in Cloverhill Prison in aid of Our Lady's Children's Hospital in the Summer of 2019. He attended Harold's Cross National School and St. Kevin's Secondary school in Clogher Road in Crumlin. The respondent left school at 14 and worked for his brother as a dispatch rider at the time of the offences. The respondent had been a source of help around the house for his parents and spent his time living with them and his partner and son.

The Parties' Submissions

20. The appellant relies on *The People (DPP) v. Parkes* [2019] IECA 199 wherein Irvine J. held:-

> *"The onus is on the DPP to prove that the sentence imposed constituted a substantial or gross departure from what would be an appropriate sentence in all the circumstances."*

The appellant submits that the sentence imposed on the respondent does substantially depart from what would be regarded as an appropriate sentence.

21. The appellant concedes that there is little case law on the appropriate sentence to impose for witness intimidation offences and submits that the only case of relevance in Ireland is *The People (DPP) v. Lehane* [2016] IECA 196. In that case, an accused charged with sexual assault offences contacted the complainant to pressurise her to withdraw the complaints. Two

consecutive sentences of 18 months were imposed with the consecutive sentence suspended for 18 months. An appeal against severity was allowed by the Court of Appeal. The two consecutive sentences were made concurrent and the last nine months of both sentences were suspended on conditions.

22. The appellant has referred the Court to the Sentencing Guidelines issued by the Sentencing Council of the United Kingdom for information purposes but cautions that the maximum penalty for the corresponding offence is 5 years' imprisonment. The appellant relies on the *dicta* from Cranston J. in *R v. Smith (Craig Anthony)* [2011] 2 Cr. App. R (S.) 118 at para. 16:-

> *"From this case law the factors which bear on sentence include whether the intimidation was isolated or part of a campaign, the content of any threat, whether the intimidation was accompanied by violence, the circumstances in which any threat was uttered, whether any encounter with the witness was premeditated or by chance, and the impact on the victim, remembering that psychological harm may be as serious as physical harm. Overall, a key factor is the public policy in ensuring the integrity of the justice system by imposing sentences which have a general deterrent effect on this type of offending."*

23. The appellant submits that the headline sentence imposed by the sentencing judge of between six and seven years' imprisonment, while placing the offence in the middle range of such offences, was too low having regard to the facts of the case. The appellant submits that the setting of a "global sentence" on the assault causing harm offence was not appropriate. The appellant submits that the sentencing judge should have imposed sentences on the witness intimidation charges contrary to s. 41 of the Criminal Justice Act, 1999 (as amended). The decision to deal with the matter under the assault heading, which attracts a maximum of 5

years' imprisonment was erroneous as the term of four and a half years' imprisonment does not reflect the gravity and nature of the offences in question.

24. The respondent submits that the sentencing judge did in fact attach enough seriousness to the nature of the offences. The respondent relies on the sentencing judge stating *"I have no doubt he had some substance or drink taken, but it seems to me he planned to intimidate this injured party and make [his] life miserable. […] The second occasion is pretty serious, where a pretty serious assault took place. He also damaged cameras […] made various threats to the injured party, and he threatened, I suppose, the well-being of his family."*

25. The respondent further submits that the sentencing judge was entitled to set a global sentence on any counts he deemed appropriate and that no-one could describe the four and a half year custodial sentence on a s. 3 assault in the context of guilty plea as being unduly lenient. The respondent submits that the appellant's real difficulty is that the sentence was not marked on the s. 41 charge because the maximum penalty for that offence is much higher.

26. The appellant submits that without prejudice to its submissions, even if the headline sentence is found to be correct by this Court, the appellant submits that the credit afforded to the respondent in mitigation departed substantially from what was the appropriate sentence. The appellant was 34 years of age at the time of sentencing and held 72 previous convictions.

27. The respondent submits that the sentencing judge achieved the correct balance and did not give excessive credit to the respondent but took into account his early guilty plea and his letter of apology to the victim, while also noting that the respondent has an intemperate side to his nature and his previous misbehaviour made the Court *"not quite sure"* if he can be reformed.

Principles for Sentencing in Witness Intimidation Cases

28. The appellant has put forward six principles that may assist this Court in assessing the present appeal and the general principles for sentencing offences of this nature. Each shall be dealt with in turn.

Witness Intimidation is a Specific Statutory Offence

29. The offence of witness intimidation is a specific statutory offence. The appellant submits that any attempt to dissuade a person from giving evidence in criminal proceedings is a serious matter and this has been recognised by the Oireachtas, which has set down a maximum sentence of 15 years' imprisonment for the offence. The appellant in its submissions, contrasted this with the comparator offence in the UK where the maximum sentence is 5 years' imprisonment. The appellant submits that a judge should also bear in mind the damage done to the administration of justice by such offences and relies on *The People (DPP) v. Lehane* in this regard.

The Nature of the Witness Intimidation

30. The appellant submits that there are degrees of seriousness attached to this offence. The appellant provided examples such as a sudden outburst in a courtroom or outside a Garda station. While such behaviour is to be deprecated, the appellant submits that it is lesser in terms of seriousness than a planned commission of the offence. Further, the encounter between an accused and a witness can, as submitted by the appellant, be relevant – be it by chance in a courtroom setting, or an organised encounter by the party charged with the offence.

31. The appellant submits that in the present case, the respondent cannot assert that this was a chance encounter between himself and the victim. The respondent brought a plank with him on the evening of the 13th November, 2020 and this, in itself increases the seriousness of the offence.

Seeking Out a Witness by Visiting their Home, Work or Place they Frequent

32. The appellant submits that this factor should be regarded as a factor when sentencing a convicted person for this offence due to the fact that this may lead to the person fearing for their safety within their own household. In the present case, the victim was sought out at his home on both occasions and late at night.

Nature, Longevity and Severity in the Conduct of the Offence

33. The appellant submits that physical assaults of a witness in a case are of high significance and that such assaults raise the seriousness of the offence in question into a higher category. The appellant submits that while some assaults may differ in the particular circumstances of a given case, a sustained attack on a witness elevates the seriousness of the offence. The appellant submits that repeated incidents of witness intimidation, such as the present case, should also place the offence into a higher category and cannot be considered as being a "one-off" event. This, it is submitted by the appellant, coupled with the threat to kill charge is also relevant to the severity of the incident and it was not a matter of issuing verbal warnings.

34. The appellant submits that other forms of intimidation may not involve physicality, such as "poison pen" letters, besetting a person, nuisance communications, social media postings that denigrate the witness or draw attention to them in a negative manner, attempts to persuade or dissuade a witness about their evidence, staring menacingly at the witness or other such conduct that amounts to a threat of blackmail or a threat against their privacy if they give evidence. The appellant submits that in *The People (DPP) v. Lehane*, there was no threat of violence, however, the accused was attempting to dissuade the complainants from testifying by *inter alia* threatening to tell her family and neighbours that she was a prostitute. While the appellant is advocating that physical force is of particular seriousness, the appellant submits that this does not negate the fact that other forms of intimidation may also be aimed at achieving the same result and may have a severe impact on the person concerned.

The Detrimental Impact of the Offending

35. The appellant submits that this is a relevant factor if the offending impacted or deterred the relevant witness. The appellant submits that in addition, the other consequences for the victim of the incident are to be taken into account where the person is someone who was already a witness in a criminal investigation or prosecution. In the present case, the victim did not attend the Circuit Court on the 3rd October, 2018 and the appellant submits that this is significant. The adverse effects the offence has had on the victim as seen in the Victim Impact Report were considerable.

Involvement of Others in the Criminal Enterprise

36. While this does not arise in the present case, the appellant submits that it may be relevant in this regard to take account of previous convictions for similar offences involving the administration of justice, or if the convicted person has previous offences of violence on his or her record.

Analysis and Determination

37. The sentencing judge approached the sentencing by identifying that this was a case where the accused had intimidated the victim twice because he was to give evidence in relation to a small road-traffic incident. He delivered a sentence of four and a half years on the assault and then stated that he was *"sentencing globally in relation to all of the counts and I'm going to take all the counts into account. If I was asked for a headline sentence, I would say between six and seven years in relation to all of the counts, but this is a global sentence on Count No. 2 of four and a half years."*

38. We consider that there is a degree of opacity around the sentencing remarks by the sentencing judge. It is unclear if in his view the intimidation offences were considered to be the more egregious offences or the assault itself. He sentenced on the assault offence, which had a maximum available penalty of 5 years' imprisonment but indicated a global penalty *"if*

I was asked" of *"six to seven years".* It is important that when a sentencing judge is sentencing on a number of offences that he or she would identify the most serious offence and proceed to identify the correct headline sentence and reduction for mitigation accordingly.

39. It is important to bear in mind what this Court has said in *The People (DPP) v. Casey and Casey* [2018] IECA 121 about global sentencing: -

> *"12. We consider it appropriate at this point to make some general observations with respect to this submission* [that a global sentence was called for]. *Where multiple offences have been committed in a spree there is nothing in principle wrong with a court taking account of the overall gravity of the offending conduct viewed globally, indeed it is desirable that it should do so. Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor. That it was part of a spree renders the gravity of each individual offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher offences for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing. However, going further and nominating a global headline sentence, while certainly possible, complicates the sentencing process as we will explain. Before doing so, however, we feel it necessary to highlight some pertinent issues.*

13. The first of these is that even if a global headline sentence is nominated, there ultimately requires to be an individual sentence for each individual offence, or at the very least a sentence or sentences for one or more offences with the others taken into consideration. It is preferable, however, not to have regard to the latter expedient. This was made clear in the case of The People (Director of Public Prosecutions) v Higgins (Unreported, Supreme Court, 22nd of November 1985) where Finlay C.J., in his judgment (with which Walsh J, Henchy J, Griffin J, and McCarthy J concurred) observed: '…the accused having been convicted on a number of charges arising out of the same incident but varying in the sense of their seriousness, the learned trial judge imposed upon him a sentence in respect of one count only and took the other counts into consideration. Having regard to the possibility that always exists of a court of appeal setting aside on some technical or other ground the conviction on a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentence should, in my view, be imposed on all counts in respect of which an accused person is convicted by the jury.'

14. Consistent with this, Professor O'Malley in his well-regarded work, "Sentencing Law and Practice" (3rd Ed), suggests (at para 31.55) that the statutory provision on foot of which other offences may be taken into consideration, namely s. 8 of the Criminal Justice Act 1951: 'was intended solely to allow defendants to ask for uncharged offences to be taken into account in order to forestall the possibility of a later prosecution for those offences. Yet, it is not uncommon for courts to take into account offences of which a defendant has actually been convicted. They impose a sentence for one offence and take the rest into consideration. Strictly speaking, a

sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive.'

15. Secondly, any individual sentence imposed cannot lawfully be disproportionately severe to the particular offence for which it is being imposed. However, the sentence imposed for the offence of conviction may be increased as a result of other offences properly being taken into consideration, provided the maximum penalty is not exceeded.

16. Thirdly, we suggest that quite apart from the issue identified in the penultimate paragraph above, a further reason exists as to why the option of taking an offence or offences into consideration requires to be used sparingly in this type of case, i.e., where an accused is being sentenced for a series or spree of similar offences, namely, that it carries with it the risk that an impression may be given either to the offender, or to a relevant victim, or to both, that the offender is in some respect getting 'a free ride' in respect of an offence or offences for which discrete sentences are not imposed. (A 'free ride' was how the Manitoba Court of Appeal put it in R v Wozny 20 MBCA 115, a case cited in that regard by Prof. O'Malley in the work previously cited, at para 15.39).

17. The principal of proportionality in sentencing is a constitutional requirement and has to be at the forefront of every sentencing judge's mind. In State (Healy) v Donoghue [1976] IR 325 (SC) 353, Henchy J opined that cumulatively Article 38. 1, Article 40.3.1 , Article 40.3.2 and Article 40.4.1o of the Constitution necessarily imply, 'at the very least, a guarantee that a citizen shall not be deprived … where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances'.

40. The Court in *The People (DPP) v. Casey and Casey* went on to discuss other ways of taking into account the global headline approach. It ultimately held that *"[i]t is a matter for individual sentencing judges to adopt the approach with which they are most comfortable, and which seems to them most appropriate in the circumstances of an individual case. We are, however, satisfied that the failure to adopt the global headline sentence approach in the present case cannot, per se, be said to have been an error of principle."*

41. In this case the sentencing judge, adopted a global headline sentence approach but failed to have regard to the importance of setting out clearly the steps he was taking to identify the most serious offence. All appropriate consideration must be given to identifying where on the scale of gravity the offending behaviour lies as regards the most serious offence. Even if it is permissible to take an offence into consideration for which a person has pleaded guilty (see the remarks in *The People (DPP) v. Casey and Casey* above), it is not permissible to take into consideration a more serious offence when imposing a sentence on what is clearly in the circumstances a less serious offence.

42. Furthermore, it is unsatisfactory that a sentencing judge would proceed to identify a headline sentence as 6 or 7 years. An accused in entitled to know the basis on which his or her offending is being judged and whether appropriate mitigation has been applied to that headline sentence. Conversely, the DPP, the victim and the public at large, are entitled to know precisely the place on the scale that the offence has been placed and to see the mitigation that has been applied to that headline or indicative sentence. This is to ensure transparency in the administration of justice and also to permit the DPP to know whether she should exercise her entitlement to appeal the sentence on the ground of undue leniency. A year difference between 6 and 7 is a substantial one. The calculation of the percentage deducted for mitigation is greatly different depending on whether the headline sentence was one of 6 or one of 7 years. Four and

a half years amounted to a 25% reduction on 6 years but to a reduction of about 35% on a sentence of 7 years.

43. This was a case that was centred on witness intimidation. There were two separate occasions of witness intimidation, separated by days, with the first offence succeeding in deterring the victim from testifying. The second offence was accompanied by serious threats, criminal damage and in particular a vicious s. 3 assault. The assault however was part and parcel of the witness intimidation. Those offences should have been the focus of any global sentencing and not the particular assault. This is not simply because the offence of witness intimidation carried a greater sentence but because the facts of this offence demonstrated that the assault and threats were part of the intimidation and not that the intimidation was part of the threats and assault. There may perhaps be occasions where it is proper to focus on an assault which is accompanied by a threat to kill or seriously injure for the purpose of identifying the appropriate sentence, even though the latter offence carries a greater maximum sentence. This was not the position here. All the offences were carried out with the intention of dissuading the witness from doing his civic (and statutory) duty of testifying in a criminal trial. For those reasons, we would disagree with the submissions of the respondent that this was a witness intimidation which culminated in the assault. The circumstances required the sentencing judge to have express regard to the specific nature of the offence of witness intimidation.

44. It is on that basis that the Court will proceed to examine whether this sentence was unduly lenient. The fact that the sentencing judge erred in how he approached the sentencing process does not of itself prove that the sentence actually imposed is unduly lenient. The principles set out by McKechnie J. in *The People (DPP) v. Stronge* [2011] IECCA 79 still apply. Those principles are so well known it is not necessary to repeat them here. The task of the Court is to assess whether the DPP has proved that the sentence imposed constituted a

substantial or gross departure from what would be the appropriate sentence in the circumstances. We must find that there is a clear and discernible difference between the latter and the former.

45. Having identified that the witness intimidation offences were the most serious of the offences, it is necessary to identify the appropriate sentences for those offences. We have been greatly helped by the submissions of the DPP. It is an offence for which the maximum penalty is 15 years and that is a factor which must be taken into account. It is an offence, which unlike assault, is directly aimed at the administration of criminal justice. In *The People (DPP) v. Lehane*, the Court of Appeal with wholehearted approval noted *"the seriousness of this type of offence, and its potential to adversely impact on the administration of justice."* The Court held that a custodial sentence was entirely appropriate. That is the starting point.

46. We also agree that the comments of Cranston J. of England and Wales in *R. v Smith (Craig Anthony)* cited above are particularly apposite. Following on from that *dicta*, the nature of the intimidation is highly relevant to the sentence. Like every offence, the context in which the offence takes place is material to its gravity. An isolated, intemperate outburst on the steps of the court is entirely different to a pre-planned campaign of intimidation.

47. Seeking out a witness at their home is of particular seriousness; the home rightly being a place which should have a special degree of inviolability. Going to a place of work or study is also significant as it affects both important aspects and relationships in the lives of witnesses.

48. The type of conduct involved is also significant to assessing the gravity of the offence. All intimidation is likely to cause some degree of psychological injury with more intense activity likely to lead to greater such harm. The conduct leading to that damage may involve degrees of escalation from nuisance communications to threats of blackmail or breach of privacy. Intimidation accompanied by actual property damage, threats to seriously injure or kill, and physical assaults are progressive escalations of considerable seriousness.

49. Another important factor is the consideration of the detrimental impact of the offending behaviour. If a person was actually deterred from going to court that is of greater seriousness.

50. The extent of the criminal enterprise is important. If the intimidation is carried out by a group, that is generally more serious than that carried out by an individual. Intimidation by or at the behest of an organised criminal group is at the upper end of seriousness.

51. We consider that in general, the following matters are relevant to where in the scale of offending behaviour the offence will lie. We have chosen from a range of low range, mid-range and upper range. Some of the categories will overlap. Each behaviour does not have to be present for the offence to come within each range. It is a matter for a court to weigh the seriousness of each item and/or the absence of inclusion of certain items for the purpose of identifying the range and the place within the range on which the offence lies. The chart is indicative only of the type of conduct or sequelae that may come within a range and the sentencing judge will have to consider the place on the range that other conduct or sequelae not covered in this chart fit.

Low Range: (0-5 years)	Isolated incident; Unplanned or sudden outburst; Sole perpetrator; Lack of violence or threat of violence; Psychological injury.
Mid-Range: (5-10 years)	Planning; Taking place in the home/work/place of study; Accompanied by criminal damage or threats of violence;

	Accompanied by physical violence Use of a weapon; Harm to Victim; The detrimental impact of the offending behaviour on the criminal justice process.
Upper Range: (10-15 years)	Serious or ongoing harm inflicted on victim; Two or more persons involved; Involvement of organised crime; Sustained campaign of intimidation; Accompanied by other offences against third parties such as false imprisonment; Potential for serious harm to the administration of justice.

52. We will now proceed to identify the appropriate sentence in respect of these offences. The first offence of witness intimidation took place in circumstances where the respondent appears to have thrown part of a door lock against the porch of the victim's home. No words were passed and the link with the respondent was made because he left his motorbike on the path outside the victim's driveway. It is noteworthy that the respondent was arrested soon afterwards but was unfit for questioning. If there was planning in this event it was negligible and had all the hallmarks of a somewhat more spontaneous event brought on by his nearness to the home of the victim and his drunken state. It is relevant that this caused the victim to be in fear to the extent that he did not attend the first Circuit Court hearing. The injury to the administration of justice is ultimately lessened by the fact that the respondent eventually

proceeded with his appeal on a sentence only basis. Applying the criteria set out above, it can be seen that this was a case which was borderline between the low range and mid-range. We therefore find that 5 years is the appropriate headline sentence.

53. The second offence is much more serious. It is aggravated by the fact that it was carried out after the first offence. There was much more planning involved. He brought a weapon to the home of the victim and damaged the victim's CCTV cameras. What was particularly aggravating was the extent of the physical assault carried out on the victim with a weapon. The victim suffered a frightening and painful physical attack and was left with permanent scarring on his face and significant psychological trauma. The entire episode was accompanied by significant threats of serious injury and death. What saves it from the highest range is that it was carried out by a sole perpetrator and did not have the intended end result of frustrating the trial of the respondent on the road traffic offence.

54. We consider that this offending comes within the mid to upper range of the mid-range. We are satisfied that an indicative sentence of 8 years is an appropriate headline sentence in the present case.

55. The question then arises as to whether these should be consecutive. We have considered that the principle of global sentencing is covered in the present case by making these sentences concurrent. We have taken into account in a proportionate manner the fact that the second offence of witness intimidation was carried out after the other offence and that offence has been increased accordingly. We consider that a headline sentence of 8 years is the appropriate sentence for these two instances of intimidation.

56. We think that this is a case where it is appropriate to mark the severity of the assault by imposing a sentence on that offence. We are satisfied that in light of the use of a weapon, the fact that it was an assault carried out for the purpose of intimidation, that the victim suffered permanent facial scarring, that he has significant psychological trauma and aggravated by the

fact that the respondent has relevant previous convictions for assault, the appropriate headline sentence is one of 5 years.

57. We are of the view that if it is permissible to take offences into consideration for which a plea of guilty has been entered in the Circuit Court (a matter to be finally decided in another case), it is appropriate to do so in respect of the offences of criminal damage and possession of an article. These offences were part of the intimidation and have been reflected in the sentence for the second offence of witness intimidation.

58. The Court must consider the question of mitigation. In the present case the amount of mitigation varied depending on how one interprets the sentencing judge's reference to a headline sentence of 6 or 7 years. We are of the view that in this case, the only matters of substantive mitigation were his early guilty pleas. His previous convictions amount to a successive loss of mitigation. His personal circumstances, which appear to have been his own internal driver for his offences, are not such that warrant any or any great deal of mitigation. The fact that he would lose his job as a courier was the result of the loss of his licence directly related to his behaviour in the matter of the road traffic accident.

59. We consider that the first offence of witness intimidation would merit a slightly higher amount of mitigation for his guilty plea as this was beneficial to the prosecution in the circumstances of the case. We therefore are of the view that a sentence of 3.5 years should have been imposed.

60. In relation to the second offence of witness intimidation, we are satisfied that the early guilty plea deserved no more than a 20% to 25% deduction allowing for this Court's margin of appreciation, as he was caught red-handed by the Gardaí and was obviously recognised by the victim. As this count of witness intimidation represents the most charges on the indictment and the one which must attract the highest sentence, we think it appropriate in those

circumstances to discount for the pleas at the generous end of our range of appreciation, namely by 25%. The correct sentence for that offence is therefore 6 years.

61. In relation to the offence of s. 3 assault, we are of the view that this offence was so serious an offence of s. 3 assault, that notwithstanding the plea of guilty the same deduction of 25% is not warranted. In this instance we are only prepared to discount by 20%. We believe the appropriate sentence for the assault is 4 years.

62. The total sentence we have identified is one of 6 years. That sentence is a clear divergence from the sentence of 4 and a half years actually imposed. We are satisfied that the sentence imposed in the Circuit Court amounted to a substantial departure from what would be the appropriate sentence in the circumstances. We are satisfied that the sentence imposed was unduly lenient.

63. There are no other matters that were drawn to our attention for the purpose of resentencing. We have considered the appropriate sentence to be imposed. We note that the sentence was only imposed on this respondent on the 11th November 2019. We do not consider that any further issue arises in the present case out of the fact that the respondent was sentenced to a lesser sentence at first instance. We are satisfied to impose the following sentences of imprisonment on this respondent:

Count 2: 4 years

Count 4: 6 years

Count 6: 3 years and 6 months

64. All sentences are concurrent and are backdated to the 15th November 2018 when the respondent first went into custody.