THE COURT OF APPEAL

Edwards J.
McCarthy J.
Kennedy J.

Record No's: 0222/2019; 0223/2019

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

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

APPLICANTS

V

HAI PENG LI
AND
HUA FENG JI

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered by Mr Justice Edwards on the 17th of November, 2020.

Introduction

1. The two respondents in this case pleaded guilty to single counts of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997, on the 25th June, 2019, on a full facts basis. They were remanded on bail until the 8th of October, 2019, which was later extended until the 18th of October to facilitate the furnishing to the court of a victim impact statement and Probation and Welfare Reports.

2. On the 18th of October, 2019, the respondents were both sentenced to two years' imprisonment, wholly suspended for a period of two years, in respect of the two counts of s. 3 assault.

3. The appellant now seeks a review of the sentences on the grounds of undue leniency.

Background to the matter

4. The second-named respondent, Hua Feng Ji, is the owner of a Spar shop on Portland Street, a share of which is also held by the first-named respondent, Hai Peng Li. The trial court heard evidence from Garda Declan Gielty, who stated that on the 8th of June, 2016, the injured party, a Mr Kieran Buckley, entered this Spar and bought a winning scratch card and cashed it. Upon leaving, an employee shouted that Mr Buckley had stolen a carton of orange juice and pulled at him. The employee said that he would ring the

Gardaí. Mr Buckley told him to do so. Mr Buckley then took out his mobile device and made a phone call.

5. When the Gardai arrived at the scene, Mr. Buckley denied the allegation. CCTV footage was examined by the gardaí, which showed the initial skirmish, and showed the injured party being punched, kicked, and detained. Copies of the footage were requested several times, but these requests went unfulfilled. The footage was later obtained on foot of a warrant.

6. Gardaí arrested both respondents. Nothing of evidential value emerged out of the interview with the first-named respondent. The second-named respondent, Hua Feng Ji identified himself on the CCTV footage, and admitted being involved assaulting the injured party. He explained that his colleague had told him that Mr Buckley was stealing orange juice. He claimed that they calmly asked the injured party if he had forgotten to pay, at which point Mr Buckley became agitated. It was at this point that the assault began. There is no audio on the CCTV footage to validate this claim.

7. Under cross-examination, it was agreed that the footage showed Mr Buckley using his phone to ring his friend, whom arrived later. Mr Buckley did not ring the gardaí himself. The second-named respondent was worried that Mr Buckley would have friends come to the shop in order to escalate matters. He claimed that Mr Buckley was making threatening statements, but there is no audio evidence to confirm this. He maintained that whilst he had not seen Mr Buckley steal anything, he had been informed by staff that he had. It was agreed that the respondents were subjected to frequent occurrences of shoplifting, and the gardaí were aware of a recent armed robbery carried out at the Spar. He emphasised the difficulty of running a business whilst under constant threat and claimed to be "*messed up*" under the circumstances. The second-named respondent then spoke of their support of the local community, such as contributing to the garda-hosted elderly charity Christmas event in Croke Park.

8. Both respondents were originally also charged with false imprisonment, and a trial date was sought. However, pleas of guilty to s. 3 assault were entered after the DPP agreed not to proceed with the false imprisonment charges. Garda Gielty spoke of the benefit of the plea in circumstances in which gardaí had been unable in recent times to locate Mr Buckley for the trial. It was also confirmed that a public liability insurance policy in respect of the Spar had compensated Mr Buckley.

Impact on Victim

9. Although the sentencing hearing was adjourned from its original date on the 8th of October, 2019, to allow for the furnishing of a Victim Impact Report, gardaí were unable to contact Mr Buckley to facilitate this. This court is bound by the s. 5(4) of the Criminal Justice Act, 1993, as substituted by s. 4 of the Criminal Procedure Act, 2010, which states as follows:

> *"Where no evidence is given pursuant to subsection (3), 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."

10. The court heard from Garda Gielty that although Mr Buckley turned down offers of transport to a hospital via an ambulance or garda car, he later presented to A&E. There, he was treated for a collapsed lung, which involved the insertion of a chest drain and required a stay overnight in hospital. He also received four stitches. Mr Buckley subsequently attended his GP for pain relief.

Circumstances of the respondents

11. Neither respondent has any previous convictions, and neither had come to the adverse attention of gardaí in the 3 years and 4 months before sentencing. They both entered pleas of guilty at an early opportunity. The court was furnished with Probation and Welfare Reports in respect of both respondents, which will be examined in turn below.

Hai Peng Li

12. The first named respondent, Hai Peng Li, was 42 years old at the time of sentencing. He is married and has a four-year old son. He underwent a kidney transplant, which requires ongoing medication and care. He has the benefit of stable accommodation, a good employment record and familial support, and had never come to the adverse attention of the gardaí.

13. It was said that Hai Peng Li did not cooperate with the investigation and was ambivalent regarding his belief that a theft had occurred. He gave a materially different account of events to that of Mr Buckley and continued to justify his actions and blame them on the victim. Whilst he was assessed as presenting a low risk of reoffending, the report did maintain that Hai Peng Li had anger management issues. These were however reported to have resolved in 2017. It was reported that he regretted his actions and accepted the effects they had.

Hua Feng Ji

14. The second-named respondent, Hua Feng Ji, was 39 years old at the time of sentencing. He is a native of China, where his parents and brother still reside. He has a degree in accountancy and is married with two children. He moved to Ireland in 2001, whereupon he attained work in a café, which he eventually bought with his earnings. He bought his interest in the Spar shop after selling that café in 2013.

15. It was submitted that the Spar was based in area of Dublin which has faced many difficulties, and the shop had suffered from instances of theft and robbery before, which led to an uncharacteristic and disproportionate reaction.

16. His probation report states that he has some insight into the impact of his actions, that he was remorseful and had learned from the incident but continued to justify his actions and still blamed it on the victim. The Probation Officer assessed the Feng Ji as presenting a low risk of reoffending and concluded that supervision would be of limited benefit.

Remarks of the Sentencing Judge

17. When sentencing the two respondents, the sentencing judge summarised the facts of the case, and interpreted that the two men had "*got the wrong end of the stick and misread the situation*" and engaged in a serious scuffle which was "*clearly the wrong way to deal with the matter*". The sentencing judge characterised their actions as a "*a gross exaggerated response*", noting their unfortunate history of being subjected to robbery and theft, but stressed that a less aggressive approach should have been taken. It was acknowledged that the respondents' insurers had paid compensation to the injured party, and the sentencing judge stated that he had "*no doubt that the insurance company has visited, I suppose, a cost on these two defendants in relation to their insurance coverage*".

18. The sentencing judge assessed the mitigating and aggravating factors before arriving at the sentence:

> *"Now, the mitigation is clear, they have pleaded guilty, they have expressed remorse, which I think it sincere remorse. Importantly, neither had a previous conviction prior to this date and neither has offended in any way since the date. The question is what to do about it? It was a serious assault with reasonably serious consequences for a victim. But on the basis of all of the evidence and submission made in the case, I think it will be unjust to imprison these two men. I think the appropriate sentence for both of them is a term of imprisonment of two years and that is to be suspended on the following basis. One, they must be of good behaviour for a period of two years and, secondly, they must enter into a bond in the sum of €100."*

Grounds of Appeal

19. The appellant rests her appeal on the following grounds:

    i) The sentencing judge did not identify a headline sentence;

    ii) The sentencing judge attributed too little weight to the aggravating factor;

    iii) The sentencing judge attributed too much weight to the mitigating factors.

Submissions of the appellant

Headline Sentence & Aggravating Factors

20. The sentencing judge did not identify a headline sentence. Such an approach has been recommended as best practice by this court in numerous cases. In *DPP v Molloy* [2018] IECA 37 the approach was favoured on the basis that:

> *"20. … it seems to us that it is likely to best focus judges at first instance on the overriding criterion of ensuring that sentences are proportionate both to the gravity of the offence and the circumstances of the offender, and in particular that 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" - see The People (DP P) v McCormack [2000] 4 IR 356. In addition, it has the*

advantage of producing better reasoned sentencing judgments, that better explain to the interested parties why a particular sentence was imposed and which are also more readily amenable to review at appellate level…"

21. Edwards J. also noted:

> *"9. This is yet another case in which this Court is faced with the difficulty that no headline sentence was identified, and no indication of the quantum of discount afforded for mitigation was given. by the sentencing judge. This creates a real problem for us in circumstances where the appellant is making the case that by virtue of where the sentencing judge ended up, which we do know. namely at a sentence of imprisonment for six and a half years, the sentencing judge must have either over-assessed the gravity of the offending conduct, or failed to have afforded sufficient discount for mitigation, or a combination of both of those things."*
>
> *…*
>
> *11. The practice commended involves a staged approach in which gravity is assessed in the first instance. with reference to the range of penalties available and taking into account culpability (including factors tending to aggravate or mitigate the intrinsic gravity of the offending conduct) and the harm done, leading to the nomination of a so-called "·headline sentence··: and then in the second stage discounting from the headline sentence to take account of any mitigating factors not already taken into account (which will be those not bearing on culpability). and in that way to arrive at the appropriate ultimate sentence."*

22. The sentencing judge described the incident as a '*serious scuffle*' although he does go on to say that the respondents' reaction was '*a gross exaggerated response*'. It is submitted that this is not borne out by the CCTV. The judge does not refer to the nature of the injuries incurred at all.

23. As no headline sentence has been identified, it is not possible to ascertain where on the scale the sentencing judge placed the offence. However, his comments would suggest that it was in the lower range and a mere '*overreaction*' by the respondents.

24. The aggravating factors in this case include:

a) The unprovoked nature of the attach

b) The duration of the attack

c) The removal of the injured party from the shop and into a stairwell.

d) The ferocity of the attack.

e) The fact that the assault continued even after Mr. Buckley had been restrained.

f) The assault started up again on a number of occasions.

g) There were three protagonists.

h) The injured part was kicked, punched in the head and body and restrained.

i) The nature of the injuries inflicted.

j) The attempt to justify the attack and blame the injured party.

25. For all of the reasons set out above, it is submitted that this assault was in the upper end of gravity.

26. This Court has recently reviewed the issue of sentencing in assault cases *in DPP v McGrath, Dolan and Brazil* [2020] IECA 50. This Court identified that the following factors tend to 'aggravate such offences':

a) Infliction of significant injuries

b) Use of a weapon

c) More than one assailant

d) Premeditation

27. In this case two of the four factors identified were present. It is submitted that these together with the other factors as set out in paragraph x above, place these offences in the upper range. As stated in *McGrath*:

> *"24. …In such cases, a starting point or pre-mitigation sentence of five years may be appropriate. Certainly, judges should not operate on the basis that a starting point of five years is not generally available and that it should only be considered, if it be ever considered, in exceptional circumstances."*

Mitigating Factors

28. Again, as no headline sentence been identified, it is impossible to identify what deduction was given for mitigation.

29. The sentencing judge identifies the following mitigating factors in his sentencing remarks

30. The respondents had '*got the wrong end of the stick and misread the situation*' – this would have had greater weight if they had admitted their mistake when the gardaí looked for the CCTV and/or when they were interviewed.

31. The insurance company had made a pay-out. It is submitted that this was also of limited mitigation. As courts regularly comment, compensation is seen an indication of remorse and not a way of buying oneself out of trouble. In this case, the compensation did not come from the respondents directly and even if their insurance premiums were increased (as assumed by the court, but not in evidence), it had a limited impact on them personally.

32. The plea – this was only entered after the trial had actually been called on. So, while it was of benefit – it came very late in the day. The timing of a plea is relevant to the weight given to it in mitigations.

33. The remorse was accepted as genuine notwithstanding the manner in which the respondents had continued to blame the victim and excuse their own behaviour.

34. The respondents had no previous convictions and had not come to the attention of the gardaí. This was accepted as being a mitigating factor, and it was clear that it was taken into account.

35. It was submitted by the appellant that imposing a sentence of two years and then suspending it fully on the basis that the respondent be of good behaviour also contributed to the sentence being unduly lenient.

Submissions of the first-named respondent

36. Counsel for the respondent draws this court's attention to the case of *DPP v Jennings* (Court of Criminal Appeal 15 February 1999), in which the Court of Appeal set targets for repeat offenders which, if reached, might allow a sentencing court to bring forward a release date or by implication avoid the imposition of a custodial sentence. At page 2 of that judgment, it reads:

> *"if he is given this, his last chance perhaps, he will hopefully take it and rehabilitate himself, get employment and become a useful member of the community".*

37. It was submitted that this is the only chance the respondent sought and seeks. He had, on the date of sentence an unblemished record and had long before met the targets set in the judgment.

Submissions of the second-named respondent

Ground One: The sentencing judge erred in not identifying a headline sentence

38. In this ground, the appellant complains that the sentencing judge erred in not identifying a headline sentence as per the jurisprudence of this court. That he failed to do so is clearly the case. Nonetheless, it was submitted that, in a case such as this, the facts of which are clear, and with clear mitigation, the failure to follow the formula as set out by the jurisprudence should not necessarily prove fatal. This is not to excuse its failure, merely to submit that the failure in and of itself should not prove fatal. Indeed, it is the jurisprudence of this Court that the failure to follow the formula will not be fatal in all cases, and that the reason for the formula was to allow a reviewing Court insight into how the sentence was arrived at. In this case, given that the sentencing judge specifically found that in all the circumstances it would be unjust to imprison the respondents by reason of the facts and the mitigation, the argument over the failure to set a headline sentence should not in and of itself prove fatal.

39. Counsel for the DPP notes that the sentencing judge, in describing the incident as a 'serious scuffle', makes a characterisation which is not borne out by the CCTV. She

submits that the sentencing judge does not refer to the nature of the injuries at all. It is submitted that this is not factually correct. The sentencing judge sets out what happened in the CCTV. He says that "*A serious scuffle ensued where from the CCTV footage it can clearly be seen that both defendants attacked the unfortunate Mr. Buckley. They punched him and they kicked him. It seems they also held him for a number of minutes*". The sentencing judge sets out what is actually in the CCTV, and describes it. He also goes on to say "*Yes, they should have tried to detain him in, to put it mildly, a less aggressive way, but they didn't"*. Therefore, to say that the characterisation of the incident as a "*serious scuffle*" that is not borne out by the CCTV and to leave matters there is to ignore the following comments later on in the very same sentence where the sentencing judge recites exactly what happens in the CCTV. It is further submitted that the sentencing judge does indeed refer to the injuries suffered by the victim in this case. He says that this was "*…a serious assault with reasonably serious consequences for the victim*". It was said that to suggest that the judge was somehow saying the opposite is simply incorrect.

40. Counsel for the DPP then goes on to say that because no headline has been identified, it is not possible to say where the sentencing judge placed the offence on the scale of offending, but that his comments would suggest he placed it in the lower range and that he viewed it as a 'mere overreaction'. It was submitted that this is unfounded speculation on behalf of the appellant. With mitigating factors such as the plea of guilty and the lack of previous convictions, along with all of the other mitigation in the case, that would suggest that the respondents would be entitled to a significant and substantial discount to whatever the ultimate sentence was. Given that the ultimate sentence was one of 2 years, which is not insignificant in and of itself, that would suggest that the starting point was much higher. This would take the starting point out of the realm of the 'lower range' as submitted by the appellant.

Grounds two and three: Aggravating and Mitigating factors

41. The appellant submits that there are a number of aggravating factors in the case: These include the unprovoked nature of the attack; its duration; the removal of the injured party from the shop and into a stairwell; the ferocity of the attack; the fact that the assault continued even after the victim was restrained; the fact that the assault started up again on a number of occasions; the fact that there were three protagonists; the fact that the injured party was kicked, punched in the head and body and restrained; the refusal to provide CCTV to Gardai; the nature of the injuries inflicted; and the attempt to justify the attack and blame the injured party. These are all set out in the appellant's submissions as separate aggravating factors.

42. It is submitted that a number of these factors repeat and incorporate each other, and are in fact in a number of cases a mere restatement of the factor itself. For example, '*the fact that the assault continued even after the victim was restrained*' is merely a restatement of several of the factors which follow, including '*the fact that the assault started up again on a number of occasions*' and '*the fact that the injured party was kicked, punched in the head and body and restrained*'. The same applies to '*the ferocity of the attack*' and those

same factors. It also applies to the '*duration of the attack*'. It is submitted that this is just a different way of saying the same thing and does not amount to separate aggravating factors.

43. It is submitted that the failure to provide CCTV to Gardaí on the day, before the Gardai were required to leave the premises to deal with another incident, is not in fact an aggravating factor. Instead, it goes to a potential mitigating factor which is not available to them. It is analogous to not pleading guilty, which this Court and its predecessor has always found to be not aggravating, but rather a loss of mitigation. It is submitted that this was recognised by counsel and the sentencing judge. Nowhere in the transcript does counsel for either respondent submit they co-operated with the Gardai, nor does the sentencing judge so find. It is submitted that to note this as an aggravating factor amounts to an error.

44. Once the appellant comes in submissions to specify aggravating factors as set out by this Court in the case of *DPP v McGrath, Dolan and Brazil*, she notes that there are four such factors, and that two of those aggravating factors as identified by this Court are present in this case: infliction of serious injuries, and more than one assailant. She submits that these two factors, combined with all the others set out by her in paragraph 15 of her submissions, bring the case into the upper range of offending. It was submitted that this case cannot be seen to be at the upper range of offending. While the two factors identified by this Court in *McGrath and others* are present, it has already been pointed out that many of the numerous further factors identified by the DPP in Paragraph 15 comprise no more than re-statement/re-iteration of a factor or factors already identified.

45. Further, when deciding where a case lies on the scale, the court will obviously be concerned the presence of aggravating features established as existing in the evidence. However, it was submitted, the court is also entitled to have regard to the absence of other commonly encountered aggravating factors. For example, in this case there is no use of a weapon, nor is there any pre-meditation. Those are potential aggravating factors identified by this Court in *McGrath and others*, and they do not appear. Neither, for example, do a number of the factors which appear in the cases of some individual accused in *McGrath and others*, factors which in those cases allowed the Court to locate the offending behaviour of those concerned in the upper range on the available spectrum. For example, in the case of Martina McGrath, there was a weapon used, and significant injuries were caused to a pregnant victim who received stab wounds, and this accused also had relevant previous convictions. That offence was also committed on bail. In the case of Mark Dolan, there was extreme violence, the use of a weapon, the infliction of scarring, and the impact of his assault on his victim's sports career. In the case of Dale Brazil, there was pre-mediation, an approach to the victim's house, weapons used by two assailants acting in concert, the infliction of serious injuries which resulted in fractured bones, the significant impact on his victim, relevant previous convictions, and the fact that his offending was committed while on bail.

46. It is submitted that while there are serious injuries in the instant case, they by no means approach the type of injuries present in the individual cases in *McGrath and others*, an important factor contributing to those offences being placed in the upper range of offending. It was accepted that there is also more than one assailant in the instant case. However, it was submitted, there is also a lack of pre-mediation, the lack of a weapon, a big difference in the injuries inflicted, the lack of evidence of long-term sequelae for the victim, no previous convictions, and no question of the offences being committed while on bail. It was submitted that the absence of such factors was an important, indeed vital, element taking the instant case out of the upper end of offending.

47. Finally, it was submitted, while counsel for the DPP seems to rely heavily on the duration of the incident, it should be borne in mind that the respondents themselves rang the Gardaí, and then detained the victim until they arrived. Therefore, the incident lasted as long as it took the Gardai to arrive. While the respondents certainly could have and should have simply let the victim go and had the Gardai deal with the matter, once they did decide to detain the victim until the arrival of the Gardai they did not detain him for any longer than they perceived to be necessary. Too much force was used, of that there is no doubt, and that is why the plea of guilty was entered. However, it seems somewhat unfair to list the duration of the incident as aggravating given that, once they decided to detain the victim until the arrival of the Gardai, they were somewhat at the mercy of outside factors once they rang the Gardai.

48. As to mitigating factors, counsel for the DPP lists what she submits the trial judge found as mitigating factors and then seems to take some pains to deprecate them. She submits that the sentencing judge found the following mitigating factors: that the respondents had '*got the wrong end of the stick*'; that the insurance company had made a pay-out which had resulted in an assumed increase in premiums; that there had been a plea; that the remorse expressed was genuine; and that neither accused had any previous convictions. Each of these is commented upon by counsel for the DPP in submissions. To traverse these seriatim:

49. Counsel for the DPP submits that the sentencing judge found that the respondents had '*got the wrong end of the stick*', and then submits that this would have had further weight if the respondents had admitted their mistake when gardai looked for the CCTV or when they were interviewed. First, it was submitted that while the sentencing judge did find that the respondents had '*got the wrong end of the stick*', it is not at all clear that he found that as a mitigating factor. That particular comment comes when the sentencing judge is reciting the facts of the case. While he found that as a fact, it was submitted that he did not specifically consider it as mitigation. Further, after noting that the respondents had misread the situation, he went on to say: '*They thought Mr. Buckley had stolen items or an item and they confronted Mr. Buckley in an aggressive way. This was clearly the wrong way to deal with the matter*'. Therefore, to say that the sentencing judge found this to be a mitigating factor cannot be entirely ascertained from the transcript. However, if he had in fact done so, the deprecatory comments regarding his so doing made in

submissions are again not accepted. None of it obviates the finding that the appellants had indeed misread the situation.

50. Counsel for the DPP says the trial judge found as a mitigating factor that the insurance company had made a pay out to the victim Mr Buckley, and that this had had an impact on the respondents as the owners of the shop. The trial judge did find that this was so. The evidence of the pay-out was given in cross examination. The sentencing judge found that: '*I have no doubt that the insurance company has visited, I suppose, a cost on those two defendants in relation to their insurance coverage*'. Counsel for the DPP then observes in submissions that this was of limited value as mitigation, as the pay-out came from the insurance company and not the respondents directly, and that even if their premiums increased (as assumed by the Court without evidence) it had a limited impact on them personally. In rebuttal it was submitted that the value of the pay-out was that the victim received some compensation for what happened to him, and while that did not come from the respondents, it was paid by their agent. It was submitted that it was an appropriate factor to be taken into consideration by the sentencing judge, and it was.

51. Counsel for the DPP notes that the trial judge found that the plea was a mitigating factor. She then goes on to say that the plea was only entered after the trial had been called on, and therefore the benefit which accrued to the respondents because of it should be minimised. This ignores two issues. First, the manner in which the plea came about was elicited in cross-examination:

> *"Q: The matters came before the Court in the way that Ms. O'Neill has outlined, once the Director agreed not to proceed with the count of false imprisonment pleas were entered. Those negotiations between counsel were entered into significantly before the trial, is that right? A: Correct, yes".*

This, it was submitted, shows that the respondents entered their plea once the situation changed, and therefore it was a plea which was entered as early as could reasonably have been expected. It was not the earliest possible plea, but because it was dependent upon a changed landscape, that should not be held against them. The second issue which the DPP's submission ignores is that the plea in this case was of particular value. In this case, the victim could not be located by the Gardai when the case was listed for disposal. The matter came up for sentence originally on the 8th of October. On this date, there was no Victim Impact Report, and the matter was adjourned to allow one to be obtained. On the sentencing date of the 18th of October, the matter proceeded without a Victim Impact Report, as the court was told Mr. Buckley could not be located. Therefore, if the respondents had not entered their plea, there is a chance they could have avoided any conviction whatsoever. They did not choose to take this chance, but instead entered their plea. Again, this was elicited in cross-examination of the investigating Garda:

> *"Q: And I suppose in those circumstances, although one can never tell, but it was a beneficial plea in that you can't find the victim now for the victim impact report, is that right? A: Yes".*

52. Counsel for the DPP submits the sentencing judge found the remorse expressed as genuine, notwithstanding the manner in which the respondents had continued to blame the victim and excuse their own behaviour. It is accepted that the Second-named Respondent did not apologise in interview with the Gardaí. Instead, he gave his version of events in order to provide an explanation as to what had happened. However, the Probation Officer's report, notes that Mr Ji accepts responsibility for what he did, and that:

> *"He also expressed regret and remorse for his actions. Mr. Ji maintains that that victim was verbally abusive, threatening, and hit him. Mr. Ji stated that he recognizes that nothing justifies his actions."*

The report then goes on to say:

> *"He acknowledged the physical and psychological impact on the victim. He also recognised the negative impact the incident would have had on the victim's family. He stated he that he is sorry for this".*

53. Counsel for the DPP agrees that the fact that the respondents had no previous convictions and had not come to the attention of the Gardaí is a mitigating factor. It is submitted that this is an extremely important mitigating factor. At age 36, the respondent had no previous convictions on the date of offence. At age 39, he had come to no negative attention in the meantime.

54. These are all the mitigating factors counsel for the DPP identifies. They are all the mitigating factors which the sentencing judge alludes to in his sentencing comments. However, there are a number of other factors which the sentencing judge must be inferred to have taken into account. First, there is their record of employment. Second, there is the record of entrepreneurship displayed by the second-named respondent. Third, there is the fact that the Probation Services found the second-named respondent to be at a low risk of re-offending. Fourth, it would seem, given all of the above, to be totally out of character for both respondents. Fifth, there is the fact that they are foreign nationals and while there is a level of English, it is by no means near that of a native speaker. Finally, in respect of the first-named respondent there seems to be a health issue involving his kidneys. It was submitted that each of these was an important factor in deciding how to deal with the respondents, and that the sentencing judge was fully cognizant of each. He did not specifically recite them, but that does not mean that they did not feature in the case, or that they should be ignored in the submissions of the appellant when urging this Court to exercise its powers to increase the sentence of the sentencing judge.

55. It was submitted that the sentence passed by the sentencing judge was entirely appropriate given the circumstances of the offence and the personal circumstances of each respondent.

Discussion & Decision

56. It is accepted that the offending behaviour of these respondents was completely unacceptable, and a wholly disproportionate reaction to any perceived provocation. We have viewed the 11 minutes approximately of video from the CCTV system in the Spar store and have found it to be helpful. The onset of violence was very sudden. It was considerable while it lasted, but fortunately for the injured party it did not last very long. The injured party, Mr Buckley, was felled to the floor and was then kicked and punched for some moments by up to three persons, including the two appellants, in a quite disgraceful and frenzied way. When the initial assault on him ended and he got up off the ground, his ordeal was prolonged by the fact that he was physically restrained, manhandled around the shop, and his liberty was curtailed. Most of the 11 minutes of video is concerned with recording this period involving his restraint and manhandling.

57. The matter is put before us on the basis that this was an assault causing harm aggravated in numerous respects, and that accordingly following this Court's judgment in *The People (Director of Public Prosecutions) -v- McGrath, Dolan and Brazil* [2020] IECA 50, the starting point from a sentencing perspective should have been towards the high end of the range. A difficulty that immediately arises in that regard is the failure of the sentencing judge to indicate his pre-mitigation or headline sentence, or indeed where he had started on the range or scale of available penalties and how the notional needle had been moved up or down along that range to take account of aggravating or mitigating factors. All we know is that the sentencing judge ultimately arrived at a post mitigation sentence of two years' imprisonment which he saw fit to suspend in its entirety. Counsel for the DPP suggests that if an appropriate headline sentence had been nominated, that even with generous discounting there would have to have been a custodial sentence to be served in this case, given its seriousness.

58. We do not, respectfully, agree that a custodial sentence to be actually served was inevitable in this case. The sentence imposed, by one of the most experienced sentencing judges on the bench, was undoubtedly lenient. Moreover, it is not well explained in terms of how the ultimate disposition was arrived at, or in terms of the sentencing objectives that the sentencing judge was prioritising. However, be that as it may, this Court would only be justified in interfering if the sentence actually imposed represented a significant departure from the norm. We are not persuaded that it was. It was, as we have said, a lenient sentence, but a sentencing judge has a margin of appreciation in that regard and is entitled to impose a sentence towards the lenient end of his/her margin of appreciation in what they deem to be an appropriate case in which to show leniency. Interference will only be justified where the degree of leniency was such that it exceeded the available margin of appreciation to such an extent so as to place the case clearly outside the norm.

59. In our judgment that while this was a serious instance of assault causing harm, it was not a grossly aggravated instance of it. That said, however, counsel for the DPP was correct to suggest that there were several aggravating factors tending to increase culpability. There were multiple participants, the brief initial attack which involved felling the victim and kicking and punching him on the ground was quite ferocious in its intensity, and that attack was then compounded by being associated with a subsequent

restraint of liberty. The nature of the harm done was also aggravating in that it required a later surgical intervention in hospital to insert a chest drain to re-inflate a collapsed lung.

60. However, the attack, albeit wholly unjustified, has to be seen in the context in which it occurred. It was not a gratuitous pre-meditated attack, but rather, was spontaneous and in response to a perceived provocation; notwithstanding that the respondent's perception was utterly mistaken and erroneous, and that how it was responded to was utterly disproportionate. Moreover, it seems the appellants had been the victims of an armed robbery in the recent past, and that they were troubled in running their business with persistent shoplifting, making them hyper vigilant and, it may be reasonably inferred, under stress to protect their business. They unquestionably over-reacted, but it was within a context which requires to be considered in assessing their moral culpability.

61. In our view, given the context in which it occurred, and the aggravating features alluded to, the appellants' offending behaviour would have merited a headline sentence at the upper end of the mid-range on the spectrum of available custodial penalties. The entire spectrum (ignoring non-custodial options) is sixty months, and a three-way division would give a low range of 0 to 20 months, a mid-range of 21 to 40 months, and a high range of 41 to 60 months. An appropriate headline sentence would have been 40 months in our judgment, with some margin of appreciation on either side of it.

62. There were significant mitigating circumstances. There were pleas of guilty. The accused were first time offenders, with no previous convictions and no convictions since. They had expressed remorse which was accepted to be genuine. They were positive contributors to their community. Some restitution was made. They were assessed as being at low risk of re-offending. In terms of a straight discount for mitigation they would have been entitled to a discount of at least 50% on the headline sentence.

63. The question then for the sentencing judge would have been whether, in circumstances where they were first time offenders, priority should be given to the penal aim of reform and rehabilitation, over and above that of retribution and/or that of deterrence, and to that end be prepared to show some additional leniency. While the sentencing judge does not expressly address this, it is clear to us that there was arguably a strong case for a suspended sentence here as an incentive towards reform and rehabilitation. It was certainly within the sentencing judge's range of discretion to have opted to suspend the post mitigation sentence as an incentive towards reform and rehabilitation. The recent report of the Law Reform Commission on Suspended Sentences (LRC 123-2020) discusses (at paras 3.26 to 3.28) the use of a wholly suspended sentence in that way and cites the recent decision of this court in the *People (Director of Public Prosecutions) v Broe* [2020] IECA 140 as explicating the typical basis on which a court might do so. As we are satisfied that this was an entirely appropriate case in which to avail of the option of suspending what remained of the post mitigation sentence, we do not consider that the ultimate wholly suspended sentence imposed in this case was outside the norm. That sentence was undoubtedly a lenient one, but it was not in our view unduly lenient.

64. The application is dismissed.