



THE COURT OF APPEAL

206CJA/20

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

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

BETWEEN/

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
APPLICANT**

- AND -

**PHELIM CODY
RESPONDENT**

JUDGMENT of the Court delivered on the on the 25th day of November 2021 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 7th October 2020 in Tipperary Circuit Criminal Court. The respondent pleaded guilty to offences under the Road Traffic Act 1961 (as amended), and the Road Traffic Act 2010 (as amended). The sentence sought to be reviewed is one of two and a half years' imprisonment fully suspended.

Background

2. On the evening of 29th June 2019, the respondent, Phelim Cody, and the deceased, Stephen Gleeson, as well as six friends met in Garrykenny. During the evening they moved to the home of Mr. Cody, also in Garrykenny. In the early hours of the morning, at around 5:00am on the 30th June, Mr. Cody, Mr. Gleeson, and two friends decided to take out an old car that was being restored by the respondent. The car in question was in defective condition, with underinflated tires, no back seats, and no rear seatbelts. It was also uninsured and had no NCT. The car could not move out of low gear and it was stated that it was traveling at no faster than 30-35kph. The route taken was an almost three mile loop on rural roads from Garrykenny to nearby Portroe and back. While approaching Garrykenny, the car hit the left-hand side of the road, crossed over, hit

the right-hand side of the road and overturned. Mr. Gleeson was thrown from the car and died; the other occupants of the car were essentially unharmed.

3. The respondent made immediate admissions to the attending Gardaí that he was the driver, stating that he had killed his best friend. He was attempting self-harm so the attending garda handcuffed him. He was subsequently brought for alcohol and drug testing, following which he was admitted as an in-patient to psychiatric services in Ennis. He was found to have a blood alcohol reading of 188/100mg and it was further found that he had consumed cannabis. The sentencing court heard that the crash occurred from a combination of driver error and the defective nature of the car; the severity of the injury caused was as a result of the lack of rear seats and seatbelt.
4. A large amount of evidence was adduced by the defence as to the character of the respondent, including evidence from the father of the deceased bearing no ill will to the respondent, and referring to a supportive relationship between the Gleeson family and Mr. Cody. Character evidence from his employers, educators, and friends was supported by the fact that the respondent has no previous convictions, and had not previously come to Garda attention. Medical evidence indicated that the respondent had been diagnosed with post-traumatic stress disorder, generalised anxiety and depression as a result of the extreme remorse he has felt since the events, and the report of Professor Henry O'Connell opined that a prison sentence would be very damaging to his mental health.

The sentence

5. The sentencing judge noted that the respondent pleaded guilty to four offences, the most serious of which being dangerous driving causing death contrary to s. 53(1) of the Road Traffic Act 1961 as substituted by s. 4 of the Road Traffic Act (No.2) Act 2011, which carries a maximum sentence of ten years' imprisonment.
6. The sentencing judge considered the aggravating factors to be the condition of the vehicle, and the driver error caused by consumption of alcohol and cannabis, placing the offence at the upper end of the lower scale. The mitigating factors, the judge considered, were the cooperative nature of the respondent and his immediate admissions, as well as his lack of previous convictions and the unlikelihood of his reoffending. His good character was considered in mitigation, and, as a result, the sentencing judge imposed the two and a half year sentence fully suspended, along with his disqualification from driving for four years. The suspension is on the condition that he be of good behaviour and remain drug-free.

Submissions of the Appellant

7. The appellant submits that the sentencing judge failed to set out a headline or pre-mitigation sentence. It is said that the sentence of two and a half years was insufficient even before one considers its suspension, and the aggravating factors were not sufficiently considered. It is submitted that the headline sentence should be above the middle point of the scale due to the aggravating factors, and that the weighing of the aggravating and mitigating factors was not proportionate. It is further said that the

sentencing judge did not consider the need to provide deterrence given the seriousness of the offences and the fatality.

8. The appellant refers to the case law of this Court, including *inter alia* *DPP v. Nestor* [2018] IECA 255, and *DPP v. Declan Moran* [2019] IECA 5. In *Nestor*, it is said that although the facts are not “on all fours” with the instant case, the aggravating factors in that case led to a sentence of four years with two suspended, indicating that the respondent’s sentence is insufficient. Further, in *Moran*, the submissions note that Edwards J. considered that the offence of dangerous driving causing death in that case, when not considering previous convictions, should be in the upper half of mid-range. The Director submits that the same headline should be applied in the instant case.
9. Finally, the appellant submits that, as in *DPP v. Byrne* [2017] IECA 97, the Court should consider the suspension of the entirety of the sentence based on the nature of the offence, the objective seriousness of it, the need for deterrence, and the subjective circumstances of the offender. It is submitted that the aggravating factors in the instant case warrant that the sentence should not be fully suspended.

Submissions of the Respondent

10. The respondent’s submissions focus on the distinguishing features of the cases cited by the appellant, as well as the mitigation relevant to Mr. Cody’s case. In *Nestor*, it is said that the blood alcohol reading of the accused was far higher than in the instant case, a pedestrian was killed, and there were injuries to two Gardaí. Similarly, in *Moran*, the accused hit a motorcyclist while executing an illegal turn on a main road, and left the scene without assisting the deceased. The respondent considers the case of *DPP v. Flynn* [2020] IECA 294, in which *Moran* and *Nestor* were considered. It is said that in that case, certain ostensible “outliers” are cited as only requiring sentences of two to four years, including *DPP v. Ryan* [2017] IECA 31. In that case, three years was considered an appropriate headline sentence, in which the intoxicated accused caused grave injuries to a pedestrian while driving with no lights and only a provisional licence, following which he left the scene without assisting. It is said that, although it was questioned whether a fully suspended sentence was unduly lenient in *Ryan*, this Court decided not to give the accused a custodial sentence.
11. The respondent submits that *Moran* is not a useful comparator in relation to setting a headline sentence due to the facts of that case. It is argued that the “freak” element to the fatality in the instant case, the short, rural, and slow nature of the trip, and all four boys’ awareness of the condition of the car and the driver, distinguish the respondent’s case.
12. The relevant mitigating factors are reiterated, in that they are “exceptional” and that they go far enough to render the sentence fully suspended. Pertinently for the purposes of this appeal, the respondent notes that Mr. Cody has, for example, taken on a managerial role at the local café, continued to work with his online clothing company (while giving a percentage of its profits to charity) and remained drug-free. It is said that the long wait

for the appeal has affected his mental health. It is said that, due to *Ryan*, beyond deterrence, it would not serve the public interest to give Mr. Cody a custodial sentence.

Discussion

13. The jurisprudence relating to undue leniency appeals is well settled at this point. This Court will not intervene in the sentence imposed unless it is satisfied that the sentence constituted a substantial departure from the appropriate sentence.
14. This is a tragic case for all involved. The conduct of the respondent in the early hours of the 30th June 2019 was highly reckless and the consequences were devastating. The aggravating factors are many and obvious; the analysis of the respondent's blood revealed a blood alcohol level of 188 mgs alcohol per 100mls of blood, where the limit for a person with a learner permit is that of 20mgs, the sample also revealed the presence of cannabis, the vehicle was not in a serviceable pre-collision condition; the tyres were underinflated which impacted on the stability of the vehicle, the inner thread of one tyre was under the legal limit, the vehicle had no rear seats and had been modified to carry two occupants. The collision came about due to driver error and defects in the vehicle, with the fatal injuries to Stephen Gleeson resulting from the absence of seating and consequently the absence of restraints causing him to be ejected through the rear window. The impact on the family of the deceased is of course immense and we will return to the impact statement shortly.
15. The mitigating factors are also many: immediate admissions, enormous distress on the part of the respondent, he has no previous convictions, a plea of guilty was entered, genuine and deep seated remorse, indeed the respondent is devastated by the loss of his friend, the young age of the respondent, and the impact on his mental health. We have received reports and testimonials which we have carefully assessed. Mr. Cody is described by his family doctor as a 'gentle and well-meaning young man'. We don't intend to highlight in any detail the content of the reports or testimonials but the testimonials reveal a sensitive and thoughtful person.
16. The effect on the respondent's mental health was immediate and significant. The Court was presented with a number of documents detailing the psychological impact of the accident and its aftermath on Mr. Cody. At the scene of the accident, he is reported to have attempted self-harm by hitting his head off the ground, attempting to stab himself with a screwdriver, attempting to impale himself and heading in the direction of a nearby lake to jump in. He was restrained, brought to University Hospital Limerick and subsequently admitted to the Acute Mental Health Unit in Ennis, where he stayed for four days. He attended eight psychological therapy sessions between January and June 2020, where he is reported to have shown remorse, sadness and anxiety about the accident and the death of his friend. His clinical presentation was consistent with diagnoses of Post-Traumatic Stress Disorder, Moderate Depression and Generalised Anxiety. The Clinical Psychologist notes that across all three diagnoses is profound remorse.
17. Mr. Gleeson's father gave the impact evidence which, understandably makes very sad reading. His son died aged 21. His loss has devastated his family. Mr. Gleeson speaks

with great empathy, compassion and understanding of the devastation caused to two families and highlights Mr. Cody's own loss and Mr. Cody's assistance to the Gleeson family.

18. The Director relies on nine grounds of appeal. She contends that the sentence is unduly lenient. While Mr. Redmond BL on behalf of the Director contends that the judge erred in determining that a non-custodial sentence was appropriate, the focus of this appeal concerns the headline or pre-mitigation sentence nominated. The judge placed the gravity of the offending at the upper end of the mid-range and nominated a headline sentence of 2 ½ years. It is said that insufficient weight was given to the aggravating factors, thus resulting in a headline sentence which is out of kilter with the appropriate sentences for this type of offence.
19. Sentences for the offence of dangerous driving causing death must vary from case to case. There is a very sound logic to this as each offence will have different facts. Some will involve appalling driving, speed, danger to the public, a callous disregard for other road users, or, as here the use of intoxicants, be that alcohol or drugs or both. Some will involve reckless and stupid decisions to drive and some offences may include all of the above.
20. As observed by Mahon J. in Ryan,

"justice must be done and be seen to be done. An individual who drives dangerously, particularly while under the influence of alcohol, and who in consequence severely injures another road user must expect to pay a very high price in terms of punishment. Society demands that such individuals ought to be dealt with severely by the courts. Equally, it is necessary to consider the personal circumstances of the offender in order to arrive at the appropriate sentence."
21. In the present case the facts are somewhat unusual. The decision to drive was undoubtedly reckless, a terribly bad decision on the part of a very young man in the company of his friends. This was a case however, where the background facts disclose a spur of the moment decision to drive the car around a back country road (a 3 mile loop) at 5am, in order to show how the repairs to the vehicle were coming along. The vehicle was in first gear, constantly cutting out and travelling at 30-35 km/h. This was not a case (as happens) of young people speeding, executing doughnuts and the like and callously putting other road users at risk, although of course, the respondent put the lives of all four people in the car at risk and potentially other road users and pedestrians.
22. The sentence imposed is a lenient one, indeed a very lenient one, but the question for this Court is whether the sentence imposed in terms of the legislation is unduly lenient. The law requires that a judge, when imposing sentence, must impose a proportionate sentence. The sentence must reflect the gravity of the offending, which is assessed by reference to the offender's culpability and the harm done. The sentence must also reflect the personal circumstances of the offender. It is without a shadow of a doubt that the mitigation proffered on behalf of this respondent is truly exceptional. However, a judge,

in imposing sentence, must also consider the best interests of society. This involves a consideration of the necessity for general deterrence in the imposition of sentence.

23. This Court has repeatedly deprecated driving while under the influence of intoxicants, be that drugs or alcohol. The multiple aggravating factors in this case dictate, on one view of the facts, that a custodial sentence was required and indeed, if this court had been sentencing in the first instance, we would have considered a custodial element to be appropriate. The judge nominated a headline sentence of 2 ½ years and suspended the sentence in full in order to give effect to what has been characterised as the exceptional mitigation. The offence of dangerous driving causing death in the present case merits a significant punishment in our view in order to properly reflect the gravity of the offending conduct.
24. One of the objectives of sentencing an offender is to deter that offender, but in the case of dangerous driving while intoxicated, the concept of general deterrence is highly significant. Individuals simply cannot consume intoxicants and then proceed to drive, placing the public at risk and causing immense and long lasting harm.
25. We are satisfied that the offence of dangerous driving causing death where intoxicants are a feature or where there are multiple aggravating factors requires, in most instances, a custodial sanction. However, that cannot simply be a statement of policy and should not be taken as such as each case is fact-dependent and it is necessary for the judge to drill down into the factual matrix to determine the proportionate sentence.
26. In the present case, the respondent behaved in an extraordinarily reckless manner and caused immense harm as a consequence. Therefore, the sentence imposed must reflect the views of society, which depreciates such conduct. The punishment imposed, as we have stated, must operate as a general deterrence to others and must also deter the respondent from any such future activity.
27. In the circumstances, we have come to the conclusion that the headline sentence nominated by the judge was simply too low. It failed to adequately communicate the censure of society or to sufficiently promote general deterrence, leading to the structuring of an ultimate sentence that is difficult to justify. In that respect the sentencing judge reflected the mitigating circumstances in the case by the suspension of the entirety of the already-too low headline sentence, effectively arriving at a post-mitigation sentence that involved a discount of 100% on the headline sentence (in terms of any requirement to serve an actual prison sentence). While the mitigating circumstances were substantial, they would not have justified a straight discount of 100%, and this represented a further error.
28. It is important to emphasise that the errors we have identified are rooted in the way in which the sentence was structured. It was outside the norm both in respect of the headline sentence and in respect of the level of discount applied for mitigation, and we consider that in that sense it was unduly lenient.

29. It is important to say that, had the sentence been properly structured, the respondent might still have avoided actual custody, had the trial judge opted to avail of the residual discretion which resides in every judge to "go the extra mile" after determination of an otherwise appropriate post-mitigation sentence and suspend all or part of that post-mitigation sentence because of the existence of "*special reasons of a substantial nature and particularly exceptional circumstances*". However, the sentencing judge did not invoke that residual discretion, or identify any special reasons or exceptional circumstances that could have justified having recourse to it. Rather, her approach involved determining upon on a headline sentence of imprisonment for 2½ years, which was altogether too low; and simply applying a straight discount to that (amounting to 100% in terms of any requirement to serve an actual custodial term) to reflect mitigation, leading to a sentence which, having been structured in that way, must be regarded as being outside the norm for a case such as this and unduly lenient.
30. We will therefore quash the sentence imposed and proceed to sentence the respondent as of today's date. In doing so, we are entitled to take account of the additional material which was furnished to us by Mr. O'Brien BL for the respondent.

Re -Sentence.

31. As we have stated, this type of conduct with multiple aggravating factors requires the communication of significant censure. We have considered how best to give effect to that objective, and how best to structure a proportionate sentence.
32. Whilst the aggravating features appear at first blush to be very serious indeed, and would in most instances result in a high level of moral culpability of an offender, when we examine the detail of the circumstances leading to the tragic events of the date in question, a somewhat different picture emerges.
33. Leaving aside the mitigation for the moment, we will look to those circumstances which gave rise to the decision to drive this vehicle with the resulting disastrous consequences. The deceased and the respondent were the best of friends. Mr. Cody bought the vehicle from Mr. Gleeson; both were very interested in everything to do with cars. Mr. Cody had been working on the vehicle and in the course of this had removed the back seats and seatbelts and undertaken other works on the car. It seems that according to the witness statements, all four friends took the disastrous decision to take the car for a spin on the public road in a rural area around 5am. It seems the distance that Mr. Cody drove was about three miles or less. Speed was not part of the offending, as the car was being driven slowly, possibly due to a defective gearbox which meant the car was in first gear all the time and kept cutting out. The speed was placed at between 30km and 35km per hour. The incident occurred on the return journey in that the car connected with the roadside and then crossed over, made contact with the other side and turned over. It seems that the accident occurred due to an over-correction on the part of Mr. Cody which brought into play the underinflated tyres. The over-correction was an error on the part of the respondent, very likely due to his inexperience and youth. The absence of rear seats and restraints led to Mr. Gleeson being ejected through the rear window and to his death. None of the other occupants were injured.

34. We are of the opinion that the respondent's culpability in the circumstances should be placed in the mid-range of offending. As has been stated by this court in *Flynn*:-

(1) "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)."

35. This Court has acknowledged that there is no clear blue water between the ranges of penalty. Moreover, this court affords considerable deference to the judge's margin of appreciation in the imposition of sentence and values the fact that a sentencing judge hears the evidence first-hand. It is noteworthy in the present case that the respondent gave evidence and we have carefully considered that evidence.

36. We have been referred to comparators which are of some limited assistance, bearing in mind that in imposing sentence the factual matrix of any given case may differ significantly. Moreover, some of the cases cited are appeals against severity of sentence and some reviews of sentence on the part of the Director. However it is worth noting that in the case of *Moran*, a headline sentence of eight years was nominated, where the circumstances included the existence of a previous conviction for drink driving. In *Nestor*, a headline sentence of six years was nominated where the appellant caused a death and injured two members of the Gardaí. The cases of Fleming and Ryan are properly described by Edwards J in the decision of *Flynn* as outliers where the headline sentence was 4 years and 3 years respectively. Some of the cases cited above concerned dangerous driving causing death and some causing serious injury. Mr. O'Brien urges this Court to consider the respondent's case as an outlier on the basis of the factual matrix and the mitigation present.

37. As we have said, we are satisfied that the headline sentence nominated by the judge of 2 ½ years in the circumstances of the offending is too low taking account of the multiplicity of aggravating factors present. All other things being equal, the offending conduct here is required to be met with a substantial carceral sanction. There is a requirement in law to sentence, not for the offence as viewed objectively, but for the offence as committed by the particular offender in his circumstances. We accept that the facts of this case are unusual, and believe that this case can be distinguished from some of the other cases mentioned. The respondent's behaviour was reckless in the extreme. However, some of the factors which would ordinarily aggravate an offence of this nature were not present; such as a relevant previous conviction, speed or leaving the scene of the accident. We have identified the aggravating factors which are present; the most significant being that the appellant was intoxicated by alcohol and cannabis. While he was also driving a vehicle which was not roadworthy, his culpability in that respect is somewhat mitigated by the fact that the distance driven was short, the car was driven slowly, fortunately, nobody else in the vehicle was injured, he was not attempting to drive home from a pub or a wake and had in fact encouraged one of his friends not to drive the distance to his home. We take into account the extraordinarily compassionate approach of Mr. Gleeson's family.

Taking the aggravating factors into account and the matters identified, which operate as extenuating factors of his culpability, we consider a headline sentence of 4 ½ years to be appropriate. This is proportionate to the offending and provides the necessary general deterrence in the interests of society.

38. This case bears some similarities to the *Ryan* decision, where the Director reviewed a fully suspended sentence of three years for the offence of dangerous driving causing serious injuries. In *Ryan*, the respondent drove a vehicle at speed without lights and whilst intoxicated in an urban area, colliding with a car which had the right of way and causing life altering injuries to a pedestrian. He left the scene. Having pleaded guilty, a three year wholly suspended sentence was imposed. On appeal, the court did not consider a three year sentence inappropriate, but was concerned with the fact that the sentence was fully suspended. The Court was of the view that a 12 month custodial sentence was appropriate, but decided in the exercise of its residual discretion to re-impose the three year wholly suspended sentence in light of the fact that eight months had passed since sentence was imposed. Moreover, the Court concluded that the public interest would not be served by sending the respondent to prison. These represented special reasons and exceptional circumstances justifying the exercise by the Court of its residual discretion.
39. The Director has sought to handle this tragic case with sensitivity, in particular as the family of Mr. Gleeson have treated this tragedy with such compassion. We have carefully assessed the mitigation and we are satisfied that the mitigation present is exceptional. The respondent's response at the scene was one of devastation, he co-operated fully, he pleaded guilty and reports and testimonials were furnished to the Court. Moreover, we have now received an additional booklet of material concerning the respondent's current position.
40. In excess of a year has passed since the imposition of sentence. During that time, he has maintained full-time employment in a local café, he has furthered his education, and completed 25 certifications in various courses. He has developed an online clothing company and has raised money and awareness for Irish charities. He is in receipt of ongoing therapy with the community mental health team and is currently on medication to deal with mental health issues. He has undergone voluntary drug testing and is drug free. His relationship with Mr. Gleeson's family continues.
41. His consultant psychiatrist opines that he presents as extremely remorseful and insightful and has made every effort to deal with the consequences of his actions. She also states that this review has exacerbated his mental health difficulties and has brought back vivid memories of the accident.
42. In our view, the material before the sentencing judge provided extensive mitigation. The material before this Court demonstrates that Mr. Cody is making every possible effort in his life. His remorse is clearly evident from the letter he wrote for this Court and supported by the additional material furnished. The mitigation is of an exceptional kind. In order to properly reflect this calibre of mitigation, we will discount the headline sentence of 4 ½ years by 2½ years leaving a post-mitigation sentence of two years. We

are satisfied to do so, as in addition to the type of mitigating factors that are routinely encountered, there were highly significant and exceptional additional circumstances that required to be reflected in the discount to be applied in this offender's case. This entitled this particular accused to receive an above average discount on the headline figure.

43. We now consider whether special reasons and exceptional circumstances exist in this case which render it appropriate for us, in order to do justice, to go further and suspend any of the two year sentence post-mitigation that we have determined upon, either in whole or in part. As previously alluded to, it is well established in jurisprudence that even in a serious case a judge has a discretion to "go the extra mile" and suspend part or even all of the remaining sentence "where there are special reasons of a substantial nature and particularly exceptional circumstances" which would justify doing so. See the judgment of Murray C.J. in *The People (Director of Public Prosecutions) v. McGinty* [2006] IECCA 37, where, speaking with reference to offences contrary to s.15A of the Misuse of Drugs Act 1997 in respect of which there is a presumptive mandatory minimum sentence, he said:

"It cannot be said that there could never be circumstances in which, having regard to the interests of society as a whole, the facts of the particular case and the circumstances of the accused, where (sic) a suspended sentence would be appropriate. Undoubtedly a trial judge sentencing a convicted person for an offence such as that in question here is constrained by the considerations already referred to above to consider that a term of imprisonment is normally what should be imposed. However, where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interest of justice. This is a combination of factors which could only arise in a relatively rare number of cases. This Court has previously upheld a sentence of such a nature in the case of D.P.P. -v- Alexiou [2003] 3 I.R. because there were such exceptional circumstances and special reasons."

44. The discretion spoken of has been availed of by this Court in a small number of cases including *The People (Director of Public Prosecutions v Flanagan* [2015] IECA 94, another s.15A case. We feel it important to say, however, that if the residual discretion exists even in cases where the legislature has provided for a presumptive mandatory minimum sentence, there is no reason in principle why it should not also exist in other cases involving serious offending but in respect of which there is no presumptive mandatory minimum sentence. We accept of course that it is a discretion to be availed of sparingly, and that special reasons of a substantial nature and wholly exceptional circumstances must be identified.
45. In the present case, we are satisfied that there are such special reasons and particularly exceptional circumstances enabling this Court to go the extra mile. It is one of the rare cases spoken of by Murray C.J. in which, we believe, it is appropriate to do so.
46. Amongst the special reasons and exceptional circumstances that we would point to are that the respondent, prior to this offending, was a law-abiding citizen with no previous

convictions. He has continued to be a law-abiding citizen. We are struck by the efforts he has made since the sentence was imposed on the 7th October 2020 and the evidence we have received in this regard. He is contributing positively to society. He is continuing to address the issues of anxiety and depression which are as a result of the accident. The certificates obtained by him disclose that he has undergone suicide awareness training. He remains under the care of the Mental Health Services. We are especially influenced by the evidence we have received concerning the fragility of his mental health and his vulnerability in that respect in the event of being required to serve a custodial sentence.

47. This case involves an appalling tragedy and one which cannot go unmarked by a significant sentence. However, as in *Ryan*, we acknowledge and weigh in the balance the competing considerations involving, on the one hand, the need for the courts to be seen to deprecate and punish this type of conduct on behalf of society; and, on the other hand, the issue as to whether, in the circumstances of the case, incarcerating a young and mentally fragile first-time offender would ultimately be in the interests of society.
48. We consider this case to be very unusual; this is evident from the facts of the offence itself, the exceptional mitigation, the continuing rehabilitation on the part of the respondent, and the compassionate view of Mr. Gleeson's family.
49. The respondent is a young man who has suffered anguish as a result of the tragic death of his friend which came about as a result of his actions. In our assessment the desirability of not further damaging the already fragile mental health of this respondent effectively reduces the choice to one of wholly suspending the two year sentence, or not suspending it at all. A partly suspended sentence is not, in our view, a realistic option in the present case because the evidence before the court is clear and to the effect that any period of incarceration would be damaging to the appellant's mental health and would lessen his ability to once again become a positive contributor to his community and to society. To incarcerate him would therefore involve subjecting him to an unintended additional penalty in terms of his mental health, with the residual impact on his ability to contribute to society which would not ultimately be in the public interest.
50. He is deeply and genuinely remorseful, he holds himself fully responsible and he will live with this for the rest of his life. In the exceptional circumstances of this case, and for the special reasons stated, we are convinced that it would not be in the interests of justice to order that he now serve a period in custody.
51. Consequently, we will suspend the two year sentence that would otherwise be appropriate on the same conditions that attached to the suspended sentence imposed by the court below, and for a period of three years. The disqualification from driving for four years remains.