



THE COURT OF APPEAL

Record No's: 35, 36, 37 & 38 CJA/2019

**Edwards J.
McGovern J.
Kennedy 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-

**ALAN WALL, BARRY WALSH,
CONOR O'CONNOR & MICHAEL TYNAN**

RESPONDENTS

JUDGMENT of the Court delivered on the 2nd day of March 2020 by Mr. Justice Edwards.

Introduction

1. For the avoidance of confusion, this judgment will refer individually by name to Alan Wall, Barry Walsh, Conor O'Connor & Michael Tynan, respectively, rather than using designations such as first, second, third and fourth named respondents. However, collectively the four individuals will be referred to as "the respondents". The Director of Public Prosecutions will be referred to throughout as "the applicant".
2. On 30th of October, 2018 the respondents each entered guilty pleas before Waterford Circuit Criminal Court to one count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and one count of possession of a firearm with intent to commit an indictable offence, contrary to s. 27B of the Firearms Act, 1964 as substituted by s. 60 of the Criminal Justice Act, 2006 as amended by s. 39 of the Criminal Justice Act, 2007, respectively. They were then sentenced on the 8th of February 2019.
3. In the cases of Alan Wall and Michael Tynan, they each received a sentence of five years imprisonment with the last eighteen months thereof suspended on conditions for three years post release (the said conditions including being subject to Probation Service supervision for two years post release) for the robbery offence; and a concurrent sentence of three years imprisonment for the firearms offence.
4. In the cases of Barry Walsh and Conor O'Connor, they each received a sentence of six years imprisonment with the last twelve months thereof suspended on conditions for

three years post release (the said conditions including being subject to Probation Service supervision for two years post release) for the robbery offence; and a concurrent sentence of four years imprisonment for the firearms offence.

5. All sentences were to date from the 3rd of May 2018, being the date on which all of the respondents went into custody.
6. The Director of Public Prosecutions now seeks a review of each of the sentences imposed on grounds of undue leniency.

Background to the matter

7. The sentencing court heard evidence from Detective Garda Michelle Burns who outlined the circumstances of the armed robbery of Cleaboy Post Office, Waterford, by the four respondents on the 3rd of May 2018. The four respondents travelled to the Post Office in a red Renault Laguna motor car, registration 06 MO 10313, driven by Mr Tynan. Mr Wall, Mr Walsh and Mr O'Connor then entered the Post Office premises together, leaving Mr Tynan outside in the Renault Laguna as the getaway driver. One of the three raiders who entered the Post Office had a sawn-off shotgun and the other two had hammers. The raiders were wearing balaclavas and latex gloves to conceal their identities. At the time of the incident there were two female cashiers working inside the counter of the Post Office and there were also two female customers present in the public area of the premises, one of whom had her two children with her, one aged 3 and the other a baby in a pram. The raider wielding the sawn-off shotgun banged the gun off the Perspex glass partition at the counter. The Post Office workers behind the counter were threatened that they would be shot if they did not hand over cash. In the circumstances outlined the staff members were forced to hand over €42,755.00, US\$950.00 and Stg£1,200.00 as well as a quantity of stamps and Post Office stock. The whole incident lasted a minute and ten seconds and was captured on CCTV. The CCTV recording shows, inter alia, the clothing worn by the raiders and the fact that one of them had a red and black Liverpool rucksack. The raiders then returned to the red Renault Laguna parked outside and, as they did so, the Post Office staff immediately raised the alarm. The fleeing raiders were observed by witnesses and on CCTV leaving the Cleaboy area in the Renault Laguna travelling towards the Waterford Outer Ring Road. Witnesses described the vehicle driving in an erratic manner en route.
8. Subsequently, and within minutes of first receiving a report of the raid, gardaí received a second report concerning a vehicle on fire in a quiet cul de sac in the Knockhouse area of Waterford City. A further report was received from a motorist concerning three males he had seen running across the Waterford Outer Ring Road, from the direction of the burning vehicle, who then entered and ran across some fields and into a wooded area near the WIT Arena, which is near the Waterford Greenway. The motorist had turned around having seen the three men in question, and having done so then observed a fourth man following the initial three.
9. Local gardaí were quickly despatched to the scene. The burning vehicle was found to be the red Renault Laguna used in the raid and gardaí succeeded in extinguishing the fire

before it was fully burnt out, and managed to preserve it for forensic examination. Certain items were later found in that vehicle including a sawn-off shotgun and a hammer as well as two shotgun cartridges. Some gardaí who were first on the scene then attempted to pursue the suspects on foot, given the inaccessibility of the location and terrain. A large number of other garda units also responded, and within a short time a large-scale search of the area was embarked upon.

10. While this was on-going a witness who was out walking the Greenway happened to observe three males hiding in a wooded area, and he alerted gardaí. On searching the location the witness had described, gardaí discovered three men cowering in a hole within a fallen tree and on closer inspection a fourth man was found hiding on the far side of the tree. These four men were the respondents.
11. The immediate area where the men had been hiding was then searched and a Renault car key was found, as well as a red McKenzie hoodie, a navy Adidas tracksuit bottoms, a grey McKenzie tracksuit bottoms, and a red and black Liverpool rucksack. All of those items, apart from the key, were to be seen on the Post Office's CCTV recording of the raid as having being worn or carried by participants in the raid. Subsequently the key was found to match the partially burnt out Renault Laguna. The red and black Liverpool rucksack was found to contain the full proceeds of the robbery being the cash and foreign currency consisting of €42,755.00, US\$950.00 and Stg£1,200.00 as well as the stamps and other items taken from the Post Office, including a TV Licence Book. The four respondents were arrested and detained.
12. The Garda investigation and CCTV review established a significant degree of organisation and pre-planning of the armed robbery. Gardaí established that the robbers had access to a second vehicle, a black Audi, 02 C 40254, and one of the respondents was observed moving between the Audi and the red Laguna on the morning of the robbery and to have done two trial runs from where the vehicle was found parked up to the Post Office prior to the actual robbery. Mr Tynan and Mr Wall had also entered the Post Office the previous day and, Mr Wall had done so again just moments before the robbery. All four respondents were interviewed in garda custody and they were uncooperative in terms of accounting for their activities. They each answered "no comment" to the questions asked of them at interviews, including when statutory inference provisions were invoked in respect of them. It was confirmed at the sentencing hearing that, notwithstanding that all of the respondents had been acting in concert, the gardaí were not able to establish, beyond reasonable doubt, which of the three respondents that had entered the Post Office premises was the one carrying the shotgun in circumstances where all three had taken steps to conceal their respective identities.

The Impact on the Victims

13. Victim impact statements were received and read into the record from the two Post Office staff who were present during the robbery, a Ms Caroline Walsh and a Ms Geraldine Hayes. Neither of the two customers who were also present, including the lady with small children, wished to make a victim impact statement.

14. In her victim impact statement, Caroline Walsh said:

"There are very few occupations where you face a real threat of armed attack. You would scarcely think that working in your local post office would pose such a threat. However, on Thursday the 3rd of May 2018, this is exactly what happened to me.

I was initially reluctant to submit an impact statement as I try not to think about it to a large extent. I have dealt relatively well with the aftermath of the robbery; I have not allowed to significantly alter me or how I live my life.

However, it would be incorrect to say that this has not had a huge effect on both myself and my family when you imagine the absolute terror I felt, or of that of my husband and children when they were told that the post office where their wife and mother worked had been held up at gunpoint. I don't think I was ever hugged as tightly as when I finally got home to them later that day.

Some nights I lie awake, sleep is as likely as winning the lotto, and it replays again and again in my head. I can see them entering the post office and then the gun pointing directly at me. I'm happy to say that this has become less frequent as time has passed, but I still cannot banish the memory of absolute shock and fear for both myself and my colleagues and customers. I still scan the door constantly and am immediately suspicious of anyone entering the post office who might have any part of their face covered with a scarf or hat pulled down. I am grateful that no one was physically harmed, but my main wish is that this never happened.

I hope they will reflect on the effect this has had on me, my colleagues, our customers and the wider community, how totally senseless this robbery was. I hope they will come to realise the impact it has on someone when you decide to arm yourself with a gun and attack a defenceless target, as we were that day.

I wish the people who carried out this robbery no personal ill will, I only hope that none of their mothers, fathers, families or friends experience what we did that day. The Post Office is not only a place for people to go to pay their bills or send Euro to family abroad, it is part of the glue in our community and it should be a safe place. No one should be afraid to go to work for fear of being shot. The same for any other member of the public who uses the post office. I sincerely hope I will never experience anything like this again."

15. Ms Geraldine Hayes, in her victim impact statement said the following:

"While working on Thursday the 3rd of May 2018, I have to say the events of that morning changed my life forever. I have never before experienced events that happened that day before in my years of working. The fear and terrifying events will stay with me forever. The worst part of it, despite being threatened with a gun, was the sheer noise and aggressiveness of the people involved. I actually felt fearful for my life. For weeks after the robbery, I used to lie awake and relive what

happened, what could have happened and what I would have done differently. In hindsight, there was nothing I could have done. I am grateful that no one was physically harmed but it still leaves you wondering what could have happened. It also upset me badly to see the effect it had on my husband and children. I'm a mother and a grandmother and would hate to think any one of my family had to experience what I went through. There are still days while at work that when the door opens, or someone different comes in, or they are in loud groups, that my heart actually skips a beat and I feel anxious. This will probably stay with me forever. I hope that justice is served, and the people involved realise the severity of what they did and the effect it had on me and my colleagues and the customers in the Post Office at the time."

The Respondents' Personal Circumstances

Alan Wall

16. The sentencing court heard that Mr Wall's date of birth is the 2nd of June, 1980. He has thirteen previous convictions which break down as follows: four for various offences under the Criminal Justice (Public Order) Acts 1994-2011; three for unlawful possession of a controlled drug under s. 3 of the Misuse of Drugs Act, 1977; one was for failure to appear, contrary to s. 13 of the Criminal Justice Act, 1984; and one, dated the 18th of June, 2015 and recorded at Waterford District Court, was for the unauthorised possession of firearm ammunition, contrary to s. 2 of the Firearms Act, 1925 as amended.
17. The probation report on Alan Wall assesses him as being at moderate risk of reoffending unless he addresses his criminal behaviour and unemployment. It records Mr Wall as displaying some insight into the distress and trauma caused to the victims by his actions. The report further indicates that Mr Wall has a reasonably significant past employment history. He has variously worked as a Boner in a meat processing factory, and in the storeroom of an adhesive company, as well as in construction. At the time of the offence Mr Wall was in a long-term relationship, and had fathered two children aged sixteen years and fourteen years respectively. His partner was pregnant at the time. There were some tensions between him and his partner at the time of the offence, and he had no fixed accommodation at that time. The probation report indicates that Mr Wall's past offending is related to his use of alcohol and cannabis. He claims to have become involved in the robbery in order to gain money to pay off a drug debt. He denies any current dependency issues but the probation officer believes he may be underestimating the extent of his drug and alcohol dependency issues.
18. The court below received a number of positive testimonials in respect of Mr Wall from previous employers. A Prison Governor's report indicated that he is on enhanced privilege level, that he is engaging with education services in the prison and that he is cooperative and mannerly with staff.

Barry Walsh

19. The evidence was that Mr Walsh was born on the 6th of January 1989. He had been educated to Junior Certificate level and was a qualified block layer until 2008 when the recession hit. He had fifty-five previous convictions. Twenty-two of these were for

offences under the Criminal Justice (Public Order) Acts, 1994-2011; fourteen were for road traffic offences; three were for failing to appear, contrary to s. 13 of the Criminal Justice Act, 1984; three were for theft offenses contrary s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, two were for burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, one was for handling stolen property, contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; one was for possession in a public place of an article with a blade or which is sharply pointed, contrary to s. 9(1) of the Firearms and Offensive Weapons Act, 1990; two for obstruction of a member of the Garda Síochána or a person duly authorised under the Misuse of Drugs Act, 1977 in the lawful exercise of a power conferred by that Act, contrary to s. 21(4) of the Misuse of Drugs Act, 1977; one for unlawful possession of a controlled drug for the purposes of sale or supply, contrary to s. 15 of the Misuse of Drugs Act, 1977; one for violent behaviour in a Garda Station contrary to s. 15 of the Dublin Police Act, 1842; and one for robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

20. The robbery conviction is a relevant offence in the present context, and the details are that it was recorded at Cork City Circuit Court on the 8th of November, 2013. Mr Walsh received a sentence of three years imprisonment for that offence with the final year suspended. The conviction for possession in a public place of an article with a blade or which is sharply pointed, related to a bill hook. It was recorded at Cork Circuit Criminal Court on the 24th of February 2010, and Mr Walsh received a sentence of 150 hours of community service for this offence. The burglary offence was recorded on the 27th of May, 2008 at Cork City District Court and the Probation Act was applied. The s. 15 drugs offence was recorded on the 11th of June, 2012, again at Cork City District Court, and the sentence imposed was one of four months imprisonment plus 140 hours of community service.
21. It was accepted by Detective Garda Burns that Mr Walsh had a drug problem and, although originally from Cork, was living in Dublin at the time that he committed the present offence. The sentencing court had before it a letter from Merchant's Quay Ireland confirming that Barry Walsh had successfully undergone a fourteen week residential treatment program in late 2014 and early 2015. The court also had a number of testimonials concerning Mr Walsh's abilities as a son, partner and father. Mr Walsh himself also wrote letters of apology to the injured parties and to the court, and these were handed in.

Conor O'Connor

22. Conor O'Connor was born on the 2nd of June, 1980. He informed the Probation Service that he has three children, including a nineteen-year-old son residing Cork city and eleven-year-old daughter residing in County Cork and a two-year-old son residing in Dublin. The evidence before the court below was that he has one hundred and fifty five previous convictions. The breakdown of these includes one hundred and twenty three for Road Traffic offences; eight for public order offences contrary to the Criminal Justice (Public Order) Acts 1994 to 2011, eight for theft contrary to s. 4 of the Criminal Justice

(Theft and Fraud Offences) Act, 2001; five for burglary, contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; two for handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; two for robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; one for unlawful possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act, 1977; one for making a threat to kill, contrary to s. 5 of the Non-fatal Offences against the Person Act, 1997, one for obstruction of a peace officer, contrary to s. 19(3) of the Criminal Justice (Public Order) Act, 1994, and the remainder comprising sundry minor offences.

23. In terms of Mr O'Connor's previous convictions for robbery offences he was recently convicted of this at Cork City Circuit Court on the 24th of November, 2014 and received a four-year prison sentence with the final year suspended to take effect from the 16th of July, 2014. The present offence was committed during the period of the suspension of that final year. In respect of the other robbery conviction this was recorded on the 12th of February 2009 at Cork City Circuit Court and Mr O'Connor received a sentence of three years imprisonment to date from 25th of November, 2008.
24. The investigating Garda accepted that Mr O'Connor, as indeed was the case with all of the other respondents, had pleaded on the first occasion on which the matter was before the court. He accepted that Mr O'Connor had a drug habit and a history of drug use. This was further confirmed in the Probation Report on Mr O'Connor. He had previously attended Coolmine Drug Free Residential Treatment Center in 2003 for cocaine abuse but regrettably relapsed in 2006 when his mother was diagnosed with a terminal illness. Mr O'Connor and started a car balancing business in 2003 in the Cork area but lost this business in 2007 due to his substance misuse. Mr O'Connor told the probation officer that he was smoking heroin and taking benzodiazepines on a regular basis prior to committing this offence.
25. Mr O'Connor indicated through his counsel that he wished to convey an apology to the staff and customers of the post office who were present during the robbery, and a letter from Mr O'Connor to that effect was handed in.
26. A probation report on Mr O'Connor placed him at high risk of re-offending in the next 12 months if in the community. The main areas of risk in that regard were substance misuse, negative associates, and lack of education, training or employment. The probation report also records that Mr O'Connor has certain mental health issues consequent upon experiencing significant trauma as a juvenile.

Michael Tynan

27. The court heard that Michael Tynan was born on the 24th of February, 1984, and that he is the father of four children. He is estranged from his former partner. He had ADHD as a child and left school after doing his junior certificate. He then undertook an apprenticeship as a cabinetmaker. He worked with his father for some years before starting his own business as a car valet. His business failed ultimately due to his substance abuse. He has attempted to address his addictions on a number of occasions but on each such

occasion he has relapsed. He is involved with psychiatric services in Waterford as he has suffered from drug-induced mental health difficulties. He has seventy two previous convictions, broken down as follows: he has three convictions for unlawful possession of controlled drugs for the purpose of sale or supply, contrary to s. 15 of the Misuse of Drugs Act, 1977; fourteen convictions for unlawful possession of controlled drugs, contrary to s. 3 of the Misuse of Drugs Act, 1977; two convictions for offences under the Firearms and Offensive Weapons Act, 1990, being offences contrary to s. 9(4) (i.e., having in a public place a flick-knife or other article made or adapted for use for causing injury to or incapacitating a person) and s. 9(5) (i.e., having in any public place any article intended by him unlawfully to cause injury to, incapacitate or intimidate any person either in a particular eventuality or otherwise), respectively; one conviction for criminal damage contrary to s. 2 of the Criminal Damage Act, 1991; one for theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offenders) Act, 2001; one for possession of certain articles contrary to s. 15 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and fifty convictions for offences contrary to the Road Traffic Acts.

28. The sentencing court heard that all three s. 15 drugs convictions were recorded at Waterford Circuit Court on the 14th of July, 2014. They related to three separate offences arising in 2011. Mr Tynan received eight months in respect of each matter and the sentences were made consecutive. However, the sentences were also suspended on conditions.
29. The court heard that the conviction recorded under s. 9(4) of the Firearms and Offensive Weapons Act, 1990 was recorded at Waterford District Court on 29/7/2005 when a fine of €900 was imposed. The conviction recorded under s. 9(5) of the same Act was taken into consideration with an offence of possession of certain articles recorded at Waterford District Court on 07/1/2014, for which Mr Tynan received a suspended sentence of eight months imprisonment.
30. A Probation Service report on Mr Tynan concluded that he was also at high risk of reoffending, with pertinent risk factors being substance abuse, criminal associates, antisocial attitudes and attitudes towards authority. The report records Mr Tynan's rationale for partaking in this robbery as being coercion from individuals to whom he owed a large drug debt. Mr Tynan is said to have expressed remorse and discussed at what happened to the victims of the robbery and to have acknowledged the aggressive and frightening nature of the incident.
31. A number of testimonials were placed before the court below testifying to Mr Tynan's abilities as a son and nephew. The court is also provided with a certificate in respect of his completion of a "Moving beyond Addiction" programme, and the course in personal decision-making. A positive Governor's report was also provided confirming that he is currently on an enhanced regime in the prison and that he poses no problems for staff and management in the prison.

The Sentencing Judge's Remarks

32. In sentencing the respondents, the sentencing judge stated:

"This is the sentencing of the offenders in the robbery of the post office at Cleaboy in Waterford City on the 3rd of May 2018. This robbery was truly a terrific terrifying traumatic event, it may only have lasted 70 seconds within the actual post office but it is clear from the victim impact statements it has had a devastating effect, not only the ladies, both staff and customers within the post office at the time of the robbery, but also on the whole community around and about Cleaboy who, as one of the victims stated in remember victim impact statement; "It is part of the glue of our community."

There are a number of aggravating factors in this robbery. The degree of planning and preparation which included the use of a second car which was used for reconnoitring the routes and areas around the post office in the immediate days beforehand. The inspection of the premises whereby two of the gang had entered the post office prior to the raid, once on the previous day and once earlier on the morning of the robbery. The organisation of the four participants where each appeared to have a defined role; one the gun man, two with hammers and the fourth as the driver waiting in the getaway car outside. They operated on this occasion as an organised gang. Three; the attempts to avoid detection which included the wearing of the most frightening of disguises, the balaclava which not only prevents identification but can in still terror in circumstances such as this. The wearing of latex gloves to avoid fingerprints. The attempted destruction by fire of the motor car and the sawn off shotgun to avoid forensic harvesting of clues. Four; the location of the premises in the centre of a community, a post office where it must have been anticipated that there may be mean (sic) members of the public potentially old age pensioners and young mothers collecting payments. Five; the traumatic effects, not only on the staff but on the customers. The victim impact statement of Caroline Walsh refers to the absolute terror of the event. Six; the violence used. Ms Hayes refers to the sheer noise and aggressiveness of the raiders when told, they were extremely aggressive, banging their hammers on the internal partition and doors and waving the firearm, a sawn off shotgun, that most lethal of weapons in a confined space. The threat to use the gun, shouting at the staff to hand over the money or they would be shot, together with the fact that there was ammunition found for the gun. Six; the total amount of the money stolen, albeit recovered, but nonetheless over €46,000, or equivalent currency was stolen. I will deal with the aggravation of prior relevant convictions on an individual basis.

I place this offence at the upper scale of gravity for a robbery, and the possession of the firearm in the medium scale. I have not treated the actual possession of the gun per se as an aggravating factor, just its use, being waved about and banged on the Perspex glass, under the heading of the violence of the occasion.

For Michael Tynan and Alan Wall, I place the appropriate sentence at seven years' imprisonment. For Barry Walsh and Conor O'Connor, each of whom have previous convictions, convictions for robbery, I place the appropriate sentence at eight years.

I've been addressed on the mitigating factors by counsel and I will now go through these individually. In relation to Michael Tynan, he has 72 previous convictions, but they are none of which are of the magnitude of this. There are however three section 15 Misuse of Drugs Act convictions and 14 convictions for personal use of drugs. So, this is clearly an indication, this has been pointed out by Mr Sheahan of a significant drug problem. There is rationale for the participation set out in the probation report. Mr Sheahan tells me that his client has now obtained insight and empathy for the victims and that he has feelings for shame, remorse and disgust. I note however there is a significant risk of reoffending, particularly in view of extensive history of drug use. He's a 34-year old father with four children with certain learning difficulties and certain difficulties with his mental health, but particularly his profound embedded drug use, and the most significant factor is his early plea of guilty.

In relation to Alan Wall, Mr Cody points to his guilty plea and says that in light of his previous relatively minor previous convictions, he has 13 in all, none of anything of this significance. Although, the unauthorised possession of one round of ammunition, he submits that this is considerably out of character. He has pleaded guilty which is significant mitigating factor on the earlier occasion. He has submitted two work references, one for a period working with a pig slaughtering company in 1997 to 1998, and the other from a building staff solution company who organise placement on building sites. And I note that Mr Wall may have travelled to work on a number of project (sic) in Scotland. I'm told he has a significant work history. That he has had some difficulties with alcohol but he has no current dependency issues and he described Mr Cody describes Mr Wall's involvement as a gross error of judgment. Again, I've had the benefit of Ms Burke's very detailed probation report.

In relation to Mr Barry Walsh, Ms Leader has outlined the mitigating factors and how he had a good work history until the recession in 2008 when he lost his work as a block layer and began taking drugs and accumulated significant debt, which debts caught up with him. She says that he is truly sorry for what he has done and he has gone and written quite a number of apology letters to each of the individual persons affected by this and I have considered them and have no difficulty in they being passed on to the respective persons. I've also read his letter of apology to me and the other letters that have been submitted on his behalf. I have indicated that I regard the 55 previous convictions of Mr Walsh has placed him in the significantly different category, thus I've reflected that in the headline sentence. There is a previous conviction for robbery which was dealt with at Cork Circuit Court on the 8th of November, 2013.

And finally, in relation to Mr Conor O'Connor, who has 155 previous convictions; eight for theft and five for burglary, two for handling stolen property, one for threat to kill and two for robbery of establishments. Mr Whelan has set out the mitigating factors, he points out his apology to his victims. He says that he has insight,

remorse and the most significant is his guilty plea. He points to the traumas of his life and the pattern of addiction and that he has since most recently gone into prison on remand successfully completed the Methadone program. The probation report of Ms O'Neill sets out his personal circumstances and I've taken those into account and indicates that he is at high risk of reoffending within the next 12 months if in the community. And that he has a positive attitude towards engaging with all available services while he is in custody. And I have considered the letter that he has written to me and I have no doubt I have read all of these letters, I have no doubt as to the sincerity of all of the sentiments expressed by each of the individuals.

Taking into account the mitigating factors that have been outlined in each case, I will reduce the sentence for Michael Tynan and Alan Wall by two years to five years' imprisonment, and for Barry Walsh and Conor O'Connor, by two years, to six years' imprisonment.

I have then been urged by each of the counsel to consider the benefits towards rehabilitation of suspending a portion of the sentences, and for Mr Tynan and Mr Wall, I'm prepared to suspend the last 18 months of the sentence in each case, for a period of three years, as an encouragement towards rehabilitation. And for Mr Walsh and Mr O'Connor, I'm prepared to suspend in their cases the final 12 months of each sentence for a period of three years. In each case, it is a condition of suspension that each be subject to post release supervision for a period of two years. The bonds to be entered in the sum of €100.

For the firearms offences, I am setting a headline of five years for Mr Tynan and Mr Wall, which for the reasons outlined for the mitigation that I have identified, I will reduce in each case to three years. For Mr Walsh and Mr O'Connor, I find the appropriate headline sentence to be six years, which I will reduce for mitigation to four years. To give a greater sentence would be unjust in all of the circumstances and so I am not imposing the presumptive minimum sentence of five years.

In each case, the sentence is to run concurrent so as to not offend against the principle of totality and proportionality."

The DPP's complaints

33. In her Notice of Application in each case the applicant complains that the sentencing judge failed to identify appropriate headline sentences. It is acknowledged that the sentencing judge correctly identified a number of very significant aggravating factors and that he stated that he was placing the offence "at the upper scale of gravity for a robbery" and "in the medium scale" for the offensive possession of a firearm. However, the applicant maintains that the headline sentences actually determined upon, namely seven years imprisonment in the case of Alan Wall and eight years imprisonment in the case of Barry Walsh and Conor O'Connor, were simply too light having regard to the gravity of the offending conduct.

34. The applicant points to a significant number of aggravating factors that existed in all cases. These included:
- (a) The extremely serious and violent nature of the offence committed;
 - (b) The violence used and threatened against those present in the Post Office;
 - (c) The level of planning and pre-meditation involved in the offence committed;
 - (d) The respondents acted as a gang;
 - (e) The sum of €45,000 taken in the robbery;
 - (f) The traumatic effect this robbery had on the victims of the crime;
 - (g) The attempted destruction of the sawn off shot gun and the vehicle;
 - (h) The impact on the wider community, given the fact that the robbery was at a Post Office at the centre of the local community;
 - (i) The fact that a firearm was used in the course of the robbery.

Moreover, in the case of Barry Walsh, and Conor O'Connor there were relevant previous convictions for robbery for which prison sentences had been imposed; and in the case of Alan Wall there was a relevant previous conviction for a firearms offence, albeit that it was dealt with summarily and non-custodially. In addition, in the case of Mr O'Connor this offence was committed during the suspended final year of a four year sentence imposed for another robbery.

35. This court was referred to an extensive quotation from Sentencing Law and Practice (3rd Ed) by Thomas O'Malley commencing at paragraph 15-36 and running to 15-38 inclusive. In these passages Mr O'Malley addresses the types of factors that may influence the assessment of gravity in robbery cases. We have no hesitation in accepting the correctness and reliability of this material from such a renowned sentencing scholar. The court was also referred to its own decision in *The People (Director of Public Prosecutions) v O'Sullivan and O'Rourke* [2019] IECA 289, a severity appeal in a robbery, endangerment and possession of drugs case in which aggregate sentences of 12 years imprisonment with two suspended were upheld, and where the sentence structure had included a term of nine years for the robbery component, which had involved a Post Office and which, although by no means are identical, bore many similarities to the present case.
36. We were also referred in the applicant's written submissions to the case of *The People (Director of Public Prosecutions) v Noonan, Murphy and Saunders* [2019] IECA 112, in which this court refused to interfere with sentences of ten years with the final two years suspended for a conspiracy to commit a robbery offence involving a cash in transit van. In that case the court had remarked that "*the sentences imposed were at the outer limits in*

terms of leniency. Had more severe sentences been imposed, in the range of nine to ten years, the court would very likely have upheld such sentences." The President's reference to more severe sentences in the range of nine to ten years was a reference to post mitigation or ultimate sentences to be actually served.

37. At the oral hearing the court's attention was drawn by counsel for the applicant to its earlier decision in *The People (Director of Public Prosecutions) v Leon Byrne* [2018] IECA 120, a decision handed down on the same day as this court's guideline decision in *The People (Director of Public Prosecutions) v Casey and Casey* relating to cases of burglary and aggravated burglary. In that case we had noted that the spectrum of penalties in the case of robbery ranges from noncustodial options up to imprisonment for life. We stated (at paragraph 60):

"On the basis that a life sentence is likely to be reserved for only the very worst and most egregious offences of this type, the practical reality is that the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. An effective fifteen year range allows for a low range of zero to five years, a midrange of six to ten years and a higher range of eleven to fifteen years."

38. Moreover, we held that essentially the same approach as now applies to the assessment of gravity in burglary and aggravated burglary cases should also apply to robbery cases. In that regard we had said that in *Casey and Casey*, at paragraph 48 of the judgment:

"If a number of the factors to which reference is made [i.e., aggravating factors] are present, this will place the offence in the middle range at least, and usually above the mid-point in that range. The presence of a considerable number of these factors, or, if individual factors are present in a particularly grave form, will raise the offence to the highest category."

39. In regard to the headline sentences selected for the firearms offence the applicant complains that these were too low given the aggravating factors that applied in the case of the firearms offence and the presumptive sentencing regime that applies thereto.

40. Quite apart from complaints about the adequacy of the sentencing judge's headline sentences, and his assessments of gravity, it was further contended on behalf of the applicant that the sentencing judge had had undue regard for mitigating factors in each case.

The respondent's submission

41. It was submitted in each case on behalf of the respondents that the sentencing judge had approached his task carefully and conscientiously and that great weight should be afforded to the reasons stated by the sentencing judge for his decision. It was suggested that even if this court was to regard the sentences, both in terms of the headline or starting point, and the ultimate post mitigation sentences, as being lenient it could not be said that they were unduly lenient.

The applicable legal principles governing s. 2 reviews.

42. The law with respect to the conduct of undue leniency appeals is well-settled at this stage. The jurisdiction to review a sentence on the grounds that it was unduly lenient derives from s. 2 of the Criminal Justice Act of 1993, as amended, which (to the extent relevant) provides:

- “2.— (1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the “sentencing court”) on conviction of a person on indictment was unduly lenient, he may apply to the Court of Appeal to review the sentence.
- (2) An application under this section shall be made, on notice given to the convicted person, within 28 days, or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine, from the day on which the sentence was imposed.
- (3) On such an application, the Court may either—
- (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or
 - (b) refuse the application.”

43. In terms of the general principles governing such reviews, the leading authority is *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2 of the Act of 1993, and in it, O’Flaherty J. giving judgment for the court, sets out a number of principles and considerations relevant to the conduct of such reviews. He said:

“In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was ‘unduly lenient’.

Secondly, the court should always afford great weight to the trial judge’s reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J has termed the ‘constitutional principle of proportionality’

(see People (DPP) v. W.C. [1994] 1 ILRM 321), his decision should not be disturbed.

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

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

44. Since then, the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R.356. In that case Barron J. stated:

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error of principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of potential penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

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

- "(i) the onus of proving undue leniency is on the D.P.P.;*
- (ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;*
- (iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;*
- (iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*

- (v) *the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;*
- (vi) *it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally*
- (vii) *due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."*

Discussion and Decision

46. It is appropriate to record that while the applicant does not agree with the headline sentences or starting points in the case of any of the respondents, she does not quarrel with the entitlement of the sentencing judge to have differentiated somewhat between the respondents in circumstances where some of them had worse records than others, and the offending conduct of some of them was more aggravated than in the case of others. No issue is taken with either the fact or extent of the differentiation actually made. However, her case with respect to the assessment of gravity is simply that the sentencing judge started at too low a point on the spectrum of available sentences in all cases.
47. We agree with the submissions made on behalf of the applicant in that regard. All of the respondents were parties to a common design and shared in the intrinsic moral culpability of the basic offending conduct. In addition there were multiple aggravating circumstances in all cases. However, in some cases there were more aggravating circumstances than in the case of some of the other participants, justifying a differentiation between participants at the level determined upon by the sentencing judge. Be that as it may, in our judgment the starting points or headline sentences were too low in every case. Applying the *Leon Byrne* jurisprudence we think these cases straddled the boundary between the high end of the mid range and the low end of the high range. We consider that the offending conduct of each of the respondents would, in the case of the robbery offence, have merited a headline sentence of between nine years imprisonment in the case of those least culpable and ten and a half years imprisonment in the case of the most culpable. Accordingly, the headline sentences nominated by the sentencing judge of seven years and eight years respectively were outside of the norm and represented an error.
48. We also consider that the discounts afforded for mitigation were excessive. While the personal circumstances of the respondents were not precisely identical, we consider that the appropriate discount to take account of their respective individual mitigating circumstances should have been in the 20% to 25% bracket, particularly in circumstances where they had been effectively caught red handed, and notwithstanding the respondents' guilty pleas. Accordingly, we are of the view that the sentencing judge was

in error in the degree to which he discounted for mitigation in the circumstances of the case.

49. In each case the resultant post mitigation sentence imposed for the robbery offence was outside the norm and was unduly lenient.
50. It is necessary to turn at this point to the sentencing for the firearms offence. We think that the sentencing judge got it right in terms of the headline sentences of five years and six years respectively that he nominated. He then generously discounted from these figures for mitigation and arrived at post mitigation figures of three years and four years respectively. It is not necessary for us to express a view on the level of discount afforded for mitigation save to say that it is difficult to justify in the light of the views we have expressed concerning the level of mitigation to which the respondents were entitled on the robbery offence. Be that as it may, the real problem with the sentences imposed for the firearms offence is that this was an offence which carries with it a presumptive mandatory minimum sentence of five years imprisonment. It is presumptive because the legislature has preserved the possibility for a sentencing judge to impose a sentence of less than the presumptive mandatory minimum where the sentencing judge considers it to be unjust to impose the presumptive mandatory minimum in the circumstances of the case. In this case the sentencing judge arrived at that view. The question is was he right to do so? It seems to us that the circumstances of the case were insufficiently extenuating to have enabled the sentencing judge to come to the conclusion that it would be unjust to impose the presumptive mandatory minimum sentence in the case of each of these respondents. They had certainly pleaded guilty at the first available opportunity, but there was nothing else exceptional about the case or their circumstances. It seems to us that the mere fact that they had done so would not per se have rendered it unjust to have imposed the presumptive minimum. The circumstances of this case were very serious. The weapon involved was a sawn-off shotgun. While it was not discharged it was used to frighten and intimidate in the course of an armed robbery. To have possessed such a weapon with a view to using it in those circumstances was highly culpable and requires to be marked by significant punishment. Moreover, it is public policy, reflected by the Oireachtas having made provision in law for a presumptive mandatory minimum sentence, that such offences should attract a custodial sentence of not less than five years, save where it would be unjust to impose such a sentence. We think there would have been nothing unjust about imposing the presumptive mandatory minimum sentence in each of these cases. In our view the sentences actually imposed for the firearms offence, being sentences in all cases below the presumptive five year minimum, namely sentences of four years and three years, respectively, were outside of the norm and were unduly lenient.
51. It is necessary in the circumstances to quash the sentences imposed by the court below and to proceed to a resentencing of each of the respondents.
52. In the case of Mr Wall we will nominate a headline sentence of nine years imprisonment for the robbery offence. We will afford him a discount of two years to reflect the

mitigating circumstances in his case, leaving a net sentence of seven years imprisonment on the robbery offence. In addition, we will impose the presumptive mandatory minimum sentence of five years for the firearms offence to run concurrently with the sentence for the robbery offence.

53. In the case of Mr Walsh we will nominate a headline sentence of ten years imprisonment for the robbery offence. We will afford him a discount of two and a half years to reflect the mitigating circumstances in his case, leaving a net sentence of seven and a half years imprisonment on the robbery offence. In addition, we will impose the presumptive mandatory minimum sentence of five years for the firearms offence to run concurrently with the sentence for the robbery offence.
54. In the case of Mr O'Connor we will nominate a headline sentence of ten and a half years imprisonment to take account of his particularly bad previous record which includes two relevant offences, and the fact that this offence was committed during the currency of the suspended portion of an earlier sentence. We will afford him a discount of two and a half years to reflect the mitigating circumstances in his case, leaving a net sentence of eight years imprisonment on the robbery offence. In addition, we will impose the presumptive mandatory minimum sentence of five years for the firearms offence to run concurrently with the sentence for the robbery offence.
55. Finally, in the case of Mr Tynan we will nominate a headline sentence of nine years imprisonment for the robbery offence and we will afford him a discount of one year and nine months to reflect the mitigating circumstances in his case, leaving a net sentence of seven years and three months imprisonment on the robbery offence. In addition, we will impose the presumptive mandatory minimum sentence of five years for the firearms offence to run concurrently with the sentence for the robbery offence.