



THE COURT OF APPEAL
(CRIMINAL)

Record Numbers: CCA CJ 0134/2019

Birmingham P
McGovern J
Collins J.

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT/

- AND -

CRAIG MC GRATH

RESPONDENT

Judgment of the Court delivered on the 18th day of February 2020, by Mr. Justice Collins

BACKGROUND.

1. This is a leniency appeal brought by the Director of Public Prosecutions (hereafter "*the DPP*" or "*the Director*") arising from a sentence imposed on the Respondent by His Honour Judge Eugene O'Kelly in the Circuit Court (South Eastern Circuit, County of Waterford) on 24 May 2019 following his prosecution and conviction on a plea of guilty for assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997 (hereafter "*section 3*") and a separate prosecution and conviction for manslaughter, again on a plea of guilty.
2. The first in time of these offences (Bill 43/2018) – the section 3 assault causing harm – involved an unprovoked assault on a Kiefer Dowling on 18 August 2017, first within and then immediately outside a nightclub in Waterford which resulted in the victim being knocked unconscious. The Respondent pleaded guilty to this count on 7 November 2018. At the time of the offence, the Respondent was subject to a three months suspended sentence which had been imposed in the Circuit Court (on appeal) on 16 June 2017.
3. The second of the offences (Bill 70/2018) involved the unlawful killing of Damien O'Brien, arising from another unprovoked assault during which the Respondent punched the deceased in the face with sufficient force to knock him to the ground, resulting in him sustaining a fractured skull and consequential brain injuries that proved fatal. The post-mortem report indicates that Mr O' Brien had suffered a broken nose, broken eye sockets and a broken jaw as a result of the assault on him by the Respondent, in addition to the skull fracture that was the immediate cause of his death. The Court was told that it was accepted before the Circuit Court that Mr O' Brien was knocked unconscious by the force of the punches, that is to say that he was unconscious before his head impacted against the ground. The Court was also told that it had been accepted that the facial injuries suffered by Mr O' Brien were caused by the punches, not by the impact of Mr O' Brien striking the ground.

4. This second assault occurred on 7 July 2017 at a time when the Respondent was on bail on the section 3 assault charge. Mr O'Brien died on 13 July 2017 which therefore was the date of the manslaughter offence. The Respondent pleaded guilty to this offence on 26 February 2019.

THE SENTENCING HEARING

5. For logistical reasons, the Judge heard the evidence of Detective Garda Seamus Halpin in relation to the manslaughter offence first. The Judge also saw CCTV footage of the assault on Mr. O'Brien, which this Court was also invited to view and which it has viewed in the course of the appeal hearing. The CCTV footage of the assault itself is difficult to decipher but clearly shows a man subsequently identified as the Respondent involved in a scuffle and then immediately leaving the scene of the assault at some speed, in the company of another man and later shows the Respondent engaging in what appears to be some form of re-enactment of his assault on Mr O' Brien.
6. The Judge also heard a victim impact statement read by Mr. O'Brien's sister, Ms. Sandra Griffin, which this Court has also seen. Detective Garda Halpin gave evidence that the Respondent had twenty-four previous convictions, most of those convictions were for Road Traffic Act offences and the Respondent had not had a custodial sentence imposed on him for any of those offences. That total of twenty-four previous convictions did not include the s.3 assault conviction because sentence had not yet been imposed for that offence.
7. In relation to the section 3 assault, evidence was given by Garda Barrett. Again, there was CCTV footage which was shown to the Circuit Court and which this Court has also reviewed in the course of the appeal hearing. The footage initially shows a violent attack on the victim inside the nightclub, in the course of which the victim was punched and head-butted. Both parties were then ejected from the nightclub. Footage from a CCTV camera located at the entrance to the nightclub then records the Respondent striking the victim with a single punch with his left hand which was struck with sufficient force to knock Mr Dowling unconscious, resulting in him collapsing to the ground.
8. Mr Dowling chose not to make a victim impact statement.
9. A plea in mitigation was then made on the Respondent's behalf by counsel, principally by Ms. Gearty SC. She very frankly acknowledged the seriousness of the offences and made it clear that the Respondent expected to receive custodial sentences in respect of each. She referenced her client's pleas of guilty and also referred to the fact that her client had written a letter of apology (which this Court has also seen). Ms. Gearty referred to her client's education and employment history. In terms of the sentence that the Court might impose, Ms. Gearty referred to a 6-10 year sentence that had been imposed for manslaughter where a weapon had been used and/or where there was an element of pre-meditation. She submitted that neither of these elements (weapons/pre-meditation) were present in this case. Accepting that other injuries had been caused to the deceased, Ms. Gearty pointed out that the post mortem report indicated that the immediate cause of death was the deceased's head striking against the pavement. It was, she submitted, a

"result crime" and therefore of a different order to deaths caused by (for instance) a stabbing or a shooting.

10. On this basis, and having regard to the Probation Report in respect of the Respondent, the Court was invited to suspend a portion – possibly (so counsel suggested) a significant portion - of the sentence to be imposed on the Respondent.
11. Toward the conclusion of her submissions, Ms. Gearty made a reference to the *"totality principle"*, to which further reference is made later in this judgment.
12. The Probation Report to which Ms. Gearty referred was before this Court. It is dated 22 May 2019 and in it the Probation Officer expressed the view that the Respondent was aware of the harm he had caused to his victims, especially Mr. O'Brien and had shown a great deal of remorse about the killing of Mr. O'Brien whom – he said – had no intention of seriously hurting.
13. The Probation Report went on to describe the Respondent's family circumstances. The Respondent is recorded as saying that he had a very supportive extended family. The Report also refers to the Respondent's immediate family circumstances, his education and employment history, a history of substance abuse (in terms of limited cocaine use and alcohol use) and concludes by expressing the view that applying a risk assessment tool used by the Probation Service, the Respondent was then *"at moderate risk of reoffending in the next twelve months."*

THE SENTENCE

14. The Judge identified a number of aggravating factors in respect of the section 3 assault, including the fact that it occurred in a nightclub where young people gather to enjoy themselves and that it was unprovoked. The assault continued after it was initially stopped by security staff; the appellant had head-butted the victim and the blow that had knocked the victim unconscious had been delivered completely without warning and in the presence of security staff.
15. The Judge referred to the Respondent's previous convictions, noting that, while they were for motoring offences, the most recent convictions were of such a serious nature that the Respondent had received a suspended sentence for one and an order for Community Service in lieu of a prison sentence for another.
16. Taking those aggravating factors into account, the Judge placed the section 3 assault *"at the upper end of the mid-range on the scale of gravity for s.3 assault"* and the appropriate headline sentence was, in his opinion, one of 3½ years' imprisonment. The Judge then referred to the mitigating factors that had been outlined to him, particularly the Respondent's early guilty plea and indicated that, taking account of all those factors, he would reduce the term of imprisonment by one year, resulting in a sentence of 2½ years imprisonment.
17. In relation to the manslaughter offence, the Judge observed that the circumstances were similar to the circumstances of the section 3 assault. He referred to the powerful victim

impact statement from Ms. Griffin. Again, the Judge noted, there were a number of aggravating factors.

18. The first such factor was the nature of the criminal act and the devastating and enduring effect it had, and would continue to have, on Mr. O'Brien's family. The Judge referred in this context to the force and violence of the attack on Mr. O'Brien and the circumstances in which the attack took place. Such was the violence of the blows that Mr. O'Brien had suffered depressed and fragmented fractures of his facial bones ever before he hit the ground. The Judge referred to the evident inability of the Respondent to control himself, whatever its cause. Another very serious aggravating factor was the fact that, at the time of the manslaughter offence, the Respondent was on bail on the section 3 assault on Mr. Dowling. The fact that the Respondent had left the scene of the assault without offering any assistance to Mr. O'Brien was a further aggravating factor, as was the fact that the Respondent appeared to have requested the person with him at the time of the assault to give a false statement to the Gardaí to the effect that he could not identify the Respondent and did not know who he was.
19. The Judge then cited a statement from Mr Tom O'Malley concerning sentencing for manslaughter which referred to the wide range of sentences imposed depending on the circumstances of the offence which concluded by stating that "*The general trend seems to be that the more deliberate and gratuitous the assault or violence leading to the victim's death the heavier the punishment that is deserved.*" The Judge went on to place the offence at the lower to medium range of gravity for manslaughter and identified the appropriate sentence at 7 years' imprisonment which he then reduced to 5 years having regard to the mitigating factors that he identified, principally the Respondent's early plea of guilty and his apology, as well as the matters referred to in the Probation Report, particularly what was said there regarding the Respondent's remorse.
20. The Judge noted that the manslaughter sentence had to run consecutively to the section 3 sentence, resulting in a total sentence of 7½ years' imprisonment.
21. However, the Judge went on to consider what he referred to as "*[t]he totality principle of the two sentences combined*". In recognition of that principle, and as an incentive and an encouragement to the Respondent to rehabilitate himself and to realise his potential to become a useful member of society on his release, the Judge indicated that he would suspend the final two years of the combined sentence. He did so by allocating the suspended portion of two years entirely to the section 3 sentence, explaining that, in that way, "*much of the period of six years will be absorbed while [the Respondent] remains in custody serving the manslaughter sentence and there should still be a sufficient length of suspension on his release to serve a meaningful purpose*". The Judge imposed conditions regarding post-release supervision by the Probation Service and the entering into a bond to keep the peace and be of good behaviour by the Respondent.

THE DPP'S APPEAL

22. By notice of application dated 19 June 2019, the DPP seeks a review of the sentences imposed on the Respondent pursuant to section 2 of the Criminal Justice Act, 1993 (as amended)
23. The notice of application sets out a number of grounds. In summary, the notice asserts that the sentence of 2½ years imprisonment with 2 years suspended for the section 3 assault was unduly lenient and did not properly reflect the aggravating factors present.; that the sentence of 5 years for manslaughter was unduly lenient and did not properly reflect the aggravating factors present; that the Judge erred as a matter of principle in placing the manslaughter offence at the lower to mid part of the medium range and setting a headline sentence of 7 years; that the Judge erred in principle in structuring the sentences in the manner that he did such that "*the effective term of imprisonment*" imposed for the two offences was a term of 5½ years; that the Judge had undue regard to the principle of proportionality; that the Judge attached undue weight to the mitigating factors and in particular placed too much emphasis on the pleas of guilty and the personal circumstances of the Respondent and , finally, that the Judge failed to have regard for the societal need for a serious deterrent element to the sentences for two serious violent offences in almost identical circumstances less than a year apart.
24. These grounds were developed in the Director's written and oral submissions to the Court. As regards the section 3 assault, no challenge is made to the Judge's characterisation of the offence or to the headline sentence of 3½ years. Rather it is said in the Director's written submissions that the Judge had undue regard to the mitigating factors and had given what was said to be a "*double discount*" to the Respondent by the reduction of the headline sentence (by one year) and the suspension of the final 2 years, leading to "*a reduction of 85 percent from the headline sentence of three and a half years to an effective custodial sentence of six months' imprisonment*" which is said to be unduly lenient in all the circumstances. Emphasis is placed on the fact that the offence was committed while the Respondent had had the benefit of a suspended sentence and a Community Service order in lieu of imprisonment.
25. In Mr O' Doherty's oral submissions, it was accepted that the decision of the Judge to reduce the headline sentence for the section 3 assault by a year, while arguably on the generous side, did not involve any error that might warrant this Court's intervention. Instead, the focus of counsel's submissions was on the decision of the Judge to suspend the final 2 years of that sentence.
26. As regard the manslaughter offence, the Director contends that the sentence of 5 years failed to reflect the many aggravating factors said to have been present, particularly the nature of the earlier section 3 offence and its temporal proximity to the manslaughter offence, as well as the fact that the manslaughter offence was committed while the Respondent was on bail in respect of the section 3 offence. As to the headline sentence of 7 years, this is said to be unduly lenient and inconsistent with the guidance given by the Supreme Court in *DPP v. Mahon* [2019] IESC 221. The decision in *DPP v. Mahon* was delivered shortly before the sentencing hearing but was not brought to the attention of

the Judge by either party. The Court shall refer further to it later in this judgment. Counsel submitted that, having regard to the aggravating factors present, the manslaughter offence arguably fell within the category of "*high culpability*" manslaughters or, in the alternative, that it was at the upper end of the "*medium culpability*" band. The DPP's submissions also reference the decision of this Court in *DPP v. Hutchinson* [2017] IECA 154 which is also discussed below.

27. The Director also challenges the reduction of the headline sentence by two years to five years which is said to have been unwarranted by the mitigating factors present here and says that a 5 year sentence for an offence of the severity and culpability of the manslaughter offence here was unduly lenient.
28. In his oral submissions, Mr O' Doherty for the Director appeared to lay some reliance on the fact that the manslaughter offence occurred during a "*curfew*" that had been imposed on the Respondent as a condition of bail on the section 3 charge. As Ms Leader SC observed, however, this does not appear to have been a matter relied on before or by the sentencing Judge and, accordingly, it is not something to which this Court can properly have regard in this appeal.
29. Finally, the Director contends that the Judge had undue regard to the principle of proportionality imposing "*an effective cumulative custodial sentence of five and a half years for two extremely violent assaults committed almost a year apart, in almost identical circumstances, the second of which directly resulted in the death of the victim and which were required by law to be consecutive to each other*". According to the Director, the sentence ultimately imposed on the Respondent failed to have adequate regard to the societal need for a "*very serious deterrent element to the sentences to be imposed*" and the Court gave undue regard to the totality principle and in particular the issue of rehabilitation, reference being made in this context to the decision of this Court in *People (DPP) v. Coughlan* [2019] IECA 173.
30. The Respondent's written submissions helpfully identify the relevant principles applicable to leniency appeals by reference to the decision of the Court of Criminal Appeal in *People (DPP) v Stronge* [2011] IECCA 79 and Ms Leader submitted that the Director's appeal here did not come close to meeting the statutory threshold as explained in that decision.
31. The Respondent also refers in some detail to *DPP v Mahon*. The manslaughter offence here – so the Respondent contends - "*fell squarely*" into the category of "*medium culpability*" identified in the judgment of Charleton J for which the appropriate headline sentence is between 4 and 10 years. Ms Leader brought the Court to Charleton J's analysis of "*high culpability*" cases and urged on the Court that the manslaughter offence here did not share the characteristic features of cases in that category. She also submitted that the judgment in Mahon indicates that manslaughter cases of the kind before the Court were within the "*medium culpability*" band and that *Hutchinson* was clearly regarded by Charleton J as such a case. Furthermore – so it was said - there was no suggestion in the discussion of *Hutchinson* that the Supreme Court thought that the

sentence imposed in that case was unduly low. Accordingly, the Respondent says, the headline sentence of 7 years identified by the Judge here was appropriate.

32. As regards the reduction of that sentence to 5 years, in the Respondent's submission that was within the discretion of the Judge, having regard to the plea of guilty and other mitigating factors identified by the Judge in his sentencing remarks.
33. The Respondent rejects the suggestion of double discounting, pointing out that the Judge dealt with both offences separately and set out where each fell in terms of their gravity and applied reductions to take account of mitigating factors. The combined sentence at that stage was one of 7½ years. Only then did the Judge suspend part of the cumulative sentence so as to take account of the totality principle.
34. As regards the decision to suspend 2 years of the overall sentence, the Respondent argues that the Judge was entitled to take this approach, citing a further recent decision of the Supreme Court in which the judgment of the Court was given by Charleton J., *People (DPP) v FE* [2019] IESC 85. To impose the sentences urged by the DPP, it is argued, would result in a sentence that would have a "crushing effect" on the Respondent and one which would exceed what was necessary "to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences." The suspension of a portion of the sentence was also justified by the contents of the Probation Report and the desirability of encouraging the Respondent to rehabilitate himself.
35. As for the Director's complaint that the sentence for the section 3 assault had been reduced by 85% and the manslaughter sentence by 30%, the Respondent responds by observing that it is well-established that the process of sentencing is not amenable to a mathematical approach, citing the decision of this Court in *People (DPP) v O' Brien* [2018] IECA 2. Furthermore, the Respondent says that the Director's submissions ignore the nature of a suspended sentence. Such a sentence constitutes real punishment and real deterrence. In this context, the Respondent relies once again on *People (DPP) v Stronge*.

DISCUSSION

36. This is a leniency appeal and it is therefore appropriate to identify the principles that apply to this category of appeal. These are conveniently set out in judgment of the Court of Criminal Appeal (delivered by McKechnie J) in *People (DPP) v Stronge* as follows:

"From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are:-

- (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."*

These principles provide the framework by reference to which the Director's appeal falls to be determined.

37. It appears to the Court that the following issues require to be addressed in this appeal:
- Whether the sentence of 2½ years' imprisonment imposed by the Judge for the s. 3 assault was unduly lenient in all the circumstances
 - Whether the sentencing Judge erred in his assessment of the gravity of the manslaughter offence so that the sentence of 5 years' imprisonment imposed by him was unduly lenient in all the circumstances
 - Whether the Judge erred in his structuring of the sentences and/or had undue regard to the principle of proportionality and/or to the mitigating factors and/or failed to have due regard to the need for deterrence in deciding to suspend 2 years of the total sentence for the section 3 and manslaughter offences.

The Section 3 Sentence

38. The Court has already noted that the DPP has not challenged the Judge's identification of 3½ years as the appropriate headline sentence for the section 3 assault.
39. The next element of the section 3 sentence involved the reduction of that headline sentence by a year to reflect the mitigating factors and in particular the fact of the Respondent's early guilty plea. Having regard to the approach that this Court is required

to take in leniency appeals, it does not appear to the Court that there is any basis for interfering with this aspect of the Judge's sentencing or any basis on which the Court could properly conclude that the sentence actually imposed for the section 3 offence constituted "a substantial or gross departure from what would be the appropriate sentence in the circumstances." Counsel for DPP did not, in truth, seriously suggest otherwise.

40. That leaves the issue of suspension. However, while the Court appreciates that the Judge allocated the suspended portion of two years entirely to the section 3 sentence, this was in reality a matter of mechanics and it appears to the Court that the issue of suspension can properly be addressed only by reference to the aggregate sentence imposed by the Judge. The final two years of **the section 3 sentence** were not suspended because the Judge considered that, absent such suspension, the section 3 sentence would otherwise have been excessive. No reasonable sentencing judge could have taken that view and that was not the basis on which the Judge here proceeded. Rather the Judge considered – rightly or wrongly – that it was appropriate to suspend two years of the aggregate sentence because otherwise the **totality of the sentences** imposed on the Respondent would have been excessive. The critical sentencing decision in this context, therefore, was the Judge's decision to suspend two years of the aggregate sentence, rather than his decision as to how to allocate the suspended portion between the two sentences. That issue can only be addressed after the Court reaches a view on the manslaughter sentence imposed by the Judge.

The Manslaughter Sentence

41. It is trite to observe that manslaughter's protean character presents significant challenges in a sentencing context. As Charleton J stated in *People (DPP) v Mahon*:

"Covering as it does a broad band of conduct from intentional killing under provocation, to excessive force in self-defence, to criminal negligence in the management of a machine or of a car, to assault without intent to kill or cause serious injury, manslaughter is a notoriously difficult crime on which to achieve an appropriate sentence." (at para 49)

42. Notwithstanding that difficulty, Charleton J's judgment in *Mahon* provides very valuable assistance to sentencing judges by identifying a number of different bands of manslaughter cases, ranging from the worst cases (where the level of culpability involved may be so high as to be virtually indistinguishable from that in murder offences) to lower culpability cases where the level of culpability is low and where aggravating factors are absent. Between these two poles, Charleton J identifies two intermediate bands, involving respectively high and medium culpability.
43. As already noted, the Judge was not referred to *People (DPP) v Mahon*. Given the fact that the decision had been given only a short while before the sentencing hearing here, that may be understandable. In any event, it was the subject of considerable discussion at the hearing of this appeal and it is clear that the Court can and should consider it: see *People (DPP) v FE* at para 38.

44. As already noted, the Respondent points to Mahon and says that it shows that the Judge was "*entirely correct*" in fixing a headline sentence of 7 years for the manslaughter offence, that being "*exactly in the middle of 'medium culpability' category range*" which, according to Mahon, attracts sentences of between 4 and 10 years. On the other hand, the Director argues that the seriousness of the offence here is such as arguably to place it in the "*high culpability*" band (for which, according to Mahon, a headline sentence of between 10 and 15 years tends to be given) or, at least, at the upper end of the "*medium culpability*" band.
45. The analysis in Mahon is of immense utility to practitioners, judges and the public. However, it is important to appreciate the limitations inherent in any form of sentencing guidance such as that provided in respect of manslaughter in Mahon (and in respect of other offences in other decisions of the Supreme Court and of this Court). The analytical framework set out in Mahon provides a structure within which manslaughter offences can usefully be categorised for the purposes of sentencing and offers important guidance as to the range of headline sentences that will normally be appropriate for offences within particular categories. But the Mahon guidelines do not obviate the need for a close analysis of the facts of each individual offence and for a careful identification of the aggravating factors that arise in relation to that particular offence.
46. As Mahon emphasises, the key differentiating factor as between the different bands of manslaughter is the culpability of the perpetrator, with significant emphasis on the relative presence or absence of aggravating factors. These necessarily vary from case to case and it would not be appropriate, in the Court's view, to regard the previous decisions cited in Mahon as anything more than illustrations of where particular manslaughter offences, considered by reference to the culpability of the particular accused and the particular aggravating factors that were present, fall along the broad spectrum of culpability that characterises the offence of manslaughter.
47. Accordingly, the Court cannot accept the submission made by Ms. Leader to the effect that it necessarily follows from the fact that *People (DPP) v Hutchinson* is cited in Mahon as a case in the "*medium culpability*" category, that all so-called "*one-punch*" manslaughter cases must be so regarded. Such an approach would involve an approach to sentencing based on superficial labelling rather than principle and, in the Court's view, would be wholly inconsistent with Mahon. The Court is equally unpersuaded by Ms Leader's argument that the reference in Mahon to *People (DPP) v Hutchinson* should be read as an implicit endorsement by the Supreme Court of the sentence imposed in *Hutchinson* – where the accused was imprisoned for 7 years, with the final year suspended but on appeal that was reduced to 5 years, with the final year suspended - as being an appropriate sentence for all so-called one punch manslaughter cases and/or as indicating where in the medium culpability category such cases are generally to be placed.
48. It appears to the Court that, just as there is a broad spectrum of manslaughter cases, there is also a spectrum of so-called "*one punch*" manslaughter cases. In some cases, the assault/unlawful act involved may be very minor, with the fatality occurring because the

deceased stumbles/falls or is knocked to the ground and where, if the deceased had not struck their head, they would not have suffered any or any significant injury. The judgment in *Hutchinson* suggests that it was such a case. The judgment records that the evidence indicated the single punch thrown by the accused "*as not being of particular force*". It also refers to the fact that the deceased had a number of health issues at the time of the assault, from which it appears reasonable to infer that these health issues may have been a contributory factor in the deceased's death (which occurred after the deceased had been released from hospital after what appears to have been only a brief stay and where the judgment records that he returned to work for a couple of days before being taken ill).

49. The Court considers that the facts - and the relevant level of culpability - here are very significantly different to the facts in *Hutchinson*. In the first place, this case did not involve a single punch. The Respondent punched Mr O' Brien twice, in rapid succession, first with his right fist and then with his left fist. Secondly, as is evident from the factual narrative already set out, those punches caused immediate and serious injury to Mr O' Brien. Even if Mr O' Brien had not fallen in a way that resulted in him hitting his head and suffering a fracture to his skull (and the consequential brain injuries that proved fatal), the Respondent would nonetheless have been guilty of a very serious assault. So, while the punch delivered in *Hutchinson* may not have been of "*particular force*", the contrary is the case here: the punches delivered by the Respondent were clearly of tremendous force, having regard to the evidence of the injuries that Mr O' Brien suffered before ever he hit the ground.
50. There is a further aspect of the case before the Court that particularly differentiates it from *Hutchinson*, namely the aggravating factor that is the section 3 offence. It is clear from the judgment in *Hutchinson* that the accused there also had a previous section 3 assault conviction which was considered to be an aggravating factor both by the sentencing court and by this Court on appeal (though this Court considered that excessive weight had been given to this factor by the sentencing court). The section 3 offence in *Hutchinson* had been committed some 4 years prior to the manslaughter. Here, the manslaughter offence was committed less than a year after the section 3 assault. More significant, however, is the similarity of the offences here and the fact that, in the earlier section 3 offence, the Respondent had rendered his victim unconscious with a punch or punches. As is obvious, where victims are knocked unconscious by a punch, they are not able to take any steps to break their fall and/or to protect their heads and the risk of a violent impact of head on hard surface is therefore greatly increased. The Respondent knew how powerfully he could punch – that had been graphically demonstrated in the course of his assault on Mr Dowling - and cannot plausibly suggest that, when he assaulted the deceased, he could not have foreseen the consequences, at least to the extent that Mr O' Brien was seriously injured, rendered unconscious and fell to the ground without having an opportunity to break his fall or protect his head. In the circumstances here, therefore, the prior section 3 assault was a particularly serious aggravating factor in assessing the gravity of the manslaughter offence and the level of culpability involved in it. There is no suggestion in *Hutchinson* that the accused's previous section 3 offence had

anything like the same significance in assessing the gravity of the manslaughter offence as is the case here.

51. In fairness to the Judge, he did identify many if not all of these factors. However, the Court is of the view that, when proper regard is to had to all the relevant aggravating factors, the Judge's characterisation of the manslaughter offence here as "*in the lower to middle of medium range of gravity for manslaughter*" is wrong in principle and that the sentence which the Judge proceeded to impose on the Respondent – seven years reduced to five years – departs substantially from the appropriate sentence.
52. In the Court's view, this offence is properly considered to be at the higher end of the medium culpability category identified by the Supreme Court in *Mahon*. The Court considers that, in all the circumstances, the appropriate headline sentence for this offence is in the range of 8½ - 9 years and the appropriate sentence after allowing for mitigation is 7 years imprisonment. In the Court's view, the 5 year sentence imposed by the Judge failed to reflect the gravity of the offence, the culpability involved and the many aggravating factors that were present and it was, accordingly, unduly lenient.
53. The Court also gives some weight in this context to the need for sentences for offences of this kind – particularly offences at the more serious end of the spectrum, as this case is – to have a deterrent effect.
54. It follows from the analysis above that, in concluding that this offence is properly placed at the higher end of the medium culpability band, the Court does not intend to suggest that this is where all "*one punch*" manslaughter cases should be placed. There will be many cases where the appropriate sentence will be lower – perhaps significantly lower - than the sentence the Court considers appropriate here. It is, nonetheless, important that future offenders should understand very clearly that this category of manslaughter is one which is regarded very seriously and that, in the event that offenders put themselves in circumstances where an unlawful death results from the throwing of a punch or punches by them leading to a fatal head injury being sustained by the victim, then depending on the circumstances, of the offence, a significant and immediate sentence of imprisonment may result. Equally, the Court's assessment of the manslaughter offence here should not be understood as giving rise to any inference that other such cases may not properly be regarded as coming at the very highest end of the medium culpability band in *Mahon* or, potentially, within the high culpability band. Issues such as that cannot be determined on an a priori basis.

The Structuring of the Sentence and the Suspension of 2 years of the Section 3 Sentence

55. As already noted, the Judge suspended two years of the total sentence imposed on the Respondent by reference to (i) the "*totality principle*" and (ii) the desirability of incentivising rehabilitation.
56. The totality principle is discussed in detail by Charleton J in his judgment for the Supreme Court in *People (DPP) v FE*. It is conveniently encapsulated in the following passage from a judgment of Street CJ set out at paragraph 35 of *FE*.

"The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences."

57. As both this passage and the broader discussion in *F.E.* make clear, it is not the case that, where consecutive sentences are being imposed, the aggregate sentence must in every case be reduced. Rather the sentencing court should ask itself whether that aggregate sentence "*exceeds what is called for in the whole of the circumstances*" so that a downward adjustment is necessary "*to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.*"
58. The Judge does not appear to have asked himself that question here and, if he had, the Court is of the view that he could not reasonably have concluded that an aggregate sentence of 7½ years for the offences at issue here "*exceed[ed] what is called for in the whole of the circumstances.*" To the contrary, it is the Court's view that an aggregate sentence of 5½ imprisonment was manifestly inadequate in all of the circumstances. In expressing that view, the Court does not overlook the Respondent's submissions, by reference to *Stronge*, as to the status and effect of a suspended sentence. However, it is the Court's clear view that, having regard to the nature of the offences at issue here, an immediate custodial sentence significantly in excess of 5½ years was and is warranted.
59. The aggregate sentence to be imposed on the Respondent has, of course, altered. It is now 9½ years rather than 7½ years and so the question of the application of the totality principle presents somewhat differently. In addition, there is the issue of rehabilitation. The Judge was correct to identify positive material in the Probation Report. Furthermore, the post-sentence material furnished to this Court is also positive. Mr McGrath has successfully completed a number of vocational training courses, as well as courses in first aid, parenting and overdose prevention. The Court has also a Governor's report that states that the Respondent has not received any P19s and that he is a well behaved and good student in school. In all the circumstances, the Court considers that the final 2 years of the Respondent's manslaughter sentence should be suspended, for a period of 2 years. In taking that approach, the Court is predominantly motivated by the desirability of providing a concrete incentive to rehabilitation but has also had regard to the aggregate sentence now imposed on the Respondent both as regards the totality principle and the impact on the Respondent of the fact that the duration of his sentence has been materially lengthened by reason of the DPP's appeal.

60. In conclusion, for the reasons set out above, the Court will:

- leave unchanged the sentence of 2½ years imprisonment for the section 3 assault
- substitute a sentence of 7 years imprisonment for the 5 year sentence imposed by the Circuit Court Judge for the manslaughter offence, that sentence to run consecutively to the section 3 sentence in accordance with the relevant provisions of the Criminal Justice Act 1984.
- in lieu of the order made by the Judge, suspend the final two years of that manslaughter sentence for a period of two years, subject to the same conditions as were imposed by the Judge.