THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Record No: 66/2019

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

RESPONDENT

V

KENNETH BROE

APPELLANT

JUDGMENT of the Court delivered on the 22nd of May by Mr Justice Edwards

Introduction

1. On the 3rd of May, 2018, convictions were recorded against the appellant following his trial on indictment (on Bill No DLPD0002/2009) before Letterkenny Circuit Criminal Court of one count (being Count No 1 on the indictment) of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997 ("the Act of 1997), and one count (being Count No 2 on the indictment) of assault causing harm contrary to s. 3 of the Act of 1997, both committed on the 9th of October, 2008. The conviction on Count No 1 was by a majority verdict of the jury, in the ratio of 10:2, while the conviction on Count No 2 was by a unanimous verdict of the jury.

2. After being remanded in custody for sentencing, the appellant was subsequently arraigned in the same court on the 24th of July, 2018 on a different Bill of Indictment (Bill No DLPD0002/2009A), and pleaded guilty to an offence of possession of cocaine for the purpose of sale or supply contrary to s. 15 of the Misuse of Drugs Act, 1977, as amended, which had been discovered on his person during the course of his arrest for the two assault type offences. This matter was then adjourned for sentencing on the same time as the appellant was due to be sentenced for the assault type offences

3. The sentencing hearing took place on the 13th of December 2018, following which the Circuit Court judge reserved his decision until the 19th of December, 2018. On that date he imposed sentences of ten years' imprisonment with final 18 months suspended in respect of the s. 4 offence; a sentence of three and a half years imprisonment in respect of the s. 3 offence; and a sentence of 12 months imprisonment in respect of the s. 15 offence. All of these sentences were to be served concurrently and were to date from the date of sentencing but with credit to be given for time already spent in custody while on remand.

4. The appellant now appeals against the severity of the sentences imposed upon him. In reality, the focus of the appeal (which was said by the appellant's counsel to involve a net discrete issue) is on the sentence of ten years with the final eighteen months suspended imposed in respect of the offence of causing serious harm contrary to s. 4 of the Act of 1997 as this subsumes the others.

Factual Background

5. The court below heard evidence that both assaults of which the appellant had been convicted had taken place on the 9th of October 2008, and had involved the same victim, a Mr Kristian Shortt.

6. On the evening of the 8th of October 2008, the injured party met up with the appellant in Letterkenny town and they went drinking together. They were seen on CCTV footage leaving the "Voodoo" bar sometime after 2.30 AM on the 9th of October 2008. Mr Shortt had given the jury a description of what each of them were wearing, and these descriptions were confirmed by the footage. The appellant was wearing a grey tracksuit with no visible staining. The two men returned to the apartment of a friend, a Mr Damien O'Connor, at flat 2, 53 Upper Main Street, Letterkenny in County Donegal, where alcohol and cocaine was available. While Mr Shortt claimed not to have taken any cocaine at this location, he was a regular user, and admitted to having taken cocaine earlier that day.

7. The jury had heard that while together in this flat on the occasion in question the appellant and Mr Shortt began arguing, and had squared up "*toe to toe*", without yet physically assaulting each other. Mr Shortt had removed his shirt while doing so. Mr Shortt gave evidence that he had no dispute with Mr O'Connor, whose flat it was and who was also present.

8. After their mutual displays of aggressively squaring up to each other, Mr Shortt believed the matter to be finished and went to get his jacket. To quote from Garda Maughan's evidence, Mr Shortt had testified that as he did so he "*felt a weapon protrude into his body several times*". Garda Maughan confirmed that Mr Shortt had added that Mr Broe had stabbed him. A blood-stained scissors was found in the apartment during a subsequent scene of crime examination, and a later forensic examination confirmed the blood on scissors to be that of Mr Shortt.

9. During the course of the assault, Mr Shortt was rammed up against the wall and stabbed repeatedly in the neck, head, chest and back. He claimed that the appellant verbally threatened to kill him.

10. At one stage, the victim became unbalanced after finding it difficult to breath. After falling to the ground, Mr Shortt was then further subjected to repeated blows to his head and neck. Mr Shortt feared his jaw had been broken while these blows were being rained on him, although this transpired not to be the case.

11. The stabbing with the scissors became the subject of the charge under s. 4 of the Act of 1997, while the blows to Mr Shortt's head and neck while he was on the ground became the subject of the charge under s. 3 of that Act.

12. Following a call from Mr O'Connor, gardaí arrived at the apartment at 7.04 AM on the 9th of October 2008. An ambulance was already at the scene. Mr Shortt was conscious but incoherent and had been injured to the extent that Garda Maughan encountered difficulty in determining if he was male or female. Mr O'Connor, who had blood on him, and who

was highly agitated, was adjudged to be impeding garda investigations (whether intentionally or not) and found himself being arrested. However, Mr O'Connor, notwithstanding his agitation, managed to inform the gardai at the scene that the assaults had been committed by the appellant. It is perhaps noteworthy that at the appellant's trial it was suggested by his counsel during cross-examination of the victim that Mr O'Connor had in fact been the perpetrator, a suggestion rejected by the victim; and manifestly also by the jury.

13. During a review of CCTV footage in the course of the Garda investigation the appellant was seen walking down Main Street in Letterkenny, between 6 and 7 AM that morning, wearing a grey tracksuit with staining on the bottom part of it.

14. The scene of crime examination yielded a fingerprint on a glass and a palm print in blood on the door, both belonging to the appellant. A key for a Renault car registered in the name of the appellant was also found. The car itself was found outside the home of a Mr Barry Whittle where, again following a review of CCTV footage, the appellant had been observed going to after the assault.

15. A Ms Siobhan O'Donnell was called by the prosecution and confirmed that she had been contacted by Mr Whittle on the morning of the 9th of October 2008 to come urgently. She went to Mr Whittle's house, where she encountered the appellant wearing a towel, having just showered. In her ensuing conversation with the appellant, he claimed he had given somebody a beating but was unable to remember whom. The appellant blamed Mr Whittle and claimed to have been set up by Mr O'Connor. The appellant requested that Ms O'Donnell buy him some jogging trousers, tracksuits and vests. Later in the day, the pair were listening to Highland Radio, and heard a report about a stabbing. Ms O'Donnell stated that the appellant looked shocked and that he had said that he would "*not do that"*, that he had "*been brought up well by his father*", and that he "*would use his fists, feet, teeth, anything but not weapons*".

16. On the 10th of October 2008, the appellant, accompanied by Mr Whittle and another man, took a taxi from Mr Whittle's house in Letterkenny and set off in the direction of Dublin. The taxi was followed by Gardaí with a view to intercepting it. However, they were unable to do so before it crossed the border into Northern Ireland. Despite this, they managed to intercept it later on in County Monaghan after it had crossed back into the Republic of Ireland.

17. Upon intercepting the taxi, gardai arrested the appellant. The appellant was searched and was found to be in possession of 16½ grams of cocaine with an approximate street value of €1,100.

18. Following his arrest, the appellant was interviewed six times, and these yielded nothing of evidential value for the most part. However, when presented with the pair of scissors used in the assault, the appellant denied any association, claiming "*No, it looks horrible. It's not me*." Upon being shown the CCTV footage previously he agreed that the person to be seen in the footage did look like him.

Medical Evidence

19. The injured party declined to submit a victim impact statement, but it can be accepted that his injuries were severe. Upon arriving at the scene, Garda Maughan was initially unable to determine whether the victim was male or female due to the extent of his injuries. There was no medical evidence in relation to the s. 3 assault, however Mr Shortt provided evidence of that. The court was also provided with two medical reports, from a Mr Michael Sugrue and Dr Mary Barry. Mr Sugrue treated the victim in Letterkenny University Hospital, where he noted blood loss, reduced air entry and a weak pulse due to the injuries. The victim required bilateral chest tubes, and the covering of a sucking right chest wound. Mr Sugrue noted a two-centimetre right chest laceration and a one-centimetre chest laceration; two lacerations in his right ear; three lacerations on his left hand and; two posterior lacerations. Mr Shortt required resuscitation on two occasions in Letterkenny University Hospital and developed significant haematosis. Mr Sugrue concluded with his opinion that the multiple stab wounds were potentially life threatening, requiring surgery in Letterkenny, immediate resuscitation, and subsequent surgery in St Vincent's Hospital in Dublin.

20. The evidence of Dr Mary Barry from St Vincent's Hospital confirms Mr Sugrue's record of the injuries. Surgery was carried out on Mr Shortt's neck due to due to injury to the external carotid artery and internal jugular vein. A further emergency tonsillectomy was required due to a very significant bleed from his oral cavity following his earlier surgery. Dr Barry indicated that Mr Shortt made a very good post-operative recovery in the following days, and most of his issues from then on related to his palette and oral cavity. Mr Shortt spent approximately a week in hospital in Dublin before being transferred back to Letterkenny. He has since made a good recovery.

Circumstances of the Appellant

21. The court heard that the appellant was born on the 11th of June 1973 and accordingly was 35 years at the date of the offence, and 45½ at the date of sentencing. Information as to the appellant's family circumstances was gleaned from a probation report dated the 30th of November 2018. He is the elder of two siblings. His mother died by suicide in 2013 and his father had been in bad health for some years and the appellant became in effect his primary carer and lived with him. In his younger years he had a difficult relationship with his father and alcohol was an issue in the family unit when he was a child. The appellant was said to be currently in a long-term relationship (at the date of the report). He has two adult children from a previous relationship, a son and the daughter. He describes now having a positive relationship with his son, and expresses regret over his decision-making when they were growing up, as his own lifestyle issues meant he was not present for his children. The lifestyle issues referred to involved managing chronic drink and drug issues.

22. The appellant began drinking in his mid-teens. He had problematic patterns of drinking from his early 20s and alcohol dependence from his mid-20s. While in his 20s and working in the UK he was hospitalized due to ulcers relevant to his drinking. He received a blood transfusion and unfortunately the transfused blood was possibly contaminated, leaving him at risk of developing the variant Creutzfeldt-Jakob's disease (CJD).

Understandably this became a source of significant anxiety for the appellant, and unfortunately this led to a deterioration in his drinking and mental health. He returned to Ireland in his mid-20s and he worked in gyms and as a security man/doorman. His work type frequently had him around alcohol, drugs and violence. He developed a cocaine habit and an extremely chaotic lifestyle. His mental health issues included recurring depression and suicidal ideation. Following the incident in 2008 which led to him receiving a custodial sentence he made a conscious effort to move away from previous employment patterns that were associated with drink, drugs and violence. In recent years he has been on social welfare. He sought counselling and has attempted to address his long-standing alcoholism. Although he has made some progress, he requires to make further progress in that regard. The appellant self-reports that he has fully addressed his cocaine habit and has been clean since 2010.

23. Garda Maughan provided the court with details of the previous convictions of the appellant, all of which, bar one, were dealt with in the District Court and did not relate to assault. In 1992 convictions were recorded for an offence under s. 112 of the Road Traffic Act in 1992 for which he received a 12-month prison sentence, a conviction under the Litter Act, and a conviction for Criminal Damage for which he received a fine. There were further convictions in 1994, 1995 and 1998 for Public Order type offences in respect of which he was fined and/or bound to the peace. However, in May 2008 there was a Circuit Court conviction for assault causing harm, contrary to s. 3 of the 1997 Act, for which the appellant received a 3-year prison sentence, with the final year suspended. This arose from an incident in which, while he was working as a doorman at a nightclub, he had become involved in an altercation with a patron during which he partially bit off that person's ear.

24. During cross examination, Garda Maughan confirmed that the appellant had made significant concessions by way of admissions under s. 22 of the Criminal Justice Act, 1984, and allowing statements to be read pursuant to s. 21 of the same Act, which reduced the length of a trial which had been allocated an estimated three weeks down to six days.

25. The probation report assesses the appellant as being at moderate risk of reoffending over the next twelve months if in the community. The primary risk factors were identified as his offending history, his associations, drinking/drug issues, and work with secondary issues regarding emotional difficulties and orientation. His risk categorisation would increase from moderate to high should he use drink or drugs.

26. A large number of positive testimonials were submitted to the court below on behalf of the appellant from family members, friends and associates in his community. These included an offer of employment with a roofing company.

The Director's views

27. Counsel for the prosecution stated that in respect of *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116, the Director took the view that, before mitigation was considered, the gravity of the offence was such that the headline sentence ought properly to lie within the

indicative range for assault offences of the most serious type, namely as potentially meriting a sentence in the range between seven and a half to twelve years imprisonment. Counsel for the prosecution has asked us to note the following factors as having informed the Director's view: -

I. The sustained and vicious nature of the assault;

II. The fact that it was unprovoked;

III. The severity of the injuries;

IV. The use of the weapon, the scissors, although it was acknowledged that these were not taken to the scene;

V. The impact on the victim;

VI. The fact that the appellant left the scene and did not seek help for his victim;

VII. The fact that the appellant actively tried to evade detection, and

VIII. The attempt, under cross-examination, to lay the blame on Mr O'Connor.

28. During the course of the plea of mitigation it was conceded that, in respect of the *Fitzgibbon* case, the assault offences of which the appellant was convicted would properly attract a pre-mitigation sentence in the upper range, and it was submitted that the headline sentence in the appellant's case should be located in the middle or just slightly below the middle of that range.

Mitigating Factors

29. It was highlighted that this was not a premeditated offence and the scissors which were used in the course of the assault were present in the flat at the time.

30. It was submitted on the appellant's behalf that he had pleaded not guilty as "*he did not believe that he could have been capable of doing what he had done*". This was supported by the evidence of Ms O'Donnell who stated that the appellant had expressed shock and disbelief when he heard details of the assault in the report on Highland Radio.

31. At the time of the offences, the appellant was addicted to drugs and alcohol and did not lead a stable lifestyle.

32. It had been indicated to the sentencing judge that the appellant accepted the verdict of the jury and would not be appealing against conviction.

33. The significant passing of time between the date of the offences and the date of sentence was also highlighted, and it was submitted on behalf of the appellant that the court should be mindful of whether the appellant was substantially the same person as he was in 2008. It was submitted that there has been a marked change in the appellant following the completion of his three-year prison sentence in 2010.

34. The news that he was at risk of developing CJD was the catalyst for the appellant's development of a drug dependency and worsened his pre-existing alcoholism.

35. While serving his sentence in respect of the 2008 conviction for assault causing harm, the appellant, with the help of a psychiatrist, began to take control of his life, and began taking several psychiatric medications.

36. The appellant's physical health has deteriorated, and he now suffers significant hearing loss in his left ear and is now beginning to lose hearing in his right ear. Although this transpired to be unrelated, hearing loss can be a symptom of CJD and worry in that regard is said to have caused the appellant a high degree of stress.

37. It was also highlighted that after Mr Shortt had given his evidence there was an interaction between the appellant and Mr Short, possibly initiated by Mr Shortt, when both men shook hands and indicated to each other that they bore each other no ill will and the appellant apologised to Mr Shortt.

38. The sentencing judge was also given a positive report from the governor of Castlerea prison, along with two certificates of achievement from the Red Cross which the appellant had earned whilst in custody.

Remarks of Sentencing Judge

39. In sentencing the appellant, the sentencing judge acknowledged that there was "*no dispute but that this offence of causing serious harm lies on the upper end of the scale of such offences*", before going on to rehearse what he saw as the aggravating features of the case which were, in essence, those that had been identified by the Director. He stated that he would not treat the previous conviction for assault causing harm as an aggravating factor, but rather as resulting in a loss of mitigation. In that regard we wish to make it clear that it would have been open to him in his discretion to treat it as an aggravating factor, in circumstances where it was a conviction for another assault type offence. However, given the large lapse of time between the two offences we would not quarrel with his decision to treat of it as he did.

40. The trial judge went on to nominate pre-mitigation or headline sentences of ten years imprisonment for the s. 4 offence, four years imprisonment for the s. 3 offence and eighteen months imprisonment for the s. 15 drugs offence, and no issue is taken with any of that in the present appeal. It should be mentioned in passing that in relation to the s. 3 offence the sentencing judge appears to have been mistakenly under the impression that the victim's jaw was in fact broken, although it was not. The evidence was that the victim had apprehended that his jaw was broken, but subsequent medical examination did not reveal a fracture. However, in our view that detail does not detract from the overall viciousness of the attack and the absence of an actual fracture would have had little bearing on a proper assessment of gravity.

41. The sentencing judge then turned to mitigation. He noted the delay and the explanation for it, including that the delay from 2008 to 2013 was attributable to a judicial review

(which, we are told, went all the way to the Supreme Court and was ultimately unsuccessful) taken by the appellant, but that the further delay from 2013 was not the fault of the appellant.

42. The trial judge further noted the appellant's efforts to rehabilitate, his assumption of the role of carer for his father, the tragic loss of his mother, and his efforts to move away from previous employment patterns which were associated with drink, drugs and violence. He noted a letter to the court from the appellant expressing remorse and a strong desire for the future to maintain a drug and alcohol and crime free life-style. He took due note of the appellant's health issue arising from the potentially contaminated blood transfusion, and also his mental health issues. He records that there was evidence that the appellant is doing well in prison and notes that he had completed harm reduction and conflict awareness course. Finally, he had regard to the positive testimonials received in respect of the appellant.

43. He concluded:

> *"In relation to the offence of possession of cocaine for the purpose of sale or supply, there is also the additional and significant mitigating feature of a plea of guilty to that offence. But in relation to the most serious offences, or the more serious offence of causing serious harm, all of the mitigating circumstances relate essentially to Mr Broe's sustained efforts at rehabilitation in recent years and has expressed desire to lead a crime-free life in the future and to deal with his alcohol and drug issues.*
>
> *That being so, and to encourage him in that regard, I propose to reflect the entire value of those mitigating features by suspending a portion of the sentence rather than by imposing a reduced sentence in the hope that Mr Broe will be encouraged in his rehabilitation as a consequence of that suspension.*
>
> *So I will suspend the final 18 months of the ten-year sentence which I impose on Count No. 1, which is causing serious harm, and I have suspended for a period of 18 months on his entering into a bond in the sum of €100 to keep the peace and to be of good behaviour for a period of 18 months subsequent to his release; and, further, that during the first 12 months subsequent to his release, he will go under the supervision of the probation service and that during that time, he will abstain completely from alcohol and unprescribed drugs, he will attend for residential alcohol treatment that is therapeutic in nature and that is approved by the probation service. He will submit to regular supervised drug screenings with random screenings requested by a supervising probation officer and those screenings to be funded by the accused. And he will attend all appointments with the probation service and follow all directions from his probation officer relevant to counselling, employment and training options.*
>
> *In relation to the offence of assault causing harm, Count No. 2 on the indictment, having regard to the mitigating features that I have identified, I will reduce the*

sentence of four years to one of three-and-a-half years to run concurrently. In relation to the possession of cocaine for the purpose of sale or supply to which the accused entered a plea of guilty and having regard to all of those other mitigating -- common mitigating features which have been identified, I will reduce the sentence to one of 12 months' imprisonment to run concurrently also. Now, full credit is to be given to Mr Broe for all time already spent in custody in relation to these matters".

Grounds of Appeal

44. The appeal is solely in respect of the sentence imposed for the offence of causing serious harm contrary to s. 4 of the 1997 Act, as this was the only part for which the sentencing judge did not give any reduction from the headline sentence. This appeal rests on the following grounds:

I. The sentencing judge erred on a question of law, or on a mixed question of law and fact, when, having found that mitigating factors existed in respect of the appellant, he imposed a sentence which gave effect to the said mitigating factors solely by suspending part of the headline sentence and in failing to reduce the headline sentence to take account of the said mitigating factors.

II. The sentencing judge erred in imposing an overly severe sentence in all the circumstances of the case.

The second ground of appeal was not proceeded with.

Submissions of Appellant

45. The main concern of the appellant is the decision of the sentencing judge to "*to reflect the entire value of those mitigating features by suspending a portion of the sentence rather than by imposing a reduced sentence*".

46. The attention of the court has been directed to the Supreme Court determination in *DPP v. Michael John Walsh* [2015] IESCDET 26, in which it was stated that:-

The precise way in which it would be appropriate either for a sentencing judge or the Court of Appeal to impose or confirm a sentence to reflect mitigating factors is very much a function of the particular circumstances of each individual case involving not only a consideration of the offence but also all of the circumstances of the offender. While there may be factors which, as O'Malley points out, might lead to the suggestion that either reduction or suspension was more appropriate in a particular case, it would only be in a clear case (if at all) that the choice made by a sentencing judge in that regard could be said to be circumscribed as a matter of law."

47. While the application of Mr Walsh was refused by the Supreme Court on the basis that "*it would be difficult to describe the point now sought to be relied on by Mr. Walsh as having represented a central part of the case which he made to the Court of Appeal,*" it is the contention of the appellant that that consideration does not apply in this case, and that

this Court should find the court below to have been in error in reflecting all of the appellant's mitigating factors by means of a suspension of eighteen months of the nominated headline sentence. Counsel for the appellant was asked by the President, who was the presider on the panel hearing the appeal, if that was his client's sole complaint; and if so, whether if there had been a straight discount he would have any ground for complaint. Counsel confirmed (a) that it was his sole complaint and (b) that if there had been a straight discount it was unlikely there would have been an appeal. However, he added, were the Court to find that the manner in which the sentence had been structured amounted, as was his case, to an error of principle, he would be asking this Court to quash the sentence imposed by the sentencing judge at first instance and that it should, in re-sentencing the appellant, show some further leniency towards his client in circumstances where his progress towards rehabilitation was continuing.

48. Returning to the *Walsh* case, our attention was drawn to the fact that the Supreme Court had noted that there has been some debate both in the case law (see *People (D.P.P.) v. O'Reilly* [2008] 3 I.R. 632) and in academic commentary (O'Malley, *The Irish Criminal Process*, Round Hall (2009)) about the circumstances in which either a suspension or a straight discount might be more suitable.

49. O'Malley opines (in *The Irish Criminal Process*) that:

> *"it is very difficult to establish criteria for choosing between reduction and suspension particularly since the Irish courts are entitled to take all the personal circumstances of the offender into consideration for the purposes of deciding the original sentence".*

50. In *Sentencing Law and Practice*, (3rd edition, paragraph 22-19) turning to the issue of 'Part-Suspension as Mitigation', O'Malley states: -

> *"…part suspension of sentence amounts to some mitigation but it must always be clear that it is not the same as a discount or reduction. The offender who breaches any of the specified conditions during the operational period will become liable to serve the suspended portion. If this should happen, the offender may be said in retrospect not to have received any real credit for mitigating factors".*

51. In respect of the *Walsh* case, O'Malley states that:

> *"it is not being suggested that part-suspension is never appropriate in these circumstances, but it is suggested that a court should always begin by asking if there is any reason why a straight reduction would be an inappropriate means of granting mitigation".*

52. It is submitted on behalf of the appellant that the sentencing judge erred in structuring the sentence for the offence of causing serious harm offence contrary to s. 4 of the 1997 Act. This can be seen as more of an anomaly when considered in context with the two

other offences, for which credit for mitigation was given by means of reductions from the respective headline sentences.

Submissions of Respondent

53. Counsel for the respondent submitted that the obligation of a sentencing judge to give due credit for mitigating circumstances is implicit in the concept of proportionality as adopted by the courts in this jurisdiction. It is well established that such credit should be applied after the appropriate headline sentence has been identified by the sentencing judge. In order to give the appropriate credit, the relevant mitigating circumstances must firstly be identified. In this case they were properly identified by the sentencing judge as follows:

    I. The passing of ten years since the commission of the offence.

    II. The significant steps taken by the accused towards his rehabilitation during that period of time and, in particular since 2010, when he finished serving a sentence imposed in 2008 for assault causing harm. This included:

        i. his assertion that he had not used cocaine since 2010;
        ii. that he had undergone some counselling for his alcoholism;
        iii. that he has become very much devoted to his family;
        iv. that he had been acting as a carer for his father;
        v. that he had sought to move away from previous employment patterns which were associated with drink, drugs and violence;
        vi. the character references submitted to the court including a letter from a potential employer who would be prepared to give him employment upon his release;

    III. His expression of remorse which appeared to the court to be sincere;

    IV. His very serious health issues which had also caused him a significant amount of depression;

    V. The positive reports from the prison showing that he had used his time reasonably well in prison, working responsibly in the gym, completing a harm reduction course and a conflict awareness course.

54. The manner in which such credit should be applied was the subject of an application to the Supreme Court in *Walsh*, referred to in the appellant's submissions.

55. In *Walsh*, the appellant had appealed concurrent sentences imposed on him in Clonmel Circuit Court, where the mitigating circumstances of the case had been reflected with the suspension of the final 18 months of the overall sentence, subject to conditions. In the grounds of appeal to the Court of Appeal, the appellant complained *inter alia* that the sentencing judge had failed to attach adequate weight to the mitigating circumstance urged upon him. In the oral and written submissions, it was further urged that the relevant mitigating circumstances should have resulted in an unconditional reduction in

sentence rather than a suspension of sentence on conditions. The Court of Appeal rejected the appeal but did not specifically refer to the latter point.

56. The appellant sought leave to appeal to the Supreme Court under Article 34.5.3 of the Constitution on the grounds that the Court of Appeal failed to deal with that aspect of the appellant's argument. The issue of general public importance urged was whether it should be "*the norm for sentencing judges to reduce a custodial sentence unconditionally for mitigating factors before going on to consider whether there should be a suspension or part suspension of that reduced sentence in the interests of rehabilitation*".

57. The Supreme Court refused leave to appeal on the grounds that, given the limited way in which the point was canvassed before the Court of Appeal, the Court was not persuaded that the issue arose in such a clear cut manner as would warrant treating the point as being one of general public importance. The failure to raise it as a stand-alone ground of appeal was indicative of the fact that it represented but one of a series of general points which were made to, and rejected by, the Court of Appeal concerning the adequacy of credit given for mitigating factors. It was *"…also indicative of the fact that this is not the sort of clear case where there might be an argument that the choice between reduction and suspension amounted to an issue of principle."*

58. In the course of the judgment the court referred to the debate in caselaw and academic commentary on the circumstances in which either a suspension or reduction might be more appropriate, before concluding:

> *"The precise way in which it would be appropriate either for a sentencing judge or the Court of Appeal to impose or confirm a sentence to reflect mitigating factors is very much a function of the particular circumstances of each individual case involving not only a consideration of the offence but also all of the circumstances of the offender. While there might be factors which, as O'Malley points out, might lead to the suggestion that either reduction or suspension was more appropriate in a particular case, it would only be in a clear case (if at all) that the choice made by a sentencing judge in that regard could be said to be circumscribed as a matter of law."*

59. When considering the implications of the decision, O'Malley said that:

> *"It is not being suggested that part-suspension is never appropriate in these circumstances, but it is suggested that a court should always begin by asking if there is any reason why a straight reduction would be an inappropriate means of granting mitigation"* (Sentencing Law & Practice 3rd edition, para 22-19).

60. It was submitted that it is for a sentencing judge to decide, in considering all the circumstances of the case and in particular all the mitigating circumstances, whether part-suspension or a reduction in sentence is the appropriate choice in any one case. That choice is not circumscribed as a matter of law. It is only in rare cases, if any, that the

decision to opt for one over the other is open to challenge on appeal as a matter of principle. It is submitted by the respondent that this is not one of those rare cases.

61. The sentencing judge outlined his reasoning as such:

> *"But in relation to the most serious offences, or the more serious offence of causing serious harm, all of the mitigating circumstances relate essentially to Mr. Broe's sustained efforts at rehabilitation in recent years and his expressed desire to lead a crime free life in the future and to deal with his alcohol and drug issues.*
>
> ***That being so, and to encourage him in that regard**, I propose to reflect the entire value of those mitigating features by suspending a portion of the sentence **rather than by imposing a reduced sentence** in the hope that Mr. Broe will be encouraged in his rehabilitation as a consequence of that suspension"* [emphasis added].

62. The respondent submitted that it is clear from the foregoing that:

    i. The sentencing judge considered whether he should apply a straightforward reduction in sentence;

    ii. He decided to opt for part-suspension to reflect the mitigating circumstances;

    iii. He did so for the specific and legitimate purpose of encouraging the further rehabilitation of the appellant;

    iv. This was an appropriate exercise of his discretion when the mitigating circumstances related almost in their entirety to his efforts to rehabilitate

    v. It was consistent with his expressed desire to continue with such efforts.

63. It was submitted that this was a proper exercise of the discretion of the sentencing judge and did not amount to an error of principle.

64. The appellant does not take issue with the sentences imposed on the other 2 counts, i.e. the s. 3 assault and the s. 15 possession count. On the former, the mitigating circumstances were reflected by a reduction from a sentence of four years to three and a half years imprisonment. This represented a reduction of one-eighth of the total sentence.

65. On the s. 15 charge, the reduction was from eighteen months imprisonment to twelve months. However, for that particular offence, the court was obliged to give substantial credit to the appellant for his plea of guilty, long recognised as a most significant mitigating factor with regard to sentencing in any case.

66. The suspension of the final eighteen months of the ten-year sentence on the s. 4 charge represents an effective reduction of three-twentieths of the entire sentence. This is in fact marginally higher than the reduction on the s. 3 count, in circumstances where the same mitigating factors applied in both offences.

67. In circumstances where the appellant has asked that greater leniency be shown to him in the event of this court finding an error of principle (of which the respondent strongly contends there is none) and needing to proceed to a re-sentencing, we are asked to note the case of *The People (DPP) v Damien Greene* [2018] IECA 207, in which the appellant appealed against the severity of his sentence for an offence of causing serious harm. He received a sentence of 10 years with the final 3 years suspended.

68. We have said many times that single cases produced as comparators are of little value. The value of comparators is in indicating trends.

69. However, for what it is worth, the respondent points out that the *Greene* appeal focussed on the submissions that the trial judge had over-assessed the gravity of the offence by determining a headline sentence of 10 years. There were many similarities between that case and this:

    i. it involved an attack with a knife;

    ii. the attack was not premediated;

    iii. but was completely unprovoked;

    iv. the appellant was extremely intoxicated at the time;

    v. he was uncooperative with the gardaí;

    vi. the accused only pleaded guilty as he could not remember the incident;

    vii. upon conviction he accepted the verdict of the jury and showed remorse;

    viii. the victim did not put in a victim impact statement.

70. However, the respondent points out, Greene did not involve such a sustained attack (the wound had been inflicted by a single stroke of the knife), nor did it involve such serious and life-threatening injuries.

71. *Per* Edwards J. in that case:

> *"Counsel for the Respondent has referred us to the People (Director of Public Prosecutions) v Fitzgibbon [2014] 1 IR 627, and has suggested that according to the criteria set out in that case, and in particular the aggravating circumstances of a bladed weapon having been used, that the case had properly been located in the high range as identified by Clarke J. The high range, which relates to pre-mitigation sentences, runs from seven and a half years to twelve and a half years. The trial judge had started in exactly the middle of that range, and it was submitted that there was no error of principle in him so doing.*
>
> *We entirely agree. The circumstances of this case clearly justified the location of the offence in the middle of the high range as identified in the Fitzgibbon case".*

72. It was submitted that this case – in terms of the culpability of the offender, the gravity of the offence and the impact on the victim – was even more serious and that the trial judge was correct to place it in the high range and, if anything, was lenient in placing it exactly in the middle of that range.

73. The respondent points out that there are some similarities in terms of the mitigating factors in each case. The discount given for mitigation was not the focus of the appeal in *Greene*. Edwards J. made the following comment in reference to the suspension of the final three years of the sentence:

> *"Arguably that was generous in the circumstances but we agree that it was appropriate".*

74. The respondent submits that in all the circumstances of this case, the sentence properly reflected the gravity of the offence, and gave all due credit for the mitigating factors in an appropriate manner. No error of principle is disclosed, and the sentence was not unduly severe.

Discussion and Decision

75. The appellant was, we think, well advised in not proceeding with Ground of Appeal No II, and in not challenging the headline sentence, having regard to this Court's remarks in *The People (Director of Public Prosecutions) v. Mark O'Sullivan* [2019] IECA 250, where we said at paragraph 8:

> *"In the almost 5 years since the decision in DPP v Fitzgibbon, quite a number of cases of s. 4 assaults have come before the courts, whether by way of appeals against severity or applications to review on grounds of undue leniency. The experience of the Court is that the upper end of the suggested range before mid-range and upper-range offences impose excessive constraints on sentencing judges. The experience of the courts operating under Fitzgibbon is that an upper limit of 7 ½ years for a mid-range is too low and a figure of ten years will be more appropriate. Likewise, we are inclined to the view that a figure of 12 ½ years as a pre-mitigation* [upper limit] *for high-end offences is too low and should be increased to fifteen years with exceptional cases higher again."*

76. Having carefully considered the submissions in this case we are not satisfied that the sentencing judge erred in principle in reflecting mitigation solely by means of suspending eighteen months of the uncontroversial headline sentence. It is well established that a wholly suspended sentence is still a sentence, and in the case of a part suspended sentence both the portion required to be served in custody, and the suspended portion, together comprise the sentence. However, it cannot be gainsaid that where a court sees fit to suspend a sentence in whole or in part, it involves a more lenient sanctioning or punishment of the offender than would be the case where a sentence is required to be served in full. The imposition of the suspended portion still communicates society's deprecation of, and desire to censure, the offending conduct, while sparing the offender (providing he/she adheres to the conditions on which the sentence was suspended) the

"hard treatment" that would otherwise have to be endured if the suspended portion were required to be served. Accordingly, suspending a sentence in whole or in part will often be an appropriate way of reflecting mitigating circumstances, particularly where amongst the factors which the sentencing judge wants to reward is progress towards rehabilitation or reform to date, and where he/she also wishes to incentivise continuation along that path. The reward for mitigating circumstances which require to be acknowledged including progress towards rehabilitation or reform to date, may be provided by the leniency associated with suspension, while the incentive to continue with rehabilitation or reform is provided by the conditionality associated with the suspension. Often, where this mechanism is used, the length of the suspended period may be somewhat greater than it would be if recourse was to be had to a straight discount, as an extra incentive towards future desistence having regard to the consequences of non-compliance with the conditions of the suspension.

77. What a judge must strive to avoid, however, is unconsciously setting up an accused to fail. Before a suspended sentence is used to reflect mitigation and as an incentive to rehabilitation/reform, a sentencing judge should satisfy himself or herself that there is a least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence, because of the risk that, if a condition of the suspension is breached, the accused could lose all of the earned mitigation to which (s)he is entitled. To take a plea of guilty as an example, a person who is hopelessly addicted to drugs and facing sentencing for a burglary should get an appropriate discount for his/her plea regardless of whether (s)he is willing to address or, if willing, he has yet succeeded in addressing, the root cause of his/her offending behaviour, namely the need to feed his/her drug habit. If the plea is reflected in the part suspension of a sentence, and the suspension is conditional on the accused being of good behaviour and not re-offending, if (s)he then re-offends (which in the circumstances may be highly likely) (s)he will potentially lose all of the credit which (s)he was entitled to for having pleaded guilty. (S)he will, in effect, have been set up to fail.

78. What this example shows is that a sentencing judge ought to, when structuring a sentence, use his/her judgment as to whether the risk associated with using a suspended sentence is justifiable in the circumstances of the case. However, this will be a judgment call in every case and it is not something to be measured with a micrometre. As was stated in the *Walsh* case, *"it would only be in a clear case (if at all) that the choice made by a sentencing judge in that regard could be said to be circumscribed as a matter of law"*. It follows therefore that it will only be in rare cases that an appellate court would be disposed to intervene on that account.

79. In the present case we are completely satisfied that intervention is not merited. The risk associated with structuring this appellant's sentence to reflect mitigation and incentivise rehabilitation/reform by means of part suspension of the headline sentence was clearly one that could justifiably be taken. The entire plea in mitigation was predicated on the submission that the appellant had stayed out of trouble since his release from prison in 2010, that he was clean of drugs since 2010, that while he continued to suffer from

alcoholism he had made some progress in addressing it and wanted to continue with that. He had also moved away from the type of employments that exposed him to violence, drink and drugs. He had also become a carer for his father. These were all positive indicators that the appellant was serious about wanting to turn his life around. While it was true that the Probation Service had assessed him as being at moderate risk of reoffending, their report indicated that but for the progress that he had made he would otherwise have been assessed as being at high risk of reoffending. Finally, the proportion of the overall sentence for the s 4 offence that it was proposed to suspend was relatively modest, in circumstances where the appellant did not have going for him the two mitigating circumstances which typically yield the greatest level of discount, namely a plea of guilty and previous good character.

80. In circumstances where we can see no error of principle in the sentencing judge's approach to the appellant's case, nor with respect to how he structured his sentence, we must dismiss the appeal. We have noted that he continues to do well in prison. While we have not been able to intervene to the appellant's advantage, in circumstances where we have not identified any error of principle, we nevertheless congratulate him on his continued progression and encourage him strongly to continue with his efforts to change his life for the better.