UNAPPROVED

THE COURT OF APPEAL

Edwards J.

McCarthy J.

Donnelly J.

Neutral Citation Number: [2020] IECA 331

Record No: 188/2018

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

IAN O'SULLIVAN

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 26th of November, 2020.

Introduction

1. On the 21st of November, 2017, the appellant came before Tipperary Circuit Criminal Court, and entered a plea of guilty in respect of one count of robbery contrary to s. 14 Criminal Justice (Theft and Fraud Offences) Act, 2001. On the 16th of May, 2018, the appellant was sentenced to 12 years' imprisonment by that court, backdated to the 16th of March, 2017, and with the final 4 years suspended for a period of 4 years. The appellant was

further mandated to engage with the probation service for two years post-release, and comply with their requests. He was also to abstain entirely from alcohol and illicit drugs during that period. A compensation order was further made in the sum of €5000.

2. The appellant now appeals against the severity of the sentence imposed.

Background Facts

3. The court heard from Detective Garda Patrick Powell, who on the 26th of February, 2017, received a call from Thomas Lonergan at around 2 a.m., requesting that gardaí should call to his address, claiming that he had been assaulted and robbed. Garda Powell attended his home at 2.10 a.m. He noticed a large physical injury to Mr Lonergan's face. His shirt had been ripped and he had dried blood on his head, face and clothes. Garda Powell summoned an ambulance, and Mr Lonergan proceeded to inform him what had happened.

4. Mr Lonergan stated that as he was walking home from a night out along Thomas Street in Clonmel, he was approached by three males coming from the direction of Shenanigan's Bar. One of the men demanded money. This was refused by Mr Lonergan. In response, the man punched him. Mr Lonergan attempted to flee, but was pursued by the men, who caught him and kicked and punched him while demanding his phone and money. After acquiescing and giving the men the contents of his pockets, Mr Lonergan was subjected to further kicks by the appellant while he lay on the ground. The appellant could be heard laughing as he kicked his victim. This continued until one of the other males pulled the appellant away from Mr Lonergan. Mr Lonergan was subsequently able to complete his short journey home and proceeded to contact the gardaí.

5. Gardaí were able to identify the injured party and the perpetrators from CCTV footage which showed the attack in its entirety. On the 10th of March, 2017, the appellant was arrested on foot of this identification, and was detained at Clonmel garda station and

interviewed on three occasions, from which nothing of evidential value emerged. One of the other assailants was dealt with by way of the juvenile liaison scheme.

Impact on Victim

6. After the arrival of the ambulance sent for by Garda Powell, Mr Lonergan was transferred to South Tipperary General Hospital and then to Waterford Regional Hospital for treatment for his injuries. Mr Lonergan received a fracture to his nose and an injury to his right eye socket. He experienced severe swelling to his face and head, which was an initial cause for concern. A report dated the 3rd of March detailed that CT scans and X-rays showed the facial bones, as normal. Mr Lonergan still complained of pain in his right jaw, which was due to extensive bruising and a small laceration under the right eye, which required closing with surgical glue. A medical report from the 30th of May 2017, outlined that following a review on 5th April 2017, Mr Lonergan had a small residual haematoma on the right upper cheek. Whilst he still complained of reduced vision, the report concluded that no other ocular abnormalities were present. The sentencing judge received a photograph taken shortly after the robbery, which displayed the visual aspect Mr Lonergan's injuries.

7. Mr Lonergan prepared a victim impact statement in which he counts himself lucky to be alive, after having his head and face specifically targeted in the attack. Mr Lonergan's situation became more grave due to the concern of the doctors that he could go into diabetic shock as a result of the attack in circumstances where he is a type 1 diabetic and his blood sugar levels post incident were recorded as being very high, a physiological reaction to his exposure to trauma. Fortunately, this did not occur after the administering of insulin. The severe swelling to Mr Lonergan's head caused much worry that there could be internal bleeding and swelling of the brain, which fortunately was not the case. In total, he spent three days in hospital and had to make return visits to the ENT doctor and to eye specialists. As a medical representative, Mr Lonergan was unable to work for 8 weeks due to the damage

inflicted upon his face. He describes the shock of his father and mother, who could no longer recognise him due to his facial injuries . He went for weeks without seeing his son as he believed he "*looked like a monster".* He further claims to have lost income from his weekends previously spent driving wedding cars, which when combined with the cost of the stolen phone, amounts to financial loss of around €2100. Mr Lonergan and his family experienced residual fear from the attack and moved out of their home due to fear of being attacked again. He claims that as a diabetic, his HbA1c (haemoglobin) levels have never returned to normal, which he fears will have long-lasting effects on his body. He also suffers from recurring nightmares, leading him to become aggressive and depressed. The trauma experienced by Mr Lonergan is exacerbated by his belief, induced by the appellant's laughter, that the appellant enjoyed carrying out the attack.

Circumstances of the appellant

8. The appellant has 18 previous convictions, namely:

   i) one conviction contrary to s. 3 of the Misuse of Drugs Act, 1977 as amended;

   ii) 12 convictions pursuant to the Criminal Justice (Public Order) Act, 1994;

   iii) 2 convictions for assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997;

   iv) 1 conviction for assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997;

   v) 1 conviction for possession of a knife contrary to s. 9 of the Firearms and Offensive Weapons Act, 1990; and

   vi) 1 conviction for theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences), 2001.

9. The appellant at the time of sentencing was 29 years old. He is in a long-term relationship and is the father of 3 young children. The court was furnished from a medical

report dating from 2016, which attested to severe anxiety and suicidal thoughts experienced by the appellant. He became addicted to alcohol from the age of 15, and to drugs from the age of 11, and underwent methadone treatment in 2014 for a serious heroin addiction. The medical report states that his methadone treatment seemed to have broken down by the stage of the offending. There was mention of suspected temporal lobe epilepsy in 2014, but no update has been received on this issue. It was submitted at the sentencing hearing that the appellant had been drinking heavily on the night in question, and had no memory of the attack. Garda Powell had stated that over the course of three interviews, the appellant at no point showed any remorse for his actions. However, at the time of sentencing, the appellant had instructed his counsel to apologise on his behalf and provided a letter of apology. The letter referred to a cessation of drug-taking by him since the incident. The court was also furnished several letters, one from the appellant's fiancé; one from Making Connections in South Tipperary, a training initiative, dated 2017; one from substance abuse services in Tipperary General Hospital; and one from the addiction nurse in Limerick Prison dated 13th April 2018, which detailed his referral to a psychologist and anger management services.

Remarks of the sentencing judge

10. The sentencing judge began his sentencing remarks with commenting on the wide-ranging ramifications of such an attack, which apart from causing significant harm to the primary victim, Mr Lonergan, had indirectly hurt, or had had the potential to hurt, numerous others in a secondary way, such as the victim's family, the appellant's own family, or members of the public who might have witnessed such "*horrific, sickening violence*". The following were identified as aggravating factors:

i) The three-on-one dynamic of the attack;

ii) The difference in size of the victim and his assailants;

iii) The unprovoked nature of the attack;

iv) The financial loss, which has never been repaid;

v) The physical damage inflicted on the face of the victim, and the knock-on effects this had on his family and employment;

vi) The psychological damage inflicted upon the victim;

vii) The focus on the victim's head in the attack, targeted with particular malice by the appellant, who laughed while carrying out the attack;

viii) The appellant's previous convictions, of which some were for assault and some for public aggression.

11. The sentencing judge identified the case as being in the top range for robbery offences, and noted that the maximum sentence for robbery is life imprisonment.

12. The following were identified as mitigating factors:

i) The plea of guilty, given 9 months after the attack;

ii) The undertaking given by the appellant that the injured party has nothing to fear from him;

iii) His considerable mental health problems;

iv) His children and supportive partner;

v) His letters of apology, which were accepted as displaying a deep level of remorse and some level of insight into the effects of the crime on Mr Lonergan. However, the judge noted, despite stopping taking drugs, the appellant had not recompensed the injured party for his losses. He further noted that despite the appellant's claims of deep shame from an early period, the appellant had been uncooperative with the garda investigation.

vi) Steps taken displaying motivation to change his life for the better.

13. The first two mitigating factors alone were said by the sentencing judge to warrant a reduction of the headline sentence from 14 to 12 years. The final 4 years were suspended to

give *"a strong motivation to"* the appellant *"to use his time when he comes out of prison in a productive way"*, on the condition that he keep the peace and be of good behaviour, engage with the probation service for a period of two years from his release, and comply with any and every request made by them. It was further made a condition of the suspension that the appellant was to abstain entirely from alcohol and illicit drugs during that time. The sentence was backdated to the 16th of March, 2018, to reflect time spent in custody.

14. The sentencing judge, on learning that the appellant had a pending personal injuries action unrelated to the case, made a compensation order of €5000 to be paid to the injured party if and when a cheque reflecting any damages agreed in settlement or awarded by a Court, was received.

Grounds of Appeal

15. The appellant originally sought to appeal his sentence on six grounds, but we were informed at the commencement of the oral hearing that he was confining his complaints to those in the grounds relating to the headline sentence of fourteen years imprisonment, namely

- that the sentencing judge failed to accurately place the particular offence as committed by the particular appellant at the appropriate position along the spectrum of gravity; and
- that the sentencing Judge misidentified and gave undue weight to the aggravating factors in the case and consequently imposed a sentence that was disproportionate, overly harsh, and wrong in principle.

Submissions of the appellant

16. It was submitted that the sentencing judge erred in principle and in law in nominating a headline sentence of fourteen years, firmly placing the offence within the high range.

17. In *People (Director of Public Prosecutions) v Leon Byrne* [2018] IECA 120, the appellant committed the robbery of a phone with a weapon as he followed the victim into his home. He was sentenced to two years' imprisonment having nominated a headline sentence of 5½ years. The sentence was set aside on a review by this Honourable Court on the basis of the headline being to allow as well as an excessive discount for mitigation. A sentence of three years was imposed. The case was not relied upon as a comparator (as it is a review case) but for the following statement of principle at para. 60:

> "*In fixing a headline sentence a judge's scope for action is determined in the first instance by the spectrum of penalties available to her. In this instance that spectrum ranged from non-custodial options up to imprisonment for life. 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 mid-range of six to ten years and a higher range of eleven to fifteen years.*"

18. Our attention was drawn to O'Malley on 'Sentencing Law and Practice' (3rd Ed., Round Hall, Dublin, 2016) at paras. 15-29 to 15-39 where, in order to assess where on the available range an offence should be located, the author notes common characteristics that can be identified from the broad ranges. In the lowest range, the violence used is often minimal and the value of property taken small. Mid-range offences may include the use of considerable violence, use of knife or weapon, a level of pre-meditation and/or an increased level of value in respect of the property stolen. With reference to the highest range of gravity, O'Malley observes as follows:

> "*Robberies in the highest range typically share some characteristics of those at the higher end of the mid-range but will also, as a rule, involve the actual or planned taking of a very significant amount of money or valuables such as jewellery or art works. Some particular instances of these robberies are considered immediately below but it needs to be said that the value of the property taken is not the sole factor that will place a robbery in the top range for sentencing purposes. The infliction of serious or life-threatening injuries, the targeting of an elderly or vulnerable victim, challenging police who arrive on the scene, or being instrumental in the loss of life are all factors that may bring a robbery offence into the highest category.*"

19. We were referred to *People (DPP) v Wall, Walsh, O'Connor and Tynan* [2020] IECA 48,where the Court of Appeal held the gravity of the offending in that case straddled the line between the high end of the mid-range and low end of the high-range of offending. *Wall* involved the robbery of a post office in which sawn-off shotguns and hammers were produced. €46,000 in cash was stolen during the course of the robbery. The offence involved a high degree of pre-meditation and planning, including an inspection of the premises prior to the commission of the offence. The offence was carried out by an effective organised gang who were armed and forensically aware. They attempted to destroy the evidence by setting the car and firearms on fire and wore latex gloves. There was significant aggression aimed at the victims and numerous victim impact statements were before the court. Nonetheless, the Court of Appeal held that a headline sentence of ten and a half years' imprisonment reflected the gravity of the offence.

20. We were also referred to *People (DPP) v Barnaville* [2018] IECA 351, where the appellant in that case had been sentenced to five years imprisonment on two robbery charges to run consecutively and with the final four years suspended (five years' imprisonment was imposed for each offence). Whilst no headline sentence was attributed in the circuit court, the

Court of Appeal noted that it lay "*certainly well into the mid-range*". The level of violence in these offences was extreme. The first offence involved the appellant repeatedly kicking the injured party whilst he was on the ground with the CCTV footage showed the victim's body being lifted from the ground by the force of the kicks being inflicted. The second offence involved the appellant repeatedly kicking the injured party on the face, head and body as he lay unconscious. The appellant had a previous history of violent crime and these offences were committed whilst he was on bail. The two incidents were carried out over a 24-hour period and while the accused was on bail. Nonetheless, the Court of Appeal held that, "*it is correct to say that these robberies were not at the top end of the range*".

21. In *People (DPP) v Keane* [2017] IECA 118, the accused had kicked an elderly and vulnerable person repeatedly on the head whilst he lay unconscious. The physical injuries sustained by the injured party were significant and he spent three days in hospital. During the course of the robbery the two perpetrators stole the victim's phone. The Court of Appeal held that the nominated headline sentence of four years was too low and the headline sentence was more appropriately seven years. It was submitted that though there are significant similarities between *Keane* and the present case, the former is arguably more serious inasmuch as it involved a particularly vulnerable victim.

22. Further, in *People (DPP) v Coffey* [2019] IECA 14, the Court of Appeal held that there was no error in principle when a headline sentence of three years had been nominated in the court below. In that case, the appellant and the co-accused attacked the injured party from behind, knocked him to the ground and stole his mobile phone. It was noted that the offence had a considerable effect on the injured party. The appellant had a significant previous conviction history, including numerous convictions for violent crimes. Nonetheless, the offence was deemed to lie in the middle of the low end.

23. Counsel for the appellant acknowledged that the offence was vicious, gratuitous and utterly unprovoked. However, it was submitted that the following factors demonstrate that the sentencing judge erred in placing the offence on the higher range of offending:

i) The robbery did not involve the use of a weapon;

ii) The robbery was apparently spontaneous;

iii) There was apparently no sophisticated pre-planning;

iv) The robbery did not occur in the victim's home;

v) The robbery did not include a prolonged period of deprivation of liberty;

vi) The robbery did not include the theft of items of particularly high value.

24. It was submitted that the starting point of 14 years was excessive and resulted in a final outcome which involved an unduly severe sentence. It was therefore submitted that the sentence should be set aside.

Submissions of the respondent

25. Counsel for the respondent argued that in *People (Director of Public Prosecutions) v. Leon Byrne* [2018] IECA 120 the Court of Appeal provided guidance setting out an effective 15 year range for robbery offences for all but the most exceptional cases. A low range attracted zero to five years as a headline sentence, a mid-range offence attracted six to ten while a higher range attracted eleven to fifteen years. In the instant case the sentencing judge determined that the facts before him placed the offending in the higher range. Having regard to the guidance provided by *Byrne*, it is submitted that the sentencing judge, if satisfied that the offence was in the higher range was absolutely within the margin of discretion in arriving at an effective headline sentence of 14 years before making the appropriate deductions for mitigation.

26. It was submitted that the gravity of the offence having regard to the intrinsic moral culpability associated with the manner in which the offence was committed in this instance,

i.e., the particular offending conduct, was at its highest in this case. The offending conduct was intentional. It was not committed recklessly or negligently. It took place in the early hours as Mr Lonergan was waking home. He was attacked and robbed by three males, one of whom was the appellant. This was a sustained, unprovoked attack, involved gratuitous violence, which continued after Mr Lonergan handed over his belongings. The appellant targeted Mr Lonergan's head. Indeed, as the sentencing judge described, the attitude of the appellant while the attacked was going on '*showed a quite sinister level of callousness, laughing at the discomfort and discomfiture of Mr Lonergan while he was raining kicks on his head*.' The appellant was pulled way by other male. That fact that three were involved and using violence does not lessen the appellant's moral culpability in the attack. Referring to the fact that one of the co-offenders had been dealt with under the juvenile liaison scheme, it was submitted that the appellant was not to be equated with someone who not had yet achieved his age of majority, but rather he was 28 years of age and someone with relevant previous convictions, who had received a community service order and suspended sentences in the past for crimes of assault and crimes showing '*aggression in public places'*. Mr Lonergan had requited hospitalisation and the sentencing judge heard evidence from Mr Lonergan's Victim Impact Statement of the effects of the crime on him.

27. With regard to the appellant's previous convictions, it was submitted by counsel for the respondent that the sentencing judge was entitled to attach such weight to those convictions as he did. While certain public order offences can be categorised as minor, in the context in which this offence was committed in public in the early hours involving an attack on Mr Lonergan by three males, it was a relevant matter that the appellant has previous convictions for offences relating to public order. While the appellant did not have previous convictions for robbery, his convictions for assault are absolutely relevant speaking to the violence actually involved in this attack. It was submitted that the sentencing judge did not

mischaracterise the previous offending but properly addressed it and placed it in the correct context. While it was complained by the appellant that the sentencing court failed to note the absence of a previous custodial sentence, the appellant's list of prior convictions establishes that he been the subject of community service orders and suspended sentences, yet the appellant still found himself before the Court with this robbery offence.

28. The respondent submitted that the sentencing judge committed no error in principle, that the sentence imposed was proportionate, that the sentencing judge gave appropriate consideration to all mitigating and aggravating factors, and that the sentencing judge arrived at a sentence that was properly constructed. The respondent submitted that the appellant therefore ought to fail in his appeal.

Discussion & Decision

29. One of the problems with an offence such as robbery where the Oireachtas has indicated its cardinal seriousness by providing for a range of potential penalties that encompasses the full spectrum ranging from non-custodial disposals through to imprisonment for life, is that little or no guidance is provided to sentencing judges as to how to ordinally rank individual instances of offending behaviour that may constitute the offence. The most that can be said is that the legislature views robbery offences as being generically serious and as sometimes meriting significant punishment, up to and including life imprisonment for particularly egregious instances of the offence.

30. In addition, to date there is no "formal" guideline judgment of the Irish appellate courts on robbery offences. By "formal" we mean a judgment in which the court says it is providing guidance, one in which advance notice was given of the intention to provide guidance, one in which the court attempts to review sentencing for a whole offence or for a class of offences, and one in which the parties were invited to address submissions to the court on aspects of sentencing for the offence or class of offences in question that go beyond

issues arising on the facts of the case. Moreover, although it has not invariably been the case, formal guideline judgments (of which there are relatively few) have sometimes been formulated in the context of several appeals relating to sentencing for the offence or class of offences in respect of which it is intended to provide guidance being listed together for hearing purposes so as to facilitate the incorporation of a wider range of views, than might otherwise be available, in the guidance to be formulated. Where this has been done individual decisions have still been rendered but with the judgment in one of the cases heard together providing the vehicle by means of which guidance for the future is provided, as well as deciding the immediate issues that fall for decision in the particular case.

31. Broadly speaking such formal guidance as has been issued by the Irish appellate courts has tended not to be prescriptive or "top down" in its approach; but rather merely descriptive of patterns based on a synthesis of previous decisions, i.e., "bottom up" in its approach, suggesting indicative ranges for the purpose of assessment of gravity, and identifying potentially aggravating circumstances, or mitigating circumstances bearing on culpability, to be taken into account in determining the appropriate indicative range in which to locate a case.

32. Much more commonly, although still relatively infrequently, the Irish appellant courts have also seen fit to issue "informal" guidance in a judgment that would not qualify as a "formal" guideline judgment in the sense just spoken about. Where such informal guidance has been offered it will not necessarily have been the case that the court will have given advance notice of its intention to offer guidance, or that it will have invited submissions on issues beyond those arising for decision in the case before it. Such informal guidance may only seek to address certain manifestations of the offence rather than the whole offence, and may not necessarily be comprehensive in the identification of relevant factors. Moreover, it

tends to be even more "bottom up" in its approach than is to be found in formal guideline judgments.

33. The relevance of these observations in the context of sentencing for robbery offences is that such appellate guidance as is available to sentencing judges in this jurisdiction on this topic is limited to the informal guidance contained in the *People (Director of Public Prosecutions) v Leon Byrne* [2018] IECA 120, and such further *ad hoc* guidance as may be gleaned from individual appellate decisions, both pre-dating and post-dating the *Byrne* decision, as may provide assistance as comparators.

34. In regard to the *Byrne* decision, it should be noted that it was delivered on the same day and by the same panel of the Court of Appeal as delivered this court's formal guideline judgment in respect of sentencing for burglary and aggravated burglary offences in *The People (Director of Public Prosecutions) v Casey and Casey* [2018] IECA 121. The *Casey* decision was a formal guideline judgment because, *inter alia*, the Court of Appeal had flagged in advance its intention to give guidance, and had caused a number of burglary type sentencing appeals to be heard together on the same day for the reasons suggested above. The case of *Leon Byrn*e was one of those. It involved an an undue leniency review in respect of sentences for robbery, burglary and aggravated burglary and on basis of the latter two was included in the group of cases heard together in anticipation of the issuance of a formal guideline judgment on burglary and aggravated burglary. The influence of the *Casey* decision and judgment on the decision and judgment in the *Leon Byrne* case is patent. In particular, the Court can be seen to have applied a broadly similar approach with respect to the sentencing for the robbery offence in Mr Byrne's case, to that adopted and promulgated as guidance in *Casey* and applied to Mr Byrne's case with respect to his sentencing for his concurrent offences of burglary and aggravated burglary. Accordingly, while the decision in the *Leon Byrne* case does not constitute a formal guideline judgment, it nevertheless provides

important informal guidance in respect of sentencing for robbery heavily influenced by the approach commended by this court in respect of sentencing for burglary/aggravated burglary offences, and should be seen in that light.

35. It also bears remarking upon that the *Leon Byrne* decision was rendered in the context of an undue leniency review. That did not render it unsuitable as a vehicle for the provision of informal guidance on how sentencing for robbery should be approached and it is immaterial whether guidance is offered in the context of an appeal against severity of sentence or an undue leniency review.

36. As counsel for the appellant has correctly recognised, and as indeed we have said many times, decisions in undue leniency reviews are sometimes unsuitable cases to be used as comparators. The reason for this is that in cases where the sentence at first instance is found not to be unduly lenient, that is the extent of the finding. It does not mean that the Court of Appeal approves of the sentence or would have imposed the same sentence. Moreover, in cases where there has been a finding of undue leniency leading to a re-sentencing, the sentence imposed on re-sentencing will, and for a variety of reasons, not necessarily be the sentence which the Court of Appeal, if it had been required to sentence at first instance, would have imposed. Be that as it may, we understand that neither counsel is proffering the *Byrne* case as a comparator, but rather both sides are relying upon it for the guiding principles of general application to sentencing for robbery set out in the Court of Appeal's judgment.

37. We are grateful to counsel on both sides for their helpful and very focussed submissions, and for referring us to the additional caselaw to which reference has already been made.

38. We are satisfied that while this was a serious instance of robbery, involving significant culpability and the causing of appreciable harm to the primary victim, it was not

one in which the headline sentence fell to be located in the high indicative range as identified in the *Byrne* decision, namely as attracting a custodial sentence of between 10 and 15 years. We have no hesitation in concluding that the nomination of a headline sentence of 14 years in this case was excessive and disproportionate to the actual gravity of the appellant's offending conduct, serious though it was.

39. The intrinsic moral culpability of the appellant's offending, taking into account relevant aggravating factors and the harm done, would have placed it in the upper half of the mid-range in our view. In theory mitigating factors bearing on culpability (if any) could also be relevant but we are satisfied that there were none here. In that regard we did consider if the apellant's addiction could have been a mitigating factor bearing on culpability. Addiction is certainly capable of mitigating culpability where a person acts under chemical compulsion, but we do not believe that the evidence establishes that that was the case here. Rather, we are satisfied that it was a case of self-induced intoxication which certainly does not mitigate culpability.

40. We accept that there were multiple aggravating factors, but they would not all have required to be afforded equal weight. Moreover, in making that observation we acknowledge that the Byrne decision offers little guidance as to what weight is generally to be afforded to different aggravating factors. Suffice it to say that we consider that, in the context of this case, the most significant of these was joining with others in the attack, the use of actual violence by punching and kicking leading to the causing of actual harm, as opposed to merely threatening violence and causing apprehension of harm, and the focus during the attack on the victim's head. While relevant previous convictions were also an aggravating factor, as was the unprovoked nature of the attack, these factors would attract more modest weight viewed in the overall circumstances of the case than those just mentioned

41. We do not consider that the sentencing judge was correct to regard the failure to make restitution as an aggravating factor. That was a further error. The making of restitution might have provided mitigation and evidence of genuine contrition, but the failure to do so does not aggravate the offence.

42. We broadly agree with Mr O'Malley's discussion at some length of gradations of seriousness in Sentencing Law and Practice, 3rd Ed, from paragraphs 15-34 to 15-39, a discussion which is too lengthy to reproduce here in full, but to which an interested reader is referred. However, within that more extensive discussion, that learned author remarks at paragraphs 15-36 and 15-37 of his work that:

> "15-36 *Use of a knife or other weapon, including an imitation firearm, will usually bring a robbery* [from the low range] *into the midrange or higher. This will certainly be true where any appreciable level of violence was inflicted on the victim, whether with a knife or weapon or otherwise, irrespective of the value of the property taken. Given that offences in this midrange are likely to attract prison sentences extending from two or three years up to ten years, they vary considerably in nature. Towards the higher end of this range are carefully planned robberies, often involving several participants who either used or were clearly prepared to use serious violence to accomplish their goal and to start a considerable amount of money or other property. The value of what they aimed to steal as well as what they actually got away with is a relevant consideration. Also at the higher end of this range, or at least in the middle of it, will be a series of robberies committed by an individual over a short time span which cumulatively inflicted a good deal of injury or damage, in material terms and otherwise, on the victims. The same holds true of robberies carried out in shops, banks or other premises where several people were traumatized as a result. Each offence must be assessed separately for the overall sentence will reflect the totality of*

the harm inflicted. Towards the lower end of the scale might be a case where the offender brandished, but did not use, a knife or imitation firearm, who did not steal property of any great value and whose actions did not have a lasting or severe impact on the victim.

15-37 *Robberies in the highest range typically share some characteristics of those at the higher end of the mid-range but will also, as a rule, involve the actual or planned taking of a very significant amount of money or valuables such as jewellery or artworks some particular instances of these robberies are considered immediately below but it needs to be said that the value of the property taken is not the sole factor that would place a robbery in the top range for sentencing purposes. The infliction of serious or life-threatening injuries, the targeting of an elderly or vulnerable victim, challenging police who arrived on the scene, or being instrumental in the loss of life are all factors that may bring a robbery offence into the highest category."*

43. As counsel for the appellant rightly points out, no weapon was brought to the scene, and the attack was essentially spontaneous or certainly was one involving no great degree of preparation and advance planning. The attack, although extremely violent and such as to cause appreciable harm, both physical and psychological, to the victim, did not inflict serious harm (i.e., such as would attract a charge pursuant to s.4 of the Non Fatal Offences Against the Person Act 1997, as opposed to a charge under s.3) or life threatening injuries. Neither was the financial loss occasioned very high, although we do not gainsay that it may have caused great inconvenience, worry and distress to Mr Loughran. In mentioning these matters we do not seek to minimise the horror and trauma of this attack from Mr Loughran's perspective, which we fully recognise. It was a dreadful offence to be utterly deprecated, and we do so unhesitatingly. We merely wish to differentiate this case from the even more serious

manifestations of the offence of robbery which might have justified its placement in the upper range rather than within the mid-range where we believe it belongs.

44. We re-iterate that the headline sentence for this case belonged in the upper half of the mid-range and to have located it at the upper end of the indicative high range was a serious error. We are supported in our view by the comparators which have been adduced, albeit that the use of comparators as a tool in sentencing comes with limitations that require to be recognised and acknowledged, something to which we have alluded many times in other judgments. Notwithstanding that the appellant was then afforded a relatively generous combined discount to reflect mitigation and to incentivise reform and rehabilitation, we are satisfied that the ultimate sentence was still disproportionate on account of that error. In the circumstances we must quash the sentence imposed by the court below.

45. In re-sentencing the appellant we take into account all of the material that was placed before the court below. We will also take into account the additional material handed in to us by counsel for the appellant at the oral hearing, which comprised (a) correspondence from Substance Abuse Services confirming (i) that the appellant is awaiting an assessment on behalf of St Francis Farm Treatment Centre in Carlow, (ii) that he awaiting resumption of anger management counselling and (iii) that he is now on a resumed Methodone programme; (b) a letter from "Making Connections, South Tipperary", a QQI Employability Skills training initiative confirming that he was registered with them from August 2017 until May 2018; and (c) letters to the court from the appellant's mother and sister respectively.

46. In re-sentencing the appellant we will nominate a headline sentence of 8 years imprisonment. To reflect his mitigating circumstances, including his plea of guilty, his addictions and mental health difficulties, his remorse and his progress towards rehabilitation and reform to date we will discount from the headline sentence by 2 years, leaving a post mitigation sentence of 6 years. In addition, as an incentive to him to continue his good work

towards reform and rehabilitation we will suspend a further year of that 6-year term, leaving a net resultant custodial sentence of 5 years' imprisonment (assuming he keeps to the conditions upon which his sentence is being part-suspended). The conditions attaching to the suspended portion of his sentence will be the same as those attaching to the suspended portion of the sentence imposed by the court below. The sentence is again to date from the 16/03/2018. It is our intention that the compensation order would remain undisturbed and accordingly it is re-imposed on the same terms and basis as in the court below.