THE COURT OF APPEAL

Record No. 143/2017 & 144/2017

Mahon J.
Edwards J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

JONATHAN DOWDALL AND PATRICK DOWDALL

APPELLANTS

JUDGMENT of the Court delivered on the 23rd day of April 2018 by Mr. Justice Mahon

1. The appellants have appealed sentences imposed on them by the Special Criminal Court on the 1st June 2017 being, in respect of Jonathan Dowdall, terms of imprisonment of twelve years and four years, and in respect of Patrick Dowdall, terms of imprisonment of eight years and three years. The sentences were imposed following pleas of guilty to, in each case, charges of false imprisonment contrary to s. 15 of the Non Fatal Offences Against The Person Act 1997, and threatening to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997.

Grounds of appeal

2. The following grounds of appeal are common to both appellants:-

(i) The court erred in principle in failing to give sufficient weight to the mitigating factors;

(ii) the court erred in principle in failing to allow the appellants any or any adequate credit for their pleas of guilty;

(iii) the court erred in principle in failing to give any or any sufficient weight to the fact that the appellants had expressed remorse and that they had no previous relevant convictions, and were of previous good character;

(iv) the court erred in principle in failing to place sufficient weight upon the appellants' personal and family circumstances;

(v) the court erred in principle in placing too much emphasis on the application by the appellant for a Newton Hearing and penalised the appellants for embarking on the Newton Hearing whereby they maintained their pleas of guilty but disputed certain facts put forward by the complainant;

(vi) the court erred in finding that the appellant had invoked a Newton Hearing on issues of marginal importance, and in consequence suffered a loss of mitigation, in circumstances where the appellant had indicated in his application for a Newton Hearing the same was only required in the event that the highlighted issues were germane to how the sentence was to be calculated;

(vii) the court determined issues of credibility between the complainant and the appellants without making findings as to whether the complainant had visited the appellants' home for the purpose of engaging in deceit - namely procuring the first appellant's motor bike by a fraud. The failure to engage with this evidence and other cogent evidence touching upon the complainant's reliability make the findings against the appellants which were dependant upon the credibility of the complainant unsafe.

(viii) the court acknowledged that the complainant had for the first time in court claimed that he had looked at his mobile phone when he was dropped into the city centre and saw the time as 10 p.m., but did not conduct an examination of why this was so and ignored other evidence which was contradictory of it;

(ix) the court accepted that the complainant was correct when he stated that the appellants were members of the IRA but was not prepared to accept the complainant's claim that they were also members of the UDA. The failure to acknowledge why the court reached contrary conclusions and to assess the significance of it renders the findings unsafe;

(x) the court failed to conduct an appropriate assessment of the credibility of the complainant. This failure renders subsequent findings unreliable;

(xi) The appellants are entitled to a written reasoned judgment adequately examining how and why points were determined against them. The judgment of the sentencing court does not provide that to them and the adverse factual findings are in consequence unsafe.

3. The following additional ground of appeal relates to the second appellant only: -

(xii) The count had insufficient regard to the age and health of the second appellant and the consequent difficulties which would be faced by him in serving a lengthy custodial sentence.

Background facts

4. On the 19th March 2016, gardaí attended at the first appellant's home address on foot of a search warrant in respect of an unrelated matter. In the course of their search, gardaí found an USB stick which, when analysed, was found to contain a video of a person being detained and assaulted. Follow up enquires by gardaí revealed the identity of this person to be Alexander Hurley, the complainant. He was located by the gardaí on the 28th May 2016 and he provided a statement in relation to what had occurred.

5. Mr. Hurley had come in contact with the appellants when he responded to a web site advertisement for the sale of the first appellant's BMW motor bike. On the 12th January 2015 Mr. Hurley attended the first appellant's home where he examined the motor bike and tried on motor bike clothing that was included in the sale. In further contact between Mr. Hurley and the first appellant, the complainant agreed to purchase the motor bike subject to organising a loan he said he had applied for to a Credit Union and the Bank of Ireland.

6. On the 15th January 2015 the first appellant invited Mr. Hurley to dinner in his home. He picked him up outside the Rotunda Hospital at approximately 7.30 p.m. and they arrived at the first appellant's home approximately twenty minutes later. On arrival he was forced into a garage attached to the house, and tied with cable ties to a chair by the second appellant. He was then questioned at length in relation to alleged acts of dishonesty carried out by him. The appellants were convinced Mr. Hurley was attempting to obtain the first appellant's bank details with a view to accessing the account and defrauding him and that he was not genuinely interested in purchasing the motor bike. A ten minute video clip of what occurred, taken by a young woman also present, was shown to this court. What took place in the garage over an approximately two hour period was truly appalling and shocking. The complainant was subjected to what can only be described as a brutal assault punctuated with menacing threats of being maimed or killed in an effort, apparently, to persuade him to admit to a plan to defraud the first appellant. The complainant's head was shaved and there were repeated instances of a tea towel being placed over his face and water being poured onto the tea towel, a practice commonly referred to as "water boarding". He was told he would be chopped up and taken to Northern Ireland, that he would be buried in the mountains, that his head would be burnt at the stake and that a pliers would be used to remove knuckles from his hands. A pliers was produced by the first appellant (who was wearing a balaclava) and moved close to his hands in support of that threat. The appellants' told the complainant that the appellants were members of the IRA and that the first appellant was a close friend of two prominent Sinn Féin politicians. He also overheard the appellants and a third person discussing aloud what they were considering doing to him including feeding him to dogs, chopping him up and placing him in cellophane bags and storing him in the boot of a BMW. The complainant was threatened that he and his family, including his parents, would be dead within forty eight hours if gardaí were alerted following his release. The extent of the distress and terror experienced by the complainant was clearly evident from the short video clip seen by the court.

The appellants' personal circumstances
7. The first appellant is a married man with four children and has no relevant previous convictions. He was formerly an elected Sinn Féin councillor and had built up a successful electrical contracting business. He was born on the 21st May, 1978. His father, the second appellant, has no previous convictions and has a good employment history. He has significant health issues and is on a range of medication. He has a medical history of depression, suicidal ideation and self-harm. He was born on the 28th February, 1957.

The "Newton Hearing"
8. On the 28th April 2017 the Special Criminal Court received evidence from Detective Inspector William Hanrahan and heard pleas in mitigation from Mr. O'Higgins S.C.(on behalf of the first appellant) and Mr. Bowman S.C. (on behalf of the second appellant). Mr. Hurley's victim impact statement was also read to the court on that occasion. The court indicated that it would impose sentence on the 19th May 2017. On that date the court was asked on behalf of the appellants to hear additional evidence by way of a 'Newton Hearing' for the purposes of making determinations on specific issues which might conceivably impact on sentence. In effect the appellants were challenging aspects of the information provided by the complainant, Mr. Hurley, to the gardaí. The application was acceded to following submissions made to the court on the 30th May, 2017 and a 'Newton Hearing' was conducted on the 31st May 2017 in the course of which Mr. Hurley and both appellants gave evidence. The court then proceeded to rule on the hearing. The following extracts from that ruling indicated the court's determinations in relation to the various issues that had arisen, and its reasons therefore:-

> • *"…we are not satisfied beyond reasonable doubt that Mr Dowdall made the telephone call to the injured party on the relevant date on foot of the telephone records which were referred to in evidence. We therefore give the accused men the benefit of the doubt in this respect"*
>
> • *"We do not accept the evidence of Jonathan Dowling or Patrick Dowling on this issue. However, on Mr Hurley's own evidence we cannot be satisfied beyond a reasonable doubt that he was in the house for that entire period and we are satisfied beyond a reasonable doubt on a calculation as we have just set out that he was in the house for a period of approximately two hours. This does not include the time spent in the Dowdall's car as the indictment refers to the Dowdall house as being the location of the false imprisonment."* (Mr. Hurley had said in his statements to the gardaí that he had been detained in the house for approximately three hours).
>
> • *"It is clear on the evidence that Mr Hurley's recollection is flawed as regards the Dowdall's mentioning the UDA. We accept that the other threats regarding the IRA were made and we reject the accused's men's evidence in this respect."*
>
> • *"...we accept Mr Hurley's evidence in this regard and we are satisfied beyond a reasonable doubt that both he and his family were threatened by the accused men.* (This relates to Mr. Hurley's contention that threats were issued in an effort to persuade him not to report the matter to An Garda Síochána).
>
> • *"We accept that Jonathan Dowdall may well have done so but this does not in any way assist our determination as such complaint would simply be matters as reported by Jonathan Dowdall and therefore would not comprise independent evidence. We reject the accused's evidence in this regard. That is that Mr Hurley took these particular items."* (This was in relation to Mr. Hurley's denial that he had stolen certain documentation from the motor cycle clothing he had tried on in the course of his first visit to the first appellant's home).

The judgment added:

> • *"..we do not consider this particular matter to be of any significant moment in the assessment of gravity of the offence nor is it a mitigating factor "*

9. Sentences were finally imposed on the following day, the 1st June 2017. Specifically referring to the 'Newton Hearing' conducted on the previous day the court stated:-

"The Newton Hearing; this court wishes to deprecate in the strongest possible terms the seeking of a Newton hearing in order to establish facts of marginal materiality to the criminality of the offender, particularly where so to do subjects a victim to giving evidence and undergoing the trauma of having their credibility attacked in cross examination. As stated by Lord Justice Judge in R v. Underwood [2005], 1 Criminal Appeal Reports at page 13:

> *"If the issues at the Newton hearing are wholly resolved in the defendant's favour the credit due to him should not be reduced. If, for example, however the defendant is disbelieved or obliges the prosecution to call evidence from the victim who is then subjected to a cross examination which, because it is entirely unfounded, causes unnecessary and inappropriate distress or if the defendant conveys to the judge that he has no insight into the consequences of his offence and no genuine remorse for it, these are all matters which may lead a judge to reduce the discount which the defendant would otherwise have received for his guilty plea, particularly if that plea is tendered at a very late stage. Accordingly, there may even be exceptional cases in which the normal entitlement to a credit for a plea of guilty is wholly dissipated by the Newton hearing."*

The Court was not satisfied beyond reasonable doubt that Jonathan Dowdall made the telephone call on the evening in question. However, an arrangement was put in place that Jonathan Dowdall would collect Mr Hurley and convey him to his home. When he arrived there he was greeted by Patrick Dowdall and ushered immediately to the garage of the house. This indicated premeditation. The Court accepted that the accused men did not mention the UDA on the evidence of Mr Hurley. However, this does not affect the gravamen of the other threats made. The Court found that the duration of the false imprisonment was approximately two hours rather than three hours and rejected each accused man's evidence regarding this issue.

However, if the length of the time of the injured party's ordeal was one hour or even less than that, it does not lessen the gravity of the offending conduct. Therefore, whilst the findings of this Court may have favoured the accused to some very limited degree, in the round such matters do not material affect the moral culpability of each offender. To put the injured party through the ordeal of cross examination, testing his credibility, significantly lessens the credit otherwise to be given for an already late plea of guilty."

10. It is therefore clear that the sentencing court did not believe that a 'Newton Hearing' was, in the circumstances, justified, and it was particularly critical of the fact that in the course of that hearing the credibility of the complainant was challenged in cross examination. The sentencing court clearly indicated its view that the purpose in seeking a 'Newton Hearing' was *to establish facts of marginal materiality to the criminality of the offender.* Essentially, the court dismissed as almost irrelevant or of minimal consequence that the 'Newton Hearing' had resulted in it being established that certain aspects of the information provided by the complainant to the gardaí were untrue or inaccurate. The court however specifically identified the fact that the 'Newton Hearing' had established that the appellants had not, contrary to what Mr. Hurley had maintained to the gardaí, mentioned the UDA. The court also referred to the fact that the 'Newton Hearing' had established that the duration of the false imprisonment was approximately two hours rather than three hours as had been suggested by the complainant. The court observed that the gravity of the offending conduct was not lessened whether the duration of the false imprisonment was *one hour or even less than that*. The court expressed its view that what was established in the 'Newton Hearing' *"may have favoured the accused to some very limited degree..".* It is in any event clear that the appellants were to be more heavily penalised, in terms of the sentence they might expect, because of their application for a 'Newton Hearing' and because of (or, indeed, despite) what was determined by the court as a consequence of that hearing.

11. It is appropriate at this juncture to point out that in the course of his submissions to the court in support of the application for a 'Newton Hearing' Mr. O'Higgins S.C. emphasised that his client was not seeking to go behind his plea of guilty. What he wished to do was to avoid the imposition of any additional penalty in respect of matters which might be determined in his favour at the conclusion of the 'Newton Hearing'. Mr. Bowman S.C. did not make separate submissions on behalf of the second appellant, but specifically adopted those raised by Mr. O'Higgins.

The sentence imposed

12. It is undoubtedly the case that the court below carefully considered the sentences it believed appropriate in respect of both appellants. It heard detailed submissions on behalf of each and proceeded to give a carefully constructed sentencing judgment. This court rejects the appellants' contention that the sentencing judgment does not adequately examine *how and why points were determined against them*. Whether or not the sentences imposed were, in all the circumstances, appropriate is a separate matter and will be addressed later in this judgment.

13. The court below, having set out in some detail the background facts and having explained its views in relation to the 'Newton Hearing' and its determinations in relation to same, explained its general approach to sentencing the appellants in the following terms, terms in which this court generally agrees:-

> *"The functions of sentence are to punish the offender, protect society and offer the possibility of rehabilitation and, as has been stated on many occasions, the sentence to be imposed is the appropriate sentence for the offence as committed by the particular offender. The initial stage of the construction of a proportionate sentence requires the assessment of the appropriate notional sentence to be applied in principle, having regard to the gravity of the offence and with reference to the range of penalty for the offence.*
>
> *The second stage is that of the reduction of the notional sentence taking into consideration any mitigating factors. In assessing gravity, the Court must take into consideration the circumstances of the crime, with regard to the range of penalty and must take into account any circumstances bearing on the accused' moral culpability which can be either aggravating or mitigating factors. These are most serious offences. The injured party was subjected to a horrendous and terrifying ordeal. He endured what can only be described as physical and mental torture at the hands of the Dowdalls."*

14. The sentencing court proceeded to identify the aggravating factors in relation to both appellants as follows:-

> *"(i) the conduct was directed towards causing significant harm to the injured party, both physically and psychiatrically,*
>
> *(ii) the gratuitous and humiliating and degrading nature of the conduct,*
>
> *(iii) the prolonged nature of the activities,*
>
> *(iv) the terror to which the injured party was subjected,*

(v) the use of cable ties and the physical restraint of the injured party,

(vi) the use of the tea towel and buckets of water,

(vii) the production of the pliers in the course of issuing threats to the injured party

(viii) the severe impact on the victim, and

(ix) the recording of the event."

15. The mitigating factors were identified as follows: -

"(i) the first named appellant's state of mind was affected by stress associated with business and family problems,

(ii) the plea of guilty,

(iii) the expressions of remorse and the apologies,

(iv) the absence of relevant previous convictions,

(v) their employment records, and

(vi) the age and medical condition of the second named appellant.

16. It is evident that the sentencing court felt obliged to reduce the credit to be afforded in respect of the mitigating factors, and in particular the plea of guilty, for the reasons it set out in the following terms: -

"Finally, each accused sought a Newton hearing in order to determine issues of fact which they disputed. The prosecution were obliged to call evidence from the victim who was then subjected to cross examination. Consequently, we find it necessary to reduce the discount which the defendants would otherwise have received for the guilty pleas, particularly where those pleas were tendered at a very late stage. However, we will give credit for the pleas of guilty, but that credit is significantly reduced. Furthermore, despite protestations of remorse on the part of each accused man, the Newton hearing has the effect of tainting the genuine nature of the remorse asserted by each of them.".

17. The court then proceeded to, in relation to the first appellant, set the headline sentence at fourteen years in respect of the first count and one of six years in respect of the second count. The second appellant's headline sentences were set at eleven years and six years respectively. In the case of the first appellant, the headline sentence of fourteen years was reduced to twelve years imprisonment, while the headline sentence of six years was reduced to four years imprisonment. In the case of the second appellant, the headline sentence of eleven years was reduced to eight years imprisonment, while the headline sentence of six years was reduced to one of three years imprisonment. The maximum sentences for the two offences are life imprisonment and ten years respectively.

Discussion and decision

18. Newton hearings occasionally arise in the course of sentencing in order to determine more precisely facts relevant to the assessment of an appropriate sentence. Some offences (including those which are the subject matter of these appeals) include disputed (as between prosecution and defence) facts and circumstances relating to their commission. In *R v Cairns* [2013] EWCA Crim 467 it was stated:-

"The admission comprised within the guilty plea is to the offence and not necessary to all the facts or inferences for which the prosecution contends."

19. In *R v. Gardner* [1982] 2 SCR 368 at 414, it was said that: -

"A guilty plea, after all, is merely an admission of the essential legal ingredients of the offence."

20. Where issues or disputes arise as to the correct facts for consideration by a sentencing court, the so called 'Newton Hearing' may be utilised to ensure that the sentencing court is operating on the basis of facts and circumstances which are accurate. The *Newton* principles were set out in the judgment in the Court of Appeal decision in *R v. Newton* [1983] 77 Cr. App. R 13, as follows: -

"There are three ways in which a judge in these circumstances can approach his difficult task of sentencing. It is in certain circumstances possible to obtain the answer to the problem from a jury.

The second method which could be adopted by the judge in these circumstances is himself to hear evidence on one side and another, and come to his own conclusion acting so to speak as his own jury on the issue which is the root of the problem.

The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to his conclusion. But if he does that then, as (the trial judge) himself said in a passage to which reference will be made in moment, where there is a substantial conflict between the two sides, he must come down on the side of the defendant. In other words, where there has been a substantial conflict, the version of the defendant must so far as possible be accepted."

21. It is the second of these options which is now referred to as a 'Newton Hearing'. The English Court of Appeal elaborated on the Newton principles in its decision in *R v. Underwood* [2004] EWCA Crim 2256, and which was referred to by the court in this case. Part of the passage quoted by that court (and referred to earlier in this judgment) stated:-

"If, for example, however, the defendant is disbelieved or obliges the prosecution to call evidence from the victim who is then subjected to a cross examination which, because it is entirely unfounded, cause unnecessary and inappropriate distress or if the defendant conveys to the judge that he has no insight into the consequences of his offence and no genuine remorse for it, these are all matters which may lead a judge to reduce the discount which the defendant would otherwise have received for his guilty plea, particularly if that plea is tendered at a very late stage.."

22. It is quite clear that the court below took such a view in relation to the appellants, and their application for a 'Newton Hearing', with the consequence that less credit was afforded to both in respect of their guilty pleas.

23. A sentencing court ought not penalise an offender who has pleaded guilty to an offence simply because a 'Newton Hearing' was requested by him unless it is established that there was no justification for such a request being made or where the offender fails entirely to establish any disputed or uncertain matters in his favour. Where such an outcome is the result of a 'Newton Hearing' in which the complainant has been cross-examined, (which will almost invariably be the case), the nature of that cross examination may be a relevant consideration for the court. Only in the rarest of cases will the experience of being cross-examined at a Newton Hearing be remotely similar to the traumatic experience of a complainant being cross examined where the alleged offence is completely denied by the accused person.

24. Mr. Hurley was cross examined by counsel for both appellants. That cross examination, while it challenged aspects of the complaints made against both appellants, as indeed it had to in the circumstances, was, as cross examinations generally go, relatively mild and did not seek to deny or undermine the basic complaints made by Mr. Hurley that he had been kidnapped and seriously assaulted by the appellants. At most it might be said that the cross examination was business like. At the outset of his examination of Mr. Hurley, Mr. O'Higgins S.C. addressed him thus: -

> *"And none of the questions which I am asking here are in any way designed expressly or impliedly to detract from the fact that you are both the complainant and the injured party; do you understand that?"*

25. Likewise, at the commencement of his cross examination of Mr. Hurley, Mr. Kelly B.L. (for the second appellant) stated:-

> *"I want to repeat what Mr O'Higgins has said that any questions you're being asked here by either side don't impinge on your status as an injured party and you are an injured party in this matter. What happened to you was criminal and was wrong. That's my approach and it's Mr Dowdall's approach and I want you to know that?"*

26. The court is satisfied that in the circumstances in which the 'Newton Hearing' was requested and conducted the criticism expressed by the court below was not justified. That unjustified criticism, and the consequences for the appellants that flowed from it, represented an error of principle. While the 'Newton Hearing' did not result in all issues arising therein being determined entirely in the appellants' favour, a number of matters of significance were determined in their favour. These matters were relevant to sentencing and ordinarily might have been expected to have secured some, albeit modest, amelioration of the appellants' position in terms of the sentences likely to be imposed upon them.

27. In particular this court takes issue with the view expressed in the course of the sentencing judgment that the length of Mr. Hurley's ordeal, as established in the 'Newton Hearing', being two hours rather than three hours, was a matter of irrelevance.

28. In any sentencing, the assessment of the gravity of offending conduct involves the taking into account of both the culpability of the offender and the harm done. Offending conduct such as occurred in this case has, of course, a certain intrinsic gravity but a court cannot proceed to sentence an offender solely on the basis of its assessment of the intrinsic gravity of the offence. It also has to properly take account of aggravating and mitigating factors bearing on culpability in the circumstances of the particular case. While the need to do so was acknowledged by the court below in its sentencing judgment, the proper taking into account of aggravation or mitigation involves not just identifying the existence of an aggravating or mitigating factor but also assessing the degree to which intrinsic culpability is in fact aggravated or mitigated by the relevant factor. There is nothing in the judgment of the court below to suggest such engagement in so far as the aggravating factor of ordeal was concerned.

29. In a case where the victim of a crime has been subjected to an ordeal, the fact that he/she was subjected to ordeal is an aggravating factor. However, the degree of aggravation will vary according to the duration of the ordeal and any additional specific harm caused directly thereby, over and above any more general harm and trauma which the victim has suffered by virtue of the offending conduct. Accordingly, the duration of a victim's ordeal will always be relevant and account requires to be taken of it. The longer the duration of the ordeal, the greater the extent to which the intrinsic gravity of the offending conduct is aggravated. Conversely, the shorter the duration, the less is the degree of aggravation by virtue of the victim having been subjected to ordeal. Moreover, the longer the duration of an ordeal the greater the possibility of additional trauma having been caused to the victim. Conversely, the shorter the duration, the lesser will be that possibility. These are all factors to be afforded appropriate weighting in the synthesis which the sentencing court must engage in for the purpose of assessing gravity. Duration of ordeal is certainly not irrelevant.

30. Further, the sentencing court, while acknowledging that the appellants had pleaded guilty, observed that they had done so at a very late stage. It stated:-

> *"Consequently, we find it necessary to reduce the discount which the defendants would otherwise have received for the guilty pleas, particularly where those pleas were tendered at a very late stage. However, we will give credit for the pleas of guilty, but that credit is significantly reduced…"*

31. These comments suggest that the court considered the guilty pleas to be deserving of less credit because of the stage at which they were tendered than might otherwise have been the case.

32. In fact, guilty pleas were entered by both appellants almost two months before the scheduled trial date. While it is of course the case that guilty pleas could have been indicated earlier, in circumstances where, as was explained to this court, additional charges had been earlier preferred against the appellants and then dropped, arguably some delay in pleading guilty may have been justified. The court takes the view that the sentencing court's description of the pleas of guilty as having been tendered *at a very late stage* may not have been fair to the appellants. The term *very late stage* usually describes the situation where a plea of guilty is entered a day or two before the scheduled trial date, or on the morning of the trial. The court is satisfied that the appellants have also established that the sentencing court erred in principle on this basis.

33. A plea of guilty is always of value even in circumstances, such as exist in these cases, where the task of successfully prosecuting both appellants may not have proved unduly difficult. As every criminal lawyer and judge knows, there is no certainty of outcome in any prosecution no matter how strong the prosecution's case may be on paper. A plea of guilty removes that uncertainty, and is therefore always of value on that account alone. In addition, it spares scarce resources, avoids witnesses having to attend unnecessarily, it is an acknowledgment of wrong doing, it is frequently an indication of remorse, and it will often result in reduced stress and apprehension for the victim of the crime.

34. Section 29(1) of the Criminal Justice Act 1999 provides:-

> "In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court, if it considers it appropriate to do so, shall take into account:
>
> (a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and
>
> (b) the circumstances in which this indication was given."

35. In England and Wales there exists a definitive guideline for a sentencing court on guilty pleas. It provides that a discount of one third is appropriate where the plea was entered at the first reasonable opportunity, reducing to one quarter where it was entered after a trial date was set, and to one tenth when entered on the morning of the trial or after the trial had begun. In *Sentencing Law and Practice (3rd Edition)* Professor O'Malley suggests that these levels of discounts are broadly similar in this jurisdiction. He says, at p. 165:-

> *"It seldom exceeds one third, although it might do so in an exceptional case, where for example the offence would never have come to light or being possible to prosecute if the offender had not voluntarily confessed to it and co-operated with the police and their investigation."*

36. We do not disagree with Prof O'Malley's comment. While we do not wish to be taken as laying down any hard and fast rule, this Court has itself suggested in a number of earlier judgments that a plea of guilty typically attracts a discount of between 15% and 30% in mitigation, depending on the circumstances of the case. It requires to be borne in mind, however, that in very few cases is a plea of guilty the only mitigating factor. Where there are several mitigating factors the final discount for mitigation is never calculated on an arithmetic basis and is not the sum of its parts. Different factors will be afforded different weightings and there may be overlapping mitigating effects.

37. In the instant cases, there was the added incentive to plead guilty in the expectation of a significant credit being allowed in relation to sentence because of a backlog of cases in the Special Criminal Court. In the course of his plea in mitigation to the sentencing court Mr. O'Higgins S.C. stated:-

> *"…But, in my respectful submission, before this court, that is the Special Criminal Court, pleas, in my respectful submission have a premium at present which they don't necessarily have before other Courts. I say that in circumstances where the other division of the Special Criminal Court has made it clear, in taking pleas and in handing down sentences, that, because of the volume of cases that is before the Court at present, there is a premium on a plea and I ask the Court that it would apply that premium."*

38. While this court is unaware of any specific policy current in April 2017 such as was suggested by Mr. O'Higgins it is nonetheless aware of the enormous pressure of work on the Special Criminal Court at that time. It is therefore prepared to accept that at the time (early 2017) it was, in general terms, understood that pleas of guilty in the Special Criminal Court would be generously rewarded in terms of sentence reduction.

39. This court finds that the choice of headline sentences for both appellants at fourteen years and eleven years respectively to have been appropriate and within the discretion available to the court. Likewise it is in agreement with the headline sentences identified in respect of the second counts in each case. The offences, and in particular the kidnapping offences, were especially serious. They had clearly had been planned meticulously and were committed with scant regard for Mr. Hurley's well-being. The only remotely positive feature to emerge from this dreadful event was that Mr. Hurley was not seriously physically injured in the course of his ordeal. Nevertheless the psychological fallout for Mr. Hurley must have been very significant.

40. Having regard to the fact that errors of principle have been established in relation to the sentences imposed by the Special Criminal Court, it is necessary for this court to re-sentence both appellants as of today. The court considers that three factors, taken together, in particular merit significant discounts from the headline sentences identified by the Special Criminal Court and with which this court is in agreement. They are the pleas of guilty, the expressions of remorse which this court accepts were genuine, and the lack of previous convictions, save for one road traffic matter in the case of Jonathan Dowdall. With regard to the latter, the lack of relevant previous convictions for men aged approximately forty years and sixty years, respectively, is a significant feature in the circumstances of this case and suggests that the offending in these cases was very much out of character for both appellants. It has long been the practice by all courts to mark a lack of prior relevant offending with a significant reduction in a sentence which might otherwise be appropriate. For example, in *DPP v. Hynes* [2016] IECA 102, Edwards J., in delivering the judgment of this court in a sentence appeal arising from a serious s. 3 assault said:-

> *"In addition, a very important factor was the appellant's previous good character, and the fact that he was a first time offender and had previously lived for some 59 years without ever obtaining a criminal conviction. The courts have always treated first time offenders with considerable leniency.."*

41. The structure of the sentences to be imposed in these cases is particularly important. While the custodial elements of the sentences must be significant, we believe that the sentences should incorporate a substantial suspended element to incentivise rehabilitation, which is very much in the public interest. A suspended element of a sentence is very much part of the overall punishment imposed in relation to any offence and may have very serious consequences for an individual who breaches the conditions upon which it is imposed. In *DPP v. Stronge* [2011] IECCA 79, McKechnie J., in delivering the judgment of the court observed:-

> *"..it is sometimes wrongly felt that simply because a portion of a custodial sentence is suspended, that suspension has no or no ongoing value as part of the overall sanction. Such a view is clearly erroneous…the suspended sentence remains very much an active part of what the court imposed and if the conditions of the bond are breached, the convicted person may be called upon to physically serve the suspended portion.."*

42. In relation to the second appellant, the issue of his age, and more particularly, his state of health are particularly relevant considerations. By all accounts, the second appellant has significant health issues and is dependant on a concoction of drugs to maintain life. The fact that he has very serious health problems and is living daily with the possibility of premature death is an added stress for him rendering life in prison all the more difficult for him. This is a factor which ought to be recognised in the sentences to be imposed.

43. In the often quoted judgment of the Court of Criminal Appeal in DPP v. McCormack [2000] 4 I.R. 356, it was stated at p. 359

that:-

> *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors."*

44. Finally, the court has also had particular regard to testimonials submitted on behalf of both appellants, and to letters written to the court by them and close family members.

45. The offending conduct in both cases was egregious and we consider that the headline sentences set by the court below, although severe, were within the range of the court's discretion. We do not therefore intend reducing the headline sentences. However, we will be allowing somewhat increased discounts for mitigation on account of the insufficient discounts afforded by the court below in the circumstances of the errors that we have identified. Finally, having already indicated that this is a case in which recourse could usefully be had to the option of partly suspending any sentences to be imposed, we will take the opportunity to do so in re-sentencing each appellant.

46. In relation to the first appellant, the court will, in respect of count 1, discount by four years from the headline sentence of fourteen years to adequately take account of the available mitigation, leaving a sentence of ten years imprisonment. It will impose that sentence of ten years but will, in addition, and for the purpose of incentivising rehabilitation in circumstances where it is dealing with a first time offender in his forties with a previously good employment record, suspend the final two years of that sentence on condition that he enters into a bond of €100 to keep the peace and to be of good behaviour for a period of three years post release. Also in relation to this appellant, in respect of count 2 the court will impose a sentence of four years imprisonment. The sentences will be served concurrently and will date from the same date as directed by the Special Criminal Court.

47. In relation to the second appellant, the court will, in respect of count 1, discount by four years from the headline sentence of eleven years to adequately take account of the available mitigation, leaving a sentence of seven years imprisonment. In addition, for the purpose of incentivising rehabilitation in circumstances where it is dealing with a first time offender in his sixties, with a previously good employment record and who is in bad health, the court will suspend the final three years of that seven year sentence on similar terms to those imposed in relation to the first appellant. The sentence in respect of the second count will be one of three years imprisonment. Both sentences will be served concurrently and will date from the same date as directed by the Special Criminal Court.

Postscript

The court, following the delivery of its judgment, acceded to an application by counsel for Jonathan Dowdall to alter the sentence in respect of count 1 to ten years imprisonment with the final two years and one month suspended for a period of three years post release. It did so having been informed by said counsel that a net custodial sentence of less than eight years might improve the first appellant's prospects for temporary release at a later stage in his sentence.