



**THE COURT OF APPEAL**

**[108/17]**

The President

McCarthy J.

Kennedy J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**DAVID BURKE**

**APPELLANT**

**JUDGMENT of the Court delivered on the 14th day of May 2019 by Birmingham P.**

1. This is an appeal against the severity of a sentence imposed on David Burke on 16th January 2017 in the Central Criminal Court. The sentence appealed is one of ten years imprisonment, with the final two and a half years suspended, in respect of the offence of manslaughter.

2. The background to the matter now coming before the Court is to be found in the events with which occurred on 1st January 2014 and culminated in the unlawful killing of one Dale Creighton. The appellant and six other co-accused had stood trial for murder in the Central Criminal Court in October 2016. Several days into the trial, a number of pleas of guilty to manslaughter were offered and accepted including that of Mr. Burke's. In the case of two of those on trial, Ms. Aisling Burke and Mr. James Reid, pleas to lesser counts were offered and accepted. It is the situation that the appellant had offered to plead to manslaughter before the trial commenced, as had a number of the co-accused.

3. A sentence hearing took place on 19th and 21st December 2016, and having taken time to consider the matter, sentences were imposed on 16th January 2017. In one respect, the approach of the sentencing Judge was slightly unusual in that she imposed the same sentence, she described it as a baseline sentence, on each of those who were being sentenced for manslaughter. She then differentiated between individuals on the basis of the nature and extent of their participation, and to some degree, their background and personal circumstances, by suspending different portions of the sentence. The sentences imposed in respect of manslaughter were:

- (i) the appellant, David Burke, a sentence of ten years imprisonment with the final two and a half years suspended;
- (ii) Ross Callery, ten years imprisonment with the final four years suspended;
- (iii) Graham Palmer, ten years imprisonment with the final five years suspended;
- (iv) Jason Beresford, ten years imprisonment with the final four years suspended;
- (v) Gerard Stevens, ten years imprisonment with the final seven years suspended.

4. In the course of her lengthy and detailed sentencing remarks, the Judge set out in considerable detail what she found as a fact had occurred. It is convenient to quote those remarks, both because it gives a detailed account of what occurred, and in a situation where her entitlement to reach certain findings of fact is challenged, it serves as a useful point of reference. The Judge observed as follows:

"[o]n the evidence, the Court is satisfied beyond a reasonable doubt that the following occurred. All of the defendants, who are known to one another, attended the Plaza nightclub on New Year's Eve. The entrance fee included multiple free drinks. In addition, some, at least, of the defendants took cocaine on the night, according to the probation reports prepared for the Court. Sometime after the nightclub closed at 3 am, Aisling Burke, who the Court saw on CCTV in the Plaza nightclub with a pink handbag and phone, was walking alone from the Plaza. The Court is satisfied that she was robbed and that her handbag, with at least one mobile phone in it, was taken. She raised a hue and cry with her brother, the defendant David Burke. In the aftermath, three men ran past a witness named Karl O'Leary, and he gave chase to one of them who turned out to be Dale Creighton. CCTV shown to the Court shows Dale Creighton walking up towards the footbridge from the Tallaght side at approximately 3.50 am on the 1st of January 2014. He is followed by Karl O'Leary, a witness in the case, and after him came James Reid [one of those who entered pleas to a lesser offence]. As he proceeded along the ramp, the deceased man turned around, and an object, which the Court has seen, was noticeable in his right hand. The Court is satisfied that that was a knife. The three proceeded onto the bridge. Mr. O'Leary somehow overtook the deceased, Dale Creighton, between the access ramp on the Tallaght side and the exit steps on the Dominic's side, but the Court has no evidence as to how this occurred. Karl O'Leary is seen shortly afterwards exiting the bridge from the bridge onto the steps at the Dominic's side and is followed onto the steps by the deceased, Mr Creighton. As Mr. O'Leary reaches the bottom of the steps, David Burke appears holding a long, pole-type object. David Burke had crossed by means of the Tallaght bypass and approached the steps from an area known within the course of the case as

'the Black Path' which is behind and under the footbridge. At this point, David Burke and Mr. O'Leary confronted Mr. Creighton, while James Reid was still behind him on the footbridge. The Court is satisfied that as this confrontation was taking place, Mr. Creighton was still in possession of a knife. As Mr. Burke and Mr. O'Leary confronted Mr. Creighton, he vaulted the rails at the side of the first platform of the steps and disappeared from the view of the CCTV camera. Mr. Burke and Mr. O'Leary followed him. As they did so, James Reid appeared from the bridge, descended the step and goes out of shot to the side of the bridge where Creighton, David Burke and Karl O'Leary had disappeared from view moments earlier. Approximately half a minute later, James Reid appears from the dark side of the bridge and is seen to be in possession of a knife. Twenty seconds later, Karl O'Leary appears from the dark side of the bridge, back into the range of the CCTV camera, and is seen to be in possession of a pole similar to the one which David Burke had used to confront Dale Creighton. In view of the CCTV camera, Karl O'Leary and James Reid walked down the side of the bridge to the area known as the Black Path. David Burke and Dale Creighton remain out of sight on the dark side of the bridge. A minute and a half after Karl O'Leary and James Reid left, headlights of a car appear at the top of St. Dominic's Road, heading towards the bridge. As the car approaches, David Burke and Dale Creighton appear at the bottom of the steps to the bridge. David Burke appears to be in control of the situation. As Dale Creighton appears to touch him on the head, David Burke strikes him with his left arm to Dale Creighton's head, followed by two punches to his right arm to Dale Creighton's head. The approaching car stopped at 3.55 am and two men emerged, being James O'Brien and Kane Duffy. As they approach, David Burke is seen to kick Dale Creighton. James O'Brien is observed kicking Dale Creighton in the head with his right foot, followed by another kick to the head with his right foot. James O'Brien then delivers nine right-handed punches to the head area of Dale Creighton. Having done so, he and Kane Duffy returned to the car. Kane Duffy returned briefly and had a conversation with David Burke, but the Court has no evidence as to the content of that conversation. The car and its passengers leave, and David Burke appears to be talking to Dale Creighton.

At this point, being 3.56 am, Ross Callery arrives from the dark side of the bridge, and without preliminaries or inquiries of any kind, strikes Dale Creighton a heavy blow, sending him back towards the railings which adjoin St Dominic's school. Having done so, Ross Callery then immediately walks up the steps of the bridge, followed by David Burke and then Dale Creighton. Ross Callery puts on his jacket and some conversation ensues between Dale Creighton and David Burke and Ross Callery; again, the Court has no evidence of the content of that conversation. Whatever the content of the conversation, Dale Creighton is seen on the CCTV camera stepping backwards down the steps, and at the bottom, turning and running from Callery and Burke. He is chased across the road and is seen to fall to the ground adjacent to a tree and road sign outside numbers 1 and 2, St Dominic's Road. Mr. Edward McCabe, who lives at number 2 St Dominic's Road and whose attention was drawn by the commotion, told the Court that one of the men was shouting at Dale Creighton asking, 'Where's the phone' or something to that effect. He described how one of the men bent down and took a phone from the deceased. He heard one of the men shout to Dale Creighton, 'You're all right, you're all right, get up'. The deceased and David Burke and Ross Callery then moved back across the road towards the steps leading up to the bridge. At this point, the deceased had no weapon and David Burke and Ross Callery had ascertained that he was not in possession of Aisling Burke's phone, or indeed her handbag. At 3.58.30, the deceased, Dale Creighton, heads up the steps of the bridge following by Ross Callery and David Burke, and he disappears out of camera shot at 3.58.49 am and is not seen again until 4.03.41 am, which is eight seconds short of five minutes, when following phone calls to the gardaí about the assault that was being perpetrated on the footbridge, Garda Jennifer Walsh in the control room in Tallaght Garda Station manually turned the CCTV camera onto the footbridge.

The Court has been offered little evidence by the defendants as to what occurred on the footbridge during the almost five minutes when the deceased was out of view of the camera, but the Court does have the evidence of Ms. Sheila McCarthy and her partner, a resident of Priorsgate, an apartment block which overlooks the entire scene, after the events which caused her to call the Gardaí not once, but twice, and on the second occasion to ask for an ambulance as well. According to Ms. McCarthy, the deceased was initially chased up to the middle of the bridge. Her evidence was that the beating continued towards the middle of the bridge, and the deceased was being kicked and punched into the head and body and that he collapsed at that stage onto the bridge. Cross-examined by Mr. Marrinan, senior counsel for Graham Palmer, she agreed that initially it was the two lads, who can only have been David Burke and Ross Callery, who were assaulting him on the bridge. She confirmed that in her statement she had said that it was so, that one was wearing a white top and that both were leaning against the railings of the footbridge kicking the deceased on the ground, and it was at that point that she rang the guards a second time. Her evidence accords with what is seen on the CCTV footage, namely Dale Creighton, the deceased, walking up onto the bridge followed by David Burke and Ross Callery, and the Court is satisfied that at the initial stages on the bridge, Dale Creighton was given a hiding as described by Ross Callery in his memo of interview to the gardaí, and that this was carried out by Ross Callery and David Burke. James Reid was present on the footbridge for a minute of those unseen five minutes of the assault, and Aisling Burke was present on the footbridge for approximately four minutes of the unseen portion of the assault, having arrived at the scene approximately a minute after the deceased, Dale Creighton, disappeared from view at 3.58 am. The evidence shows that Aisling Burke arrived at the bridge less than a minute after the deceased disappeared from view onto the bridge. Accordingly, she was present for practically the entire of the beating administered to him by various parties, both that which was visible on the CCTV and that which was not.

James Reid returned to the scene from the Black Path more or less at the same time as Aisling Burke. He spent a minute, between 4.00.31 and 4.01.38, on the bridge.

Graham Palmer arrived at 4.02.30 am at the bottom of the steps from the area of the Black Path. He was met by James Reid. He goes up the steps and disappears out of shot of the CCTV camera at 4.02.44. The man with whom he arrived, John O'Donovan, walked away from the bridge. The evidence, therefore, is that Graham Palmer was on the footbridge just under a minute when the camera finally panned on to the ongoing assault on the footbridge.

At 4.02.43, almost four minutes after the final assault on the footbridge commenced, Jason Beresford arrived from the Black Path. James Reid initially appears to attempt to block his path to the bridge but is then seen to put an arm around him and accompany him up to the footbridge. Like Graham Palmer, Jason Beresford was on the footbridge for just under a minute before the CCTV camera panned onto the assault on the bridge. At 4.03.41, the CCTV camera being operated by Garda Jennifer Walsh pans from the steps of the bridge onto the bridge itself and captures the last minutes of the fatal assault. It is clear from the evidence of the CCTV footage that by the time the camera panned onto the assault that Dale Creighton was in a very serious condition. He was lying prone and immobile with his head facing towards the steps. His body is visibly limp and this is particularly noticeable when there's an attempt made by Graham Palmer to lift him up to a sitting position. He resembled a ragdoll who had no independent power of movement. When the CCTV camera panned onto the bridge at 4.03.41 am, there were six persons on the footbridge along with the deceased. They were David Burke, James Reid, Ross Callery, Aisling Burke, Graham Palmer and Jason Beresford.

Notwithstanding his obvious vulnerability and his inability to defend himself, the assault on the deceased continued. The most shocking incidents perpetrated during the final minutes of the assault were perpetrated by Jason Beresford, the youngest of the defendants, who had arrived on the scene only a minute earlier at 4.04 am. While Graham Palmer attempts to lift the limp and lifeless body of Dale Creighton into a sitting position, Jason Beresford is seen to draw back and kick the deceased, Dale Creighton, full in the face as if his head were a football. During the final three minutes which are captured on CCTV, Jason Beresford is again seen striking Dale Creighton with his right hand to the deceased's groin area and is also seen stamping on the prone Dale Creighton with his right foot. And, finally, at 4.06 am Jason Beresford is seen to grab Dale Creighton by the scruff of the neck and sling him violently down the steps where he comes to land a number of steps down. The original assailants, David Burke and Ross Callery, have little involvement in the final assault, though Ross Callery was unable to resist a kick with his right foot while Dale Creighton lay prone having been violently kicked by Jason Beresford.

During the period covered by the CCTV footage, Graham Palmer appears to be the one in control of the interrogation of Dale Creighton. He is seen repeatedly striking him in the head and groin area and persists in this briefly even after Dale Creighton has been flung down the stairs.

Gerard Stevens is the last person to arrive at the scene. He is first seen on camera shortly after 4.04 am and is not seen again after 4.05 am. During his time at the scene, which was one minute, he gave a number of kicks and slaps to the deceased in the area of the upper body and head. Neither James Reid nor Gerard Stevens are visible on CCTV during the final minute of the assault. The assault effectively ended when Jason Beresford flung the limp body of Dale Creighton down the steps at 4.06.20 am, though even then, as I've said, the defendant, Graham Palmer, is still attempting to interrogate Dale Creighton. Jason Beresford, David Burke and Ross Callery dragged Dale Creighton back to the top of the steps and placed him down with his feet dangling over the steps. The gardaí arrived at 4.07 am and Ross Callery, Jason Beresford, Aisling Burke, David Burke and Graham Palmer ran across the bridge towards the Tallaght side. Ms. McCarthy gave evidence that she saw two people run away on the Dominic side. On the basis of her evidence and the CCTV footage, it appears to the Court to be a reasonable inference that the two people seen by Mrs McCarthy leaving on the Tallaght side were James Reid and Gerard Stevens."

5. Having set out what she had concluded were the facts of the case in the considerable detail just quoted, the Judge then addressed the nature of the offence of assault manslaughter. She said that her first task was to place the offence on the scale of gravity of such offences. In doing so, the Judge took into account a number of factors including;

- (i) the prolonged nature of the assault over a period of fourteen minutes;
- (ii) the severity of the beating inflicted by multiple parties;
- (iii) the infliction of extensive and severe blunt force trauma to the young man's head and face such that he was unrecognisable to his family when they were summoned to the bedside;
- (iv) that the incident also left extensive bruising to his trunk, back, upper and lower limbs, and facial fractures;
- (v) the fact that the beating continued unabated long after the deceased was capable of protecting himself or offering any resistance, all served to place this offence on the higher end of the scale of gravity.

6. The Judge then proceeded to fix what she described as the "baseline sentence" at ten years. She said that in fixing that baseline sentence, that the Court was taking into account the completely understandable distress of the Creighton family, not merely at the loss of the young man's life, but at the manner of his killing. The Judge quoted Dale's mother as saying:

"[t]he torture and the fear that my son was put through that night will haunt me for the rest of my life. It is my first thought in the morning when I wake up and my last at night when I finally fall asleep. I have nightmares about Dale on the bridge that night."

The Judge quoted Dale's father to like effect. He is quoted as saying:

"I couldn't believe that my son was left unrecognisable in the bed, that one human being could do that to another...Every night for the last three years, I go to sleep thinking of Dale and I wake up to a nightmare. So much so the stress of his death has taken a toll on my health that I have suffered three heart attacks."

7. Having identified a baseline sentence, the Judge looked to the role and the circumstances of each individual offender to determine what the ultimate appropriate sentence in each of those cases would be. It is appropriate to set out what she had to say in relation to the appellant and also what she had to say, because of arguments advanced in relation to parity/relativities, in relation to Dale Creighton. Dealing with the situation of Ross Callery, she said:

"[h]e said he walked up to the victim and punched him in the face. He stated that he punched the victim hard in the face and the victim fell back given the force of the punch. He acknowledged that the victim was not threatening him when he attacked him. He said he punched the victim because he was frustrated at him because he believed he had robbed a phone from a girl, and for waving a knife at him earlier. Mr. Callery said he then chose to remain at the scene to see if the alleged stolen phone would be recovered. He described other individuals, who were acquaintances of his, arriving on the scene and that the victim was assaulted repeatedly by these individuals. Mr. Callery described kicking the victim in the back during this period. He said he did this in an attempt to get the victim to produce the alleged stolen phone. Mr. Callery described not being fully aware of the extent of the injuries being inflicted on the victim during this period given the quantity of alcohol and drugs he had consumed. He said that, during that period, he made a phone call about the party he was due to attend. On reflection he said there's no way he would have done that had he realised the severity of the situation he was in. He told the probation officer a short time later the victim was thrown down the steps of the footbridge. Mr. Callery recalls being shocked when this happened, and described the sound of the victim's head hitting off the steps. He recounted a moment of clarity where he believed the victim had suffered enough, and he said he helped to lift the victim back up the steps while trying to ensure that he did not experience any further damage to his body, and described placing him on the footbridge. He said the Gardaí arrived at the scene at this point and he fled the area.

Mr. Callery's admissions are limited to what can be seen on CCTV, namely the punch he threw at the bottom of the steps when he first arrived on the scene, and the kick that can be seen on the CCTV in the last few minutes of the assault. He

offers no explanation as to what he was doing for the almost five minutes when he was up on the bridge with the deceased in the company of David Burke and Aisling Burke, before the CCTV camera swung around to catch the end of the fatal assault. The Court is satisfied that during that unseen period, he and David Burke gave the deceased a severe beating. The Court is drawing that inference from the following evidence: Firstly, as Dale Creighton walks up the steps onto the bridge at 3.58, he is followed by Ross Callery and David Burke and, less than a minute later, by Aisling Burke. From that moment until the end of the assault, he is on the Ross Callery is on the footbridge, apart from three seconds between 4.02.27 am and 4.02.30 am, when he momentarily comes down the steps to James Reid. For three and a half minutes, the only men on the footbridge are David Burke and Ross Callery. Ms McCarthy, watching from Priorsgate apartment, gave evidence at pages 50, 56 and 59 of day 1, she said she observed that he ran up the steps 'and then they ran after him, and I asked Adrian' her partner, for his phone, 'when they got up to the bridge I saw the group of individuals then, you know, assaulting the chap, again the same chap. They chased the chap up to the middle of the bridge. I just saw a group of individuals beating another young chap on the bridge'. She said 'the chap, there was one single chap, they seemed to be just surrounding the one single chap who was wearing dark clothes. They were just he was in the middle, they were all surrounding him, and they were kicking him and punching him into the head and body. He collapsed at that stage onto the bridge'.

None of that is seen on CCTV, but it was sufficiently severe to cause Ms. McCarthy to ring the Gardaí for a second time and to ask them to get an ambulance. Ms. McCarthy said, at p. 56, 'the fella who was wearing the white top following the entry onto the bridge was leaning against the railings on the footbridge, and so was the other fella, and they were both kicking your man on the ground'. The only people the Court is satisfied who were on the bridge at that junction were you, Mr. Callery, and Mr. David Burke. When re-examined by Mr. Gillane [Senior Counsel for the prosecution], and asked about two men leaning against the railings of the footbridge, 'and they were kicking the man', 'can you just explain what you mean by leaning against the railings?' 'they had their hands on the rails. There's railings going across the bridge because it's enclosed and they had their hands on the rail of the bridge'. Asked 'and is that while kicking?', she said 'yes'. None of that is captured on CCTV, and apart from that at all, Mr. Callery, while in the course of his interviews, while he told many lies to the Gardaí in the course of his interviews, he did refer on a number of occasions to what happened when they first went onto the bridge at the top of the steps and he told the Guards 'I kicked him a few times'. He did not remember where he was when he kicked him. Asked where the lad was when he kicked him, he said 'on his hands and knees on the bridge'. He also told the Guards that when they got him up at the top of the steps, 'your man was getting the shite kicked out of him' and he also was asked whether the man was fighting back and he said 'at the start, yes'. Asked 'was he standing, sitting, kneeling, lying down, sitting, which is it?' 'lying down'. Asked 'was he fighting back?', he said 'at the start, yes, at the start he was throwing punches'. Asked again what happened at the top of the steps, 'he only got a hiding, that's it, that's exactly what happened'. Asked how serious he rated a hiding to be, he answered 'don't know, a few digs, a few kicks, not life-threatening anyway'. He also said in his interview that he saw the deceased in the row with another fellow. Asked when he gave him a kick, he said he was on his hands and knees, this was after the other fellow dropped him with a punch. Asked which foot did he kick him with, he said his right. Asked how hard on a scale of one to ten, ten being the highest, he answered seven. The Court is therefore quite satisfied that a beating was administered on Dale Creighton by Mr. Callery and Mr. Burke immediately following the movement onto the bridge. Thirdly, the Court is satisfied of that because when the CCTV camera pans to the bridge at 4.03.41, it is clear that Dale Creighton has already been the victim of a severe beating. The Court therefore concludes that you, Ross Callery, and David Burke were the primary assailants in the beating described by Ms. McCarthy."

8. Dealing with the situation of the appellant, David Burke, the Judge had this to say:

"He was 25 at the time, was therefore the oldest of those who assaulted Dale Creighton on the night. Mr. Ó Lideadha [Senior Counsel on behalf of David Burke] on his behalf has constructed an elaborate plea to the effect that Mr. Burke's only crime was in unlawfully detaining Dale Creighton for investigation of the alleged phone theft, thereby and by that unlawful detention enabling him to be viciously assaulted by others. The Court rejects that plea. It is probably true that David Burke, having in effect arrested Dale Creighton at 3.52am at the bottom of the steps to the footbridge, if he had handed him over to the Gardaí for the investigation of the alleged offence of robbery, he might not have been charged for the offence of assaulting at the bottom of the steps. The fact is, of course, he did not summon the Gardaí. He decided to take the law into his own hands, having already hit and kicked Dale Creighton repeatedly; having ascertained that he did not have his sister's mobile phone or handbag; he marched him up to his kangaroo court on the footbridge and, for the reasons already given in respect of Ross Callery, the Court is quite satisfied that during the three to four minutes before Graham Palmer arrived at the bridge, David Burke and Ross Callery gave Dale Creighton a severe hiding, which left him in a collapsed state on the bridge, during which time Aisling Burke was screaming and roaring and cursing and demanding her phone. When Graham Palmer arrived at 4.02.30, he took over the interrogation role. As the camera pans onto the final stages of the assault, David Burke is seen to the left of the camera, bending over, looking somewhat tired after his exertions.

The Court is satisfied that David Burke did not inflict further injuries during the final three minutes of the assault. The Court is prepared to accept that he wanted to prevent the further punishment that was being meted out to Dale Creighton by the late arrivals on the scene. He, having been present from the start, was best placed to know precisely what punishment had already been suffered by Dale Creighton, and to know that he had had enough. The Court is also prepared to accept that he was shocked when the lifeless body of Dale Creighton was flung down the steps by Jason Beresford. It does look as if David Burke made to catch Dale Creighton's feet as his body goes flying past, and his gesture immediately afterwards of putting his hand to his head does indicate shock to the Court. That said, the Court is satisfied beyond reasonable doubt that David Burke and Ross Callery gave Dale Creighton a severe beating when they first marched him up onto the bridge, and that beating was primarily responsible for the limp condition of Dale Creighton's prone body, which is seen as the camera pans to the bridge at 4.03.41am. While, in the Court's view, Mr. Burke has not fully acknowledged his role, the Court does accept that he is genuinely remorseful. As with the other accused, there are many testimonials placed before the Court to show him to be a pretty normal, decent young man who prior to these events had a life which was on a reasonable trajectory. As I say, he does have a number of minor previous convictions, none of which relate to violent offences, and the Court proposes to ignore them for the purpose of this sentence. He has been in custody since last July, and to date has been a model prisoner, availing of such rehabilitative programmes are on offer.

In the scheme of things, the Court must hold David Burke to be the most culpable of the participants. He was the oldest, he set the agenda. He determined what was to happen. It is undoubtedly true that at the end of the assault, he lost control of the situation, but that was the end result of his own actions. Mr. Burke, the Court sentences you to ten years imprisonment, having regard to your guilty plea which offers hope of successful rehabilitation, and the remorse and insight which you have shown, which similarly offers hope that you will not reoffend, the Court proposes to suspend the last two

and a half years of your sentence.”

9. A large number of grounds of appeal have been formulated, some, it may be noted in passing, couched in terms somewhat more polemical than usual. However, in substance, two points are made. It is said that the Judge erred in rejecting the arguments advanced in relation to what the evidence indicated was the role played by the appellant. It is said that the Judge fell into error in coming to the conclusion that the appellant was one of the two most culpable for what transpired. On the appeal, the appellant has advanced the same arguments, which were described as elaborate by the trial Judge when rejecting them. The argument is based on answers given by Ms. McCarthy when giving evidence at trial. She was the woman who had twice contacted the Gardaí because of her concern at what she was witnessing from her apartment, and it would appear that she viewed the offence during the minutes when the CCTV was not available. She then describes two individuals whose actions she had reported on running towards St. Dominic's Road.

10. The Judge expressly rejected the submissions made on behalf of Mr. Burke. She sets out in some detail in the course of her sentencing remarks the conclusions she arrived at and why she arrived at them. In the Court's view, she was clearly entitled to come to the conclusions that she did, and indeed, the Court would go further and say that her conclusions were clearly correct. We, therefore, reject the suggestion that the Judge was wrong in concluding that Mr. Burke was one of those most culpable, and rejects the suggestion that she should have approached the case on the basis that he was one of those least culpable, and should have been dealt with on the basis that his role had been to detain the deceased, thus exposing him to the risk of being assaulted by others.

11. While that was the primary submission made on behalf of the appellant, and the Court rejects it, he has a second or supplemental submission which is that even if the primary arguments are rejected, that the Judge fell into error in dealing with him more severely than she was dealing with Ross Callery. It will be recalled that the sentencing Judge, in the course of her remarks when dealing with the situation of Mr. Burke, commented:

“[h]e set the agenda. He determined what was to happen.”

The Court has some concern that this conclusion may go somewhat further than is supported by the evidence. There is no doubt, however, that the sentencing Judge was correct to conclude that the greatest culpability rested with Mr. Burke and with Mr. Callery. The Court is also satisfied that the Judge was correct to draw a distinction between the respective positions of Mr. Burke and Mr. Callery, both by reference to Mr. Burke's involvement at the early stages of the incident, as what might be described as an instigator, and also having regard to the fact that Mr. Callery was significantly younger, younger by some five years. The Trial Judge reflected the distinction by imposing a net sentence of seven and a half years on Mr. Burke and a net sentence of six years on Mr. Callery. If one accepts that a distinction was appropriate, the scope for intervention is obviously limited. Ordinarily, when a significant sentence is imposed, this Court would be very reluctant to intervene by reducing a sentence by a year or less, or for that matter, in the case of an undue leniency review, increasing a sentence by a year or less. This flows from the fact that the Court's practice is not to intervene merely because had it or its individual members been called upon to sentence at first instance, it would or might have imposed a somewhat different sentence. If what is contemplated is a very limited intervention, then this would normally be suggestive of the fact that the sentence imposed did not involve an error of principle, but fell within the available range. However, it seems to the Court that somewhat different considerations apply when the sentencing Court was dealing with a number of offenders and was addressing issues of relativities and parity. If there are multiple defendants being placed at different points on the scale, the Court is in a position to review whether the placing of a particular individual at a particular point is appropriate. Addressing that question in the current case, the Court has concluded that the divergence between Mr. Callery and Mr. Burke was excessive. There is a differential of 18 months if regard is had to the net sentences. In percentage terms, the net sentence imposed on Mr. Burke was 25% higher. The Court has concluded that such a divergence is too great and that it should intervene. The Court will do so by increasing the period of Mr. Burke's sentence, which is to be suspended from the present two and a half years to one of three years and three months, leaving a net sentence to be served of six years and nine months. For the reasons we have indicated, there will be many cases where the Court would balk at such a limited intervention. However, we are satisfied in this case that to address questions of relativity and parity, the intervention is justified, and indeed, required.

12. Accordingly, we will quash the sentence imposed in the Circuit Court and substitute therefor a sentence of ten years imprisonment with the last three years and three months suspended.