THE COURT OF APPEAL

Birmingham P
Edwards J.
Baker J.

Record No: 271/2017

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

JURACI da SILVA.

Appellant

JUDGMENT of the Court delivered on the 30th day of July, 2019 by Mr. Justice Edwards

Introduction
1. The appellant in this case was charged with murder, with assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997, and with producing an article, i.e. a knife, in the course of a dispute or a fight, in a manner likely unlawfully to intimidate another person, contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. He was tried before a jury in the Central Criminal Court. The jury returned with verdicts of not guilty of murder but guilty of manslaughter, not guilty of assault causing harm, and guilty of the s.11 offence.

2. The appellant was sentenced to a term of imprisonment of eight years in respect of the manslaughter, and to a term of imprisonment of five years in respect of the section 11 offence. Both sentences were to be concurrent and to run from 8 October 2016.

3. The appellant now appeals against the severity of his sentences.

Background to the matter
4. The sentencing court heard evidence that in the early hours of the morning of the 8thof October 2016 the appellant, who is a Brazilian national working as a butcher at the Dawn Meats plant in Waterford, was socializing in the city of Waterford with a number of friends and co-workers. They had been drinking in various licensed premises and playing pool. Just before 3am on that date the appellant left his companions to go home. He lived at the time on John's Lane which was just off John's Street. While making his way home he encountered Mr. James Banville and Mr. Conor Hogan on Cross Lane. The appellant was quite inebriated, and later contended that he was subjected to racist taunts by Mr. Banville and Mr. Hogan following which they then proceeded to assault him by kicking and punching him. The incident on Cross Lane was captured on CCTV, and it was also independently witnessed, and both the recording and the witness's testimony made it clear that the appellant was not the aggressor on this occasion. The CCTV also captured Mr. Banville and Mr. Hogan ingesting drugs, later shown to be cocaine, just before they engaged in harassing and assaulting the appellant.

5. Following this initial harassment and assault, the appellant continued in the direction of his home and on arrival at his apartment met with one of his flatmates, a Mr da Cruz. Mr da Cruz testified that the appellant enquired about his friends from whom he had become separated. While in the apartment the appellant changed his clothes and having done so armed himself with a kitchen knife and took it with him as he left the apartment. At this point he was accompanied by Mr. da Cruz. When interviewed after the incident giving rise to the charges that were later preferred against him, he contended that he had gone out again to look for two of his friends with whom he had been earlier, and he had brought the knife with him because he was concerned about the safety of those friends.

6. Upon leaving the apartment with Mr. da Cruz they proceeded from John's Lane onto John Street and walked around for a few minutes before returning to John's Lane and separating. Mr. da Cruz went back home but the appellant stopped to speak to a couple of young women who were sitting on the steps outside his apartment building. As he was doing so Mr. Banville and Mr. Hogan passed by. They again taunted the appellant, this time with sexual innuendos, and again assaulted him. This was only an estimated 15 minutes after the first assault. As on the previous occasion, the second assault was also captured by a CCTV camera on an adjacent building. Once again it was clear that the appellant was not the aggressor.

7. After the second attack had ceased, Mr. Banville and Mr. Hogan continued from John's Lane onto John Street and proceeded in the direction of New Street. The appellant initially hesitated momentarily but then followed them. Mr. Banville and Mr. Hogan walked around the corner into New Street and a further altercation ensued between them and the appellant on New Street. This altercation was not captured on camera, however there were a number of eye witnesses who were in a position to give some evidence as to how matters unfolded. These witnesses indicated that when the appellant reached the top of the hill and turned on to New Street, Mr Banville and Mr Hogan were some distance further along that street. There was evidence that a considerable amount of shouting ensued emanating from all protagonists. Mr Banville and Mr Hogan then proceeded back along New Street in the direction from which they had come, towards the appellant. The appellant stood his ground and did not retreat. Shouting continued and when Mr Banville and Mr Hogan reached him there was a confrontation and an ensuing altercation. We were told during the appeal hearing that there was evidence at the trial from eye witnesses to the effect that, at one point during this altercation, the appellant was being held by Mr Banville and Mr Hogan, and seemingly it was at this point that the appellant produced the kitchen knife with which he had armed himself and stabbed both Mr. Banville and Mr. Hogan.

8. Mr. Hogan sustained only superficial wounds but sadly Mr. Banville sustained mortal wounds. After he had been stabbed Mr. Banville managed to walk just a short distance before collapsing and falling to the ground. He was assisted first by Mr. Hogan and then by several people who came upon the scene. He was bleeding quite severely and although he was removed to hospital all attempts to resuscitate him were unsuccessful and he was pronounced dead.

9. Gardai arrived at the scene shortly after the incident, and the appellant was quickly identified as the principal suspect in connection with the suspicious death of Mr. Banville. Gardai then went to the appellant's apartment and he was arrested there. He was taken to a Garda station where he was detained and found unfit to be interviewed immediately due to being intoxicated. He later complained of headaches and dizziness and was seen while in custody by a doctor.

10. When he had recovered sufficiently to be interviewed he was questioned about the incident and he initially denied assaulting or stabbing either Mr. Banville or Mr. Hogan. As previously indicated he was later charged with the murder of Mr Banville, with assaulting Mr Hogan causing him harm, and with the s.11 offence involving possession of a knife. Insofar as the murder charge was concerned, he offered a plea to manslaughter in advance of his trial, but this was not acceptable to the Director of Public Prosecutions and in those circumstances the trial proceeded as a murder trial. The case was defended based on provocation and in the alternative as a case of excessive self-defence. While it is not clear on what basis the jury decided to return a verdict of not guilty of murder but guilty of manslaughter, the appellant was sentenced on the basis that he had been subjected to substantial provocation involving being physically assaulted and subjected to taunts of a racist and sexual kind on two separate occasions just a short time before the incident in which Mr. Banville and Mr. Hogan were stabbed.

The impact on the victims
11. The sentencing court received poignant victim impact statements from Mr. Banville's partner, Kelly Leonard, as well as from his brother Aidan, and these were read into the record. In addition, his sister, Ms Anne-Marie Banville, gave victim impact evidence herself in court. It was manifest from these testimonials that Mr. Banville was dearly loved by his large family and that they are all distraught to have lost him. It is particularly tragic that Mr. Banville had three very young children, Carly, aged 3, Cian, aged two and Kelsey, aged just six weeks, at the date of sentencing and that they will grow up without knowing their father. Further, Ms. Leonard and her young children were entirely dependent on Mr. Banville and they have lost their home and their means of support due to his untimely death.

12. There was no victim impact evidence from Mr. Hogan, perhaps because the appellant was acquitted of the charge of assaulting Mr Hogan causing him harm. Mr Hogan was nonetheless a victim in respect of the s.11 offence of producing an article, i.e. a knife, in the course of a dispute or a fight, in a manner likely unlawfully to intimidate another person.

The appellant's personal circumstances
13. The sentencing court heard that the appellant had been working in Ireland only for a short time before the incident. He is a Brazilian national who had trained as a butcher in his home country and who had been recruited in August of the previous year by Dawn Meats in Waterford to come to Ireland and work for them. The court heard that he has no previous convictions of any description either in Brazil or in Ireland.

14. At the sentencing hearing the court received a letter in Portuguese from the appellant, which was translated by a court interpreter and read into the record. It was in the following terms:

> "Today I am writing this letter for the Mr. Judge to talk about myself and my life and how I got here to Ireland. My full name is Juraci da Silva. I am a Brazilian citizen. I'm from a very humble and poor family of eight brothers, including me. All my family is in Brazil at the moment. I am married, I have a wife, two kids, a daughter and a stepdaughter, both in Brazil. I am 36 years of age. I had to leave school very early because I had to work to provide for my family. When I was 12 years old until the present moment I am working, even in prison. I have to start working early to help my parents, my mum and my dad which are in Brazil. My mum is very ill at the moment. She has been ill for seven years because she had a stroke and she never got better after that. My dad is also very old and he has some troubles to walk. I miss them very much and my whole family, my wife, my kids. Now, my wife has to work very hard to support my two kids, it has been really difficult for her and also mind my sick parents. The Irish company went to Brazil, they made a selection process for a butcher and they hired me and they brought me here with a few other Brazilian nationals. I've been here working to support my family back there because to have a better life for them. Now I find myself in this situation, I do not understand why these two men assaulted me, maybe because I'm a foreign, dark skin, I say I never understood that, I never sought any of these troubles. This company selected me, they hired me, I came here legally with a visa to work, a visa which the Irish government gave me. I've been paying my bills and my taxes and sending money to my family and I never had any troubles. My mind is not the same at the moment with all these things, I can't think straight anymore. I've been spending this time in prison without speaking to no one, no family, no one that I know. I never thought these things would happen in my life. I pray for my wife and for my kids. I miss them, I'm here in Ireland without them. I just wanted them to have a better future. There is one thing that I want to tell you, Mr. Judge, is that I just want to provide a better life for my families. I don't know what happened that night, I do not understand why I was surrounded by these violent people. I came to Ireland with the intention to have a better life. I didn't want to do any harm to anyone at any time. I'm not a criminal, I never had any trouble, I was never arrested. I've never seen a police station inside. That's what happened and now my family misses me. I want forgiveness. I miss them a lot. I know that Mr. Banville's family miss him a lot, but I also want to say that I miss my family a lot and I would like that someone could put themselves in my shoes and see what I am feeling as well. I still keep thinking about that night and I don't want to keep thinking of that again and I don't understand why these men assaulted me without no reason."

The sentencing judge's remarks
15. The sentencing judge's remarks were reasonably lengthy but in the circumstances of this case it seems to us appropriate to set out several substantial extracts. He commenced by rehearsing the procedural history including the charges in respect of which the appellant had been tried, the verdicts, and the fact that there had been an offer to plead to manslaughter in advance of the trial. He referred to what he accurately described as *"a very eloquent plea on behalf of Mr da Silva"* by his counsel which was both a plea in mitigation and a submission with respect to the law on sentencing in manslaughter cases. He also referred to the *"very eloquent statements"* of Kelly Leonard and from the late Mr Banville's brother, Aidan, as well as to the evidence received from Mr Banville's sister, Anne Marie, all of which motivated him to describe what had occurred as being a *"tragedy of epic proportions"*.

16. The sentencing judge commented, accurately, that a court, when sentencing for manslaughter, has a range of potential penalties that it can apply. Accordingly, the available options range from the imposition of a very substantial custodial sentence, to a somewhat lesser custodial sentence, perhaps suspended in part, and on down to, in exceptional cases, a wholly suspended sentence,

or even a fine. What might be considered to be the appropriate sentence in any particular case will entirely depend on the circumstances of the case. As the sentencing judge put it: *"In simple terms, unlawful killing at the lower end of the spectrum can be close to accidental or reckless and at the higher end of the spectrum, can be very close to murder and that is the difficulty in sentencing for the crime, because of the range."*

17. The sentencing judge recorded that counsel for the appellant had opened *in extenso* the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Kelly* [2005] 2 IR 321, and noted that that case was authority, inter alia, for the position that an accused who had offered to plead guilty to manslaughter, and who had gone on to successfully defend a charge of murder, should be treated at sentencing as though he had pleaded guilty to manslaughter at the outset.

18. The sentencing judge noted that in the *Kelly* case, which had also involved a stabbing in the course of a dispute, that in the circumstances of that case, which are described in the reported judgment, the Court of Criminal Appeal (CCA) had concluded that it was:

> *"... not possible to consider it in the most aggravated category of manslaughter cases". "This was a killing without any context of premeditated criminality. An aggravating feature was the use of a knife. There was, however, no sense that the knife was carried with a view to being used as a weapon."*

19. He further noted that in the *Kelly* case the CCA had stated that a sentencing court had to give considerable weight to the absence of previous convictions. It had then added: *"However, the death of an innocent young man as a result of being stabbed by the accused clearly required a substantial custodial sentence."* In the *Kelly* case, the CCA's assessment had been that it fell *"the upper part of the middle range of gravity in offences of manslaughter"*, while emphasising that *"current Irish sentencing principles required an individuated approach"*.

20. The error of principle that had been made at first instance in the *Kelly* case was that the sentencing judge had made no attempt to identify where on the range or spectrum of penalties the case fell to be located in terms of its gravity, before the application of mitigating circumstances. The CCA in the *Kelly* case, having dealt *"with specific statistics"* as the trial judge in the present case put it, ultimately quashed a sentence of fourteen years imposed at first instance, and substituted a sentence of eight years instead.

21. The sentencing judge in the present case considered that the *Kelly* case, although *"an important precedent"*, was by no means on all fours with this case and he expressed the view that he was prepared to distinguish it on several grounds.

22. He went on say:

> *"Just to deal with one issue in particular, the Court accepts Mr Cody's submission that in relation to the possession of the knife, the Court has to accept that it occurred between the first and second assault. In other words, after the assault was committed on Mr da Silva for the first time, he went back to his apartment and at that stage, took possession of a kitchen knife. Because, for two reasons, the Court can come to this conclusion; there is no doubt that after the second assault, he couldn't have come into possession of the knife, because he didn't return to his apartment and it would be unfair to Mr da Silva, on the basis of two interpretations of the evidence, to say that he went out earlier in the evening armed with a knife. So the logical inference that the Court must adduce is that Mr da Silva armed himself with a knife between the first and second assault. The next issue, which Mr Cody is correct about; the Court cannot come to the conclusion that the taking possession of that knife was at a time when he was intent on specifically using it, because of the evidence of his apartment flatmate that he was concerned about the safety of two other members of the company.*

23. The sentencing judge records that defence counsel had contended in his plea in mitigation that the case fell to be located towards the lower end of the spectrum of available penalties, and that the prosecution had disagreed strongly with this submission. The sentencing judge commented:

> *"This was a case where the Director of Public Prosecutions decided to prosecute murder in the Central Criminal Court. There are clearly exceptional cases in the Central Criminal Court which are of a very exceptional nature, where the Court will contemplate either a suspended sentence or a fine, or a very low custodial sentence and those can occur in exceptional circumstances and that is certainly not one of these.*
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> *Now, the position the Court finds itself in is obviously there were two contradictory defences put forward by the defence, which they were entitled to do and the Court had a duty to present those to the jury, but the specific facts, which are overwhelming and not in dispute in this matter, is that Mr da Silva was the subject of two very serious assaults. He was a man of no previous convictions. The first assault was very serious and it was accompanied by racist comments and the second assault was very serious and accompanied by sexual comments of a damaging nature to Mr da Silva. Mr da Silva, after the second assault, having hesitated for some little time to speak to his colleagues in his apartment or shout up to them, then decided to go after these two men.*
>
> *Now, at that point in time, there is no doubt that Mr da Silva was no longer under threat of serious injury to him. He had been seriously assaulted. These two men had moved on. They had moved up to the top of the street and had turned right and had come down another street and at that point in time, Mr da Silva was under no threat whatsoever from these two men. So the undoubted factual situation is that he had armed himself with a knife between the first and second assault; he had been a victim of two unprovoked, very serious assaults, but at that point in time, after the second assault, he decided to chase after these two men. The evidence is also clear from both Mr Evan Russell and Keith Wall, the two men that had the best view of the incident, that in relation to the fatal connection between these two men, that Mr da Silva did not try to run away. At best, he could be said to have stood still until these men approached him, or either advanced to them and on the basis of that, it's also clear that this interchange between Mr da Silva and Mr Banville and Mr Hogan was over in seconds. So from that point of view, the Court has to take the view that this is a very serious offence. So what has happened is that in reaction to two very serious offences committed on him, Mr da Silva committed an even more serious offence. There was no need for Mr Banville to die on the night in question. It's totally unacceptable what he did, but we are dealing with a situation where a young man has lost his life and in the very eloquent comments from his sister, has left a grieving family, partner, children, brothers, sisters, parents behind him.*
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> *Now, in relation to the letter of Mr da Silva which has been read out to the Court, I fully understand it. He has been trying to explain his background to it. He is a hard-working man with no previous convictions. He has come to this*

country to work and feels very aggrieved that he was not showing any initial aggression to anyone. He was out having a good time. Mr O'Kelly has rightly pointed out that there was no genuine remorse in this letter. He, in his interview with An Garda Síochána, he didn't deal with the issue why he had the knife or why he did what he did. In the letter, he hasn't done that either. I don't consider that an aggravating or a mitigating factor at all. It's just a factual situation that there has been no deep remorse displayed by Mr da Silva. He says he doesn't understand what happened and unfortunately what is clear as to what happened is that he was a man who was -- in his profession, had a knowledge of the danger of knives. He armed himself with a knife. He was prepared to use it and did use it in a lethal manner."

24. At this point the sentencing judge determined the appropriate headline or pre-mitigation sentence to be one of fourteen years imprisonment, in circumstances where he was of the view that there were substantial aggravating factors, principally the fact that the appellant had armed himself with a knife and was prepared to use it, and the fact that he had gone after Mr Banville and Mr Hogan after he had been assaulted the second time and had failed to leave the area although he had had the opportunity to do so.

25. That having been said, the sentencing judge went on to note that there were also *"very substantial mitigating circumstances in this case."* He identified these as:

"the two previous very serious assaults on him, accompanied by racist language and sexual language; the fact that he is of previous good character and also the fact that he is a Brazilian man with no English, who has come to Ireland to work hard and that any prison sentence imposed on him will be much harder away from his family and also, his time within prison, not having English, will be difficult for him."

26. Ultimately, the sentencing judge discounted by six years from the headline sentence of fourteen years that he had set for the manslaughter offence, leaving a post-mitigation sentence of eight years. He also imposed a concurrent five-year sentence for the s. 11 offence.

The Grounds of Appeal

27. There are six substantive complaints listed in the appellant's Notice of Appeal. These are:

(i). that the trial judge erred in law and in fact in imposing a custodial sentence which was excessive in all the circumstances of the case;

(ii). that the trial judge erred in law and in fact in placing the index offence in the highest category as the starting point for the construction of his sentence.

(iii). that, notwithstanding the reduction in the presumptive sentence from 14 years to eight years, the trial judge erred in law and in fact in failing to suspend any portion of the ultimate sentence;

(iv). that the trial judge erred in law and in fact in failing to treat the original plea of guilty to manslaughter, prior to the trial, as an effective plea of guilty when considering his sentence;

(v). that the trial judge erred in law and in fact in failing to give any or any adequate weight to certain of the mitigating factors advanced on behalf of the appellant;

(vi). that the trial judge erred in law and in fact in attaching disproportionate weight to purported aggravating factors and/or in characterizing certain factors as aggravating.

Discussion and Decision

28. It is proposed to address these grounds in the order in which they are listed. In ground of appeal no (i) the appellant complains that his sentence was excessive and in ground of appeal no (ii) it is complained that the sentencing judge placed the offending conduct "in the highest category". In substance both grounds suggest that the sentencing judge over assessed the gravity of the case. We do not believe that to be the case. As was pointed out in exchanges between the President and counsel for the appellant at the oral hearing, the sentence imposed was by no means untypical of sentences imposed in similar cases. This is true both as to the headline sentence, and as to the ultimate sentence in a situation where the accused could avail of substantial mitigation. The headline sentence that was selected was the result of very careful consideration by the sentencing judge. We consider his assessment to have been rigorous and entirely correct. It was consistent with the approach commended in *The People (Director of Public Prosecutions) v Kelly* [2005] 2 IR 321; and as the President pointed out at the oral hearing also with the approach of this court in *The People (Director of Public Prosecutions) v Mahon* [2017] IECA 320.

29. Following the oral hearing in this case, and during the period in which judgment has been reserved, the Supreme Court has given judgment on an appeal against our judgment in the Mahon case. That appeal was dismissed, and the Supreme Court's judgment has the neutral citation *The People (Director of Public Prosecutions) v Mahon* [2019] IESC 24. Several important issues had been raised in that appeal, not least an issue concerning how the sentencing judge should approach sentencing an accused in a manslaughter case in circumstances where there were several possible routes by means of which the jury could have arrived at a manslaughter verdict. The Supreme Court held that where there is an ambiguity in the factual implications of the jury's verdict, the judge is entitled to come to an independent conclusion as to the relevant facts upon a consideration of all the evidence presented before the jury. Although in the present case the jury could have arrived at their manslaughter verdict on the basis of provocation, alternatively on the basis of excessive self-defence, alternatively on the basis that the jury simply had a reasonable doubt as to whether the appellant had the intention to kill or cause serious injury, the sentencing judge sentenced the appellant ostensibly on the basis that provocation was the most likely explanation, and there has been no suggestion that he was wrong to do so.

30. Of more significance to this appeal, is the fact that when determining to accept the appeal in the *Mahon* case, the Supreme Court also certified that it would consider as a point of law of general public importance the question:

"How does a trial judge approach setting a proper sentence which is valid in the context of the gravity of the crime of manslaughter, widely variable as such sentence is primarily based on the individual facts of the crime, but perhaps aggravated or mitigated by other factors?"

31. In giving judgment on behalf of the Supreme Court, and in addressing this question, Charleton J availed of the opportunity to offer some welcome additional guidance on sentencing in manslaughter cases.

32. At paragraph 48 of his judgment in the Mahon case Charleton J refers to the Analysis of Manslaughter Sentencing 2007 – 2002, updated in 2017, by the Judicial Researchers Office and notes that both parties to the appeal had accepted this to be a valuable source of information. That analysis was availed of, together with relevant precedents furnished by the prosecution and information from the annual report of the Irish Prison Service for 2017, for the purpose of formulating guidance on sentencing bands. It indicated, as might be expected, a very wide variation in the sentences imposed for manslaughter offences. Arising from this Charleton J went on to observe:

> "49. Covering, as it does, a broad band of conduct from intentional killing under provocation, to excessive force in self-defence, to criminal negligence in the management of a machine or of a car, to assault without intent to kill or cause serious injury, manslaughter is a notoriously difficult crime on which to achieve an appropriate sentence. Hence, this judgment now seeks to assist in pointing out sentencing bands. All sentencing exercises are, essentially, assessments of harm and culpability. With manslaughter, the harm is the inescapable and final one of extinguishing the life of a person. Of itself, that constitutes bringing about harm at a very high level. But the culpability to be attached to manslaughter can range from conduct only short of that required for murder down to conduct which is partly accidental; such as the fight between two friends which, while not seriously aggressive, brings about death from a fall against a wall or pavement. Hence, as the statistical analysis has shown, sentences for manslaughter can range from life sentences or very long determinate sentences to, in the most exceptional circumstances, a non-custodial option."

33. The judgment in the *Mahon* case proceeds to categorize manslaughter cases under four headings, namely "worst cases", "high culpability", "medium culpability" and "lower culpability".

34. It was stated that in worst cases the unlawful killings in question "are close to indistinguishable in culpability from murder. Cases involving the highest level of culpability attract an appropriate sentence of between 15 to 20 years and a life sentence is also possible. Relevant to the level of culpability are matters such as the circumstances in which the victim died, and the conduct of the accused." The judgment cites as examples falling into this category cases such as *The People (DPP) v Conroy (No 2)* [1989] IR 160; *The People (DPP) v McManus (aka Dunbar)* [2011] IECCA 68; *The People (DPP) v Egan* [2017] IECA 95; *The People (DPP) v McAuley and Walsh* [2001] 4 IR 160; *The People (DPP) v Crowe* [2010] 1 IR 129; *The People (DPP) v Ward* [2015] IECA 18 and *The People (DPP) v Hall* [2016] IECA 11 and *The People (DPP) v Griffin* [2018] IECA 257.

35. The judgment in the *Mahon* case goes on to state, at paragraph 59 et seq, that cases of high culpability tend to attract a punishment of between 10 and 15 years as a headline sentence and tend to involve aggravating factors, which may include previous convictions of the accused for assault or other relevant convictions, history of violence between the accused and the victim, callousness towards the victim, confrontation involving a potentially lethal weapon, and death resulting from an unlawful act carrying a high risk of serious injury of which the accused was aware or ought to have been aware. Examples given of cases falling within this category were *The People (DPP) v Horgan* [2007] 3 IR 568; *The People (DPP) v Kelly* [2005] 2 IR 321; *The People (DPP) v Thornton* [2015] IECA 202; *The People (DPP) v Princs* [2007] IECCA 142, and *The People (DPP) v DD* [2011] IECCC 3. Many of these cases involve stabbings and fell into this category because the death resulted from a confrontation involving a potentially lethal weapon and/or an unlawful act carrying a high risk of serious injury of which the accused was aware or ought to have been aware.

36. In this context, Charleton J observes separately at paragraph 74 of the judgment, and under the heading "Aggravating factors":

> "74. It is appropriate to note, in the aftermath of that analysis, that attacks by men on women should be regarded with particular seriousness. In addition, while the introduction of a knife into an argument is often argued to result in some kind of accidental death, to introduce a lethal instrument into an emotional situation is unjustifiable. Absent a deadly attack, or an apprehension of such an attack on reasonable grounds, rarely can the introduction of a deadly weapon be regarded as anything other than a substantial aggravating factor."

37. Insofar as the category labelled medium culpability is concerned, the Mahon judgment indicates that headline sentences in this category tend to be between four and ten years, imposed where there is a high level of culpability but where aggravating factors are either absent or are considerably lesser than in the higher range. Examples given of cases falling into this category included *The People (DPP) v O'Donoghue* [2007] 2 IR 336; *The People (DPP) v Millea* [2016] IECA 137; *The People (DPP) v Hutchinson* [2017] IECA 154; *The People (DPP) v Shanley* [2017] IECA 340; *The People (DPP) v Rice* [2018] IECA 61; *The People (DPP) v Black* [2009] IECCA 91 and *The People (DPP) v Colclough* [2010] IECCA 15.

38. Finally, the judgment stated that manslaughter cases falling into the lower culpability bracket "generally result in the imposition of a sentence of up to four years' imprisonment. The lowest sentences within this range tend to be handed down where culpability is not especially high, but where the accused is nonetheless at fault, although the case is one without the aggravating circumstances which may be found in cases falling into the higher ranges of culpability. Fully suspended sentences have been imposed in what may be regarded as indeed very exceptional cases."

39. In our view this was a case that fell within the high culpability category in terms of its gravity, albeit towards the low end of the indicative range. We consider that the sentencing judge's decision to nominate a headline sentence of 14 years imprisonment was entirely appropriate to the circumstances of the case. As he pointed out the incident resulted in the unnecessary taking of the life of a young man, and it has left three young children without a father and has devastated the victim's wider family. It was wholly unnecessary and resulted from a confrontation involving a potentially lethal weapon and an unlawful act carrying a high risk of serious injury of which the appellant ought to have been aware. We find no error principle in the assessment of gravity.

40. This brings us to ground of appeal no (iii) in which the appellant complains that it was an error on the part of the sentencing judge not to consider suspending any part of his sentence. We find no fault in the sentencing judge's failure to do so. This was not a case in which the appellant required to be rehabilitated and incentivised to continue along a path on which he had begun. There was no requirement to hold the metaphorical "sword of Damocles" over his head. Apart from this incident he was previously of good character and no substantial grounds existed for concern about a likelihood of reoffending. He was entitled to substantial mitigation in the circumstances of the case and the best, and entirely appropriate, way to reflect this was to afford him a straight discount from the headline sentence, rather than resorting to a part suspension which would have served no purpose. That was what the sentencing judge did in the exercise of his discretion. We find no error of principle on that account.

41. In our estimation ground of appeal no (iv) is entirely without substance. The transcript makes clear that the sentencing judge was completely alive to the need to treat the appellant as though he had pleaded guilty at the outset. In the very first paragraph of his sentencing remarks the sentencing judge expressly alludes to the fact that a plea to manslaughter/unlawful killing was tendered at the outset. Moreover, later in his sentencing remarks the sentencing judge referred specifically to the headnote accompanying the report of the Kelly case in the Irish reports, and quoted expressly from it where it states the proposition, at point number two, that

"as the accused had offered to plead to manslaughter and then had successfully defended himself against the charge of murder, the accused should be treated as having pleaded guilty to manslaughter at the outset." The suggestion is that notwithstanding his acknowledgment that a plea to manslaughter/unlawful killing had been tendered, and notwithstanding his quotation of the passage just cited, the sentencing judge in fact overlooked this factor because he did not refer specifically to treating the appellant as having pleaded guilty in the portion of his sentencing remarks in which he identifies, what he characterised as, *"the substantial mitigating circumstances"* in the case. We are satisfied that the failure to specifically name check yet again the offer to plead guilty in this portion of his judgment does not justify an inference that he overlooked that factor, particularly in circumstances where he had expressly acknowledged its relevance at an earlier stage in the same judgment. Indeed, the appellant was afforded a very substantial overall discount on the headline sentence that was nominated, amounting to approximately 43%, and it is clearly to be inferred from the overall level of discount afforded that he was treated as though he had pleaded guilty at the outset. We are not prepared to uphold this complaint.

42. Ground of appeal no (v) involves a complaint that that the trial judge failed to give any or any adequate weight to certain of the mitigating factors advanced on behalf of the appellant. The written submissions filed on behalf of the appellant identify six matters which it is said the sentencing judge failed to consider either adequately or at all. These are:

> i. The appellant's acceptance of responsibility before trial;
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> ii. The appellant's vulnerable position on the night of the crime being a foreign worker with no English, intoxicated to some extent, and subjected to terrifying and confusing assaults;
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> iii. The appellant's concern for the safety of his friends at the time of the offence;
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> iv. The absence of any premeditation;
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> v. The low likelihood of reoffending;
>
> vi. Remorse demonstrated by the Applicant;

43. The first item on this list has already been dealt with in addressing ground of appeal number (iv). As regards the remainder of the items on this list, it is manifest on any reasonable consideration of the transcript of the sentencing judge's remarks that all of these factors were taken into account by the sentencing judge. It is not necessary for a sentencing judge to name check in a formulaic way each nuance of a case made in mitigation. The transcript reveals that this judge, who had also been the trial judge, was intimately familiar with the facts of the case and fully alive to all its nuances. He specifically referenced the fact that the appellant was a foreign national and could not have failed to appreciate that he has little or no English (as pointed out earlier in this judgment the appellant's letter had to be translated in the course the sentencing hearing by a court interpreter). The sentencing judge readily accepted that the appellant had been harassed and taunted in a racist and/or xenophobic, and indeed sexually insulting, way on the night. Whether it was racism or xenophobia, there can be no doubt but that the harassing conduct of Mr Banville and Mr Hogan, received full consideration. The sentencing judge further specifically referenced the appellant's contention that he had been concerned for the safety of his friends and gave the appellant the benefit of the doubt in regard to that. While there is no specific reference to his low likelihood of reoffending, it is manifest from the entire tone of the sentencing judgment that the sentencing judge did not consider that he was likely to reoffend. The sentencing judge expressed very considerable empathy for the situation in which the appellant had found himself and stated that he fully understood the letter that had been written, and the context in which it was written. This is also relevant in the context of the final complaint under this heading, namely that the trial judge failed to have regard to remorse demonstrated by the appellant. Again, that is simply not the case. While in responding to the appellant's letter the sentencing judge stated that *"no deep remorse"* had been displayed by the appellant, he was at pains to state that he didn't consider this to be either an aggravating or mitigating factor. On the contrary he said, *"it's just a factual situation"*, and we consider that it was a finding of fact that the sentencing judge was entitled to make on the evidence. However, notwithstanding this, the trial judge had quite separately demonstrated that he was fully alive to the fact that there had been a taking of responsibility by the respondent to having perpetrated an unlawful killing. It bears reiterating that at the very start of his sentencing remarks he had referenced specifically the fact that a plea to manslaughter/unlawful killing had been tendered at the outset of the trial. In conclusion on this issue, we are entirely unpersuaded that the trial judge erred in any way in how he addressed the mitigation to which the appellant was entitled. We consider that the quite generous level of overall discount that was afforded for mitigation was appropriate to the circumstances of the case.

44. The final complaint, which is the subject of ground of appeal no (vi), suggests that the trial judge erred in law and in fact in attaching disproportionate weight to purported aggravating factors and/or in characterising certain factors as aggravating. The focus of the submission in this respect was the trial judge's comment that it was clear that the appellant was a man who, in his profession, had a knowledge of the danger of knives, that he had armed himself with a knife, that he was prepared to use it and that he did use it in a lethal manner. It was contended that there was no specific evidence that the appellant had a knowledge of the danger of knives. We dismiss this complaint *in limine*. In our determination the trial judge's remarks were entirely apposite. The trial judge was in no way unfair to the appellant on that score. As has been seen earlier in this judgment, the Supreme Court's judgment in the *Mahon* case suggests that for the appellant to have produced a knife in the circumstances in which he did, was properly to be regarded as an aggravating circumstance. It comes under the heading of producing a potentially lethal weapon during a confrontation. The sentencing judge's point was that it was reasonably to be inferred that an accused who was a butcher and who use knives daily could not have failed to appreciate the potential lethality of a kitchen knife when used as a weapon. There is no evidence that the trial judge afforded this factor undue weight, but he was entitled to take it into account as an aggravating circumstance. We find no error of principle.

Conclusion

45. In circumstances where we have not been disposed to uphold any of the appellant's grounds of complaint, we must dismiss the appeal.