THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 2016/158

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

DONAL LEE

Appellant

JUDGMENT of the Court delivered 12th of May 2017 by Mr. Justice Edwards.

Introduction
1. The appellant pleaded guilty to three counts of burglary and one count of trespass. He was sentenced to one year of imprisonment in respect of the trespass offence and five years with the final two years suspended in relation to the burglary counts. As a condition of the suspension of those sentences the sentencing judge barred him from entering the towns of Laytown and/or Bettystown and their environments for a period of five years from the date of sentence without the consent in writing of the Chief Superintendent for the relevant Garda district. The appellant now seeks a review of the said sentences on the grounds that they were unduly severe and disproportionate in all the circumstances. In circumstances where he has at this stage served the sentence for the trespass offence this appeal is concerned only with the sentences for the burglary offences.

The Circumstances of the Case and the Impact on the Victims
2. On the morning of the 30th of August 2015 the appellant broke into McDonagh's bar in Bettystown by removing a number of roof tiles and entering through the ceiling causing extensive damage totalling approximately €4,500. Donal McDonagh – the pub's proprietor – is a man in his early eighties who lives alone adjacent to the pub. He told the Court in a victim impact statement that when the alarm went off it *"frightened the life out of"* him and he thought that the burglar would not be able to access the safe on the premises and therefore would try to gain access to his room in order to force him to open it. He had to wait for Mr Lee to leave, unable to use his phone as he was shaking with fear. As he lives alone, he still wakes up in the middle of the night if he hears any noise from outside and he is in constant fear of burglars returning. The pub is a listed building and is therefore difficult to get insurance for. For that reason Mr McDonagh had to cover the cost of the repairs to his pub himself because, had he claimed under his insurance, he probably would not have been able to renew the insurance and would therefore have had to close his business. The appellant was interviewed and identified himself from the CCTV footage taken from the premises.

3. On the 20th of May 2015 Mr Roger Pritchett, who owns a number of holiday cottages, noticed that the rear entrance to one of the cottages was open. From CCTV footage, he observed a man entering via that entrance and leaving some minutes later. Mr Lee was identified by Gardaí from that footage.

4. On the 19th of August 2015 the appellant committed a burglary at Tara House Bed & Breakfast, Strand Road, Laytown, Co. Meath. At approximately 6 a.m. two occupants were disturbed and found Mr Lee. They restrained him before the proprietor, Ms Nuala O'Reilly, came down and identified the appellant. The appellant had entered the premises by breaking a back window causing €544.80 worth of damage. In a victim impact statement Ms O'Reilly, who lives alone, told the court that the incident has had a serious impact on her life. In the immediate period afterwards she was left in total shock and could not sleep for weeks. She still feels vulnerable and intimidated and at the slightest noise at night has to call her family to come and check for signs of intruders around her home. She also has ongoing medical bills as a result. The appellant knew Ms O'Reilly, referring to her as *"Mrs O"*, and accepted his involvement in the crime when interviewed by Gardaí.

5. On the 30th of July 2015 Sister Margaret O'Riordan was staying with a group at Anam Áras, a nun's retreat centre. She was in another room when she heard and then saw a person running, and when she went down to her bedroom she noticed €500 was missing from her handbag which was on her bed. She said she may have left a window open. The burglar was the appellant who volunteered information concerning his involvement in this crime in the course of being interviewed by Gardaí about the other matters some weeks later. The appellant did not cause any damage other than the theft of €500. Sister O'Riordan declined to make a victim impact statement but said she would pray for the appellant. However, at hearing it was noted that Sister O'Riordan is over the age of 70.

The Appellant's Personal Circumstances
6. The appellant was born on the 1st of December 1995 and accordingly he attained his majority on the first of December 2013. At the time of sentencing the appellant had 88 previous convictions, 45 of which were for burglaries. His first conviction dated from the 2nd of September 2011 at which time he was 15 years old and at the date of his sentencing his most recent previous conviction was dated the 22nd of June 2015. All of his previous convictions had been dealt with in the District Court, the majority of them when he was a juvenile. The convictions to which the present appeal pertains were all in respect of offences committed after he had attained his majority and represent his first convictions in the Circuit Court.

7. The appellant admitted his involvement to gardaí when questioned, identified himself from CCTV in relation to the McDonagh's pub burglary and acknowledged his intent to steal in respect of the various incidents. He further entered a guilty plea at the first available opportunity and consented to an additional charge being added to the indictment a day after his arraignment so that the DPP did not have to bring separate proceedings in respect of the burglary at Anam Áras. He also wrote a letter expressing remorse.

8. The appellant was 19 years old at the time he committed the index offences. He had a troubled childhood. His mother was 19 when he was born, and his father left the family home when he was relatively young. Mr Lee had a fraught relationship with his mother's subsequent partner. In court, his mother accepted this was *"not an ideal environment."* At the age of four and a half, two months before he was due to start school he suffered a traumatic experience as described in a psychologist's report submitted to the court.

He then had a number of difficulties at school. Experts differed as to whether he had ADHD, but his mother told the court that she *"never believed he had ADHD."* He was prescribed medication, namely Ritalin, to treat his possible ADHD. His mother told the court that this medication had serious side-effects on him, stating:

> *"A. To me it overstimulated him, it disagreed with him. He developed an eating disorder, memory loss which caused a lot of problems in school. He had very -- he couldn't remember his own name most of the time.*
>
> *Q. And I think unfortunately, as a result of those difficulties he didn't get much an education in the schooling system as a small child?*
>
> *A. Yes, he had little to no education in primary school."*

9. The appellant's difficulties escalated. His mother noticed a change in him and had him tested for drugs. He tested positive for cannabis. The court was told he developed a drugs addiction between the ages of eight and ten and this was a way for him to self sooth for the trauma he had suffered at age four and half. He had never received counselling or treatment in relation to that incident. While being detained at Oberstown Detention Centre, he received therapy and took his Junior Certificate, in which he performed exceptionally well for a juvenile detainee.

10. The appellant's peer group in the local community was seen as a negative influence, and according to the psychological evidence he is gullible and easily led. His mother told the court that on release she hoped to relocate with him to get him away from his old peer group and give him a second chance.

11. A psychological report detailed how the appellant falls just within the borderline range of mild intellectual disability. The appellant has an IQ of 75, indicating that he would be more intelligent than only approximately 5% of his peers. The psychological report described this as a significant finding, as it could in part lead to an explanation for his difficulties with therapy inputs. In particular, he is a man with low verbal comprehension abilities and low non-verbal problem solving capacity.

12. In his plea in mitigation, the appellant's counsel told the sentencing judge that he had met with an addiction counsellor. He had also met with Fr Peter McVerry of the Peter McVerry Trust and Fr McVerry had indicated that he would be willing to help him. Counsel for the appellant, while acknowledging that he would receive a custodial sentence, asked the court to consider structuring the sentence so as to give him an opportunity to reintegrate into the community.

13. Under cross-examination by the appellant's counsel, Garda Gavin Flood told the sentencing court that he had noticed a change in the appellant's attitude. He had begun pursuing an apprenticeship in carpentry and was evidencing more interest in himself and his future. He was anxious that he be sentenced early so that he could avail of educational opportunities in prison.

The Issue of the Suspended Sentence

14. In the course of hearing evidence concerning the appellant's previous record the sentencing judge became alert to the possibility that the offences in question, or at least one of them, had been committed during the currency of a suspended sentence. Prosecuting counsel explained that while that might be so, it was his belief that the reason there had been no-re-entry under s.99 of the Criminal Justice Act 2006 was because the conviction had been recorded after the expiry of the period of suspension. The sentence judge indicated that notwithstanding that there had been no re-entry under s. 99, once he had become aware of the breach of the bond to keep the peace he was entitled to take it into account. In the circumstances he sought further details of the relevant conviction and sentence.

15. On a subsequent date to which the matter had been adjourned the Court heard the following evidence from Garda Gavin Flood:

> *Q. Garda Flood, to the best of your knowledge on the 22nd of June 2015, the accused man was convicted of an attempt to commit an indictable offence contrary to common law and received a nine-month suspended sentence; is that correct?*
>
> *A. That is correct, Judge.*
>
> *Q. That was suspended on the condition that he enter into a peace bond for a period of two years; is that correct?*
>
> *A. That's my understanding, Judge, yes.*

16. On the basis of that information, which indicated a nine month sentence conditionally suspended for two years, it was clear that that prosecuting counsel's belief that the offences in question had been committed after expiry of the suspended period could not be correct. It was equally clear that each of the burglary offences the subject matter of the present appeal, but not the trespass offence, had been committed during the currency of the two year period in respect of which the appellant had entered a bond to keep the peace and be of good behaviour.

The Sentence Imposed

17. In sentencing the appellant, the trial judge stated that:

> *"Burglary is an insidious crime which offends against the constitutional right to property and the victims of such crimes find that the crimes perpetrated on their homes is a life-changing event for them. Their sense of security which they've taken for granted is stripped away from them and they find that their enjoyment of their houses and homes is something that they can no longer experience. They suffer a deep sense of unease and apprehension together with hypervigilance, which can linger on for many years after the crime. The accused has pleaded guilty to three counts of burglary, each of which carry a maximum sentence of 14 years imprisonment, and one count of trespass which carries a maximum sentence of 12 months imprisonment. In sentencing the accused, in this matter, I have considered the nature and gravity of the offences and intend to impose a sentence that meets the particular circumstances of the offences and the offender. The offences carry maximum sentences, and in determining what is in this case a proper sentence I must decide where this particular offence and these offences lie within the range of sentences imposed and similar offences and having regard to the range of offences that are available to the Court. The Court must have regard not only offence and the offender in this case, but to the type and range of cases involving sentence in this type of offence, while consistently in sentencing is desirable, consistency cannot and must not override the proper exercise of discretion where the circumstances of a particular case require. The Court must consider all possible sanctions available and will not, as a matter of either principle or practice, rule out any of these. In short, in deciding what is a proper and*

proportional sentence in this case, I have considered the nature of the offences, the impact that these offences have had on the victims and on society and the personal circumstances, including the history of the offender. In this regard, I thank counsel for the accused for the helpful and professional information that has been led on behalf of the offender. A proper sentence is one that reflects the gravity of the offences and balances this with the other purpose of criminal sanction; these are the punishment of the offender for the offence, the expression of the revulsion of society and the hope for the rehabilitation of the offender.

The Court has had the benefit of reports from a psychological report from Dr Kevin Lamb dated the 19th of February 2016, which in ease of the accused I will not detail here, but I have taken its contents fully into account. A letter of the accused expressing remorse, the victim impact statement of Donal McDonagh, the victim impact statement of Nuala O'Reilly, a letter from Merchants Quay dated the 29th of January 2016, a letter from the Peter McVerry trust dated the 26th of February 2016 and the oral evidence of the accused's mother. I propose, unless I'm urged otherwise, to read the redacted and amended victim impact statement of Nuala O'Reilly so that the accused can be fully aware of the impact that his offences have had on this particular victim. She states; "The effects of this intrusion on my privacy has not only had an affect at the time of the event but continues on. On being confronted by someone in my own residence in the middle of the night, who was an intruder, left me in total shock and I could not lead my normal life for weeks and continue to have nightmares about it. After the intrusion I could not sleep at night for worry and today, I still do not get a proper sleep at night. At the slightest sound I wake up and I'm awake all night. It impacted on my family and still does. Immediately after the break-in, some of my family had to stay at night with me, disrupting their own family life. As a result of what I was confronted with I no longer feel safe. In fact, I feel vulnerable and intimidated and this continues to be part of my life. My whole quality of life is now much less, lack of sleep at night leaves me with no energy during the day to enjoy the simple things in life. My family continue to have their lives disrupted because I live alone and at the slightest noise in the night I'm so upset and nervous that I have to call one of them to come down and check around my home, as I will not leave my room. This is especially the case if the alarm goes off, it is a constant worry to them in their lives and I continue to have ongoing medical bills as a result". Signed Nuala O'Reilly.

The factors relevant to the assessment of the proper range of sentence for this particular offence are the guilty plea of the accused, counsel's plea in mitigation, the strength of the prosecution case and the gravity of the crimes and I assess the gravity of the crimes as being midrange and in my view the circumstances of the burglary offences warrant tariffs of five years imprisonment. Thus having set the tariff, I have considered factors which aggravate or mitigate the gravity of this case in order to decide if there are grounds to depart from this tariff in fixing the appropriate sentence. The aggravating factors in this matter are that the accused has 88 previous convictions, 45 of which are for burglary offences, mostly committed in the Laytown and Bettystown area and this record of previous burglary convictions for such a young man, now 20 years old, can only be described as appalling and outrageous and the accused is clearly a prolific burglar. All three of the accused victims were at home on the premises when the offences were committed which has caused significant continuing psychological trauma to Mr McDonagh and Mrs O'Reilly, both of whom are in their 80s. Mr McDonagh suffered significant financial loss as a result of the damage caused to his premises by the accused as did the victim at the nuns' retreat in count 7 and the victim in count 5 also suffered financial loss. The offences in respect of which Mr McDonagh and Ms O'Reilly were committed were in the early hours of the morning when the occupants were asleep at home and the accused knew or ought to have known that somebody would be on the premises. The offences were committed while the accused was subject to a suspended sentence.

The mitigating factors are the relative youth of the accused, the accused has expressed remorse, the matters referred to in the psychological report, the early pleas of guilty, which have particular mitigating value as Mr McDonagh and Ms O'Reilly would not have to go through the trauma of giving evidence at a trial and confronting the accused in Court, together with the admissions he made at interview. The accused has a long standing cannabis addiction from a very early age, the accused had amassed drug debts. The accused's mother has indicated that upon the accused's release she intends to move away from the area to provide a fresh start for him and her family and the accused consented to count 7 being joined in the indictment without going through the formal procedures. Bearing in mind my duty to impose a sentence as proportionate to the crimes and the personal circumstances of the accused and having weighed the aggravating factors with the mitigating factors and in the hope that the accused can be rehabilitated and become a contributing member of society and to give the accused some light at the end of the tunnel, on counts 1, 5 and 7, being the burglary counts, I sentence him to five years' imprisonment on each count, and on count 4 being the trespass count, I sentence him to 12 months' imprisonment. All sentences to run concurrently and I'll deal with the commencement date of those sentences in a moment. In respect of counts 1, 5 and 7, I will suspend the final two years of the five year sentence imposed on the following conditions; one, that the accused be placed under the supervision of the probation and welfare services for a period of five years from today's date and abides by all and any conditions imposed upon him. Two, the accused enter a bond to keep the peace and be of good behaviour for a period of five years from today's date in his own bond of €100 and three, the accused not enter the towns of Laytown and/or Bettystown and their environments for a period of five years from today's date without the consent in writing of the Chief Superintendent for the relevant garda district. I have imposed the last condition to give some comfort to the elderly victims of the accused so that for at least five years they will not face the prospect of seeing, meeting or being confronted by the accused in a relatively and tight-knit communities such as Laytown and Bettystown."

The Refusal to Backdate

18. After the sentence had been announced defence counsel asked the judge if he would backdate the sentences to the date when the appellant first went into custody, which was the 30th of August 2015 when he was arrested following his burglary of McDonagh's bar, rather than to the date the pleas were entered which was what the judge was proposing to do. This request gave rise to the following exchange:

JUDGE: No I'm not going to reward the accused for committing offences while on foot of a -- subject to a suspended sentence. I would normally do that but I'm not going to reward him in this instance.

MS BUCKLEY: But it's somewhat unusual when the prosecution haven't pursued the matter being sent back.

JUDGE: They don't have to pursue a section 99 for me to take into account in sentencing that the accused man was subject to a suspended when he committed these offences.

MS BUCKLEY: I'm not sure

JUDGE: What date did he enter his pleas?

MR HANAHOE: The 2nd of February, Judge.

MS BUCKLEY: It's just I'm not sure that the prosecution are putting forward the factor that the Court is taking into account.

JUDGE: I've heard evidence of it.

MS BUCKLEY: Well the Court is taking it into account, so be it.

JUDGE: Yes, I must. The 2nd of February, is it?

MR HANAHOE: I thought it was the 2nd of February.

JUDGE: Well, let's just clarify that date .

MS BUCKLEY: The 2nd of February is the earliest plea to account in respect of the matter.

JUDGE: Yes, very well I'll back date the sentences, all sentences to run concurrently and to be backdated to the 2nd of February 2016.

Grounds of Appeal

19. In written submissions on behalf of the appellant, counsel for the appellant lists 14 grounds of appeal, which are as follows.

☐ The sentencing judge erred in principle in imposing a sentence that was excessive in the context of this offence and this offender.

☐ The sentencing judge erred in not backdating the sentence of the appellant so as to give him credit for the time that he had already spent in custody on remand where there was undisputed evidence that he had been in custody from the 29th of August 2015 until the sentence date of the 9th of March 2016 on charges arising from the incidents the subject matter of the Indictment.

☐ The sentencing judge erred in taking into account that the offences were committed in breach of a suspended sentence imposed pursuant to Section 99 of the Criminal Justice Act 2006 as amended where the prosecution evidence was that this was not the case.

☐ The sentencing judge assessed the offences as being in the *"mid- range"* and as attracting a tariff of five years. The sentencing judge having set a tariff of five years for the offending behavior erred in not departing from that tariff at all having taken into account the guilty plea, the co-operation and the circumstances of the offender and the need to encourage rehabilitation and leave the offender with hope for the future.

☐ The sentencing judge erred in not affording the appellant appropriate credit for his early plea of guilty.

☐ The sentencing judge erred in not affording the appellant appropriate credit for his co-operation and his admissions. The co-operation extended to consenting to Count 7 which was a charge unrelated to the events described in the book of evidence being added to the indictment which could not have occurred without his consent and which relieved the DPP from the obligation of preparing a separate book of evidence in respect of that matter.

☐ The sentencing judge erred in failing to taking into account sufficiently the appellant's level of maturity and young age. The appellant was 19 at the time of the commission of the offences and was 20 on the date of sentence.

☐ The sentencing judge erred in failing to take into consideration in the context of his consideration of the previous convictions of the appellant that all related to District Court matters when he was a Juvenile and this was particularly so where the Judge indicated that he considered the previous convictions to be an aggravating factor

☐ The sentencing judge erred in failing to take into consideration sufficiently the uncontested evidence that the appellant had experienced significantly traumatic events in his early life which was a relevant consideration in sentencing due to the resulting vulnerability of the appellant. The sentencing judge erred in failing to apportion appropriate weight to the evidence of Garda Flood, the appellant's mother and the Psychological Report of Dr. Lambe in this context.

☐ The sentencing judge erred in failing to take into consideration the finding in the Psychological Report of Dr. Lambe that the appellant was performing just within the Borderline Range of Mild Intellectual Disability.

☐ The sentencing judge erred in placing disproportionate weight on the punitive and deterrence principles of sentencing and in having insufficient regard to the necessity to structure a sentence that would leave the appellant with sufficient hope to encourage continued rehabilitation.

☐ The sentencing judge erred in not striking an appropriate balance in his weighing of the offending behavior and any aggravating factors against the mitigating and personal circumstances of the appellant.

☐ The sentencing judge erred in imposing a disproportionate condition as part of the suspended two year element which condition required that the appellant stay out of the Bettystown and Laytown areas of County Meath for a period of five years unless he had the permission of the Chief Superintendent of that area to enter. Whilst there was evidence that the appellants mother would consider moving from the area in question on the appellants release from custody the condition imposed was disproportionate particularly where other members of the family resided in the area.

☐ Without prejudice to the foregoing grounds regarding the length of the sentence imposed the sentencing judge erred in not suspending a greater proportion of the sentence in all of the circumstances of this case.

The Appellant's Submissions
20. The appellant takes no issue with the offence's placement at the mid-range on the scale of such offences. Nor is any issue taken with the finding that five years would be an appropriate headline sentence. However the appellant submits that the sentencing judge erred in failing to depart from the headline sentence for the purpose of reflecting the available mitigation. While it is acknowledged that the final two years was suspended it was contended that a suspended sentence is still a sentence and it was a wholly inadequate way of reflecting the available mitigation in a case such as this, and particularly given the onerous conditions attached to it.

21. The appellant relies on *The People (Attorney General) v. O'Driscoll* [1972] 1 Frewen 351 wherein Walsh J declared at page 359 that:

> "The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal."

22. The appellant further submits that the sentencing judge erred in not recognising and affording the appellant appropriate credit for his early plea of guilty as is required by Section 29 of the Criminal Justice Act 1999 which provides:

> *29.—(1) 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.*

23. The appellant submits that the trial judge placed disproportionate emphasis on the offence and failed to have sufficient regard to the appellant's early guilty plea, his co-operation and his admissions. The appellant submits that the trial judge erred in placing heavy emphasis on the nature of the offending behaviour and failed to have adequate regard to his circumstances, particularly the appellant's vulnerabilities. In this regard, the appellant relies on the judgment of the Court of Criminal Appeal *in The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 IR 513, where at p. 519 Murray J stated:

> "Vulnerability can take many forms and it is also a question of degree but mere vulnerability can never be an alibi, exonerating a person convicted of a criminal offence from culpability. It is simply a descriptive term of a very general nature relating to whole range of discrete facts or circumstances said to have influenced an accused in deciding to commit an offence which he may not otherwise have been inclined to do. Financial difficulties, family circumstances, poor circumstances, lack of education, low intelligence, to name but a few, are matters which may be raised to mitigate the wilfulness of an accused or to suggest that he or she is not a person who is deliberately pursuing a career in crime."

24. In relation to the appellant's early plea of guilty, the appellant relies on *The People (Director of Public Prosecutions) v. Tiernan* [1988] IR 250. In that case Finlay CJ stated at page 255:

> " … an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination.
>
> Such an admission of guilt may, depending upon the circumstances under which it is made and the extent of the evidence apparent to an accused person as being available against him, also be taken in some circumstances as an indication of remorse and therefore as a ground for a judge imposing sentence to have some expectation that if eventually restored to society, even after a lengthy sentence, the accused may possibly be rehabilitated into it."

25. Counsel for the appellant acknowledges that Finlay CJ was speaking specifically about rape cases, but contends that the principle he was enunciating has general application.

26. Counsel for the appellant further submits that there was evidence that the appellant could be rehabilitated and this was not given appropriate consideration. In other words, the sentence imposed did not provide for sufficient "*light at the end of the tunnel*" as it was described by Egan J in *The People (Director of Public Prosecutions) v M* [1994] 3 IR 306 at page 314. While the appellant concedes the final two years of the headline five years was suspended, it is submitted that the failure to reduce the headline sentence at all from five years indicates that the suspended sentence was intended primarily to reflect mitigation rather than rehabilitation.

27. Moreover, the appellant contends that the sentencing judge erred in refusing to backdate the sentence so that the Mr Lee received full credit for time he served on remand. The sentencing judge erred when he took into account as an aggravating factor that the offences were committed in breach of a suspended sentence imposed pursuant to s. 99 of the Criminal Justice Act 2006 as amended where the prosecution was not pursuing a reactivation application. The appellant submits that prosecution counsel made it clear that s. 99 of the Criminal Justice Act 2006 did not apply. The appellant submits that the sentencing judge further erred in not backdating the sentence to give the appellant credit for time already spent in custody in circumstances where he had been in custody continuously from the 29th of August 2015 until sentencing on the 9th of March 2016 on charges arising from the relevant incidents. The sentencing judge's reason for refusing to give the appellant credit for time served was because he believed the offences were committed in breach of a suspended sentence. The appellant says that the refusal of the court to give the appellant such credit meant the court was endeavouring of its own volition to put the appellant in the same position as if the suspended sentence had been reactivated pursuant to s. 99 of the Criminal Justice Act 2006. The appellant relies on the judgment of Moriarty J in *Moore v Director of Public Prosecutions* [2016] 4 JIC 1905 in which the said section was ruled incompatible with the Articles 40.4.1 and 41 of the Constitution.

28. Finally, the appellant submits that the sentencing judge erred in imposing a disproportionate condition barring the appellant from

entering the Bettystown and Laytown areas of Co. Meath for a period of five years without the permission of the Chief Superintendent. While there was evidence that the appellant's mother would consider moving from the area on the appellant's release the condition is disproportionate in circumstances where other members of the appellant's family reside in the area. It is submitted that its operation would present practical difficulties for the appellant who has significant intellectual limitations.

The Respondent's Submissions
29. While the appellant's submissions are advanced on the basis that the sentencing judge identified a headline sentence of five years in circumstances where in his assessment the gravity of the burglary offences put them in the mid range, the respondent submits that the tariff of five years was the net sentence arrived by the judge after he had considered both the aggravating and mitigating factors. The suspension of the final two years may therefore be inferred to have been intended to incentivise rehabilitation.

30. Having regard to the sensitive nature of the psychological report the sentencing judge had declined to recite its contents in open court. However it cannot be deduced that he did not have regard to its contents. The sentencing judge is not to be criticised for respecting the appellant's privacy in not rehearsing the detail of the report. On the contrary, the judge's approach was a humane approach.

31. The respondent rejects the appellant's position that the sentence imposed must be assessed without regard to the suspended portion. He submits that do so would be entirely artificial and that notwithstanding the punitive element of a suspended sentence a suspended sentence cannot be treated as being equivalent to a period of imprisonment.

32. While the respondent takes no issue with the appellant's submissions as to the law relating to the mitigating effects of an early plea and co-operation with the investigation, the respondent does take issue with the emphasis placed on the appellant's youth and vulnerability. It was submitted that notwithstanding his intellectual difficulties there was no suggestion that his cognitive function was impaired or that he did not appreciate the moral quality of his actions. While the respondent accepts that youth and vulnerability might amount to a significant mitigating feature they cannot be relied on indefinitely. The appellant has 88 previous convictions and of these, 45 were for burglary. The respondent says it is reasonable to infer that a similar appeal or appeals had been made on his behalf in the past, and that he had an appreciation of the harm of his actions. The respondent relies on a passage from O'Malley, Sentencing Law and Practice (2nd Ed.) at para 6–52:

> "The weight to be attributed to youth will often depend on the presence or absence of previous convictions. Some offenders will have accumulated dozens of previous convictions by the time they reach their late teens or early twenties. In such case, the previous convictions are likely to nullify any credit that might otherwise be given for youth."

33. The respondent submits that the aggravating features were appropriately identified and unimpeachable. The respondent submits that the role of previous convictions in burglary is slightly different than in respect of other offences in that multiple previous convictions for burglary might be considered an aggravating factor and this is one such case. This position is considered in O'Malley, Sentencing Law and Practice, (2nd Ed.) at para 14–06.

> "As argued in an earlier chapter, progressive loss of mitigation is probably the best way of dealing with previous convictions. This would still allow for appropriate distinctions to be made between first-time and repeat offenders. However, the character of the offender is a relevant personal circumstance and the accused may clearly be a professional burglar who has persisted in that way of life despite several previous warnings and sentences. In such exceptional cases, character might properly be treated as an aggravating factor, though not one that should attract a significant increment of punishment in light of the sentences already served for previous offences."

34. In relation to the conditions preventing the appellant from entering Bettystown and Laytown, the respondent submits that it should be noted that it was advanced on the appellant's behalf that the he would be leaving the Bettystown or Laytown area. Secondly, while the appellant submits this would place undue hardship on him having regard to his intellectual capacity, this appears to assume that he is incapable of independent living and no evidence was advanced of this fact. In those circumstances the respondent submits that the condition does not result in undue hardship.

35. In response to the appellant's ground in relation to s. 99 of the Criminal Justice Act 2006, the respondent submits that the provisions of s.99 were not invoked, and the failure to do so did not mean that a sentencing judge, who had become aware of the breach, was not entitled to take into consideration that an offence was committed during the currency of a suspended sentence when the accused was bound to the peace and had entered a bond in that regard.

36. Regarding the trial judge's refusal to backdate the sentence, the respondent accepts that in the normal course, credit should be given for time spent on remand. However, that may be done in a number of ways and does not always involve backdating a sentence. It may in fact be reflected in the sentence imposed. In the instant case, the respondent submits that it is clear that the sentencing judge gave the commencement date of the sentence careful consideration.

Analysis and Decision
37. It is complained that the sentencing judge having set a tariff of 5 years for the offending behaviour erred in not departing from that tariff at all having taken into account the guilty plea, the co-operation and the circumstances of the offender and the need to encourage rehabilitation and leave the offender with hope for the future. It is acknowledged by counsel for the appellant that the final two years of the sentence was suspended but she suggests that a suspended sentence is still a sentence and that proportionality would have required a straight discount from the headline sentence to reflect the uncontroversial mitigating factors, and then the suspension of a further period to incentivise rehabilitation. We do not agree. It is entirely a matter within the sentencing judge's discretion as to how he or she structures their sentence, providing it is consistent with established sentencing principles. It does not represent an error of principle to use the mechanism of the partial suspension of a sentence for the dual purpose of reflecting mitigation and incentivising mitigation.

38. It is suggested that insufficient credit was afforded for the early plea of guilty, the appellant's admissions and co-operation, and his young age. In addition, it is said, the adversities in his early life, his vulnerability, his cognitive and psychological difficulties and his addiction problem did not receive sufficient attention.

39. It has to be borne in mind, however, that the effect of suspending two years of the five year headline sentence, meant that if the appellant stayed on the straight and narrow he could expect to have to serve no more than the equivalent of a three year custodial sentence. This amounted to a 40% discount on the headline sentence. We are not persuaded that an effective discount of that order represented an insufficient allowance for the mitigating factors that were available in this case. Moreover, it is clear from the sentencing judge's remarks that he was fully alive to all of the mitigating circumstances in the case.

40. In so far as the incentivisation of rehabilitation was concerned, the fact that the appellant received the benefit of a suspended sentence at all, in circumstances where the judge characterised him, quite fairly, as *"a prolific burglar"*; in circumstances where he had amassed 88 previous convictions in total, of which 45 were also for burglary; in the teeth of clear evidence that he had breached the terms of a previous suspension; manifestly indicates that the sentencing judge had in mind that it should act, in part, as an incentive to the appellant to stay out of trouble. The sentencing judge referred expressly to his hope *"that the accused can be rehabilitated and become a contributing member of society"* and his desire *"to give the accused some light at the end of the tunnel".* We therefore have no hesitation in rejecting this complaint.

41. Much has been made by counsel for the appellant of the fact that the sentencing judge was not impressed by the fact that the crimes were committed in breach of an earlier bond to keep the peace and be of good behaviour entered into as a condition on foot of which an earlier sentence was suspended. It is accepted that s.99 of the Criminal Justice Act 2006 had not been invoked, but that did not preclude the sentencing judge from taking it into account in the manner in which he structured his sentence. A judge has a discretion whether or not to backdate any sentence to take account of time spent on remand. He was perfectly entitled to take the view that it would be inappropriate to backdate in full the sentence(s) he had decided to impose in this case on the basis that to do so would be to effectively reward the appellant notwithstanding that he had breached his bond. Solemn sworn undertakings given to a court have to be taken seriously, and if they are breached there may indeed be consequences for the party in default. We do not consider that the judge erred in the exercise of his discretion on the backdating issue.

42. In conclusion we do not regard the sentence imposed as excessive or unduly severe.

43. Notwithstanding that this is our view we have decided of our own motion that the conditions attaching to the part suspension of the sentence by the court below should be somewhat varied. We acknowledge that the condition that the appellant may not enter the towns of Laytown and/or Bettystown without the prior permission in writing of the Chief Superintendent of the relevant garda district is an onerous one. While we do not consider it disproportionate in the light of the evidence that the appellant's mother intends to re-locate, we recognise that it could potentially be so in the event of the intended move not proceeding. Therefore we will vary the existing conditions to this extent. Upon being released from prison the appellant must notify the Chief Superintendent of the relevant garda district of the address where he will be residing, and of any subsequent change of residence. The aforementioned condition requiring the prior permission in writing of the Chief Superintendent of the relevant garda district in order to enter the Laytown and/or Bettystown area shall not become operative during the period of the suspension of the sentence for so long as the appellant's mother continues to reside in that area. For so long as she continues to do so, the appellant shall instead be subject to a curfew during which he must remain indoors within his notified place of residence from 7pm each evening until 7am on the following morning. If and when the appellant's mother does move out from the area in question with a view to taking up residence in another area the original condition shall become active and the curfew shall no longer apply.

44. The appeal against severity of sentence is dismissed.