THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Record No: 116/2017

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

EDDIE BARNAVILLE

Appellant

JUDGMENT of the Court delivered on the 1st day of November 2018 by Mr. Justice Edwards.

Introduction
1. On the 28th of April 2017, the appellant appeared before Nenagh Circuit Criminal Court and pleaded guilty to two counts (counts nos. 2 & 3) of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001. A *nolle-prosequi* was entered in respect of count no. 1 on the indictment, namely a count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997.

2. On the same date, a "full-facts" sentencing hearing took place. The appellant was subsequently sentenced to five years' imprisonment in respect of both counts of robbery, both sentences to run consecutively, with the final four years of this cumulative sentence of ten years to be suspended on the following conditions: that the appellant enters into a bond of €100; that he keep the peace and be of good behaviour, and; that he engage with the Probation Services for a period of two years and comply with any relevant request of the Probation Services.

3. The appellant now appeals against the severity of this sentence.

Background facts
4. Garda Rob Sheehy gave evidence that, on the 24th of January 2016, at approximately 10.30pm, a Mr Kevin Barry was standing outside a pub on Kickham Street, Thurles. Mr. Barry had been socialising in this pub and was outside smoking a cigarette. In an unprovoked attack, as captured on the CCTV footage outside of the pub, Mr Barry received a punch to the side of the face from a male who came up from behind him. It was accepted in evidence that this punch was perpetrated by a third party who, at the time of sentencing, was before the District Court, having been charged with assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. While Mr. Barry was lying on the ground in a state of semi-consciousness, the appellant was seen on CCTV walking over to where Mr. Barry was lying, standing over him, looking up at the CCTV camera directly and pulling his hood over his head. The evidence was that the appellant then proceeded to get on his knees and take a mobile phone from Mr Barry's pocket. Subsequently, the appellant stood up and began to kick Mr. Barry into the chest and stomach seven to eight times while lying on the ground. Garda Sheehy testified that the *"CCTV shows that Kevin Barry's body can be seen to be physically lifting off the ground with each kick."* A quantity of change, which had fallen from Mr Barry's pocket, was then picked up by the appellant. The appellant went through all of Mr. Barry's pockets and took the money that he had in his possession, which amounted to approximately €35. This incident was the subject matter of count no. 2.

5. In respect of count no. 3, in the early hours of the morning of the 25th of January 2016, sometime after 3am, the appellant was involved in an altercation with a male outside Supermac's Restaurant in Thurles. The evidence was that a Mr Aldis Groakes, who could be seen on CCTV subsequently recovered by Gardaí, was talking to a female who was in the appellant's company. The appellant confronted Mr. Groakes, then began to grapple with him, then tripped him to the ground, and then proceeded to kick him in the stomach a number of times. Subsequently, and with his victim seemingly unconscious on the ground, the appellant leant over Mr Groakes and took certain of his belongings from his pocket, before again kicking the victim several further times, into the face, head and body, while he lay unconscious.

6. The evidence was then that, soon after the second incident, the appellant was arrested on Liberty Square, Thurles, on foot of certain public order offences. Whilst in custody, he was searched and was found to be in possession of a number of items, including a social services card in the name of Mr. Groakes, a black Nokia mobile phone, a silver bracelet owned by Mr. Groakes, and approximately €65 in cash. The appellant, who was detained pursuant to s. 4 of the Criminal Justice Act 1984 for the proper investigation of the offences for which he had been arrested, was later released and was then re-arrested on suspicion of having committed the present offences and detained for the proper investigation of those offences.

7. The appellant was interviewed three times whilst in custody by investigating Gardaí from Thurles Garda Station. CCTV obtained by Gardaí was shown to the appellant, and, upon viewing this footage, he made full admissions regarding the offences, describing in detail what he did at both scenes. Segments of these admissions were adduced in evidence. In respect of the robbery of Mr. Barry, the appellant, on being shown the footage by Garda Sheehy said*: "It looks like I'm looking up at the camera, pulling up my hood. It looks bad, Rob, I know."* He also admitted to kicking Mr. Barry on the ground when the footage was shown to him. In respect of the robbery of Mr. Groakes, the appellant admitted in interview that *"I beat the guy up, took his belongings and that's when you arrested me 20 minutes later."*

8. The appellant was ultimately charged, arraigned, pleaded guilty and was sentenced in the terms outlined at the outset of this judgment. He now appeals against the severity of his sentences.

Impact on the Victims
9. Both victims opted not to furnish the sentencing court with victim impact statements. However, certain evidence was adduced at the sentencing hearing which gives some indication as to the suffering inflicted upon the victims by the offending conduct. Garda Sheehy testified that both victims suffered *"severe bruising and lacerations"* as a result of the incident. Photographs of both victims in the aftermath of the incidents were also handed into the sentencing court. The statement of Mr. Groakes given to Gardaí stated that he had *"severe pain on my face after it. I definitely don't remember the point I was hit or punched."* Mr. Barry's statement stated that *"I can't remember what happened to me, but what I can say is that I have a mark on my forehead, the right hand side. I have a cut on the top of my head. My jaw is sore to the left hand side. My teeth and gums to the front of my mouth is sore and I can't chew food without pain. Half my fingernail is missing from the ring finger on my right hand. I did not have these injuries before I got up to go outside to have a cigarette."*

10. Most of the coins taken from Mr. Barry were retrieved but his mobile phone was never returned to him.

Appellant's personal circumstances
11. The appellant was born on the 7th of November 1994, making him twenty-two-years-old at the time of sentencing. The Probation Report ("The Report") before the sentencing court indicates that, prior to going into custody as a result of breaching his bail conditions in respect of the present offences, the appellant was living with his mother and brother in Littleton, Co. Tipperary. His father, who has issues with alcohol and who has a violent disposition when intoxicated, still lives in the family home in Thurles.

12. The appellant is a poly substance abuser, and has a very significant substance misuse problem, something which the appellant contends *"his offending behaviour is directly linked to"*. He claims to have been highly inebriated and under the influence of benzodiazepines at the time of committing both offences. Indeed, Garda Sheehy testified under cross-examination that when the appellant is *"drug free, he's he has extremely likable qualities……. I couldn't say enough about the guy when he's sober, extremely talented sportsman and easy to talk to, but there's just been so many so many falls on his behalf over the years."* He is reported to have begun taking drugs from the age of 15, *"using almost the full range of illegal substances".* In 2016, the appellant reported to have been hospitalised last year on foot of what he characterised as *"drug-induced psychosis"*.

13. It is confirmed by his probation officer that subsequent to the commission of these offences the appellant made a serious effort to address his substance abuse issues. On the 3rd of August 2016, he completed a six-week drug rehabilitation programme in Aiséirí Rehabilitation Centre in Co. Wexford. The Report states that the *appellant "settled into residential treatment very well and was at all times very involved in all aspects of the programme. He worked very well and was at all times compliant and willing to take direction from staff. Report from Aiséirí indicate that he has a very good understanding of the disease concept of addiction"*. It seems an aftercare program was drawn up to assist him thereafter but his aftercare support group ceased operations in September 2016, following which he unfortunately relapsed.

14. The Report also indicates that the appellant was subsequently referred to the North Tipperary Drug and Alcohol Service, and that he attended there for assessment on the 9th of February 2017. This assessment indicated that the appellant would *"benefit from attendance with a counsellor in respect of Drug and Alcohol issues and in relation to an underlying childhood trauma".* Subsequently, he attended an addiction counsellor on one occasion, before being taken into custody following the revocation of his bail for breaching the conditions thereof, and in particular breaching his curfew and breaching an undertaking given by him to stay out of Thurles.

15. The probation officer states that she contacted the prison on the 3rd of March 2017 to advise them of the appellant's needs in respect of appropriate counselling services; and it appears that another probation officer in Limerick prison spoke with the prison psychologist who agreed to meet with the appellant.

16. The appellant gave evidence himself at the sentencing hearing and expressed self-disgust at what he had done. He expressed his apologies to both victims and told the sentencing judge that he wanted to start a new life after leaving prison away from Thurles *"where nobody knows me"* and to *"keep my head down".* It was submitted to the sentencing judge that the appellant was committed to trying again to address his substance abuse issues.

17. The appellant has a four-year-old daughter with a previous girlfriend and The Report indicates that he has begun *"to develop this paternal relationship since beginning his addiction recovery"*. His current girlfriend is said to be a positive influence on him and has never used drugs or come to the attention of Gardaí.

18. The appellant has participated in combat sports to a high level throughout his life, and the evidence was that he has won *"national and international awards for kickboxing"*.

19. Garda Sheehy testified that in the months prior to the sentencing hearing, Gardaí had begun investigating allegations of abuse perpetrated against the appellant when he was a child. The appellant stated in the course of his evidence that this abuse had stayed with him for 18 years. It was put to him that he needed help to deal with it so as to ensure that it *"does not amount to a catalyst for ever going back to the life that you were leading with drugs and alcohol"*, and he accepted that.

20. In her plea in mitigation, defence counsel submitted to the sentencing court that the appellant is subjected to random urine testing and has passed each of these tests, indicating that, at the time of sentencing at any rate, the appellant had managed to remain drug-free in prison.

21. The appellant has twenty-three previous convictions, as follows:

- nine for offences contrary to s. 4 of the Criminal Justice (Public Order) Act 1994;
- two for offences contrary to s. 6 of the Criminal Justice (Public Order) Act 1994;
- four for possession of a controlled substance contrary to s. 3 of the Misuse of Drugs Act 1977, as amended;
- two for criminal damage;
- one for entering a building with the intention of committing an arrestable offence;
- with the remainder involving road-traffic offences.

22. The offences the subject matter of both counts were committed while the appellant was on bail in respect of public order offences. Moreover, earlier on the day of the first of the incidents in question i.e., the 24th of January 2016, the appellant had been before a special sitting of Ennis District Court, having been arrested on foot of a bench warrant.

23. The Report considers the appellant to be of a high risk of re-offending. The Report concludes that *"a significant risk factor identified was substance misuse. He has made positive efforts to address his difficulties but has experienced relapses and periods of re-offending. Another risk factor identified was his emotional/personal issues."*

Sentencing Judge's Remarks

24. In passing sentence upon the appellant, the sentencing judge made the following sentencing remarks:

> *"Well, this is a case with a number of serious aggravating factors. First of all, it would be difficult so[to]sic overstate how appalling these attacks were on two men who became defenceless once they were knocked to the ground. They were kicked repeatedly before and after being robbed. Robbery is one of the most serious crimes in the entire criminal calendar. It carries a maximum sentence of life imprisonment, and it's probably not appreciated by persons who do not come across this crime, either as victims or through observing what happens in court, when on indictment people come to be dealt with for the offence of robbery. But there are there is a very large number of victims in our society of robbery, a great many of them are scarred for life, some of them physically, almost all of them psychologically, because it is a much more serious crime than theft, it is a much more serious crime than burglary, and they are serious crimes. The level of violence inflicted on these men was quite shocking, and both crimes were committed in public places, and it is by no means inconceivable that these incidents were viewed and were viewed by, perhaps, persons with delicate sensibilities, but even persons of robust sensibility must have been themselves damaged, I'm not talking about the victims, I'm talking about people who might have witnessed what happened, and even persons, as I say, of robust sensibility must have been deeply shocked by this level of sickening violence.*
>
> *Now, it is true that Mr Barnaville has no memory of this. He made frank admissions to the gardaí when shown the fairly conclusive CCTV evidence, and it is very much to his credit that he did that, but it is the case that he committed these after ingesting a mixture of alcohol and Valium in this instance. His state was self induced, and indeed I note that he had been in court earlier on the 24th of January in Ennis District Court. After that, he got himself into this state and he inflicted these horrendous crimes on two entirely innocent individuals, whom it seems he didn't even know beforehand. So, for somebody with previous convictions, and of course the previous convictions are themselves an aggravating factor, to ingest such a cocktail that he was capable of going out and carrying out these acts, that is an aggravating factor in the case, and on top of all of that then, he has been assessed by the probation service as being at high risk of reoffending, and it's salutary to bear in mind that reoffending could involve crimes as horrendous as these again. Now, I take fully in to consideration that a huge element of that assessment is Mr Barnaville's dependence for many years on illicit substances in particular. And I'm not losing sight of the efforts at rehabilitation that he has been making, so I take a measured view of what the probation service are saying in relation to his being at high risk of reoffending. Nonetheless it is a factor in the case.*
>
> *These offences carry, as I say, a maximum sentence of life imprisonment. It is impossible to categorise either as being in anything other than the top range of such offences, and I'm talking, as I say, about the top range of very serious offences.*
>
> *In Mr Barnaville's favour is, first of all, the fact that he pleaded guilty. This plea was an early plea and it came after full admissions were made very shortly after the incidents and full cooperation having been given to the gardaí who were investigating. These are extremely important matters. If Mr Barnaville had been convicted by a jury of these offences, he would be serving he would be going away to serve very lengthy sentences indeed. He has had a troubled childhood. There was parental breakup, and for most children where there is parental breakup there is a great deal of trauma, it seems that was present for Mr Barnaville and he certainly has my sympathy for that, and that is something of an explanation for his life subsequently becoming chaotic. It is an explanation; it is by no means an excuse for the commission of crime. In addition to that, it seems that something happened to him when he was a child, which was quite appalling incident or incidents. I note that that is being investigated by the gardaí at the moment. If it is true, and I don't I've no reason to doubt for a moment that it is true, I very much hope that the perpetrator or perpetrators are brought to justice and dealt with accordingly, because abuse of children, of whatever sort, is something that will certainly receive no sanction in this Court, or indeed in any Court. But, again, I say while this might be something of an explanation for Mr Barnaville allowing his life to go off the rails, it is not an excuse for the commission of crime.*
>
> *He is somebody who clearly has good family support, and I note that he has a young daughter to whom he is obviously devoted and wants to spends time with; no doubt that will be a focal point in the future when he might be faced with decisions as to whether to go back to the life he was leading or not. I accept Garda Sheehy's very fair evidence that, when sober, he could scarcely say enough about Eddie Barnaville. He is not alone in this. A great many people who are of otherwise excellent character, when they allow themselves to come under the influence of drink or drugs or both, change character entirely, and that unfortunately is what has happened here, but as I say I'm dealing in relation to these two incidents with somebody who put himself who put himself by his own volition into this state.*
>
> *He has now in recent times, in fairly recent times, taken very important steps towards rehabilitation. I am impressed by the evidence I've heard in that regard and I'm quite sure that, having been sober now for some time, he has had an opportunity to reflect on where he has gone wrong in the past. I'm also mindful of his age; he's 22. I would be much more mindful of that were it the case that he had no previous convictions, but even at that very young age he has more convictions than years.*
>
> *He has been doing well in prison and I am very impressed with that, it does indicate to me that he is somebody who is determined - and his evidence here bore that out - he is determined to turn his life around from the chaotic state in which it was previously, during which these offences were committed. He has apologised to his victims, and I'm grateful to Garda Sheehy and his colleagues who passed on that very early apology, and it may even be that the reason why these two unfortunate victims, who undoubtedly have been very severely damaged by this, while they were ultimately did not wish to have a victim impact report prepared, but I accept fully that his heart his apology was heartfelt and that he has genuine remorse for these inexcusable actions.*
>
> *So, I have to weigh the aggravating factors with the mitigating factors, and it is unfortunately the case that Mr Barnaville cannot escape a lengthy custodial sentence. The Court has to have account take account of the punishment*

when it comes to sentencing, to rehabilitation, but also to the issue of deterrence. It would send altogether the wrong message if somebody who committed offences such as these escaped a prison sentence altogether. But I have to regard to the question of totality in sentencing, and the sentences I'm going to impose on each of the counts which will be consecutive, because they were entirely separate incidents, are considerably less than they would have been had there been, in each case, had there been one offence only.

So the sentence of the Court in relation to count 2 will be a sentence of five years' imprisonment; in relation to count 3, a sentence of five years' imprisonment, giving a total of 10 years. In view of the impressive evidence I've heard in mitigation, and in particular the plea of guilty and all that went with that, and the efforts at rehabilitation, I will suspend the last four years of that sentence on Mr Barnaville entering into a bond to keep the peace and of good behaviour during that time, to refrain sorry, for a period of four years from his release, and during that time to refrain entirely from ingesting either alcohol or illicit drugs. It will be a further term that he should engage for a period of two years from his release with the probation service and that he should comply with any and every request which the probation service makes of him. He should be bound over in this bond of €100."

Grounds of Appeal
25. In seeking to impugn the severity of the above sentence, the appellant proffers the following three grounds of appeal:

(i). The sentencing judge erred in assessing the seriousness of the offence as within the top range in determination of sentence.

(ii). The sentencing judge erred in giving insufficient allowance in regard to the mitigating factors of the Appellant and early plea of guilt.

(iii). The sentencing judge failed to have regard or any adequate regard to the Appellant's real and substantial efforts at rehabilitation since the date of his conviction

Appellant's submissions
26. In respect of ground no. (i), counsel for the appellant argues that the sentencing judge erred in over-assessing the gravity of the present offences. In furthering this proposition, the appellant has referred us to a recent decision of this Court in *People (Director of Public Prosecutions) v Sweeney* [2017] IECA 49. In this case, the appellant received a sentence of eight years' imprisonment with the final two-and-a-half-years suspended for the offence of robbery, in circumstances where he had approached a 90 year old man and demanded a sum of cash. The appellant then grabbed an umbrella from the victim and pushed him to the ground, striking him several times in the upper body with it, before taking a sum of €450 from the victim. The appellant - who was a paranoid schizophrenic and a drug user - was later identified by CCTV footage and immediately admitted his wrongdoing when confronted by Gardaí. The victim in that matter sustained significant, injuries including a fracture to his second lumbar vertebrae and went from having no history of back pain to continual lower back pain. The Court upheld the sentence and rejected the appellant's core complaint that the sentencing judge had not given enough credit for mitigation. Counsel for the appellant argues that the present case can be distinguished from the facts pertaining in *Sweeney*, including the absence of evidence that the appellant used any weapons in the present case and the fact that the injuries sustained by Mr. Groakes and Mr. Barry were not of the same gravity as those suffered by the victim in *Sweeney*. Thus, it is argued that the sentencing judge placed the gravity of both offences at too high a point on the range, and in making the sentences consecutive erred in failing to give adequate consideration to the totality principle.

27. In respect of ground no. (ii), the appellant submits that the sentencing judge failed to take sufficient account of the various mitigating factors in the case, namely his; genuine remorse for what occurred; his apology to the victims; his subsequent good character; his efforts at rehabilitation, and; his young age.

28. Ground of appeal no. (iii) centres around the complaint that the sentencing judge failed to have adequate regard to the appellant's real and substantial efforts at rehabilitation since conviction Whilst conceding that the appellant is not entitled to mitigation simply due to the fact that he or she was intoxicated at the time of the offence, the appellant cites the comments of the former Court of Criminal Appeal in *People (Director of Public Prosecutions) v Fitzgibbon* [2014] IECCA 12 (per Clarke J [as he then was] at para 9.7), and approved by this Court in People *(Director of Public Prosecutions) v Hall* [2016] IECA 11, that *"a sentencing court is required to consider, as part of the overall circumstances, whether a persistent problem with substance abuse, most particularly if it could be said to stem from a particularly difficult upbringing, can amount to a factor which can weigh significantly in an appropriate sentence process on the facts of a particular case."* The respondent submits that the appellant falls *"squarely"* within the principle outlined in *Fitzgibbon* in that many of his problems in terms of upbringing relate to a parental breakup and alleged abuse when he was a child. Further, it is argued, given the appellant's efforts at rehabilitation as adduced in evidence, insufficient weight was afforded to the penal objective of rehabilitation by the sentencing judge.

Respondent's submissions
29. The respondent contends that gravity was properly assessed, that there was an appropriate discounting for mitigation, and that the sentencing judge did not err in principle in any respect.

Discussion and Decision
30. We cannot agree with the submission that the sentencing judge over assessed the gravity of the case. These two cases, which occurred on consecutive dates but within the same 24 hour period, both targeted victims in situations of vulnerability. In the case of the robbery of Mr Barry, he had already been felled to the ground by a blow from the third party referred to earlier and was in a state of semi-consciousness. In the case of the robbery of Mr Groakes, it was the appellant who felled the victim, but again the victim was robbed while he lay unconscious on the ground. In both instances, although the victims were not in a position to offer resistance, or further resistance, because of their respective semi-conscious or unconscious states, they were viciously kicked and kicked repeatedly into their chest and stomach areas before property was stolen from their persons. In the case of the robbery on Mr Barry, the viciousness of the assault on him is conveyed by the Garda evidence that CCTV of the incident shows his body being physically lifted from the ground with each kick. In the case of the robbery of Mr Groakes, who was fully unconscious, it is particularly egregious that, having stolen property from his person, the appellant assaulted him a second time and while he was in that helpless and unconscious state by further kicking him several times into the face, head and body.

31. Counsel for the appellant points to the fact that no medical evidence was adduced suggesting serious injuries, and points to the

fact that neither victim made a victim impact statement, although both did give statements to the Gardaí in the context of the criminal investigation of these incidents in which they provide some description of how they were injured and affected. She also points to the low monetary value of the property taken. Her case is that although the circumstances of these cases were bad, the sentencing judge was wrong to describe them as being *"in the top range of very serious offences."*

32. While the evidence as to the consequences was limited, there was a clear basis for inferring significant distress and trauma on the part of the victims in consequence of the nature and circumstances of the attacks on them. The appellant is extremely fortunate that the physical consequences of the violence he used were not more serious, and that he did not have to face a homicide charge or charges. However, that is no thanks to him.

33. The appellant's culpability was significant. The attacks were intentional. In the first instance, the appellant seemingly adverted to the fact that he was in the viewing range of a CCTV camera and pulled his hood over his head before proceeding to rob and assault the victim regardless. Both attacks involved extreme violence gratuitously administered to vulnerable victims. The appellant was on bail at the time. There were two victims involved in two separate incidents. The attacks were also committed in the throes of self-induced intoxication. While the appellant has serious substance abuse issues, this was not a factor which would tend to mitigate culpability in the circumstances of this case. He was not robbing out of chemical compulsion to feed an addiction. The circumstance of self-induced intoxication in fact aggravated his culpability for the offences in this instance.

34. It is correct to say that these robberies were not at the top end of the range, however it is clear that in so characterising them, the sentencing judge was engaging in hyperbole most likely with a view to impressing on the appellant that he was facing a likely significant custodial sentence and that it was deserved. What is far more important than how the sentencing judge might have labelled the offending conduct is where he in fact located the offences on the scale of available penalties.

35. The maximum potential penalty is life imprisonment, although we have said previously that the effective range in most cases tends in practice to cap out at fifteen years, with sentences in excess of fifteen years or a life sentence being reserved only for robbery offences of an especially egregious type. An effective fifteen-year range for all other cases allows for a low range between zero (i.e. non-custodial options) and five years' imprisonment, a mid-range between five and ten years' imprisonment and a high range between ten and fifteen years' imprisonment. We consider that while these were not cases the gravity of which fell to be assessed in the high range, they were certainly well into the mid-range.

36. The sentencing judge decided that the circumstances of these cases were such that they merited consecutive sentences. No specific complaint is made about that and in any event we agree that that was a matter legitimately within the trial judge's discretion. Despite saying in hyperbole that the offences were in the top range, the sentencing judge in fact fixed on headline sentences that were on the borderline between the low and the mid ranges (in terms of the effective fifteen-year range we have identified). In doing so, however, he emphasised that he was conscious of the totality principle and that in circumstances where he felt obliged to impose consecutive sentences these headline sentences *"are considerably less than they would have been had there been, in each case, had there been one offence only."* We take from this that if there had been one offence only the sentencing judge would have fixed a higher headline sentence, and think it likely that his headline sentence would in that event have been towards the middle or upper half of the effective mid-range, and that would certainly have been appropriate in our view.

37. Notwithstanding the trial judge's possible recourse to hyperbole in his characterisation of the offending conduct, we consider his actual approach to the assessment of gravity in this case to have been impeccable and find no error of principle.

38. Turning then to the mitigation side of the sentencing exercise, the sentencing judge carefully and comprehensively considered each of the relevant mitigating factors. While we do not know the weight that he afforded to each one, or the basis on which he synthesised them, nor are we entitled to know that, it is clear that he approached the assessment of mitigation conscientiously.

39. Counsel for the appellant has been unable to identify any significant mitigating factor of which account was not taken. Her case is that the overall discount is too low and therefore the sentencing judge must have failed to give adequate weight to one or more of the major mitigating factors, namely the plea of guilty, the appellant's co-operation, his relative youth, his remorse, his apologies, his substance abuse problems, the adversities in his life and particularly his childhood, his relationship with his child and his efforts to date at rehabilitation. In our assessment the sentencing judgement is detailed and nuanced and conveys to us that the sentence imposed was a reflective one. It indicates an appropriate consideration of the various penal objectives and correctly identifies the need for appropriate punishment, for deterrence and for the incentivisation of rehabilitation. Balancing these considerations, the sentencing judge considered that a 40% discount for mitigation was appropriate, to be given effect to through the mechanism of the suspension of four years of the aggregate headline sentence of ten years' imprisonment. In our judgment that was an adequate, and even generous, level of discount in circumstances where the appellant had been effectively caught "red-handed" on CCTV, and it was comfortably within the sentencing judge's margin of appreciation.

40. It is suggested that the sentencing judge should have done more to incentivise the appellant's continued efforts at rehabilitation. In that regard, we commend the appellant for his efforts to date and encourage him to continue along the path he is now on. However, these were crimes for which a substantial custodial sentence was simply unavoidable. The mechanism of reflecting mitigation by means of a partly suspended sentence also serves to incentivise continuation with rehabilitation. While it might have been open to the sentencing judge in the exercise of his discretion to have gone further than he did in terms of incentivising rehabilitation, the failure to go that extra mile was not an error of principle. Rather, it was the legitimate exercise of judicial discretion in sentencing. There is no basis on foot of which this Court would be justified in interfering with it.

41. In conclusion, we are satisfied that gravity was correctly assessed in this case and that mitigation was adequately reflected. In the circumstances the appeal is dismissed.