THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No: CJA 217/2012

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

– V –

BRIAN HYNES

APPELLANT

Judgment of the Court delivered on the 7th day of April, 2016 by Mr. Justice Edwards

Introduction
1. This is a case in which two concurrent terms of four years imprisonment, with the last eighteen months thereof suspended, were imposed on the appellant by Naas Circuit Criminal Court on the 21st of June 2012 following the appellant pleas of guilty to a count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997 and a count of producing an article capable of inflicting serious injury in the course of a dispute or a fight and in a manner likely unlawfully to intimidate another person, contrary to s.11 of the Firearms and Offensive Weapons Act 1990.

2. The appellant now appeals against the severity of these sentences.

The facts of the case
3. The appellant, a married man with a grown up son and daughter, was born on 20/05/1951 and is now 64 years of age. He was aged 59 years on the date of the incident and 61 years at the date of sentence. His daughter Sylvia, had been in a 20-year difficult relationship with Eamon Coyne, the injured party, who was then aged 36 years. The appellant's daughter and the injured party have two young children, a boy and a girl, in respect of whom the appellant is their maternal grandfather.

4. The prosecution case was that on 16th October 2010 the appellant was at home when his daughter, who was visiting her parent's home, had in their presence and hearing received an abusive and implicitly threatening phonecall from the injured party, railing about why she was not yet home. The appellant, who was under the influence of alcohol, then proceeded to arm himself with a bayonet type knife which he kept under his bed, and walked over to the home of his daughter and the injured party which was located no more than a few minutes walk away. On arrival there, and having entered the house through the open front door, the appellant had produced the knife and immediately attacked the injured party in frenzy in the course of which he inflicted six stab wounds to the injured party's left leg.

5. The injured party suffered a good deal of blood loss. However upon medical examination at Naas Hospital where he was taken in the aftermath of the event he was documented as being "alert and oriented and under no obvious stress" and he was not detained overnight in the hospital. However it was expected that the injured party would experience localised pain, tenderness and swelling for up to three weeks after the incident. He is now left with scarring at his numerous wound sites, and has numbness in his left leg which prevents him from having physiotherapy. According to the victim impact statement the injured party was also psychologically injured by the attack, has had difficulty sleeping, has nightmares and has had to undergo counselling. There was also mention in the victim impact statement of a suicide attempt by the injured party since the attack on him, but in the absence of a psychiatric report dealing with this, and in circumstances of the co-existence of a fractured relationship with, and separation from, his partner, and other stressors in his life, such as his perceived difficulties in negotiating adequate access to his children, which is referred to in the evidence of Garda Bracken, the Court feels it would be unsafe to directly attribute this suicide attempt as being a consequence of the appellant's assault on the injured party.

6. The appellant later called to the Gardaí by arrangement and made a full statement wherein he outlined the background to the incident, and, in particular, the unhappy history between his daughter and the injured party. He did not seek to distance himself from the incident. He accepted ownership of the knife but claimed that he had very little recollection of the incident itself. In answer to a Garda question he indicated that he had brought the knife, which was a bayonet type instrument which he kept under his bed, *"probably to protect myself and just to frighten him. I had no intention of doing harm to him. It was just scare tactics, but I can't recall even being there."*

7. The appellant stated that he was *"deeply sorry about what happened",* and that both he and his wife were very upset as a result of the incident. He did not have any previous convictions and had never before or since come to the adverse attention of the Gardaí. Indeed the prosecuting Garda, Garda Bracken, referred to him as a *"good hardworking man"* with whom he never had any problems.

8. The appellant's case was that there had been a significant history of domestic violence in the relationship between his daughter and the injured party. Garda Bracken confirmed this and testified that, as a result, the appellant and his wife were often left to *"pick up the pieces"*; minding their grandchildren.

9. The Garda described the appellant's predicament as being *"a very sad situation. He's a decent hardworking man"*. The sentencing court heard that whereas the appellant may have remonstrated with the injured party on previous occasions in relation to the treatment of his daughter, he had never before reacted with physical violence. He was ordinarily inclined to repress his anger, and he was a pleasant person. The injured party in his statement of complaint had even complimented the appellant as being a great

grandfather to the children.

10. Garda Bracken told the sentencing court that there was "*a sad combination of factors at work*". He opined that the incident wouldn't have happened had the appellant been sober and but for the sad family history. As he put it, it was "*a sad occasion.....for everybody*"

11. The sentencing court had been furnished with a report of a senior clinical psychologist, Dr. Mark Fitzpatrick, dated the 30th of April 2012, that outlined the appellant's family history, including difficulties experienced by appellant's son which had let to him serving a sentence of imprisonment and which had precipitated, at least in part, the commencement of heavy drinking by the appellant. The report also recorded his daughter's experience of domestic violence, including alleged beatings at the hands of Eamon Coyne, the injured party in the course of their on-off relationship. The report also detailed the appellant's account of what occurred in the days and hours leading up to the incident, and his reaction to the perception that his daughter would be beaten again and that his children would be taken from the house contrary to her wishes. The appellant had told the psychologist that after that "everything went blank".

12. The report concluded that the appellant does not have a personal history of angry, aggressive or impulsive behaviour, the implication of that being that the likelihood of recidivism is low and his behaviour does not indicate any anti-social concern. Instead, it revealed patterns more associated with reserved and compliant personality traits. However, the appellant's stress tolerance and coping resources were assessed as being poor in the face of personal adversity, and it was of some concern that he was using alcohol as a means of compensation. He was, at the time of assessment, presenting with clinically significant anxiety and depression related concerns in reaction to life events that he felt he had little control over. He was advised to see his GP and secure onward referral to his local Community Mental Health team for medical and therapeutic intervention.

13. The sentencing judge also received positive testimonials concerning the appellant from a Mr Noel Duffy, who is a Peace Commissioner, and also from his employer, which is a packaging company with whom he had worked since 2005 as a machine operator.

The plea in mitigation
14. Defence counsel in presenting a plea in mitigation had urged the sentencing court to have regard to the following potentially mitigating circumstances.

☐ The appellant had reacted to his own understanding of what was happening and he had essentially been provoked, although it was accepted that his actions had been disproportionate to any perceived provocation;

☐ The provocation concerned had been received by the appellant in circumstances where he was significantly under the influence of alcohol at the material time.

☐ The background to the matter was (i) an issue within the family concerning the appellant's son that had led to the appellant developing a difficulty with alcohol which was ongoing at the time, and (ii) a troubled relationship between the appellant's only daughter and her partner, in which she had been previously subjected to domestic violence on a number of occasions. Against that background, the abusive and implicitly threatening phonecall received by the appellant's daughter from her partner, the receipt of which was witnessed by the appellant, had been "the straw that broke the camel's back";

☐ That what had occurred was completely out of character for the appellant;

☐ That there had been cooperation and an immediate acceptance of responsibility;

☐ That there had been an early plea of guilty;

☐ That the appellant had shown genuine remorse;

☐ That the appellant was normally law abiding and compliant;

☐ That the appellant was not a danger to anyone and represented a low risk in terms of re-offending;

☐ That the appellant was a good family man and a much loved grandfather;

☐ That the appellant had no previous convictions and was of previous good character.

The sentencing judge's remarks
15. Having described the circumstances of the offences as established in evidence, the sentencing judge went on to say:

"There are many concerning factors in the case. There is no doubt that Mr Coyne and Mr Hynes did not get on. That's confirmed by both. It would appear that Mr Hynes was protective, and indeed maybe overprotective of his daughter, and there is nothing wrong with that. But if there's an action, it should not be an overreaction and any behaviour should be proportionate, should not be disproportionate. Mr Hynes, having regard to what occurred on the night, was coming back to the house to sort Mr Coyne out. Why would a person bring the bayonet type knife with him at all? Why did Mr Hynes have to bring the bayonet knife with him, which is a serious article or weapon? If he wanted to sort Mr Coyne out it could be verbally and indeed the best course would have been not to go near the house on the night in question, but in doing so I'm satisfied that he was motivated by bad feelings towards Mr Coyne. He was motivated by animosity towards Mr Coyne, and these factors caused him to completely overreact. His reaction was completely disproportionate in the circumstances. When entering the house, he had this knife. It appears there was no words exchanged, but he went immediately for Mr Coyne. The multiple stabbings indeed represented a type of frenzied attack, but there were multiple stabbings. The contention that it was for scare tactics -- maybe initially, going to the house, but when you stab a person once and when you stab a person multiple times, six times, then scare tactics do not exist. It is -- because it turns into actual stabbings.

He had a very excellent character prior to this offence, but one must have regard to the actual circumstances and

factual circumstances which occurred on the date in question, and they were, as I see it from the circumstances of the case, there was a row going on. Mr Hynes decided that he would deal with Mr Coyne. In doing so he brought the bayonet from his own house to the house. Within the house, he immediately attacked and assaulted Mr Coyne with the bayonet knife. Mr Coyne was in a helpless and hopeless situation when confronted by Mr Hynes, who had a serious weapon in the form of a bayonet, and then the assault turned then to be multiple stabbings of the bayonet resulting in serious injuries to Mr Coyne. Whatever words were exchanged, whatever circumstances existed on the date in question, they should have been left alone and at rest. If that was the situation Mr Hynes would not be before the Court today, but more importantly, the victim, Mr Coyne, would not have been savagely assaulted and would not have received the same injuries. The attack with the bayonet knife can only be described -- and I describe it as a vicious, savage assault by Mr Hynes on Mr Coyne, and of course the effects on Mr Coyne being not only the physical but the psychological effects, being attacked in such a manner and with a bayonet knife.

16. At this point, and reflecting best sentencing practice as endorsed by this Court, the sentencing judge moved on to consider the range of available penalties for the two offences in question, noting that there was a potential maximum penalty in each case of five years imprisonment, and then proceeded to assess, with reference to those ranges, where on the spectrum the offences ought to be located in terms of their seriousness. He rated the s.3 offence as being *"at the highest level, range in respect of the maximum sentence"*, and, similarly, rated the s.11 offence as being *"in the higher range or level in respect of the maximum sentence."* Although the sentencing judge did not indicate precisely how he was subdividing the spectrum it seems reasonable to infer that in expressing the views that he did that he had in mind at least a three way division involving a lower range, a mid or middle range, and a higher range.

17. The sentencing judge then went on to say:

Then I must have regard to Mr Hynes's personal circumstances. He is now aged 61-years-of-age. He's a married man with a grown up family. He has a very strong work history. He works -- my apologies -- I think it was described as working in the printing trade, but there is a letter from Craftpak that states that Mr Hynes has been employed in his capacity as a machine operator, a maintenance supervisor with Craftpak Protective Packaging Limited since January 2005, and obviously he has a very strong work history and is an excellent worker and has an excellent work record. In mitigation there was a plea of guilty. He fully co-operated with the investigation and made admissions. He has expressed remorse. He had never come to the attention of the guards prior to or subsequent to this offence or offences and has no previous convictions. Garda Bracken, who knows Mr Hynes, expressed the view that he is unlikely to appear before the Courts again, or come before the Courts again."

18. A little bit later on in his sentencing remarks, the sentencing judge acknowledges failing to mention earlier the psychological report when dealing with the appellant's personal circumstances, and stated:

"I've also read the report of Dr Mark Fitzgerald on behalf of the defence; he is a clinical psychologist. I have read the report in respect of Mr Brian Hynes. I should have referred to it that on the date in question he certainly had alcohol taken. He may well have had excessive alcohol taken but that is not a mitigating or an excusing factor. If you drink alcohol you have a duty to yourself to behave yourself and in addition you have a duty, and more importantly, to the public and in this particular incident to Mr Coyne. I should have referred to it, but I just -- by reason of the background information relevant to what happened on the night."

19. Having reviewed the appellant's personal circumstances, the sentencing judge then refers to the aggravating factors in the case, principally the viciousness and savagery of the attack, which he had earlier correctly characterised as being "frenzied" and the fact that a bayonet or knife had been used in its perpetration. However, he then adds:

"Then I must have regard to the seriousness of the offences and to the aggravating factors, and they are substantial aggravating factors in the case, and balance them against the mitigating and the personal circumstances, and I will have regard to the mitigating and the personal circumstances, but these are very serious offences and indeed in the Court of Criminal Appeal, in particular, there is a decision of Mr Justice Murray when he was the Chief Justice, expressing an opinion in respect of the seriousness of offences involving knives, and of course, this is a bayonet knife and it's in the category of a knife which puts this case into an extremely serious category."

20. The judge then concluded by saying:

"In respect of count No. 1 I'm imposing a four-year custodial prison sentence. In respect of count No. 3 I'm imposing a four-year custodial prison sentence, both sentences to run concurrently from today's date. I will give him some light, but my hands, I feel -- my hands are tied having regard to the substantial aggravating factors, the multiple stabbings, the type of weapon that was used, and even allowing and giving him every credit which I have for the mitigating and the personal circumstances, and even allowing for the existing background leading up to this offence - that is not an excusing factor - I'm giving him the benefit of all possible mitigating and personal circumstances, but a custodial sentence must be imposed to reflect the seriousness of the offence. But in respect of the four years, in respect of count No. 1, I suspend the last 18 months, and in respect of count No. 3 I suspend the last 18 months of the four year sentences, so the four years, they run from today's date, they run concurrently, but I'm suspending the last 18 months in respect of each of the sentences, which means in reality that he will be facing a two-and-a-half year custodial prison sentence, and obviously I've no doubt that, having regard to his good character, there will most certainly be remission, but it is an extremely serious offence."

Submissions on behalf of the appellant

21. Counsel for the appellant has identified a number of matters that he says representing errors of principle in the sentencing process in this case.

22. Though it does not appear in the written submissions filed on behalf of the appellant, counsel for the appellant complained that the way in which the sentencing judge took account of aggravating factors in the case was contrary to established sentencing principles. Counsel submitted that the correct treatment of aggravating factors was to have regard to them in assessing the seriousness of the offence for the purpose of determining what should be the appropriate headline sentence before giving any discount for mitigation. It was contended that once an appropriate headline sentence had been determined, taking into account aggravation, aggravating factors could have no further relevance in the sentencing process. In this case, however, the sentencing judge appeared to have measured seriousness initially without reference to aggravating circumstances, then to have considered the

mitigating circumstances, and only then to have looked at aggravating circumstances, stating that what was required was to "*balance them against the mitigating and the personal circumstances*".

23. The first complaint made in the appellant's written submissions is that the sentencing judge erred in that having articulated a view that a sentence of imprisonment at the highest end of the (five year) scale on each count was the appropriate sentence to impose, he selected four-years as the tariff, but he did not reduce that in any way to reflect the characteristics and circumstances of the appellant. The written submissions go on to submit "that the only thing the Judge did to reflect all the mitigating factors and *'to give him some light'* was to suspend eighteen months of the sentences that he had already determined to be the appropriate sentence based on all the factors including what he determined to be aggravating factors" (underlining by the Court). It bears commenting upon that this position is ostensibly inconsistent with the contention made in oral submissions that the sentencing judge measured seriousness initially without reference to aggravating circumstances, unless the argument being made in the written submissions is to be treated as a plea advanced "further and in the alternative" in the event that the Court should conclude that the construction which counsel sought in oral argument to put on the sentencing judge's remarks is not a tenable one. The Court therefore proposes to treat the argument made in the written submissions as being a fall back position.

24. It was further submitted that in pitching the offences at the highest level on the scale, the Judge erred and thereafter, whereas he mentioned the personal circumstances of the appellant, he did so in a very superficial way and failed to have full and proper regard to all of the appellant's circumstances.

25. Furthermore, it was submitted, the judge erred in determining that the manner of the assault and the production of the bayonet were "serious aggravating factors". These were the precise circumstances and contours of the underlying index offences charged and cannot be and were not at the one and same time, "aggravating factors", and they certainly were not serious aggravating factors. An assault and the production of a weapon cannot properly be considered to be aggravating factors in a charge of assault and production of a weapon.

26. More particularly, it is complained that the sentencing judge, having noted in his judgment that "*[T]here are many concerning factors",* in particular, the disproportionate nature of the appellant's over-reaction, and the multiple stabbings, he then perpetrated a significant error of principle by stating "*He had a very excellent character prior to this offence, but one must have regard to the actual circumstances*". That, according to the appellant's written submissions, "demonstrably exalted the judge's perception of the circumstances of the offence to a level well above and/or in disregard of the personal circumstances of the appellant, matters that deserved a more proportional weighting".

27. It was further complained that whereas the sentencing judge expressed himself satisfied that the appellant was motivated by bad feelings towards Mr. Coyne, "*an animosity that caused him to completely overreact*" the judge failed to have any or proper regard to it being "an over-reaction", the underlying reason for this, the spontaneity of it and/or just what ultimately caused the appellant to snap. In that respect the sentencing judge had no or had inadequate regard to the significant provocation to which the appellant had been exposed and he failed to properly analyse the appellant's reaction in the context of his past history and the psychological report.

28. Counsel for the appellant further submitted that the sentencing judge perpetrated a cardinal error of sentencing when he determined "*that a custodial sentence must be imposed to reflect the seriousness of the offence".* It was submitted that there was no such obligation and in indicating "*I feel – my hands are tied*" the sentencing judge incorrectly determined that he did not have discretion in the matter and/or he unduly fettered that discretion. It was urged upon this Court that whereas the appellant does not seek to downplay the incident or at all resile from his apology or from his embarrassment, all the circumstances of the case, particularly the appellant's own personal circumstances should have been more fully and properly factored into the equation and balanced in the sentencing process. In concluding that there must be a custodial sentence "*to reflect the seriousness of the offence"*, the sentencing judge fell into error and fundamentally breached proper sentencing principles.

29. It was further complained that the sentence lacked proportionality. In addition, it was said that the sentencing judge placed undue emphasis on the remission to which the Court considered the appellant would become entitled in light of his good character, that being something that is a matter for the executive and which does not properly fall for consideration in the sentencing of an offender.

Submissions on behalf of the respondent

30. It was submitted on behalf of the respondent that the issue of rehabilitation of the accused did not arise as a factor that required to be considered on the facts of this case, as it was accepted that the accused was a man of entirely good character before this crime, and there was no indication that he would be otherwise after he had served his sentence.

31. Turning to the issue of provocation as a potential mitigating factor, counsel for the respondent submitted that in examining the law in relation to crimes, provocation, and resultant sentences, the issue of deterrence is an important factor. The Court's attention is drawn to *'Sentencing Law & Practice'*, Second Edition, by Thomas O'Malley, where the author states at para 6-60:

> 'While recognising provocation as a partial defence to murder and as a ground for mitigating sentence, courts in Ireland and Britain have stressed that the law expects a certain degree of restraint and self control from everyone'.

32. O'Malley further goes on to refer to the judgment of Hardiman J in the case of *The People (Director of Public Prosecutions) v. Murphy* (unreported, Court of Criminal Appeal, July 8th 2003), and quotes the following passage from that judgment:

> "This measure [i.e. the imposition of lengthy custodial sentences] is necessary in the interest of the protection of society as a whole and in particular the reinforcement of the basic social norms which require from every citizen a measure of self restraint without which social and community life would be quite impossible".

33. Counsel admits that the *Murphy* case had radically different facts to those of the present case, involving as it did the manslaughter of three innocent ladies who were sisters, following the accused's own rage at being expelled from a bar. Nevertheless, he has submitted that there was no error of principle by the sentencing judge in the present case in stating that a sentence of imprisonment at the highest end of the scale applicable to each count was appropriate, as the facts of this case reveal that (a) the attack was premeditated in the sense that the accused left his own house with a knife to go to the victim's house; (b) that the attack was in the nature of a frenzy, as the accused inflicted six stab wounds on the injured party's leg; and (c) that the provocation such as it was, was not made directly to the accused himself at that time or at that place.

34. Counsel for the respondent contends that there was no error of principle by the sentencing judge in determining that the manner

of the assault and the production of the bayonet were "serious aggravating factors". It was submitted that to say otherwise was not realistic, and was not a proper assessment of the actuality of the events.

35. Counsel for the respondent also takes issue with the complaint that the sentencing judge perpetrated a significant error of principle by over emphasising his perception of the circumstances of the case to a level which disregarded the personal circumstances of the appellant, and has submitted that this complaint is unfounded. It was submitted that a sentencing judge is entitled to, and indeed must look at, the circumstances of the offence, i.e. the actual facts of the offence, to determine the appropriate tariff in relation to the offence, and thereafter, the sentencing judge takes into account the mitigating factors which may include the personal circumstances of the accused.

36. Finally, it was submitted that that the appellant was being somewhat selective and was not affording due credit to the sentencing judge's assessment of the offence and the offender, and all the surrounding circumstances of the case, as reflected in his decision to suspend the final 18 months of the 4 year sentence imposed on the appellant.

Discussion and Analysis

37. In every sentencing process the court concerned is required to deal with a two part equation. The first part concerns the assessment of the seriousness of the offending conduct with reference to the spectrum of available penalties, and measured with reference to both moral culpability and harm done. It is on this side of the equation, and only this side of the equation, that aggravating factors are to be taken into account.

38. If a court sees fit to take aggravating factors into account it must first identify in its own mind where on the spectrum of available penalties the case ought to be located without taking account of the aggravating factors, and secondly it must then shift the position of the case on the spectrum somewhat towards the more serious end of the range so as to take account of the aggravation.

39. It is only after the seriousness of the offending conduct has been measured, taking due account of aggravating factors, if any, so as to identify an initial headline sentence, that the court then moves to the other side of the equation and completes the sentencing process by appropriately discounting from that headline sentence to take account of the mitigating circumstances in the case.

40. This Court has given careful consideration to the totality of the sentencing judge's remarks. It is clear that the sentencing judge sought to follow best practice in constructing his sentence. He had appropriate regard to the range of available penalties, and in fixing where on the spectrum the offences were to be located he duly considered the seriousness of the offending conduct in respect of each count and factored into his consideration those matters that he regarded as aggravating factors.

41. It is necessary to say something about aggravating factors and the way in which they are to be taken into account. Aggravating factors are factors separate from the specific ingredients of the offence that either tend to increase moral culpability, or which indicate that greater harm than might otherwise have been expected was in fact caused.

42. In the case of an assault causing harm neither the fact of an assault having been perpetrated, nor the causing of harm, could be regarded *per se* as being aggravating factors. However, the nature and/or manner of perpetration of an assault, including the fact that a weapon was used, could aggravate it. Equally, an exceptional degree of actual harm caused could aggravate it.

43. In the case of an offence of producing an article capable of inflicting serious injury in the course of a dispute or a fight and in a manner likely unlawfully to intimidate another person, neither the production of an article per se, nor the fact that it occurred in the course of a dispute or fight per se, nor the fact that it was produced in a manner likely unlawfully to intimidate another person per se, could be aggravating factors. However, the precise nature of the article could be an aggravating factor, and whether or not that article, it having been produced in a dispute or fight, was in fact used and the manner of its use, could all be aggravating factors. Moreover, whether another person was in fact intimidated or injured by its production, and the degree to which that was the case, are matters that are all also capable of aggravating the offence.

44. One of the complaints that the appellant makes is that "the sentencing judge erred in determining that the manner of the assault and the production of the bayonet were serious aggravating factors". We find no error in this. The assault was sustained and frenzied, using a weapon that the appellant had purposely and deliberately armed himself with and had brought to the scene. These were clearly relevant factors bearing adversely on the question of moral culpability so as to aggravate the offence. Moreover in relation to the production offence, the "article" produced was manifestly a potentially lethal weapon, being a bayonet, and it was produced in the course of a dispute or fight not just with a view to frightening or intimidating another person but was actually used, multiple times, to inflict multiple injuries on the victim. Again, these were clearly relevant factors bearing adversely on the question of moral culpability so as to aggravate the offence.

45. The sentencing judge fixed the headline sentences, after taking due account of aggravation, at four years (out of a potential ranges of five years) in the case of both offences. Once again, despite the appellant's complaint that the sentencing judge located these offences too far along the scale of seriousness in each instance, we find no error of principle. The sentencing judge characterized the attack as constituting *"a vicious savage assault on Mr Hynes"* and we are satisfied that that was an apposite description of the offending conduct, and that in principle the seriousness of it would have merited the imposition of significant custodial sentences. In our assessment the sentencing judge was right to locate each of the offences as meriting a headline sentence at the high end of the spectrum of available penalties, and we find no fault with his selection of headline sentences of four years in each case.

46. It is, of course, well established that a sentencing judge cannot confine his or her considerations to the seriousness of the offending conduct, and that the personal circumstances of the offender must also be taken into account so as to yield up what is ultimately a proportionate sentence. As was stated by Barron J in *The People (Director of Public Prosecutions) v McCormack* [2000] 4 I.R. 356 at 359:

> "The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused."

47. It was therefore necessary for the trial judge to take account of the personal circumstances of the appellant, and having done so to make an appropriate discount to the headline sentences that he had fixed upon so as to arrive at a just and proportionate ultimate sentence. The appropriate weighing of mitigating factors is no less important than the appropriate assessment of the seriousness of the offence. The appellant complains that the mitigating factors in the case were not in fact properly weighed and assessed, because the judge felt that the case was so serious that he hands were effectively tied and that, regardless of any mitigation, only a

significant bottom line custodial sentence was going to be appropriate.

48. In advancing this ground, the appellant makes, in effect, the complaint that, although he may have followed best practice up to that point, the sentencing judge can be clearly identified as departing from it at this juncture. The contention is that once he had selected his headline sentences he did not then proceed to an open minded and appropriate engagement with the considerable mitigating circumstances in the case. Rather, his next step was instead to consider where he wanted to end up, having regard to what was in effect his prejudged view that only a substantial bottom line custodial sentence was going to be appropriate. The suggestion is that the trial judge in effect decided where he wanted to end up, i.e., at thirty months, then subtracted that figure from the headline sentences of forty eight months (four years) that he had selected, and by this process of reverse engineering determined that such mitigation as there was in the case should be reflected by the suspension of the last eighteen months of the headline sentences.

49. In substance, the appellant contends that the sentencing judge, in approaching the matter on the basis that his hands were tied, fettered his own discretion. It was contended that he was required to be open minded in any proper assessment and weighing of the mitigating factors in the case, and that he ought to have been prepared to go wherever that exercise might take him, without pre-judgment or preconceived notion that no outcome other than a substantial bottom line custodial sentence would be appropriate.

50. In considering this argument it needs to be stated that it is beyond peradventure that there were very substantial mitigating factors in this case. The suspension of the last eighteen months of the headline sentences of forty eight months (four years) represented an effective discount of 37.5% which was intended to reflect all of the mitigating factors in the case. As is not unusual, there is no break down of this figure which might have indicated, in terms of the sentencing judge's arrival at this figure, precisely what weight he actually attributed to any particular factor or factors. It also has to be borne in mind that, in any case where there are multiple mitigating factors, the ultimate figure to be applied by way of discount will never, or very rarely, be the sum of its individual component parts and that, in effect, a totality of mitigation principle is applied in practice, somewhat analogous to the totality principle that is required to be operated in any consecutive sentencing exercise. This ensures that the ultimate sentence is proportionate both to the offence and having regard to the circumstances of the offender.

51. In this case there was the early plea of guilty, and the appellant's co-operation and admissions, and his expressions of remorse, factors which in themselves would ordinarily give rise to a substantial discount, even in a clear cut case, on account of the saving of court time, the removal of the risk associated with any trial, the acknowledgment of wrong-doing and as being indicative of genuine remorse.

52. In addition, a very important factor was the appellant's previous good character, and the fact that he was a first time offender and had previously lived for some 59 years without ever obtaining a criminal conviction. The courts have always treated first time offenders with considerable leniency. Acknowledging this, the Court of Criminal Appeal said in *The People (Director of Public Prosecutions) v Kelly* [2005] 1 ILRM 19 (at p.33):

> "…,the court clearly has to give very considerable weight to the absence of previous convictions. Professor O'Malley in the work already cited says at pp.187–188:
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> > 'It is widely accepted, even by ardent retributivists who would insist that punishment would be strictly proportionate to the crime, that previous good character justifies mitigation … there was a general policy that penal servitude, when it existed as a distinct form of custody, should not ordinarily be imposed for a first offence unless it was particularly serious. Today the same policy would apply to imprisonment and, when a custodial sentence is imposed, the absence of previous convictions provides a valid ground for making it as short as is at all consistent with the gravity of the offence … .' "

53. There was then in this case the undoubted provocation presented to the appellant by the abusive and threatening phone-call made to the appellant's daughter by the injured party, against a background of her being the victim of significant previous domestic violence at the hands of her partner, and in circumstances where the appellant's inhibitions had been lowered by alcohol. It is necessary to say something more about all of this.

54. The trial judge was absolutely correct in his statement of the general rule which is that excessive alcohol consumption is not a mitigating or excusing factor when it comes to sentencing. However, in the case of many general rules there may exceptions to the rule, or perhaps more commonly a requirement that the rule be applied in a nuanced and sensitive way which in some cases may result in a less than rigid or absolute application of the rule. That is in fact the position in relation to intoxication by alcohol or other substance as is clear from '*Sentencing Law & Practice'*, Second Edition, by Thomas O'Malley. Mr O'Malley, at paras 6-56 & 6-57, makes the following statements, which we endorse and approve of as being correct in principle:

> "Intoxication may function as a mitigating, aggravating or neutral factor depending on the circumstances. Courts are obviously reluctant to treat it as a mitigating factor, especially when the crime committed was of a violent nature. It is only when there is evidence of the offender having acted out of character as a result of the intoxication that some mitigation may be allowed on that account."
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> "Courts [in other jurisdictions] have also been prepared to accept that as a result of intoxication an offence was spontaneous rather than premeditated, which in turn may justify some mitigation. In a similar vein, the Irish Court of Criminal Appeal in *People (Attorney General) v McClure* [1945] I.R.275 accepted that the consumption of a large amount of whiskey to which the appellant was unaccustomed strengthened the view that the gross indecency offence of which he was convicted was "an exceptional lapse". The same argument can sometimes be made on behalf of a person of previous good character who uncharacteristically commits criminal damage to property, a public order offence or a minor assault while under the influence of drink and who was previously unaware that alcohol might incline him to behave in that way. Sentences have occasionally been reduced or suspended in these circumstances. As a rule, however, voluntary intoxication does not provide any mitigation."
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> "Furthermore, courts throughout the common law world are displaying increasing intolerance towards pleas for leniency in respect of serious offences, especially sexual and other violent offences, committed while the offender was intoxicated. This is not necessarily incompatible with the approach adopted in McClure … where leniency was granted, not so much because of intoxication, but on foot of the evidence that the offender was acting distinctly out of character at the material time."

55. As to the provocation aspect of the matter, provocation is a well established ground of mitigation. That having been said, the law

expects members of society to behave with restraint and exercise self control. There is a distinction to be drawn between genuine provocation and unwarranted outbursts of anger.

56. In *The People (Director of Public Prosecutions) v. Murphy,* relied upon by the respondent, that was the approach taken by the Court of Criminal Appeal. However the circumstances of that case, as acknowledged by counsel for the respondent, were far removed from the circumstances of the present case. In the Murphy case the applicant had been convicted of three counts of manslaughter and sentenced to an aggregate term of 14 years' imprisonment. He had set fire to house on an island off the coast of County Galway and three elderly sisters had died in the fire. Before committing this act, he had been drinking and had taken prescribed medication. He had also been expelled from a bar in which he was drinking. In his statement he had said, among other things, that he was in a rage at being put out of the bar. Referring to the evidence adduced at the trial, the Court of Criminal Appeal said that the applicant's actions were deliberate and resulted from the exercise of free will. They appeared to have been caused by a "grossly exaggerated and totally self-centred sense of resentment" at being expelled from the bar. The court accepted that the sentence was a long one for a person of his age but said:

> "We are however satisfied that very long sentences are a justified reaction to acts of unprovoked savagery which have gross consequences for the lives and well-being of innocent people. Those who yield to emotions of rage and resentment and thereby bring about the death of innocent people must realise that, as a consequence of their feral acts, tleir own lives will be gravely blighted by lengthy custodial sentences. This measure is necessary in the interest of the protection of society as a whole and m particular the reinforcement of the basic social norms which require from every citizen a measure of self-restraint without which social and community life would be quite impossible."

57. We consider that the evidence in the present case was strongly indicative of the loss of self control that accompanies genuine provocation rather than any self indulgent outburst of extreme rage. The appellant had no history of anger management issues. Rather, the evidence was all one way that he had a tendency towards passivity. The prosecuting Garda said that he was ordinarily inclined to repress his anger and was a pleasant person. Moreover, Dr Fitzpatrick said that the appellant does not have a personal history of angry, aggressive or impulsive behaviour, and that he does not give rise to any anti-social concern. Rather his behavioural history revealed patterns more associated with reserved and compliant personality traits. In addition, it is clear that what occurred, occurred against a background of the appellant having faced, in the relatively recent past, multiple significant adversities in his life, including having to cope with his son's difficulties with the law, and his daughter's stormy marital relationship in which she was frequently subjected to domestic violence at the hands of her partner. The psychological history as presented by Dr Fitzpatrick indicates that these adversities may have precipitated the commencement of heavy drinking by the appellant. While drink was clearly no answer to his problems, the underlying adversities that he faced, and his otherwise poor coping mechanisms as identified by Dr Fitzpatrick, provide at an explanation for it.

58. It is clear that what occurred on the night of the incident was utterly out of character for the appellant, who up until that point had lived a good and blameless life. The impressive testimonials produced by him, and indeed the clear sympathy for his predicament evident in the testimony of the prosecuting Garda, all speak to the fact that this was so.

59. We consider that on any view of the available evidence this was an exceptional case involving, as it did, a significant genuine provocation offered to a psychologically vulnerable party who had commenced using drink as an ill conceived, and indeed ill advised, coping mechanism for dealing with multiple adversities in his life, and who at the time of the index offence was in fact intoxicated. These various circumstances form the background to his loss of self control, and in our view were, in the circumstances of this case, properly to be regarded as mitigating factors of which account required to be taken.

60. We have carefully considered whether, having regard to all of the significant mitigating factors identified and discussed, a global discount of 37.5% to reflect that mitigation was in fact adequate. We have concluded that it was not, and that the failure to properly reflect the mitigating factors in the case was in itself a sufficient error of principle to cause this Court to quash the sentences imposed by the court below.

61. We find a further error of principle in the taking into account by the sentencing judge of the likely remission to be earned by the appellant in respect of any sentence imposed upon him. Remission is a matter for the executive (see *O'Neill v Governor of Castlerea Prison* [2004] 1 I.R. 298) and it has been stated many times by the former Court of Criminal Appeal to be an irrelevant consideration in sentencing.

62. It is not necessary in the circumstances for the court to proceed to make any further express findings with respect to the actual process engaged in by the sentencing judge which led to his insufficient discounting for mitigation. It is sufficient to state as a matter of general principle that in the sentencing process, once the headline sentence has been determined, there must be a real engagement by the sentencing court with any mitigating circumstances in a case, involving assessing and affording a proper weighting to those mitigating circumstances, and the calculation of the appropriate discount without any prejudgment or preconception as to what should be the outcome.

63. This Court must now set aside the sentences of four years with eighteen months suspended imposed by the court below, and proceed to re-sentence the appellant. In accordance with established jurisprudence counsel on both sides were invited to place before the Court any additional materials that they might wish to have taken into account in the event of the Court having to proceed to a re-sentencing.

64. That was done and in the appellant's case certain additional materials were placed before the Court, and in particular a psychiatric report from a Dr Denis Murphy, Consultant Psychiatrist dated the 22nd of January 2016, testifying as to the appellant's current mental health status. The Court has had due regard to this additional material and takes it into account together with all of the materials that were put before the court below.

65. We have already indicated that the appropriate headline sentences are four years as determined by the sentencing judge. However, on the personal circumstances side of the equation, we consider that the very considerable mitigating circumstances of the case justify a discount of two years and six months from the headline sentences of four years in each instance.

66. While it is acknowledged that the appellant has no previous history of offending, and that he has been assessed as being at low risk of re-offending, this Court does not accept the respondent's view that there is no need to incentivize rehabilitation in this case.

67. The appellant is in the predicament that he is in, at least in part, because, up to the date of the index offences, issues in his life, including his alcohol consumption, had not been properly addressed. The Court understands that since the incident he has now taken, and proposes to continue to take, appropriate measures to address those issues. While we are confident as to his *bona fides* in that

regard we consider that the appropriate way of effecting the required discount is to impose sentences of four years imprisonment but to suspend the final two years and six months thereof. Structuring the sentence in this way serves to emphasise this Court's view of the seriousness of the offences on the one hand, while both appropriately discounting for mitigation and incentivising continued rehabilitation on the other hand.