THE COURT OF APPEAL

Edwards J.
Kennedy J.
Donnelly J.

Record No: 190/2019

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

P. O'D.

APPELLANT

JUDGMENT of the Court delivered on the 19th day of October, 2020 by Mr. Justice Edwards

Introduction

1. On the 6th of March 2019, the appellant was convicted before the Central Criminal Court sitting in Cork of a single count of rape contrary to common law and as provided for in s. 48 of the Offences Against the Person Act, 1861, and s. 2 of the Criminal Law (Rape) Act, 1981, as amended by s. 21 of the Criminal Law(Rape)(Amendment) Act 1990, which offence was said to have been committed on the 10th of May 2016.

2. On the 23rd of July 2019, the appellant was sentenced to seven years' imprisonment to date from the 6th of March 2019, being the date on which the appellant went into custody. The appellant has now appealed against both his conviction and sentence.

Background to the matter

3. The complainant in this case is S.P., and at the material time she was a 21-year-old woman from a town in the southwest of Ireland. On the date of the incident giving rise to the charge in the indictment, namely the 10th of May 2016, the complainant was staying with a young man that she had become friendly with, namely, A.Q., and his mother, L.Q., at their home located about half an hour's drive away from her own home in another town in an adjacent county. She had not known this young man for very long. They had been talking on Facebook and on the phone in previous weeks and had just begun going out as boyfriend and girlfriend. S.P. had stayed with A.Q. and his mother on one previous occasion, i.e., approximately a week previously on the night of the 4th/5th of May 2016.

4. On the evening of the 9th of May 2016, A.Q., accompanied by the appellant P.O'D., with whom he was friendly at this time, travelled by bus from his hometown to the town in the adjacent county in which S.P. lived. There they met up with S.P. and a female friend of hers, H.G., outside a Spar shop. As the two young men were of the belief that one of

them had lost a €50 note since getting off the bus, some time was spent by the group retracing their steps in the hope of finding it. They were, however, unsuccessful. At one point the young men returned to a Supervalue that they had previously entered to see if the banknote had been dropped there, and while they were doing this S.P. and H.G. went to an Aldi and purchased a bottle of vodka.

5. When satisfied that continued searching was futile, the four of them then went down to where there was a bridge over a river running through the town, and they began to share the bottle of vodka. H.G. and P. O'D. had kissed while they were drinking there. After some time, it began to rain and the group moved from the vicinity of the bridge to a train station, and continued their drinking under the shelters for waiting passengers. As that was happening S.P. texted another male friend, H.C., and asked him if he could drive the group in his car to the town in the adjacent county in which A.Q. lived. He agreed to do so and collected the group.

6. When they arrived in the town in question, H.C stopped in the first instance at a "Carry Out" off-licence. A.Q., and P. O'D. then got out of the car and went into the off-licence and purchased some more drink. H.C. then drove the group to A.Q.'s home and dropped them there. He did not go in.

7. On arrival at A.Q.'s home, the group found the house to be initially unoccupied. After about a half an hour the mother, L.Q., and A.Q.'s younger brother J.Q. arrived home. The mother was initially annoyed to find the group there, particularly as P.O'D., in respect of whom she had some (unspecified) issue, was amongst them. However, after some time she stated to S.P. and H.G. that they could stay, and she joined them for a drink and, in S.P.'s words, "*we were taking pictures and stuff*."

8. Later in the evening, H.G. and J.Q. discovered that they knew each other from Snapchat and appeared to be getting on well. However, P.O'D. seemingly became jealous of this in the circumstances where he and H.G. had been kissing earlier that day when the group was drinking at the bridge. After some time L.Q. departed to go to bed. There was sleeping accommodation in three rooms upstairs, namely L.Q.'s bedroom, J.Q.'s bedroom and a small box-room, which A.Q. used as his bedroom. L.Q. went to bed in her own room, while H.G. and J.Q. retired to spend the night in J.Q.'s bedroom. Similarly, S.P. and A.Q. retired to A.Q.'s box-room bedroom. A.Q.'s intention was that the appellant, P.O'D, would stay downstairs and sleep on the couch in the living room. To that end A.Q. threw blankets and a pillow down the stairs to P.O'D.

9. The evidence of S.P. at the trial was that the appellant had seemingly become angry on learning that H.G. and J.Q. had retired to J.Q.'s room to spend the night together. He was said to be "*mad over that*" and as bedding was being thrown down to him, he shouted up the stairs to A.Q., "*tell your brother he's a gas man for taking my girl*". A.Q. then told him not to be shouting or he would have to leave the house.

10. A.Q. then joined S.P. in the box-room bedroom and they went to sleep in the same bed, having agreed that they should not yet have sexual relations as it was too early in their

relationship. The bed was up against a wall, and S.P. went to sleep on the inside against the wall, while A.Q. went to sleep beside her on the outside. S.P. gave evidence that before settling down she had taken two medically prescribed sleeping tablets, namely Xanax. As she went to sleep she could hear "*banging and stuff downstairs*".

11. After some hours S.P. woke up. He evidence was:

> "*A. … I woke up, kind of my eyes were still closed but I was waking up and there was pain between my legs so I thought it was just me and A in the bedroom, so when I was I was after telling A the night before that I didn't want to sleep with him because I was only after getting to know him, so when I felt pain in my legs I said A, I told you I didn't want to so when I opened up my eyes and he was lying beside me and his eyes were closed, he was asleep. So, I looked down and then I looked up and P.O'D. was beside me and I got a fright, I slapped him in the face because, like, he was pulling*
>
> *Q. What was he what was he doing to you*
>
> *A. He was pulling up his pants."*

12. S.P. went on to say that she had felt his penis in her private part, by which, she later clarified, she meant her vagina. She said, "*my eyes were still closed when I first felt him put his penis inside me and he had done that twice until I opened my eyes and as soon as I opened my eyes he had stopped*".

13. S.P. further testified that on waking up she had found her own pyjama pants were pulled down, as was her underwear, and the bra strap on her top had been pulled to the side. She was pulling up her pants when she perceived the presence of P.O'D. She said that after she had slapped P.O'D. he was standing up on the bed next to the wall and he said, "*what's wrong with you. I didn't do anything*". There was evidence that at this point S.P. started shaking and slapping A.Q., who was asleep to her right in the bed, in order to wake him up and she was so vigorous in doing so that he actually fell off the bed on to the floor. The evidence was that S.P. was distressed and crying. A.Q. gave evidence that he awoke to find S.P. crying and slapping his face in an effort to rouse him, that "*he*" (i.e. P.O'D.) was standing on his bedroom floor, and that S.P. had hysterically told him that "*he was after sticking it in her twice*". A.Q.'s evidence was that he then confronted P.O'D. who initially denied it but then said, "*yes, I did do it*". A.Q. testified that in response to this account, "*I think I threw him, I threw him down the stairs, yes.*"

14. There was further evidence that the commotion coming from the box-room bedroom had been such that it had woken up L.Q. leading her to call out, "*It's only quarter to 8 in the morning, what's going on at this hour of the morning?*" . At this point S.P. ran into L.Q.'s room and jumped into L.Q.'s bed and took up a fetal position. The two women then had a conversation. L.Q. then started shouting for P.O'D. to get out of the house. Seemingly, P.O'D. had not yet been thrown down the stairs at this point but was in the course of being confronted on the landing by A.Q.

15. S.P., who could hear their exchanges, testified, "*he was walking over and back and, like, over and back the landing and he was I was shouting at him, like, and he was saying I didn't do nothing and walking over and back the landing and things like that. He was mainly saying it to [A.Q.] that he didn't do anything*."

16. The evidence was that S.P. then went to the bathroom as she thought she was bleeding, and while in the bathroom she became physically sick. A.Q. entered the bathroom to see if she was ok and then left again and stood on the landing over by his mother's bedroom door. S.P. gave the following account in her evidence as to what happened next:

> *"A. And he was at his mother's bedroom door and I was still inside in the bathroom, I was crying and leaning over the toilet and P. O'D came in behind me.*
>
> *Q. Yes?*
>
> *A. I jumped up and I kind of moved back from him, like, to the side of the toilet and I moved back and he was telling me to stop crying and, like, I was angry because after what he done he was telling me to stop crying. So, I said to him do you know what you done to me, like, why are you lying, like, you know, because he was after being swearing that I [sic] didn't do nothing to me and I know what happened to me and I said to him you know what you done to me, why are you lying and he said: "Yes, all right, okay, can we not just forget about it?"".*

17. The evidence was that A.Q. then shouted at P. O'D, "*what the fuck*", or "*are you fucking serious?*" (different witnesses recount slightly different wordings) following which P.O'D. immediately sought to resile from what he had just said, contending that "*I only said that to [S.P] to keep the peace, I didn't do anything.*" It was at this point that he was thrown down the stairs by A.Q. The evidence was that P.O'D. then left the house and that as he was doing so he was continuing to say that he had not done anything, and indeed was asking A.Q. to go with him.

18. There were others who also testified at trial that they overheard ostensible admissions by P.O'D. in exchanges with S.P.

19. In that regard, H.G. told the jury that she was sitting on the bed in J.Q.'s bedroom and could hear S.P. "*gawking as if she was going to get sick*". She testified that J.Q.'s bedroom door was open and that she heard S.P. saying to P.O'D., "*why can't you just admit it*", and that he replied, "*yes, I did it, can you not just get over it*". H.G. seemed to think that S.P. was in L.Q.'s bedroom at this point rather than the bathroom. This was because she had gone out of J.Q.'s room at one point to see what was going on, and saw S.P. at that point in a foetal position and crying in L.P.'s bed. However, at the time that she heard the ostensible admission, she could not actually see either S.P. or P.O'D. from where she was positioned on the bed in J.Q.'s bedroom.

20. The evidence given by L.Q. in that regard was that she had told S.P. to go to the bathroom. She said that while S.P. was there, S.P. said to P.O'D. "*why don't you just*

admit it". The transcript then records the following exchanges as she gave further evidence:

"Q. She asked him why don't you just admit it?

A. Why don't you just admit it, there was a lot of shouting and roaring going on, she was crying and whatever and he said all right, okay, I did now can we get over it.

Q. Okay?

A. Something to effect anyway, I know I was just shocked, I was like really and then

Q. Did you hear that yourself?

A. Yes, I did, yes.

Q. You did. And when you heard that where were you?

A. I was getting out of the bed and I was -- I'd had enough, like.

Q. No, I understand. You were getting out of your own bed?

A. I was in my own kind of room, I was waiting for her to come from the bathroom.

Q. I understand?

A. Yes.

Q. Was your door open?

A. Yes.

Q. Was the bathroom door open?

A. She was coming out, yes. They kind of met in the hallway if you know what I'm saying".

21. Gardaí were subsequently called, and upon their arrival S.P. made a complaint to them that she had been raped by P.O'D.

22. There was also Garda evidence that when, upon their arrival at the "Q" home, they had encountered P.O'D. outside the house and spoke to him, P.O'D. had made no suggestion to them, although he had the opportunity to do so, that there was a woman in the house who had falsely accused him of rape.

23. In the ensuing garda investigation, P.O'D. was arrested and cautioned, and was later detained and interviewed while in detention. There was evidence that following his arrest, and while *en route* to the garda station, he had volunteered, "*I can't believe she said that.*

We were all drinking together. We all got in to the bed together", and that "*I got into the bed beside the two of them. We were all drinking.*"

24. While being interviewed in the garda station the appellant made no admissions, but on the contrary when the statements of the complainant and the other persons who had been in the house were put to him, he flatly denied that they were correct or that he had been guilty of any wrongdoing. Further, in response to questioning he offered the following exculpatory version of events:

"Q: Who went to bed first?

A. L.[Q] went up to bed first.

Q. Was she happy to have all of you in the house?

A. She was, yeah. At first she was giving out but then she was grand about it.

Q. Did J.[Q] and H.[G.] pair off?

A. To be honest I haven't a clue.

Q. L.[Q] was gone to bed. Who went to bed next?"

A. J. [Q] and H.[G]. I think they went up to his room and they were there for the night and then the three of us were down in the sitting room for a while, me, A.[Q] and S. [P]. Then A. [Q] decided he wanted to go to bed. There's only three rooms in that house and then he said to me the three of us would go up and sleep in his bed in his room, but I told him I was happy to sleep on the floor in his room and then he said ..."No, I wouldn't do that." And then I went into the inside, he went into the middle and S.[P.] was on the outside of the bed. Then we dozed off and then in the morning all I heard was roaring and shouting saying," "You tried to touch me." And then "No, you tried to rape me" and that's when I walked out of the house because she was saying that I raped her, which I didn't. That's when I got picked up by the guards right outside A.[Q]'s house.

Q. Are you sure that's what happened?

A. I'm a thousand percent".

25. The case against P.O'D. also relied on forensic evidence. His clothing was taken for forensic analysis, as was the clothing of S.P. Both provided buccal swabs to enable their respective DNA profiles to be determined. DNA material found on the inside front of P.O'D.'s grey boxer shorts yielded a mixed DNA profile, comprised of two main contributions and one very minor contribution. Nothing of evidential value was found on the clothing of S.P. With respect to the mixture of DNA material on P.O'D.'s grey boxer shorts, Dr Lorna Flanagan of the Forensic Science laboratory testified that all the

elements present in S.P.'s and P.O'D.'s DNA profiles were present in this DNA mixture and they were not excluded as being the two main contributors. She went on:

> *"…in assessing the DNA evidence, I considered the following alternative propositions; either the mixed DNA profile has originated from [P. O'D.], [S.P.] and an unknown person or a mixed DNA profile has originated from [P. O'D.] and two unknown persons unrelated to [S.P.]. The observed mixed profile is in excess of one thousand million times more likely if it came from [P. O'D.], [S.P.] and an unknown person rather than if it came from [P. O'D.] and two unknown persons."*

26. As to the potential relevance of her findings, she further stated:

> *"So, the DNA findings provide moderate support for the proposition that [P.O'D.] had sexual intercourse with [S.P.], rather than [P.O'D.] did not have sexual intercourse with [S.P.] but was in her company. I've chosen the phrase moderate support from the following scale; weak support, moderate support, moderately strong support, strong support, very strong support and extremely strong support."*

27. The appellant did not give evidence at the trial.

The Grounds of Appeal Against Conviction

28. The notice of appeal pleads the following grounds of appeal against conviction:-

a) The said conviction is unsafe and unsatisfactory in that the trial judge erred in law in refusing the appellant's application for a direction in the case.

b) The trial judge erred in law and in fact in refusing the appellant's application to rule a purported admission made by him in [A.Q.'s home] in the immediate aftermath of the alleged rape having occurred on the 10th of May 2016 as inadmissible in evidence.

c) The trial judge erred in failing to withdraw the matter from the jury as per the principles set forth in *P. O'C v Director of Public Prosecutions*, or alternatively to discharge the jury and to adjourn the trial in circumstances where the Gardaí had taken a toxicology sample from the injured party not long after the alleged offence occurred, and evidence was given at the trial by the injured party that she had taken two 25mg tablets of Xanax some hours prior to the offence having taken place (same not being in her statement of evidence and consequently the appellant could not have known this prior to the evidence having been given), the factual scenario of the case being one where the accurate recollection of the injured party of the offence was a central plank of the prosecution case.

29. In her written legal submissions in support of this appeal counsel for the appellant has addressed grounds (b) and (c) first, before addressing ground (a). We are happy to do likewise.

Ground (b): the controversial admission

30. The appellant complains that the trial judge was incorrect to have admitted the evidence as to the ostensible admission made by P.O'D. during his exchange with S.P. in the bathroom of the "Q" home on the morning in question. His counsel has submitted that the alleged admission was made by the appellant in oppressive circumstances, in circumstances where he was frightened, under pressure and in a very volatile atmosphere. Accordingly, she says, its reliability was suspect and to have admitted it offends the required standards of fairness which must be observed in the administration of justice - per *The People (Director of Public Prosecutions) v Shaw* [1982] I.R. 1.

31. There was no reliance on the Shaw principles in the application before the trial judge. Rather, the case that was made was that it would be unfair to characterise what was said as an admission at all, in circumstances where the appellant had almost immediately afterwards said "*Look, I only said that to keep the peace. I didn't do nothing.*" The point was made that the atmosphere in the house on the night was highly charged, to such a degree that when the Gardaí arrived J.Q. needed to be subdued with pepper spray. As it was characterized, "*there was extreme tension and angst in the property.*" Counsel submitted:

> *"So, what I am saying to the Court is insofar as there were words spoken by my client which might be taken as an admission, they were not, in fact, an admission and to allow it to go in in that format would, I think, be unfair and would prejudice my client in an unfair fashion."*

32. We do not accept that the *Shaw* principles were engaged in the circumstances of this case. These relate to statement evidence obtained by state action which, although technically voluntary, ought nevertheless to be excluded because the manner or circumstances in which it was obtained has fallen below required standards of fairness. The circumstances of the present case are far removed from any such situation. There was no Garda or agent of the state present when the alleged admissions were made.

33. No case was made at the trial that the admission made, but which was quickly withdrawn, was an involuntary one, or one that was coerced by oppression, fear or pressure. The only case made was that in the fraught circumstances in which the words were spoken, they could not fairly be relied upon as an admission at all.

34. The trial judge ruled:

> *"Well, the Court is dealing with admissibility, it's not dealing with the weight of the evidence or how the juries deals with it and on the face of it the context of the allegation is that [S.P.] has said that she was asleep in the box room of this dwelling house, that [A.Q.] was asleep beside her and that she woke up and she recalls what she has given in evidence in the witness box and that immediately thereafter she went into [L.Q.]'s room and that she shortly thereafter went into the bathroom and that, effectively, [P.O'D] was there and that she confronted him again on the basis that saying to her that he knew what he had done and asked said to her why are you lying about it and she has said that he made a response*

which is in the form of an admission, but immediately withdrew the admission. I mean, the only legal principle that the Court could look at it from the point of view of excluding it is that its prejudicial nature outweighs its probative value but, I mean, it is highly probative to the prosecution and it's an admission adverse to interest even though subsequently immediately withdrawn, in my view it doesn't go to -- it is admissible and the issues raised by Ms Lankford go to the weight of the evidence, that he said it in a fraught circumstances and immediately withdrew it and that's a matter for the jury to consider but, I mean, the jury are quite entitled to hear it."

35. We are satisfied that the trial judge was entirely right to rule the evidence to be admissible. The mere fact of the existence of a fraught atmosphere in the house, in circumstances where a member of the household was claiming to have been raped, would not constitute evidence so supportive of a possibility that the alleged rapist could have felt pressured or coerced to admit his crime, as to raise a reasonable doubt in the judge's mind as to its voluntariness such as would have justified ruling it inadmissible. The words spoken were clearly capable of being construed as an admission. The immediately precipitating circumstance appears to have been the distress of the complainant and her entreaty to P.O'D. to admit what he had done. There was nothing oppressive or coercive in this. The appellant later contended that he had felt obliged to admit what she was alleging he had done, so as to "to keep the peace". However, any objective assessment of that evidence would recognise the possibility that, in circumstances where he might be guilty, he could also have done so in the hope that having obtained his admission S.P. would then drop the matter. His actual words in making the admission were, "Yes, I did do it **but can we not forget about it**" (our emphasis). The proper course was to allow the jury to consider the competing versions of what had occurred, and to consider what had been intended. There was absolutely no unfairness in doing that. It was quintessentially a jury matter. There was no sufficient legal basis for excluding the evidence. It was ostensibly voluntary and uncoerced, and while undoubtedly potentially prejudicial to the defence it was manifestly also potentially probative. In our view the trial judge was right to admit the evidence.

36. We therefore reject this ground of appeal.

Ground (c): the toxicology point

37. The complaint here revolves around the fact that samples for possible toxicology testing were taken from the complainant in the course of her examination at a sexual assault treatment unit (SATU) following her report to Gardaí of having been raped. The defence were on notice of the fact that there had been a SATU examination, but seemingly did not appreciate that toxicology samples were amongst those taken in the course of that examination and that these had been included in the SATU kit that was forwarded to the forensic science laboratory for forensic examination. The Garda who was present at the SATU examination, and who received the SATU kit and in due course passed it on to the forensic science laboratory, was asked why toxicology samples were taken. She was unable to say but conceded that they were usually taken to determine the level of

intoxication. It was clearly understood by both counsel and the witness that she was referring to intoxication with alcohol, because the witness was further asked, "*And would it test for other substances*", to which she replied, "*I'm not aware*". The evidence was that the Gardaí received no report from the forensic science laboratory concerning the toxicology samples taken from the complainant. The evidence was silent as to whether the toxicology samples taken were even tested, and if so for what.

38. Counsel for the appellant attaches importance to this in circumstances where the complainant had admitted in cross-examination that she had taken two prescribed Xanax sleeping tablets prior to going to sleep against a background of also having been drinking throughout the evening. It is complained that the defence had not been on notice prior to the commencement of the cross-examination that the complainant had taken sleeping tablets and that if they had known that they could have investigated the possible effects of a combination of Xanax and alcohol. It is suggested that if the toxicology samples had been analysed and reported upon, and that report disclosed to the defence, they would likely have been made aware of the Xanax issue and would have had an opportunity to investigate and explore it. The absence of notice prevented them from doing so. This was said to have been unfair, and it is said that the trial judge ought to have withdrawn the case from the jury on that account in reliance on *P. O'C. v Director of Public Prosecutions* [2000] 3 I.R. 87.

39. We are not persuaded that there was any unfairness such as would have required the trial judge to withdraw the case from the jury. The complaint made is speculative. The evidence does not establish that even if the toxicology samples taken had been analysed in the normal way that they would have revealed that the appellant had taken Xanax or any other form of sleeping tablets. The evidence of the Garda who was cross examined about the purposes for which toxicology samples were taken at a SATU examination, said that it was done to determine the level of the subject person's intoxication (with alcohol). She was not aware if other substances would be tested for.

40. There is a long line of jurisprudence to the effect that where it is sought to either prohibit or to stop a trial on the grounds of a deficiency in the investigation, or on account of missing evidence, the person seeking to rely on that has to engage with the actual available evidence and demonstrate with cogency how the opportunity missed, or the missing evidence, creates such a degree of unfairness as to justify the granting of the relief being sought. In this case, the actual evidence does not demonstrate that even if the toxicology samples taken had been analysed in the normal way, reported on and that report disclosed to the defence that it would have revealed that the complainant had taken two Xanax tablets before going to sleep.

41. Moreover, while it is accepted that the defence could not reasonably have been expected to investigate in advance of the trial whether the combination of Xanax and alcohol could have had a bearing on the complaint's perception that she had been raped upon waking up on the morning in question; or an effect upon her memory; or upon her credibility and reliability as a witness, in circumstances where they had no reason to suspect that she

had taken Xanax; it nevertheless bears commenting upon that there is no affidavit or other evidence before us to demonstrate that had the defence had such an opportunity it might have provided any useful means of undermining the complainant's evidence. Moreover, there was no application for an adjournment of the trial.

42. The issue was addressed at trial in the context of a combined application for a Galbraith type direction, and withdrawal of the case from the jury on *P.O'C.* grounds. The trial judge rejected both applications. Insofar as the ruling related to the *P.O'C.* based application the trial judge said:

> *"The absence of any medical evidence is it's not there and it's neither prejudicial or non prejudicial to [P.O'D.] and, in my view, the absence of toxicology really – [S.P.]has acknowledged that she was drinking, that she was drunk when she went to bed and she had taken Xanax. So, that's a matter which the jury can quite are quite entitled to take into consideration in their deliberations but it's not a reason to withdraw the case from the jury"*

43. In our view, insofar as the *P.O'C.* based application was concerned, the threshold for intervention had not been reached in terms of establishing a real risk of an unfair trial that was irremediable by the giving of appropriate instructions and directions to the jury. We consider that the trial judge was right to conclude that the defence were not inhibited from placing reliance on the fact that the complainant was drunk and that she had taken Xanax. There was clearly evidence of this before the jury, and the jury were entitled to bring to bear their common sense and their experience of life in assessing that evidence. It was quintessentially a matter for the jury to consider what effect, if any, the consumption by the complainant of two prescribed sleeping tablets before going to bed, in circumstances in which she was (in the judge's words) "*drunk*" at the time, might have had on her perception of what happened to her at around 8 o'clock the following morning, on the whole quality of the complainant as a historian, and on her credibility and reliability as a witness. There would have been no justification to withdraw the case of the jury on *P.O'C.* grounds.

44. We therefore dismiss this ground of appeal also.

Ground (a): The Refusal of a Direction

45. Counsel for the appellant further applied for a direction at the close of the prosecution's case on *Galbraith* grounds, and specifically in reliance on the 2nd limb of Lord Lane's celebrated test, i.e., counsel's complaint was about the quality of the evidence adduced in support of the prosecution's case rather than the sufficiency of that evidence. In that regard the trial judge was referred to various alleged conflicts in the evidence and suggested inconsistencies in the accounts of different witnesses.

46. The trial judge refused to withdraw the case from the jury. He referred to the decision of this court in the *People (Director of Public Prosecutions) v M (J.R.)* [2015] IECA 65, before continuing:

"The Court, in looking at this application, has to determine what the jury can come to the conclusion to beyond a reasonable doubt. There are effectively three strands of evidence presented in the prosecution case; the evidence of [S.P.] herself in relation to her waking up in the morning and feeling pain and something inside her and that she then saw [P.O'D.] standing up on the bed. There are obviously issues of conflict as to where she was in the bed as between herself and [A. Q]. [S.P.] was cross examined at length and vigilantly and asserted strongly the truth of her allegation.

There is the evidence of [S.P.], [A.Q.] and [L.Q.] that at no stage were did the sleeping arrangements ever contemplate that [P.O'D.] would be in the bedroom with [A.Q.] and [S.P.] and that evidence was asserted strongly by those three witnesses, although [P.O'D.] alleges that he was invited to sleep in the box room. So, that's important and relevant evidence as far as the prosecution is concerned. It's a matter for the jury, if it goes to them, whether they should consider it or not.

And then there's the final strand of the prosecution evidence, an allegation that [P.O'D.] accepted responsibility for the act on the morning in question, which is very much in conflict and disputed by the defence on the basis that there was a lot of confusion, a very tense atmosphere and that anything that was said was to placate [S.P.] and then immediately withdrawn."

47. He concluded:

"…this is a classic jury case and there's ample evidence to go to the jury on which they can determine guilt or innocence and if they come to the conclusion that there is guilt there's ample evidence for them to come to that conclusion. So, I refuse to withdraw it from the jury."

48. We find no error whatever in the trial judge's approach. The level of contradictions and inconsistencies in the evidence did not remotely approach being sufficient to justify the granting of a direction. Every case has some level of contradictions and inconsistencies. As we pointed out in the *People (Director of Public Prosecutions) v M (J.R.)*:-

"… the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it".

49. The evidence in this case was not so infirm that no jury, properly directed, could convict upon it. The trial judge was right to refuse the application for a direction, and we reject this ground also.

Conclusion on the conviction appeal

50. In circumstances where we have not seen fit to uphold any of the appellant's grounds of appeal we must conclude that the trial was satisfactory, and his conviction is safe. We therefore dismiss the appeal against his conviction.

The appeal against sentence

51. The appeal against sentence was advanced on the following grounds:-

    a) The trial judge erred in nominating a headline sentence prior to application of mitigating factors of 10 years imprisonment.

    b) The trial judge erred in treating as aggravating factors the nature of the offence itself and the impact which the offence had on the injured party.

    c) The trial judge erred in taking into account the fact that the appellant was causing problems in the house before the offence when there was no evidence of same before him nor indeed any suggestion on the part of any of the witnesses both that the trial and in the sentence hearing to this effect.

    d) The trial judge erred in failing to adequately, or fully, take into account the contents of the Probation Report, and in particular the conclusion thereof.

    e) The trial judge erred in failing to partially suspend a portion of the sentence imposed, particularly in light of his very young age, his tragic personal circumstances and the contents of the probation report referred to above in ground (d).

52. It was subsequently indicated in the appellant's written submissions in respect of the appeal against sentence that ground (b) was no longer being relied upon.

53. Evidence was heard for the purpose of a sentencing on the 15th of July 2019. In addition to evidence summarising the facts of the case, the court heard victim impact evidence and evidence concerning the appellant's personal circumstances and antecedents. The court also had the benefit of a Probation Reports and medical reports comprising a GP's Report and a Psychiatric Report. It is necessary to summarise some of this evidence for the purposes of dealing with this appeal.

The Impact on the Victim

54. In a victim impact statement read to the court, S.P. said:-

> *"I was always a bubbly and happy person, not perfect and I had my bad days, but because of what he done to me, he took my body and my life. What he done to me made me become angry, ashamed, feel worthless and dirty. I blamed all the people I'm close to, my partner of the time, I blamed him for not waking up on the morning. I blamed myself for putting myself in the situation. I pushed my family aside or away. I turned to drugs to block out what he done to me and drank any day I could to do the same. Because of this I ended up in a women's refuge or homeless shelter because my mother couldn't handle or deal with my destructive behaviour and me and the way I was spiralling out of control. She had to protect*

my younger siblings and so I had to leave. It had a big effect on my family too as a result. During all of this there was light at the end of the tunnel when I got full time employment in McDonalds in …. I worked there for 5 months from October 2016. However, I became very depressed over my experience and rape, I began to abuse prescription medication and missed days at work. So much so that I was left go. While working there I felt uncomfortable serving male customers and this also caused problems for me, it caused me to break down crying to my boss. I told her what had happened to me, that I was raped and that was the cause of my depression. I left the job, which in turn led me back down the road of drug and alcohol abuse. The court case and the thought of it caused me huge anxiety and stress, causing my depression to get worse. I never slept a full night leading up to the trial and had nightmares over it thinking about having to be in the same room as P. I couldn't believe he wasn't admitting what he did and he was making me go through this whole thing again. The stress of giving my side of the story in court was a huge thing for me. I was also expecting my baby at this time which didn't help my stress. The court case made me feel like I was the one who did something wrong, that I was lying. But once he was found guilty it was like a huge weight was lifted off my shoulders, it was just confirming that I wasn't lying and he did rape me and ruin my life. I'm trying to put this whole thing behind me, I'm trying to move on with my life but I know what he done to me is going to affect me for the rest of my life".

The Appellant's Personal Circumstances and Antecedents

55. The court heard evidence that the appellant was born in 1997. He is from a small country town and is of traveller ethnicity. His father had died of cancer relatively recently. He is one of five children, and prior to going to custody had been living with his widowed mother and youngest brother in the family home. The court was told that the appellant had 37 previous convictions commencing at the 20th of November 2014, and continuing up until the 9th of April 2019. These were District Court convictions, and included five convictions for unlawful taking of vehicles, one for simple possession of drugs, four for burglary, five for theft, seven for public order, three for possession of offensive weapons, seven for criminal damage, one for failing to appear, and the remainder were unspecified. He had served custodial periods in respect of some of these, but they were terms of months as opposed to years. He had no previous convictions for any form of sexual offence

56. He had been cooperative with Gardaí to the extent that he had answered questions, albeit that the Gardaí did not accept many of his answers. It was accepted by the State's witness that many of the appellant's previous offences were related to a difficulty with alcohol and drugs. It was further accepted that the appellant had had some mental health difficulties.

The Probation Reports

57. The Court has the benefit of a Probation Report dated the 23rd of May 2019. It indicated that the appellant still denies the offence and maintains his innocence. The report confirms that the appellant was the 2nd youngest in a family of 5, that his father had

passed away in November 2017, aged 51 years, due to a cancer related condition. His father had been unemployed, and his mother had always been a full-time homemaker. The appellant had had no adverse early life experiences, had enjoyed an outdoor life and had an inquisitive mind such that he was looking forward to the challenges of second-level education.

58. However, the appellant had found it difficult to cope when he actually moved into second-level education and gravitated towards those in a similar situation. He accepts that this was a wrong crowd to be associated with and that he had begun to display challenging and troubling behaviour. He started drinking alcohol and experimenting with cannabis, and was getting into trouble in respect of minor public order matters. He eventually dropped out of school at the age of 16. He completed his second-level education in a Youthreach service and got on well there. However, after leaving Youthreach he found it very difficult to find work and found himself slipping back into anti-social habits, including with using substances and getting in trouble the law.

59. The Probation Report relates that the appellant experienced a traumatising event when a 22-year-old first cousin of his murdered his own two 9-year-old brothers and then took his own life. Since that incident (which, according to the GP's report, occurred in 2014) his ability to cope on an emotional level is said to have been compromised and he has experienced strong bouts of depression, high social anxiety, panic attacks, awkwardness and being in a state of bewildered distraction. However, the appellant asserted to his probation officer that during the summer of 2018 he had managed to address many of his problematic issues. He accepted that he still had an unhealthy relationship with alcohol and that excessive use of alcohol had contributed to the overall circumstances of the events in the "Q" house on the night of the 9th/10th of May 2016.

60. The Probation Report assessed the appellant as being at high risk of general re-offending in the next 12 months in the presence of the following indicators: persistence in offending in spite of sanction, history of poly-substance misuse, self-disclosed excessive alcohol misuse and being prone to reckless conduct while intoxicated, lack of meaningful daily regime, and unresolved emotional issues associated with a traumatic family event leading to disaffection and detachment. Perhaps more significantly, he was assessed as being at moderate risk of re-offending in terms of sexual offending. In that regard the risk domain areas that would require significant attention and positive movement, were listed as significant social influences, capacity for relationship stability, concern for others, impulsivity, problem-solving skills, negative emotionality and cooperation with supervision.

61. Ultimately, the assessment of the Probation Service was that any success a "t*herapeutic alliance*" with their service would have, in terms of addressing his risk domain areas, was likely to be limited given his position in continuing to maintain his innocence. Nevertheless, being on Probation Supervision would allow for his inclusion in the SORAM (Sex Offender Risk Assessment and Management) process. In those circumstances the Probation Service felt that P.O'D. could be considered as a suitable candidate for

probation supervision as part of any overall sentencing package that the Court might have in mind.

The Medical Reports

62. The psychiatric report which is dated the 18th of June 2019 sets out the appellant's social history and refers to the traumatising murder/suicide in which three of his relatives died. The collateral history taken from the appellant's mother suggested that he had struggled with "*nerves*" following the tragic death of his cousins. The appellant was known to Cork Kerry Community Health Care and Mental Health Services since 2017 and had attended there between March 2017 and November 2018. He had reported persistently low mood, fourthly with distressing dreams, withdrawal, anhedonia, poor interest and poor appetite with an intermittent passive death wish. It was considered at that time that he was suffering from Depressive Disorder with a number of psychosocial stressors. He had been placed on antidepressant medication and appeared to have improved significantly. It was recommended that he continue with his psychotropic medication and continue to avail of psychiatric services.

63. The sentencing judge also had the benefit of a report from the appellant's GP which confirms that he had attended in September 2014 for management and treatment of depression and anxiety following the tragic death of his cousins a few weeks earlier. He was referred to child and adolescent psychiatric services. In that context he was assessed by a Senior Clinical Psychologist who had expressed concern that he was vulnerable and that he might harm himself due to his significant psychological distress. Having spent a period of time in Cork prison during which time he was under the care of their mental health services he was referred onward upon his release to adult psychiatric services in his home area and was diagnosed by a consultant psychiatrist as suffering with depression and anxiety. It was at this point that he was placed on antidepressant medication. In summary, there was a significant history of depression, anxiety and multiple stressors in the appellant's life. The GP offers the opinion that it is possible that individual with these problems would give an ill- judged response when in difficult circumstances under pressure and duress.

The Sentencing Judge's Remarks

64. In sentencing the appellant to 7 years' imprisonment, the sentencing judge, who would also be the trial judge, made the following remarks:

> *"Mr [P.O'D.] was convicted after a contested jury trial hearing at the Central Criminal Court in Cork. The jury recorded his verdict on the 6th of March 2019, and he was convicted of the rape of [S.P] on the 10th of May 2016 at a dwelling house in [a named town]. The sentence hearing took place on the 15th of July 2019, and the Court adjourned the matter to today to consider sentence.*
>
> *The Court considered the following documentary evidence: victim impact statement of [S.P.] read to the Court on her behalf; a Probation Service report prepared for the Court on its order of the 23rd of May 2019, by Alan Doyle, probation officer; the psychiatric report of the 18th of June 2019 prepared by Dr RA Burns, consultant*

psychiatrist from the [named county] community health care team in relation to Mr O'D.; and a GP report from his family GP, Dr Tom Molloy, of the 27th of June 2019. The Court also has been furnished with a written list of [P.O'D.'s] previous convictions, which are 37 in all, all District Court summary matters.

The Court obviously, from a general perspective, in terms of its general duty, has a duty to protect society by punishment, deterrence and rehabilitation, and to impose a proportionate sentence, having taken into account the seriousness of the offence, the aggravating and mitigating circumstances, and ensure that the sentence is not unduly harsh or lenient. For transparency purposes and to explain its sentence, the Court has to set out a headline sentence, or should, from which it takes mitigation factors into account.

Straightaway this is really a neutral issue rather than an aggravating or mitigation issue. Obviously the substantial mitigation available to an accused person on a plea is not available to [P.O'D.]. That's neither an aggravating or mitigating matter. It also should be borne in mind that in the probation report, in terms of whether the Court follows some recommendations in relation to supervision, that [P.O'D.] still adamantly denies the charge, and therefore there has been no remorse in relation to the impact on the injured party, [S.P.].

The aggravating circumstances are the nature of the offence itself, the rape of a young woman while she was sleeping. The impact on [S.P.] is the other aggravating circumstance. I think no one could not be but moved by the written victim impact report and how the impact of a rape has on the image of oneself when their bodily integrity is breached. [S.P.] has had shattering consequences in terms of her addiction to alcohol and employment difficulties, but she has indicated that because of the decision of the jury a huge weight has been lifted off her shoulders and that she's trying to put things behind her, and that's the earnest wish of this Court, but certainly the offence had an impact of devastating consequences for [S.P.].

The -- [P.O'D.'s] -- and this has been a feature of the probation report and the past history of [P.O'D.]. [P.O'D.'s] drunkenness on the night in question was extreme. He was a very young man at the time, and -- but unfortunately the extreme consumption of alcohol, which is an aggravating factor in this offence because it's clear even before the events that [P.O'D.] was causing difficulties in that particular family home.

A very important mitigating circumstance, and the one that the Court takes into most consideration, is [P.O'D.'s] youth at the time of the commission of this offence. It happened -- he's 22 years of age now, and he was just on the cusp of 17 or thereabouts, 18, when this occurred. And also he has some very tragic personal and family circumstances which is -- which are clear from the probation and psychiatric reports, devastating loss in his family in terms of death and issues

of depression which have gone back into history, and those two matters are being taken into account in mitigation.

The Court takes the view that the headline sentence is one of ten years, and, having taken into matters -- taken all matters into consideration, the Court considers in this case -- because [P.O'D.] really hasn't acknowledged the offence that -- I don't consider that any form of probation supervision would really lend any importance to or help in relation to the structure of this offence. So, the Court therefore considers the proportionate sentence in this case to be one of seven years' imprisonment, to be imposed from the 6th of March 2019, and that's the sentence that the Court imposes, dated from that date, the 6th of March 2019."

Submissions

65. In admirably succinct submissions counsel for the appellant has sought to make the case, in support of ground (a), that the headline sentence of 10 years nominated by the sentencing judge was inappropriate and outside of the norm for an offence of this nature. She relied upon the judgment of Charlton J., when sitting in the Central Criminal Court, in *The People (Director of Public Prosecutions) v W.D.* [2008] I.R. 308, as updated by the recent guideline judgment of the Supreme Court (again delivered by Charlton J.) in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 85. According to counsel for the appellant, those decisions had indicated a headline sentence of 6 or 7 years, to be potentially adjusted upwards depending on the circumstances, as being typical for a case of rape "*in circumstances which involved no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence*", and in which there had been no plea of guilty. In counsel's submission the sentencing judge had erred in nominating a headline sentence of 10 years as his starting point. Rather, counsel submitted, the circumstances of this case fell within the lower range of potential headline sentences suggested by the *W.D.* and *F.E.* jurisprudence.

66. The further point is made, in support of ground (c) that the sentencing judge erred in concluding that the appellant had been causing trouble in the house prior to the commission of the offence, and in treating that as an aggravating factor. It was submitted that the evidence did not establish that the appellant had in fact caused any trouble.

67. In support of grounds (d) an (e), while it was acknowledged that the sentencing judge did consider the mitigating factors in the case when imposing sentence, it was submitted that it had been an error of principle to fail to suspend a portion of the sentence in the circumstances of the case.

68. In replying submissions on behalf of the respondent it was argued that there were aggravating factors in this case that took it out of the sentencing range relied upon by the appellant's counsel and which moved up into the next range. The respondent pointed in particular to the injured party's descent into depression, drug abuse and homelessness in the aftermath of the offence as demonstrating that there had been particularly egregious harm caused in this case. It was further submitted that the rape of a sleeping or otherwise incapacitated person constitutes a significant aggravating factor, and that the

injured party's young age further constituted a grave aggravating factor; all of which it is said justified the headline sentence of 10 years imprisonment.

69. Counsel for the respondent pointed out that the evidence did in fact establish that the appellant had been causing, what the sentencing judge characterised as "*difficulties*", prior to the offence. There was clear evidence that he was drunk, that he had been "*mad*" over H.G. retiring with J.Q. to spend the night in J.Q.'s room, and that this had manifested itself in aggression when he roared up the stairs to A.Q., "*tell your brother he's a gas man for taking my girl*". Moreover, there was evidence that A.Q. had had to warn him that if he did not stop shouting he would have to leave the house. In counsel for the respondent's submission, the sentencing judge was entitled to conclude that his drunk and aggressive behaviour, of which there was evidence, had been an aggravating factor.

70. Finally, it was submitted on behalf of the respondent that the sentencing judge, in discounting by three years from the headline sentence of ten years, had appropriately reflected the mitigating circumstances in the case. It was further submitted that, in the absence of any plea of guilty, acceptance of the jury verdict or expression of remorse, coupled with the Probation Service being of the view that there was no potential role for them in rehabilitating the appellant, it had been appropriate and proportionate for the sentencing judge to the trying to suspend any portion of the sentence imposed.

Discussion and Decision

71. We are not satisfied that an error of principle has been demonstrated with respect to the nomination of a headline sentence of ten years. In arriving at that conclusion, we have considered the *W.D.* jurisprudence as updated by the recent pronouncements of the Supreme Court in the *F.E.* case.

72. The original *W.D.* categorisation of rape cases for sentencing purposes, based upon a survey of the sentences that had been imposed in a large number of rape cases in this jurisdiction up to 2008, had been a fourfold one involving (i) lenient punishments (with which we need not be concerned); (ii) ordinary punishments attracting sentences of imprisonment for terms between three years and eight years with the majority in the range between five years and seven years; (iii) severe punishments attracting sentences of imprisonment for terms between nine and fourteen years; and (iv) condign punishments attracting sentences of imprisonment for terms between fifteen years and the ultimate punishment of life imprisonment (again with which we need not be concerned).

73. The assertion is made in *F.E.* that updated analyses since the *W.D.* judgment have confirmed the original analysis in *W.D.* Direct comparisons are somewhat hampered by the fact Charleton J.'s judgment in the *F.E.* case does not use the same four categorisations that he had used in *W.D.* but rather approximations of them adjusted for the fact that in seeking to categorise different cases the *W.D.* judgment did so according to post-mitigation outcomes whereas the *F.E.* judgment now does so with reference to headline or pre-mitigation sentences, which one would expect to be higher. As is pointed out in para 55 of Charleton J.'s judgment in *F.E.*, the majority of the cases surveyed in

W.D. involved the offender admitting the offence. Hence, the judgment continues, headline sentences "*can be seen to be in the order of one quarter to one third, depending on the circumstances, more than the ultimate sentence publicly reported*".

74. According to this metric it may be estimated that in the type of cases categorised in *W.D.* as attracting post mitigation sentences in the "ordinary punishments" category, ie., category (ii) cases, involving imprisonment for terms of between three years and eight years, the corresponding headline sentences would very likely have been in the alternative ranges between three years and nine months to ten years (if one grosses up by 25%), and four years to ten years and eight months (if one grosses up by 33 1/3 %).

75. At paragraph 55 of the judgment in F.E. we are also told that, "a consistent pattern in rape sentencing has been maintained over the last decade, and remains as noted in paragraph 36 of WD:

> *'The reports tend to indicate that where a perpetrator pleads guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. The substantial mitigating factor of a guilty plea, present in such a case, suggests that such cases will attract around six to seven years imprisonment where the factors of early admission and remorse coupled with the early entry of a plea of guilty, are absent.'"*

76. In the present case the headline sentence nominated by the sentencing judge was one of ten years' imprisonment. The first thing to be said is that this is within the ranges of headline sentences, calculated by either metric, that may typically be imposed for category (ii) offences, depending on the circumstances. We recognise that this is at the severe end of these ranges, by whatever metric they are arrived, but we are satisfied that it was within the scope of sentencing judge's legitimate discretion to place them there. In saying this we acknowledge a slight incongruity with the discussion in *F.E.* concerning "*more serious cases*" which suggests that these might typically attract headline sentences of between ten and fifteen years. We think that in truth a headline sentence of ten years or thereabouts is appropriate for cases on the borderline between ordinary cases and more serious cases and that this case is such a case.

77. In suggesting that we have borne in mind certain comments of Birmingham P. in this court's guideline judgment on burglary and aggravated burglary in the case of *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121, which seem to us to be apposite in any consideration of the *W.D.* and *F.E.* jurisprudence, and indeed also relevant to any consideration of where the present case ought properly to have been located in terms of its gravity. The President said in *Casey* (at para 49):

> *"The Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is*

often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."

78. We are reassured in our conclusion that the ten year headline sentence was appropriate in this case, regardless of whether it is seen as being at the upper range of what is appropriate for ordinary cases or at the lower end of what is appropriate for more serious cases in the following circumstances.

79. At paragraph 61 of his judgment in the *F.E.* case, Charleton J. states:

> *"In the original WD case, the High Court had examined about a dozen cases in the 9 to 14 year category. A consistent pattern has been maintained since then. At paragraph 40 this comment was made:*
>
> > *'Leaving aside these factors of multiple counts, a number of victims and abuse of trust, there are clearly cases where a sentence of ten years imprisonment can be appropriate for an individual instance of rape. However, a sentence of ten or eleven years imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation.'*
>
> *Examples were given which more recent analysis confirms."*

80. Having carefully evaluated the circumstances of the present case, and without gainsaying in any way that rape in all circumstances involves a violation in the most serious way of the constitutionally protected rights of women to their bodily integrity and to their physical and mental independence, we do not see this case as being one involving circumstances of unusual violence or premeditation such as would justify placing it in the category of cases requiring "*severe punishment*" that should attract a post mitigation sentence in the range between nine and fourteen years according to the *W.D.* categorisation,

81. In saying that, we are cognisant of the point made by counsel for the respondent that this rape had a severe effect on the victim in terms of adversely affecting her mental health and well-being, and that she suffered the onset of depression, and attributes her recourse to substance abuse and becoming homeless to ongoing trauma and inability to cope in the aftermath of the offence. Gravity is to be assessed by reference to culpability and harm done. Moreover, headline sentences are solely concerned with what level of punishment is merited by the gravity of the offence. Given that *F.E.* suggests a headline sentence of seven years as a typical starting point for rape offences in the "*ordinary*" rather than the "*more serious*" category, the aggravating feature that there was significant harm done in this case, coupled with the further (modestly) aggravating factors of self-induced drunkenness identified by the sentencing judge, the victim's young age, and the circumstance that advantage had been taken of the fact that the victim was sleeping,

would cumulatively tend to justify its placement towards the upper end of the indicative range for headline sentences appropriate to "*ordinary*" as opposed to more serious cases.

82. In replying submissions on behalf of the respondent it was argued that the aggravating factors in this case that took it out of the sentencing range relied upon by the appellant's counsel and instead moved up into the next range. The respondent pointed in particular to the injured party's descent into depression, drug abuse and homelessness in the aftermath of the offence as demonstrating that there had been particularly egregious harm caused in this case. It was further submitted that the rape of a sleeping or otherwise incapacitated person constitutes a significant aggravating factor and that the injured party's young age further constituted a grave aggravating factor, all of which it is said justified the headline sentence of 10 years imprisonment. In truth, as we have already said, this is a case which straddles the two categories concerned and could legitimately be in either. How it is labelled is not important. What is important is the correctness of the figure put on the headline sentence. We reiterate that we are satisfied that the sentencing judge's nomination of a headline sentence of ten years was an appropriate one in the circumstances of this case. Accordingly, we reject ground of appeal (a).

83. Before moving to consider ground (c), ground (b) having been abandoned, we feel we ought to make one brief observation at this point as it will bear indirectly upon our consideration of grounds (d) and (e). The ultimate sentence in this case was one of seven years. We therefore know that the appellant received a 30% discount in circumstances where he did not plead guilty, made no admissions and has exhibited no remorse. That having been said he has had a tragic and difficult personal life and has faced many personal adversities. However, even allowing for all of that, the discount afforded to him of 30% must be regarded as having been generous by any yardstick. This is relevant in the context of whether any scope existed to suspend a portion of the sentence. We will come back to this.

84. In so far as ground (c) is concerned there was a clear evidential basis for the trial judge's remarks concerning the extreme drunkenness of the appellant and the fact that he was, to use the sentencing judge's words, "*causing trouble*" on the night. It was a perfectly reasonable characterisation of the situation where the appellant being very drunk was aggressively shouting abuse up the stairs, to the effect that J.Q. was "*a gas man for taking my girl*", such that A.Q. had to threaten that he would be put out of the house if he did not stop. The aggravating feature from the point of view of the offence was the appellant's self- induced intoxication against a background where he knew himself that he had a long-standing problem with alcohol which he well knew had led him into trouble in the past.

85. The law is clear that self-induced intoxication will rarely provide mitigation. For example, it was stated in *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] 2 ILRM 116 that "*If people get drunk and commit offences while they are drunk, then they cannot be heard to use their drunkenness as a mitigating fact.*"

86. It is also the case, although less common, that self-induced intoxication can aggravate rather than mitigate. This arises where the offender's drunken state adds to the trauma, fear, fright or danger suffered by the victim of the offence. In motoring offences, the self-induced intoxication of a driver is manifestly an aggravating factor because it adds to the danger that the driver will injure or possibly kill either himself or somebody else. However, intoxication can add danger in other situations. The appellant himself, although he continues to deny that he raped S.P., acknowledged during the probation assessment that he had an unhealthy relationship with alcohol and that excessive use of alcohol had contributed to the overall circumstances of the events in the "Q" house on the night of the 9th/10th of May 2016. He was aware that his getting into trouble with the law in the past was linked to his unhealthy relationship with alcohol. Given the appellant's self-awareness, the sentencing judge did not err in treating the appellant's self-induced drunkenness as an aggravating factor that increasing his culpability.

87. Turning then to grounds (d) and (e), we have considered the submissions on both sides. The complaint here is essentially that the trial judge erred in concluding that in circumstances where the appellant had contested his trial and was continuing to maintain his innocence, "*I don't consider that any form of probation supervision would really lend any importance to or help in relation to the structure of [the sentence for] this offence.*" The sentencing judge is criticised for not suspending some portion of the sentence so as to leave the appellant "light at the end of the tunnel" to adopt that cliché, but also to facilitate his inclusion in the SORAM process.

88. We do not interpret the sentencing judge's remarks as pertaining to the prospects of rehabilitation or reform. In that regard we have previously said that while rehabilitation is an important objective in the sentencing process to which he courts must always have regard, there must nevertheless be a sound evidential basis before a court would be justified in "going the extra mile", again to adopt a cliché, either to reward progress to date towards rehabilitation or reform, and/or to incentivise future work towards reform or rehabilitation. We agree that in this case there was an inadequate evidential basis for intervening solely on the grounds of rehabilitation or reform, as there was no expression of remorse, no acknowledgment of responsibility and no expressed earnest or willingness to engage in what the Probation Service have labelled a "*therapeutic alliance*" towards his rehabilitation or reform. Moreover, as has already been pointed out, the appellant was treated generously in terms of the discount afforded to him for mitigation. Accordingly, we reject any suggestion that the trial judge ought to have suspended a portion of the sentence solely in the interests of promoting the appellant's rehabilitation or reform.

89. However, that is not the end of the matter. There was also a public protection interest to be considered. Given the assessment of the Probation Service that this appellant was at high risk of general re-offending, and at medium risk of sexual re-offending unless his risk domain areas were in some way addressed, it was in the public interest, as well as the appellant's, to ensure that upon his eventual release there would be monitoring of him and, should he be prepared to accept them, supports to help him try to address those risk domain areas. Although he is not willing to accept responsibility for the rape at this point

he may yet reach that destination while serving his custodial term; but even if he does not, he has already acknowledged that he has unaddressed risk areas that apply not just to sexual offending but to offending by him more generally. Given that he has at least that much insight it does not by any means follow that he would necessarily reject, and he might indeed even welcome, the making available of supports to help him try to address his risk domain areas.

90. However, whether he would welcome them, the interests of society require that steps be taken to try to abate the risks that he presents in so far as that can be done. While society is protected for the moment by the incidental incapacitation associated his seven-year prison sentence, our law does not allow for preventative detention beyond that which is incidental. The reality is that in circumstances where he will serve a finite custodial sentence, he will in due course be released to re-join society. It is therefore desirable that at the very least he should be subject to some form of monitoring following his release both in his own interest and in the interests of society. There is express statutory provision in s. 29 of the Sex Offenders Act, 2001 ("the Act of 2001"), for a post release supervision order as part of a sex offender's sentence. Supervision orders are discretionary, but s. 28 of the Act of 2001 requires a trial judge who imposes a custodial sentence for a sex offence to consider the need for post release supervision. We are satisfied that the impugned remarks of the trial judge in fact relate to his consideration of whether there was a need for post-release supervision. Accepting that he does appear to have considered the issue, we would not lightly interfere with how the sentencing judge exercised his discretion. However, we do find it difficult to understand how the sentencing judge could have thought it appropriate to reject that there was a need for post-release supervision in circumstances where the Probation Service had assessed the appellant as being a suitable candidate for probation supervision. The Probation Report, which was before the sentencing judge, explains that were he to be placed on probation supervision this would allow for his inclusion in the SORAM process. SORAM is a multiagency collaboration (between An Garda Siochána, the Probation Service, Tusla, the Prison Service and the local Housing Department) that meets routinely and regularly to discuss all those subject to the SORAM process, identify emergent concerns and, if necessary, take appropriate action. We consider that the sentencing judge in considering whether there was a need for probation supervision did not attach sufficient weight to the assessment of the probation service that the appellant could be considered as a suitable candidate for probation supervision as part of any overall sentencing package that the court might have in mind. We are satisfied that that was an error of principle in the circumstances of this unusual case and that this led to an inappropriate structuring of the sentence.

91. In circumstances where we have found an error we must quash the sentence imposed by the court below and proceed to a resentencing of the appellant.

92. We are satisfied for the reasons already set forth that this case merited the nomination of the headline sentence of ten years imprisonment. Further, we are satisfied that the appellant is entitled to a discount of three years imprisonment from the headline sentence

to reflect the mitigating circumstances in his case. However, we consider that there is a strong need for post-release supervision in the circumstances of this case. To take account of the interests of society, and to ensure that there are some structures in place to monitor the appellant after he is released we will make a post release supervision order which will remain in effect for a supervision period of five years. This will, we hope, include SORAM monitoring.

93. During the course of the post-release supervision period, the appellant will be required to engage with the Probation Service and adhere to any and all conditions as so directed by it. In accordance with such, the appellant will be required to furnish the Probation Service with his current address, and any subsequent changes thereof.

94. For the avoidance of doubt any SORAM monitoring that may be undertaken by interested agencies will be wholly independent of and separate to any notification requirements imposed on the appellant, or arising in respect of him, under Part 2 of the Act of 2001; and of our Post-Release Supervision Order which is made under Part 5 of the Act of 2001.

Summary

95. The appeal is allowed. The sentence imposed by the court below is quashed, and the appellant is re-sentenced to seven years imprisonment with a Post Release Supervision Order for a supervision period of five years subject to the conditions stated at paragraph 93 above.