THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Record No: 155/2019

Bill Nos: DUDP0581/2017
DUDP0821/2017
DUPD0909/2017
DUPD1098/2017

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

RESPONDENT

V

DAVID FAGAN

APPELLANT

JUDGMENT of the Court delivered on the 27th day of October, 2020 by Mr Justice Edwards

Introduction

1. On the 6th of June 2019 the appellant was before the Dublin Circuit Criminal Court for sentencing on foot of four separate Bills of Indictment, in respect of which he had offered pleas of guilty on arraignment, as follows:

    - on Bill No 581/2017, one count of robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;

    - on Bill No 821/2017, two counts of robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;

    - on Bill No 909/2017, one count of robbery, contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and one count of production of an article, contrary to s. 11 of the Firearms and Offensive Weapons Act 1990;

    - on Bill No 1098/2017, one count of attempted robbery, one count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and two counts of production of an article, contrary to s.11 of the Firearms and Offensive Weapons Act, 1990.

2. The appellant received the following sentences:

(i) Bill No. 581/2017 - 3 years imprisonment on the sole count of robbery;

(ii) Bill No. 821/2017 - 3 years imprisonment in respect of each of the two counts of robbery;

(iii) Bill No. 909/2017 - 3 years imprisonment in respect of the count of robbery, with the count of production of an article being taken into consideration;

(iv) Bill No. 1098/2017 - 3 years imprisonment with the final 18 months suspended, in respect of the robbery consecutive to the sentence on Bill no. 581/2017, with the count of attempted robbery and the two counts of production of an article being taken into consideration.

3. With the exception of the sentence on Bill No 1098/2017, which was made consecutive to the sentence imposed on Bill No 581/2017 in circumstances where it had been committed whilst the appellant was on bail, all sentences were to be served concurrently, and were to date from the date on which sentence was imposed but with credit to be given for all time spent in custody exclusively on those Bills since January 2019.

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

The Circumstances of the Crimes

Bill No 581/2017

5. Evidence was given by Garda Seán Parker that the sole count on this Bill concerned a robbery committed on the 24th of September 2016 at the Applegreen Service Station in Baldoyle, Co. Dublin. On the occasion in question a Mr Justinas Malvijevas was working there and had started his shift at approximately 8.30 in the evening. He was behind a till and engaged in serving a customer, just two minutes or so after starting his shift, when he noticed a male person beside him who had come behind the counter. This person had a cloth over his face and was wearing a blue jacket. Mr Malvijevas could see a kitchen knife in this person's hand and the person shouted: "*Get the fucking money*". Mr Malvijevas could only see the person's eyes, and he felt immediate fear. Accordingly, he opened the till and the man in question took money from it. He then ran from the store, out the front door, and turned right. Mr Malvijevas stated to Gardaí that during the robbery he had contemplated trying to prevent it, but he had feared for his life and decided against doing so.

6. A customer, Lisa Lawless, who was present during the robbery was in a position to give a description of the robber. She described him as very calm. A Mr Stephen O'Connor, was working as a supervisor in the store, received a report from a female customer that "*You're being robbed*", following which he looked in the direction of the till and saw a male person behind Mr Malvijevas who was at the till and this person had a knife. Mr O'Connor reported that it looked like a chef's knife with a 6-inch blade, wide at the base and sharp.

7. Evidence was given that €600 was taken during the course of the robbery. After the robber had made his getaway the Gardaí were summoned, and they took possession of CCTV footage. With the assistance of this CCTV footage they identified the appellant as a suspect and sought a search warrant to enable them to search his house. This search was carried out on the 27th of September 2016 and an item of clothing was seized. The appellant was not present during the search. However, on the following day, the 28th of September 2016, Garda Parker came across a vehicle while he was on mobile patrol, which appeared to be abandoned and which had a broken window. Upon closer inspection he discovered the vehicle to be occupied with the appellant lying in the backseat of it. Garda Parker observed presence of paraphernalia suggesting drug use and he seized a number of items of clothing, and also a silver and gold watch and a black bracelet with coloured religious depictions, which were present in the vehicle. These items were to be seen on the CCTV footage taken from the Applegreen Service Station as being worn by the robber at the time of the robbery.

8. The appellant was subsequently arrested in Naas on the 11th of January 2017 in connection with this robbery. He was interviewed while in detention and made relevant admissions.

9. It was accepted by Garda Parker in the course of being cross-examined by counsel for the appellant that his admissions had been extremely helpful, and also that the appellant was a drug addict. The appellant had offered the explanation to the gardaí for his conduct that he owed money and had acted under pressure. He accepted that he had put the staff of the service station in fear when he had produced the knife, remarking, "*I was stabbed before. I know that it is traumatising.*"

10. None of the stolen monies were recovered. When asked what he had done with the proceeds of the crime the appellant stated, "*I paid off people*."

Bill No 821/2017

11. Detective Garda Ken McGreavy gave evidence that the counts on this Bill concerned two robberies of the same premises, namely the Texaco Service Station at Strand Road in Portmarnock, Co. Dublin, initially on the 24th of December 2016 and again on the 30th of December 2016.

12. In respect of the first of these robberies, which occurred on Christmas Eve, a Mr Roman Harvey was working on the premises at the time. He had started work at 2:00 PM, and the premises was due to close at 8:00 PM. At approximately 7:40 PM his colleague left him inside on his own while he went to empty the bins. At 7:43 PM, a man walked into the shop, wearing a grey woollen hat, pulled down to his eyes. In addition, he had a black snood pulled up to the bridge of his nose, and wore black woollen gloves. Mr Harvey was later able to give Gardaí a description to this effect and an estimate of the height of the man in question. The man had a knife in his right hand. It had a long thin blade about 10 inches long. The man pressed the knife to Mr Harvey's left side and said "*Open the till*" in a Dublin accent. After having grabbed the €400 in notes from the till, the man demanded

to know "*Where is the rest of it?*", repeating this several times. Mr Harvey told him that that was all there was.

13. At this, the man grabbed two packets of cigarettes and as he was walking out of the premises said, "*Don't ring the alarm or I will be back for you*". Mr Harvey informed Gardaí that he was terrified but that once the robber had left the premises, he dialled 999 and reported the matter.

14. A few days later Mr Harvey was again working in the same Texaco service station shop. At about 6:55 PM he was alone behind the till when he noticed a male come into the shop. This male had his hoodie up and was trying to cover his face and was keeping his head down. He immediately came around to the area where Mr Harvey was standing and said, "Open the till", a few times, before then beginning to count "*One, two, three, four …*". He had a broken brown bottle in his right hand and was not wearing gloves. The person concerned was judged by Mr Harvey to be very jumpy, and he seemed to be bouncing a bit on his tiptoes. Mr Harvey was fearful that the robber would use the broken bottle against him. The robber then removed notes from the till drawer and also some €2 coins. At this point Mr Harvey realised that he was the same person who had robbed the premises six days previously. Approximately €800 was taken from the till, along with four boxes of assorted cigarettes. Before leaving the premises, the robber addressed Mr Harvey stating, "*Don't follow. I'm telling you, don't follow me*". As soon as the robber had left, Mr Harvey pressed a panic button in the premises to summon assistance. He then ran to the side of the building and met a customer who told him that the perpetrator had gotten into a taxi which was just about to move away. Mr Harvey and the customer noted the details of the taxi and later provided these details to Gardaí, who successfully traced the taxi.

15. A statement was subsequently taken from the taxi driver, which was of considerable assistance. While the perpetrator of the robbery was in the taxi, he made a phone call on his mobile phone during which he introduced himself to the person at the other end of the line as "*Fagan*". At one point, while this person was still in the taxi, the Gardaí telephoned the taxi driver who calmly said that he would call them back in a few minutes. The robber demanded to know of the taxi driver "*What did they want*", and the taxi driver, displaying remarkable *sangfroid*, responded that they wanted to talk to him about a traffic accident that he had been involved in on the North Strand. The taxi eventually deposited the robber, later established to be the appellant, on Aston Quay in Dublin city centre. The taxi driver was later shown CCTV footage in which he identified his vehicle. Ultimately the appellant was identified by Gardaí from that CCTV footage and other CCTV footage.

16. The appellant was arrested on the 19th of January 2017 at the Applegreen garage in Baldoyle. When subsequently interviewed, he identified himself on CCTV footage, and admitted to being the perpetrator of both offences at the Texaco service station.

17. Detective Garda McGreavy accepted in the course of being cross-examined that the appellant had been cooperative with gardaí and that his admissions in respect of these

crimes were considerable assistance to the gardai. He also accepted that the appellant was a chronic drug user at the time.

Bill No 909/2017

18. Detective Garda Christopher Elliot gave evidence that the incident the subject matter of the counts on this Bill occurred on Saint Stephen's day (i.e., the 26th of December) in 2016. The location was the Topaz filling station on Clonshaugh Road in Dublin 17. A Mr Said Raza was working a 3 PM to 11 PM shift there on that day. At about 5 PM he was checking the stocks in the drinks fridges with the assistance of a colleague. As he was doing this, a male dragged him by his jacket and ordered him to open the tills. This male had a knife in his right hand, and he was poking it into Mr Raza's rib cage on his right-hand side. Mr Raza had not seen this person enter the shop because his back had been to the entrance.

19. In order to gain access to the area where the tills were located, it was necessary for Mr Raza to type in a code on a keypad on a locked access door. As he was trying to type in the code his assailant started counting backwards "*five, four, three, two, …*". While it is not clear what exactly the robber might have done if he had reached zero on the countdown, Mr Raza succeeded in opening the door in time. Both Mr Raza and the robber then went into the till area. Mr Raza opened two tills initially and the robber removed the money that was in them. Mr Raza was then ordered to open to remaining tills, but explained that there was no cash in them. The robber then looked through a small space in one of those tills ostensibly to verify what he been told, and then jumped over the counter and ran out of the shop.

20. Mr Raza was able to describe the knife as having a skinny blade which was about four to five inches long. The robber, although demanding, had kept his voice down and had been holding his jacket while pushing Mr Raza in the direction of the tills. It was discovered on subsequent examination of the tills that €170 was missing from one till and €94 was missing from the second till.

21. When the gardai were called, they examined CCTV recordings that captured the incident. They observed a silver Ford Fiesta car with no wheel trim on the front passenger side wheel, and which had an inoperative back rear light, outside of the premises at the material time. The person who had committed the robbery came from this car and returned to it after the robbery. The Gardaí later learned that another robbery had taken place on the same day in Clane, Co. Kildare, in which a similar vehicle was understood to have been involved. The appellant, David Fagan, had been arrested in respect of that robbery. The clothing recovered from Mr Fagan at the time of his arrest for the Clane robbery was the same as that worn by the robber of the Topaz filling station, as captured on CCTV. Mr Fagan then became a person of significant interest in connection with the Topaz robbery. Later again, on the 19th of January 2017, Detective Garda Elliott, having learned that Mr Fagan was in detention at Coolock in connection with yet another investigation (i.e., that concerning the robberies of the Texaco station at Strand Road, Portmarnock, already described) sought and obtained permission from the relevant member in charge to interview him in connection with the Topaz robbery. During this

interview the appellant initially denied his involvement in the Topaz robbery but ultimately relented and admitted his involvement. In doing so, he stated, "*I'm really sorry*".

22. The course of being cross-examined, Detective Garda Elliott accepted that the appellant had been fairly heavily disguised during this robbery, and that accordingly his admissions had assisted to a large degree. Detective Garda Elliot further accepted that there had been no physical injuries caused to the injured party.

23. The evidence was silent as to whether the money taken was recovered.

Bill No 1098/2017

24. The evidence in relation to the incidents giving rise to the four counts on this Bill was given by Garda Paul Daly. There were two relevant incidents both occurring on the same day, namely the 3rd of July 2017, in the north east suburbs of Dublin. The first involved an attempted robbery with production of an article at a Spar shop in Donnycarney, and the second involved an actual robbery, again with production of an article, at a Daybreak convenience store on Harmonstown Road in Artane.

25. Dealing in the first instance with the attempted robbery of the Spar shop, a Ms Paula Maloney was working there as a shop assistant on the date in question. Sometime after 11 AM she was serving a man who was buying a newspaper when she noticed somebody passing by her very quickly. This person was heading in the direction of the off-licence section of the premises. Ms Maloney had initially thought that it was a staff member from a courier service as that part of the shop was utilised for parcel collection. However, the person concerned, came around the counter and right up to the till where she was working. He told her repeatedly to "*Open the fucking till*" in a Dublin accent.

26. The man in question appeared to have a knife, and he started sticking it in the till in an effort to open it. Ms Maloney recalled the handle of the knife as being silver. She shouted for the manager, a Mr Stephen Cullen, who was down the back of the shop. The would-be robber then went over to attempt to open the other till, having been unsuccessful in opening the first one, but was once again unsuccessful. Then, just as Mr Cullen was approaching him, he ran off. Mr Cullen pursued the perpetrator and, as he did so, the man in question turned around and gestured at him with the knife. In the circumstances Mr Cullen did not seek to pursue him further until there was a safe distance between them. Mr Cullen was able to observe the man getting into a car, and he had the presence of mind to take down the registration number. Unfortunately for the perpetrator, the car would not start for him immediately. This allowed Mr Cullen to approach the car and take a photograph of the perpetrator sitting in the car as he attempted to get it to start. Both registration number and the photographic evidence were later provided to the gardai.

27. In addition, Ms Maloney was able to provide a description of the would-be robber to gardaí. She described him as having his black-coloured hood up, wearing sunglasses and covering his mouth with a scarf or something of that nature.

28. In the second incident at the Daybreak convenience store, Ms Anna McHugh was working there as a store assistant. At about 11 AM, a man came into the store, wearing a baseball cap and covering his face with a scarf. She estimated that he was over 6 foot tall and she characterised him as being well enough built. He had a large knife in his hand. He kept repeating: "*Give me the money*". He came up to the till that Ms McHugh was standing at. She opened the till and he grabbed the money inside, which amounted to €540.

29. On the occasion in question, there was a second shop assistant in the Daybreak convenience store. He observed that as the perpetrator was leaving following the robbery, another person, believed to be a customer, attempted to trip them up and indeed was successful in doing so, but the perpetrator got up and ran out. At this point, the second shop assistant went out after him and saw him get into a car. The assistant noted the registration number and it turned out this was the same registration number as belonged to the car used by the would-be robber of the Spar shop to make his getaway. On his way out of the Daybreak, the robber had run past yet another customer, who was also able to provide a description to Gardaí. This customer didn't attempt to block his path or to impede him lest he might hurt someone but he followed the robber. As he did so he saw the previously mentioned other customer tripping him up.

30. The vehicle in question which had been used in both incidents was reported as being abandoned by the suspect in the region of Harmonstown DART station. A number of items were found inside the vehicle when it was seized by Gardaí, including a knife, glove, sunglasses and a solicitor's business card with a court date noted on it. A civilian witness who was inside Harmonstown DART station later told Gardaí that a man came running down the platform that she was on. He ran to the end of the platform and then took off the tracksuit bottoms he had on, and put on another pair. She had thought this was weird. He then crossed the tracks and hid behind an ESB box while the Dundalk train went by, peeping out every now and then. After the train had passed, he came out onto the platform, turned and went back towards the station building under the bridge.

31. Gardaí obtained CCTV camera footage from Harmonstown DART station, and were able to identify the appellant. He was later arrested at 7 PM on the 19th of July 2017, and was detained, but nothing of evidential value emerged from interviews with him. However, a specimen of his DNA was taken while he was in custody, which was matched to DNA found on the knife and clothes left behind in the abandoned car. Subsequent inquiries established that the appellant had been due in court on the date noted on the solicitor's business card also found in the car.

32. The appellant was charged and remanded in custody on the 20th of July 2017, both in respect of the offences on the Bills before the court, but also in respect of a matter ultimately returned for trial to Naas Circuit Criminal Court, being the Clane robbery to which reference has been made.

33. The appellant was on bail in respect of the offenses on Bill No 821/2017 at the time that he committed the offences on Bill No 1098/2017.

The Impact on the Victims

34. Not all of the victims of the offences covered by the four Bills of Indictment with which we are concerned made victim impact statements. Nevertheless, the court below was, and this court is, required to be mindful the provisions of s. 5(4) of the Criminal Justice Act 1993 as substituted by s. 4 of the Criminal Procedure Act 2010, which provides:

> "Where no evidence is given pursuant to subsection (3) [i.e, concerning the impact on a victim] the court shall not draw an inference that the offence had little or no effect (whether long-term or otherwise) on the person in respect of whom the offence was committed or, where appropriate, on his or her family members."

35. Accordingly, in the case of those victims in the present cases from whom no impact evidence was received a court would not be justified in inferring that they were not affected. On the contrary, it seems to us that if the matter is approached in a common-sense way, it would be reasonable to infer that, as a matter of likelihood, any person who directly experienced being robbed at knife point would have been frightened and traumatised by the experience.

36. Three short victim impact statements were submitted in evidence in respect of one of the robberies, namely that at the Applegreen Service Station in Baldoyle. The first was from the Applegreen site manager in Baldoyle, Mr Matthew Farrell. He states that he was not present at the time of the incident but that he can confirm that the business suffered economic loss. It is at the loss of the €600 that was stolen, and he states that the shop had to remain closed for fifteen hours of the incident to enable it to be technically examined by scene of crime examiners from An Garda Siochána. The financial loss due to the fifteen-hour closure is unspecified. He states that the staff on duty at the time were offered the opportunity to avail of counselling through the employee assistance program, which was covered by VHI.

37. A victim impact statement was also received from the customer who was present at the Apple Green Service Station in Baldoyle when it was robbed, namely Ms. Lisa Lawless. She states that in the aftermath of the incident she experienced flashbacks. She recalls the large knife and is distressed by the realisation that she might have been hurt all.

38. The final victim impact statement was from Mr Stephen O'Connor, the supervisor at the Apple Green Service Station in Baldoyle who was on duty and present at the time of the robbery there. He states that after the incident he did not want to return to work for a few days. He has always had a fear of people coming up behind him due to an incident that he was involved in as a child. His experience of the robbery made this fear worse. He did not feel comfortable working evenings or nights after the robbery. He left the employment of Applegreen three months after the incident and his experience of the robbery was a factor in his decision to do so. He was worried and afraid that if he continued to work in retail he might be robbed again.

The Appellant's Personal Circumstances and Antecedents

39. The court received evidence that the appellant has a date of birth of the 28th of February 1985, and accordingly was aged thirty-four at the date of sentencing. He has a large number of previous convictions, 109 in total.

40. The court was told that amongst these he has two previous convictions for robbery, recorded in 2004 and 2008 respectively. He also has a conviction for false imprisonment arising out of the same incident that comprised the 2008 robbery conviction. In addition, he has a conviction for burglary recorded in 2014 and a conviction for assault causing harm recorded in 2012. He has nine previous convictions for s. 4 theft recorded between 2006 and 2017. He has forty-seven previous convictions for offences under the Road Traffic Acts recorded between 2003 and 2018. He has nine previous convictions for unauthorized taking of an MPV contrary to section 112 of the Road Traffic Act, 1961. He has nine previous convictions for causing criminal damage recorded between 2003 and 2012. He has seventeen convictions for offences arising under the Criminal Justice (Public Order) Acts, and finally he has three convictions for offences under the Misuse of Drugs Act.

41. The court was told that the robbery and false imprisonment offences of which he was convicted in 2008 were prosecuted on indictment in the Circuit Court and he received suspended sentences of three years in respect of both. The court was also told that his conviction for assault causing harm was prosecuted on indictment in the Circuit Court, and that for that he received a sentence of two years and six months imprisonment to date from the 26th of January 2012.

42. The court was told that the appellant was from a big family. Further details of the appellant's personal circumstances are to be found in Probation Reports supplied to the court. He is apparently a middle child with four brothers and four sisters. In addition, he has two stepbrothers with whom he has no contact. There was a history of domestic violence in the family home during his childhood. His parents were separated for a seven-year period before reuniting.

43. The appellant has a long-standing drug addiction problem. This has caused difficulties for him in maintaining relationships with some family members although he has a positive relationship with his father, and a close relationship with a younger brother who also has addiction difficulties. Both he and this younger brother have been put out of the family home because it is shared with grandchildren and other family members do not wish the grandchildren to be exposed to them while they are abusing drugs. The appellant was on drugs at the time of the commission of these offences and committed them in order to feed his drug habit. At the time of the offending he was out of the home and homeless. He was living in hostels and sometimes sleeping rough with his brother in old abandoned cars.

44. The appellant attended primary and secondary schools in his locality but withdrew from formal education at age 16, prior to obtaining any qualifications. Since then he has sporadically attended a Youthreach Service program for early school leavers, and while serving a sentence in prison attained FETAC certificates in English and in computers. He

has occasionally been in casual employment but has had difficulty in maintaining employment due to alcohol misuse. He was registered as unemployed for a number of years and was in receipt of social welfare payments.

45. The appellant himself claims, and has self-reported to his probation officer, that he suffers anxiety and panic attacks since being assaulted by another prisoner whilst serving a custodial sentence. He has received no therapeutic or medical intervention in respect of this although he has been encouraged to engage with psychological services available to him.

The Probation Reports

46. The court below was in receipt of two Probation Reports in respect of the appellant. The first, dated the 21st of March 2018, describes the offences for which he faced sentencing and addresses the appellant's victim awareness. He was assessed as presenting with little understanding of the negative impact of his crimes for the business owners, witnesses, local community and An Garda Siochána. The probation officer reported that he would benefit from intervention in this area to further develop his insight into victim awareness. The report then continues with the consideration of the appellant's previous record and looks at his engagement with the probation service. It confirms that he was known to them since November 2001, when he was sixteen years of age; and that the present referral was his fifteenth referral to the Probation Service to date. The history provided records that that he was subject to community service orders on a number of occasions. There was positive engagement initially, but his engagement deteriorated as time went on. In the Probation Officer's most recent dealings with the appellant, whilst he had verbalised a desire to engage with the Probation Service upon release, there was concern in regard to his motivation and his previous history of poor compliance with probation requirements.

47. The appellant was assessed as being of very high risk of re-offending within the coming twelve months, if dynamic risk factors were not addressed. These were identified as his offending behaviour, his lack of engagement in training/employment whilst in the community, his lack of stable accommodation, his significant history of substance misuse, his self-reported current mental health difficulties, conflictual family relations and negative peer influence.

48. The report goes on to describe his personal circumstances, education and employment history, and his accommodation issues (which this judgment has alluded to already). On the specific issue of his substance misuse problems, he gave a history of commencing substance misuse at twelve years of age, starting with cannabis and alcohol. This progressed to using heroin, cocaine and unprescribed benzodiazepine tablets as well. According to the Probation Officer, he presents with good insight concerning his problems, acknowledging that he can achieve and maintain abstinence whilst in custody but that he quickly relapses upon release. He has been on methadone maintenance programs for a number of years. Most recently he engaged with such a program while in custody and that the time of assessment by the Probation Officer he was on a 30mls dose. He verbalised a desire to attend a residential treatment program prior to his return to the

community and stated that he was engaging with Fr. Peter McVerry SJ in regard to a referral.

49. The assessment of the appellant by the Probation Officer took place while he was in Wheatfield Prison serving a sentence. During his time in custody he had fluctuated between the three levels of the Irish Prison Service Incentivised Regime. At the time of assessment, he had achieved enhanced status as a result of good behaviour and engagement with educational services.

50. The report recommended that should the court consider imposing a period of supervision as part of sentencing, a number of conditions should be attached to address his identified risk factors, and these were set out.

51. The court later received an updated Probation Report dated the 29th of May 2019.

52. The context in which the Probation Reports had been sought was that, following evidence being given for the purpose of sentencing on the 24th of January 2018, the appellant's counsel had presented an initial plea in mitigation in which she had pressed the point that her client's addiction issues were the root cause of his persistent offending and had flagged to the court that her client had been making progress in addressing his substance abuse issues and that she was looking for a structured prison sentence which would allow him to attend a residential treatment centre. In aid of that she requested that the court direct a Probation Report and the sentencing judge acceded to this. The matter was then adjourned to the 23rd of March 2018.

53. For completeness, it should be stated that a complicating feature that arose, at least from the appellant's perspective, was that on the 15th of March 2018 he received a three-and-a-half-year prison sentence, with 18 months thereof suspended, from a judge at Naas Circuit Criminal Court for another matter (i.e., the Clane robbery referred to earlier in the recital of facts). This had been backdated to the 20th of July 2017 and was not due to expire (on the basis of standard remission) until a date in January 2019.

54. When the matter came before the court below on the 23rd of March 2018, the sentencing judge was in receipt of the initial probation report just reviewed, and a psychological report. A supplementary plea in mitigation was then presented by the appellant's counsel, again pressing the case for the appellant to be allowed go on a residential treatment program.

55. The sentencing judge was not disposed to facilitate his release from prison on bail at that point to allow him attend such a program, in light of the number and seriousness of the offences. She was also aware that he had only days previously received the aforementioned sentence from Naas Circuit Criminal Court. She was, however, open to two alternative options, the first being to finalise matters at that point with a sentence structured to provide for a custodial term, part of which would be suspended on the condition that he attend residential treatment upon his release; alternatively that finalisation of the matter would be put back for a year or a little more (by which time the

Naas sentence would have expired), on the basis that if the appellant had remained drug-free in the meantime and continued to show motivation towards turning his life around, an application that any sentence to be then imposed should be structured to facilitate his wish to attend residential treatment in early course could renewed at that point, and it was implicit that any decision by the court on that would take account of the time spent in custody and of his progress.

56. As it is pertinent to a point raised on the appeal, we consider it appropriate to set out a brief extract from the transcript of the verbatim exchanges between defence counsel and the bench on 23rd March 2018:

> *"JUDGE: All right. So, we have a couple of alternatives here, right. We can finalise the matter today. We can finalise the matter today which would include a part suspended sentence and a condition in that that he attend residential treatment or we can adjourn the matter for finalisation until the -- he spent time in custody which would reflect that sentence and ask for residential treatment at that stage.*
>
> *DEFENCE COUNSEL: Yes. And I think in fairness his remission date is the 20th of January 2019 for the -- sorry, that's for the other matter, the Naas matter. I think I know what you're saying, Judge, you're saying that basically potentially the matter could go back and we could look and see if a bed was available for him and I can speak*
>
> *JUDGE: I just want to make it quite clear, he is not getting out on bail.*
>
> *DEFENCE COUNSEL: No.*
>
> *JUDGE: Right, to attend -- I just want to make that clear.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: He's not getting out on bail to attend residential treatment, right.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: The sentence here, right, and I can go through it, will be longer than Naas, all right.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: Not significantly longer but will be longer, all right.*
>
> *DEFENCE COUNSEL: Yes, yes.*
>
> *JUDGE: The consecutive element will be three years, all right.*
>
> *DEFENCE COUNSEL: Yes.*

JUDGE: We can give a condition of that suspended sentence which will be suspended, right, residential treatment. If he seriously wants residential treatment we can put it back for a period of time and then finalise the matter.

DEFENCE COUNSEL: Yes. He is happy enough with that, Judge.

JUDGE: Right. Then he stays in Wheatfield; isn't that right?

DEFENCE COUNSEL: Yes.

ACCUSED: Thanks, Judge.

JUDGE: All right. I have to do the sums and as I said yesterday I'm not a mathematical expert. I am going to put it back then for a year, okay, and ask for a probation report, a governor's report, an education report, okay.

DEFENCE COUNSEL: Yes.

JUDGE: And we'll take it from there.

DEFENCE COUNSEL: And he'll give urine analysis as well, Judge, in the meantime.

JUDGE: Yes.

DEFENCE COUNSEL: Yes.

JUDGE: All right. I'll give you that date.

PROSECUTING COUNSEL: I know the 11th of March certainly

JUDGE: No, no. We'll just leave it for the moment now.

DEFENCE COUNSEL: Judge, the remission date is the 20th of January.

JUDGE: Yes, I know.

DEFENCE COUNSEL: So maybe it should go back to

JUDGE: I know but it will be longer in this case.

DEFENCE COUNSEL: Oh absolutely, Judge.

JUDGE: The sentence will be longer.

DEFENCE COUNSEL: Yes, yes, yes".

57. This exchange was interpreted on the appellant's side as, in effect, implying that if the appellant remained drug free and continued progress towards rehabilitation, any sentences he might receive on the adjourned date would be structured to facilitate his wish to commence residential treatment in early course. The appellant indicated his

preference that the matter should go back for a year. Accordingly, the matter was then adjourned to the 31st of May 2019, with the request to the Probation Service to provide an updated report in time for that. In addition, the sentencing judge ordered that urinalysis be provided at the adjourned date and she further requested that a Governor's report and an education report from the prison should also be provided.

58. The report dated the 29th of May 2019 records that the appellant had been moved from Wheatfield Prison to Cloverhill Prison in the meantime, where he remained on remand. The appellant had reported as being drug-free, and this had been confirmed through the addiction team in Cloverhill who advised that he had provided substance free urinalysis and that he had his name on a waiting list for residential treatment in Tiglin Treatment Centre. In a follow-up contact with Tiglin Treatment Centre, the probation officer was advised that only one place was available per month to somebody from custody and that the appellant could not be provided with a place in the short-term. However, if he were to be released at that point, and providing he was able to stay free from substances, Tiglin Treatment Center could offer him a bed in the following week. The probation officer further advised the court that if the appellant were to be released from custody, but not offered a bed in Tiglin, community day programs would be explored.

59. When the matter came back before the court on the 31st of May 2019, the court had insufficient time to deal with it due to a heavy list, and it was further adjourned to the 6th of June, 2019. At that point, the court had before it the two Probation Service reports; a letter from the Tiglin centre confirming that the appellant had fulfilled all criteria for placement on their residential treatment course and further confirming that a bed would be available for him from the 7th of June, 2019; a letter of support from Fr. Peter McVerry; a positive reference from the prison chaplain at Wheatfield; a positive education report showing that the appellant had amassed a number of qualifications during his time in Wheatfield; a positive report from the addiction counsellor at Cloverhill prison; a urinalysis report that was negative for drugs of abuse; and a lengthy report from clinical psychologist. The court also had before it three governor's reports from his time in Wheatfield and Cloverhill. These reports, while noting some disciplinary offences (such as receiving contraband and smoking in a prohibited area) resulting in P19's, were positive overall, and confirmed his status as an enhanced prisoner.

The Psychologist's Report

60. The psychologist reported that given the appellant's chronic long-term history of addiction, and his interrelated mental health difficulties, he will require integrated and longer-term supports to overcome his addiction related problems so as to reduce the risks of relapse which would in turn decrease the chances of recidivism. He goes on to say that parallel to supporting the appellant to overcome his addiction problems, he would benefit from a psychiatric review given his significant anxiety and mood instability related concerns. He adds that in addition to receiving psychiatric intervention, the appellant would also require specific therapeutic intervention to address his anxiety mood and psychological distress. He says that consideration also needs to be paid to the appellant's social, vocational and adaptive behaviour deficits if the risks of relapse and recidivism are

to be minimized. Moreover, if future recidivism is to be minimized, he will require holistic personal support and a therapeutic program to rehabilitate and resource him in becoming an independent man capable of managing himself and his behaviours in the community. The report makes detailed recommendations as to how each of these requirements could be met.

Mention on the 15th of February 2019

61. There is a further relevant detail that requires to be mentioned at this point. Although the matter had been adjourned to a date in excess of a year away on the 23rd of March 2018, and was not due to resume until the 31st of May 2019, the matter was mentioned to the sentencing judge on the 15th of February 2019 on the initiative of counsel for the appellant so as to apprise the court that a letter had been received from the Tiglin Centre saying that they were in a position to offer a place to the appellant (if he could secure release on bail to take it up). Counsel asked for his client to be granted bail at that point in circumstances where the Director of Public Prosecutions had no objection, on the suggested basis that the sentencing finalisation date of the 31st of May should remain undisturbed but also on the understanding that, if bail were to be granted, his client might be excused from attending court on the 31st of May.

62. The sentencing judge did not initially recall the case, but having checked her notes recalled it, and responded:

> *"JUDGE: Yes, all right, I'll say this once, all right. Because I've said it before.*
>
> *MR MONAHAN: Yes, Judge.*
>
> *JUDGE: He's going to be sentenced first.*
>
> *MR MONAHAN: Yes, Judge.*
>
> *JUDGE: Right and then we'll consider residential treatment, okay.*
>
> *MR MONAHAN: Yes, Judge.*
>
> *JUDGE: And I want what I said I wanted, all right and you weren't here, right, so this has nothing to do with you, all right. But I want a governor's report, I want an education report and I want urinalysis and a Probation and Welfare Service report, all right?*
>
> *MR MONAHAN: Yes, Judge.*
>
> *JUDGE: And I just and you know perfectly well, this was before this Court on the 23/3/2018, and the Court of Appeal has set down in Casey v. Byrne, all right, on April 2018 how robbery and burglary charges should be dealt with, and the Court has to take note of that. And your client will have to be advised of that and how the posts have been changed, the goal posts have been changed."*

63. It bears remarking upon that the sentencing judge's reference to *Casey v Byrne* is manifestly a conflated reference to the two guideline judgements of this court, delivered on the same day in April 2018 and dealing with sentencing for the offences of burglary/aggravated burglary, and robbery, respectively, in the cases of *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121 and *The People (Director of Public Prosecutions) v Byrne* [2018] IECA 120.

The Sentencing Judge's remarks

64. In sentencing the appellant, as previously outlined, for the offences on the four Bills of Indictment in question the sentencing judge offered the following remarks (inter alia):

> *"As regards the first bill number, which is the Applegreen in Baldoyle, this was a count of robbery. And in fixing the headline sentence in the first instance, the robbery part carries a maximum sentence of life imprisonment. So on the basis that a life sentence is likely to be served for only the very worst offences of the type, the practical reality is that the effective range of custodial penalties caps out at 15 years or thereabouts for all but the most exceptional cases. An effective 15 year range allows for a low range of zero to five years, a mid-range of six to 10 years and a higher range of 11 to 15 years. The Court is taking into account a knife was used in the robbery, monies were taken, it was premeditated and the effect it had on an injured party. The mitigating factors are his plea, the admissions were made as at interview, the value of those admissions to the prosecution, and the efforts he's made to rehabilitate himself. There was a cloth over his face during the course of this offending behaviour. The Court will fix a headline sentence of six years' imprisonment, but taking mitigating factors into account, in particular his plea, his admissions, and most importantly the efforts he's made to rehabilitate himself and the Court has the benefit of the number of documents in that regard including a probation and welfare service report, will reduce that sentence to three years' imprisonment. The Court is taking into account and well into account the contents of the victim impact reports in this matter.*
>
> *The next matter that the Court is dealing with is Bill No. 821/17. And that was the two robberies at the Texaco garage on the Strand Road in Portmarnock on the 21st, 24th December and the 30th of December. And count No. 1 on that is the robbery on the 24th, and count No. 2 was the robbery on the 30th. Again, taking into account and adopting the best approach of the Court of Appeal, will fixing the headline sentence of six years' imprisonment. This was obviously a crime of violence. A 10 inch knife was pressed to the left hand side of the face of the injured party and €400 was taken. Again, the value of his plea, the admissions he made in interview and his cooperation at interview and in particular, the efforts he's made to rehabilitate himself and the Court has documentation in that regard, will reduce that sentence from six years to three years. Again, as regards the robbery on the 30th of December, again €800 was taken and a brown bottle was in his hand during the course of this offending behaviour, will again impose a headline sentence*

of six years' imprisonment and reduce to three years. There's no victim impact reports, as I've said.

The next matter is 9/09/17 and the Court is count No. 1 is the robbery charge, Topaz in Clonshaugh Road on Stephens's day and the second count is production of an article in the course of a dispute. Again, the headline sentence will be fixed at six years' imprisonment and a male was dragged by his jacket and a knife was poked into his rib cage. Again, the mitigating factors, taking into account his remorse, his submissions, his early plea, the value of his admissions, because he was heavily disguised, but the Court, in marking the seriousness of the offence, will set the headline at six, but reduce it until three. In all these matters, I'm taking into account the principles of totality and proportionality.

The next bill No. was the attempted robbery at 1098/17 at the Spar shop on Collins Avenue. And the Court heard again the circumstances surrounding the commission of that offence. And the Court is dealing with he was on bail when this offence was committed, so any sentence given here today is consecutive to the sentences already imposed and will begin on the lawful determination of the previous bill numbers of the sentences imposed. Count No. 1 is an attempted robbery charge; count No. 2 is production of an article; count No. 3 is robbery at Harmonstown Road of the Daybreak Shop, and count No. 4 is production of an article.

As regards the attempted robbery at Collins Avenue Spar, he tried to open two tills and he ran off when another gentleman came up. He was on bail, so that's a very serious aggravating factor. Counts No. 3, and I'll take into consideration in count No. 4, is the robbery at Harmonstown Road, this was serious, a knife was involved, €540 was taken, and he was on bail.

So he has 109 previous convictions; two for robbery; one for section 3; one for burglary; nine for theft; 46 for road traffic; 9 for 112; and 9 for section 2 of the criminal damage; 17 for public order; and three under the Misuse of Drugs Act. The Court again will fix the headline sentence in this matter at six years, reduced to three years, but consecutive, on the lawful termination of the sentences already imposed. That makes a total sentence of six years' imprisonment. And the Court is reminded that Judge O'Shea in Naas, on the 15th of March 2018, gave a three and a half year sentence with 18 months suspended, backdated to the 20th of July 2017. He's exclusively held on these matters since January of this year of 2019, so any sentence is backdated to that. To incentivise rehabilitation, the Court will deduct and suspend 18 months from the sentence of six years backdated to that date in January of 2019."

The Grounds of Appeal

65. Six grounds were put forward in the Notice of Appeal:

1. The sentence imposed on each Bill No was excessive in all the circumstances of the case.

2. The sentencing judge failed to have adequate regard for the period of time that had elapsed with the appellant been in custody and the progress he had made there and erred in not backdating 581/2017, 821/2017 and 909/2017 to when the appellant originally went into custody on these matters instead of only backdating the sentence to January 2019 and not taking into account that the matter had gone back with the appellant in custody, to make progress which he did. The appellant was in custody solely on these matters prior to an unrelated matter in Naas Circuit Court being dealt with.

3. Further or in the alternative, the sentencing judge having made the sentences on Bill No 1098/2017 consecutive to the sentence imposed on Bill No 581/2017 erred in law in failing to reduce the sentence sentences, including by way of fully suspended sentence, to give effect to the principles of totality and proportionality especially having regard to the time that would elapse from start to finish.

4. The sentencing judge failed to take into account adequately or at all matters that had been ventilated on earlier dates in court, and the progress that he had made over an extended period. The trial judge previously said the appellant had two options, residential treatment prior to finalisation or finalisation with residential treatment after release.

5. The sentencing judge failed to take any or any adequate account of the fact that the appellant had been accepted into Tiglin and had in fact got someone to bring him there. Also, the [sentencing judge failed to take any or any adequate account of the] reports of the probation service which were before the court. In respect of the latter reports, the sentencing judge failed to consider the indications to the effect that the Probation Service was willing to engage with and support the appellant in custody or in the community. The sentencing judge thereby failed to facilitate the appellant's rehabilitation.

6. The sentencing judge failed to take any or any adequate account of the appellant's personal circumstances.

Submissions

66. In a carefully calibrated, nuanced and cogent submission by Ms Ní Chúagáin B.L., on behalf of the appellant, she has distilled her complaints into two main ones, although there are a number of facets to the first of these.

67. At the outset she acknowledges that these were serious offences, in respect of which there were a number of aggravating factors, including that there was a spree or sprees of similar type offending, none of which she seeks to gainsay. Accordingly, she does not take issue with the headline sentences nominated by the sentencing judge.

68. Her first complaint is that her client was encouraged to believe, and in effect had been induced by the trial judge's remarks at the hearing on the 23rd of March 2018 to legitimately expect, that if he maintained progress towards his rehabilitation he would be

facilitated on the adjourned date in being allowed to attend residential treatment in early course thereafter, and that whatever sentence was going to be imposed would be structured to allow for that. Her case is that her client perceives that what she referred to in her oral submissions as his "bargain" has not been honoured, and that he is left with an understandable sense of grievance that that bargain has been, in effect, reneged upon (our characterisation, not hers). Accordingly, she says the interests of justice require this court to interfere to alter the sentences subsequently imposed.

69. Counsel maintains that her argument is supported by certain remarks of Murray C.J. giving judgment for the former Court of Criminal Appeal ("the CCA") in *The People (Director of Public Prosecutions) v Drinkwater* [2008] 1 I.R. 527.

70. The circumstances of that case are succinctly summarised in the headnote to the report. The accused had pleaded guilty to an offence of burglary. At the hearing, the trial judge adjourned the question of sentencing, stating that he would like to hear from the accused's mother regarding her funding of a drug treatment programme for the accused and also to obtain more information regarding the activities of the treatment centre itself. On the adjourned date, the trial judge, relying on an unfavourable probation report, proceeded to sentence the accused to two years imprisonment without hearing from the accused's mother or looking at the further information about the treatment centre. The accused applied for leave to appeal his sentence to the Court of Criminal Appeal on the grounds that he had a legitimate sense of grievance in that he alleged he had been led to believe that a non-custodial sentence would be imposed, once the additional information from his mother and from the treatment centre was satisfactory. It was submitted that as a matter of law the Court of Criminal Appeal was obliged to remove that sense of grievance legitimately felt by the accused, even if the sentence itself could not be considered too severe or wrong in principle.

71. In that case the CCA declined to adopt the principle of legitimate sense of grievance in the manner in which it has been applied in English authorities, holding that, the offender's sense of grievance should not be treated as the sole and determinative factor in an appeal against sentence. Victims and the public generally had a legitimate expectation that those convicted of a criminal offence should be subject to a judicially imposed sentence, which might be a custodial sentence, as was appropriate for the crime, its gravity and the circumstances of the case. It would be wrong and disproportionate to allow an offender's sense of grievance outweigh all these other considerations in every case.

72. However, Murray C.J. had gone on to say:

> *"Certainly, if a trial Judge in the course of the sentencing process, having considered all the circumstances of the case then before him, expressed a definite view that a non-custodial sentence would be imposed if certain conditions were fulfilled, such as the availability of a satisfactory probation report, but yet proceeded ultimately on quite a different basis and imposed a custodial sentence that would be a factor which this Court would be entitled to take into account in determining whether, in all the circumstances of the case, the sentence imposed*

was excessive or wrong in principle. In a case where this Court considered that the non-custodial sentence as originally and expressly envisaged would not have been wrong in principle or unduly lenient the offender's legitimate sense of grievance at the manner in which he was sentenced could be considered as a ground for considering the custodial sentence as excessive or wrong in principle in all the circumstances."

73. A second facet to this complaint argued by counsel for the appellant is that the trial judge had been wrong in believing that she was precluded, or hamstrung in some way, from following through on her earlier indication as to how she might deal with the matter because the metaphorical "goalposts" had been moved by the promulgation of this court's guideline judgments in the *Casey* and *Byrne* cases, respectively. Counsel maintained there was nothing in either *Casey* or *Byrne* that would have precluded the sentencing judge from keeping to the commitment that she had arguably expressly, but certainly implicitly, given. The guidance offered in the *Casey* and *Byrne* cases had been with respect to how to approach the assessment of gravity in such cases, and with locating such cases within indicative ranges for sentencing purposes specified in those judgments, so that gravity might be appropriately reflected in the headline sentence to be nominated. However, there was no quarrel by the appellant with the headline sentences nominated by the sentencing judge. What the *Casey* and *Byrne* cases did not deal with was how a trial judge's discretion to seek to promote rehabilitation or reform in such cases might be exercised, both in the interests of the offender and the interests of society; nor did they deal with how a sentence might be structured in such cases to achieve those ends. The *Casey* and *Byrne* cases did not alter the long-established position that where there was an evidential basis for doing so, such as a track record of some progress towards rehabilitation or reform, a trial judge can in the exercise of her discretion seek to prioritise the penal objectives of rehabilitation and reform over the objectives of retribution and/deterrence and structure a sentence appropriately. This may legitimately require having recourse to the option of wholly or partly suspending a sentence.

74. It was pointed out that in this case the appellant had served a considerable time in custody. He had been arrested in July 2017 and held on remand in respect of these matters until he was sentenced in early June of 2019. Accordingly, he had spent 23 months in custody. While the prosecution position was that by virtue of the appellant being sentenced separately to a term of imprisonment by Naas Circuit Criminal Court for the Clane robbery, which sentence had been backdated to the 20th of July 2017, he was only on remand solely in respect of these matters from January 2019 when the Clane robbery sentence expired, the defence's position was that that was to ignore the reality that the Clane robbery had in truth been part of one of the sprees (or the same spree if all of the appellant's offending behaviour is to be regarded as a single spree) that comprises the offences charged on the four Dublin Circuit Criminal Court bills before us (the Clane robbery was committed on the same day as the robbery of the Topaz filling station on the Clonshaugh Road, and the same vehicle was used by the appellant in both incidents). The only reason the Clane matter had been returned for trial to Naas Circuit

Criminal Court rather than the Dublin Circuit Criminal Court was due to geography and rules associated with the Circuit Court being a court of local jurisdiction.

75. In the circumstances, it would have been legitimate to regard the appellant as having been in custody on all related matters from the 20th of July 2017, such that he had spent almost 23 months in custody by the time that he was sentenced on the 6th of June 2019, and in those circumstances the sentencing judge had ample scope to consider that the penal objectives of retribution and deterrence had been adequately met by the time spent in custody up to that point, but that what was then required was the prioritisation from that point on of the penal objectives of rehabilitation and reform, both in the appellant's interests and the interests of society. It would have been open to the trial judge to have followed through on her earlier indication and to have imposed the appropriate sentences but to have conditionally suspended the unserved portions thereof to facilitate the appellant's wish to continue his rehabilitation by taking up a place in residential treatment. The failure to do so was, it was argued, an error.

76. Further, it was maintained that even if the sentence ultimately imposed had been appropriate, the judge had nevertheless erred in only backdating it to January 2019 for the reasons stated already.

77. The second main complaint put forward on behalf of the appellant can be succinctly stated. It is complained that such was the appellant's progress towards rehabilitation and reform, as demonstrated by positive reports from the relevant professionals, the positive testimonials offered in respect of him, the concrete evidence of clear urinalysis, his achievements in education and training while in prison, his determination to turn his life around manifested by his repeatedly expressed desire to attend residential treatment, the fact that he had applied himself for such treatment, and the fact that he been independently assessed as fulfilling all the necessary criteria and had been offered a place, the sentence ultimately imposed failed to adequately take account of these matters. In a nutshell, it was argued there was very strong mitigation which was inadequately reflected in the sentences imposed.

78. In reply, counsel for the respondent contends, in submissions that were also cogent, well-argued and very much to the point, that the sentences imposed by the court below were entirely appropriate and that this court would not be justified in interfering with them.

79. Some emphasis was placed on the fact that the appellant had previously been given the benefit of a fully suspended sentence for robbery and false imprisonment but had failed to reform and had reoffended at a significant level.

80. It was submitted that even taking the offences on Bill number 821 / 2017 on their own, a six-year sentence with 18 months suspended might have been said to have been justified. This Bill involved the perpetration of two robberies in the same premises, one on Christmas Eve and once six days later, in circumstances of such casual disregard for the well-being of employees, the second offence having been committed by taxi, that it would have been hard to argue against the imposition of such a sentence, particularly in the

light of the appellant's previous convictions. When it is factored in that the case involved a total of six robberies and included a mandatory consecutive element owing from the commission of some of those robberies while on bail for others, it was submitted that the sentence imposed was appropriate and not in any way lenient.

81. It was said that thereafter any analysis of the grounds of appeal, or the "legitimate expectation" argument advanced by the appellant on foot of the comments made by the sentencing judge was, arguably, academic and somewhat futile. A lesser sentence than that imposed could not reasonably have been contemplated in this case given the number and nature of the robberies and the appellant's antecedents.

82. Even taking the appellant's case at its height, the sentencing judge made it clear to the appellant (on the 23rd March, 2018) that she would not be giving him bail to attend drug treatment in the light of the number and seriousness of the offences. While she also stated that the sentence she would impose would not be significantly longer than that imposed in Kildare, she did not specify that she meant the unsuspended portion of that imposed in Kildare. She also specifically stated that the consecutive element would be three years. She also specifically indicated on a number of occasions that she was not prejudging matters as to how the case would be finalised. In these circumstances the respondent's position is that it is hard to see how the appellant can realistically argue for a lesser sentence from this Court.

83. It was submitted that the *Casey* and *Byrne* jurisprudence was clearly relevant as the offences were committed during "sprees", with crimes being committed either on the same day or within the space of a few days of each other.

84. With reference to the complaint about the fact that the sentence was backdated to the date of the completion of the Kildare sentence, the respondent argues that this was a logical approach to take since the appellant should not get benefit twice for the same period in custody. The judge had been informed that the accused had had the Kildare sentence backdated to the date he went into custody, the 20th of July, 2017, which was the same date that he went into custody on these matters. The appellant has no entitlement to a "free ride" in respect of either of the robberies he committed and as such there was a clear logic to the sentencing judge's approach in backdating her sentences to the completion of the Kildare sentences.

85. The respondent suggests that had the sentencing judge taken the course of simply suspending the sentences in her cases upon the completion of the Kildare matters, then the sentencing judge would have fallen into error by failing to mark the seriousness of the offences she was dealing with. Rather, it is said, the sentence ultimately imposed by her appropriately reflected the number and severity of the offences before the Court and discloses no error in principle or tariff.

Discussion and Decision

86. We have carefully scrutinised the transcript for the 23rd of March 2018 and we are satisfied that the sentencing judge did not give any firm commitment as to how she would

deal with the matter if the second option was adopted and it was put back. We accept that she did indicate a certain likely approach, namely that there would be a suspended element to whatever (cumulative) sentence was imposed, that her (cumulative) sentence would be longer than that imposed for the Naas matter, but that it would not be significantly longer, and that the suspended element would be subject to a condition that he would undergo residential treatment. Be that as it may, we consider that she had not yet decided as to how exactly she might structure her sentence to give effect to that, because she said, "*I have to do the sums*". Specifically, she gave no commitment that the sentence would be structured so that the appellant would secure immediate release upon being sentenced so as to facilitate his entry into residential treatment there and then. While we accept that it is likely that she had in mind to afford the appellant appropriate credit for time served on remand, so that that period of time could be treated as time served towards whatever sentence might be imposed, the sentencing judge did not indicate any plan in so far as any unserved balance was concerned, and specifically did not tie her hands as to whether she might suspend the entirety of it, or just part of it. The most that the appellant was entitled to take away from what the judge had said was that if he continued to maintain his progress towards his rehabilitation he would be facilitated in entering residential treatment earlier than might otherwise have been the case. The sentence imposed as actually structured does facilitate that.

87. However, as we did find it necessary to closely examine the transcript and to parse the sentencing judge's words in order to arrive at the conclusions stated in the immediately preceding paragraph, it does seem to us that the sentencing judge was perhaps not as clear as she might have been in communicating her views and intentions. We are therefore prepared to take into account that the sentencing judge's remarks on the 23rd of March 2018 may have been erroneously interpreted by the appellant as being a commitment on her part to impose a sentence, to treat the time that he had spent on remand as time served and to then suspend the entirety of the balance, and that he now feels aggrieved that the perceived commitment was not followed through on. However, in doing so we have also noted the views expressed in the Drinkwater case, cited earlier in this judgment, to the effect that an offender's sense of grievance should not be treated as the sole and determinative factor in an appeal against sentence. As was stated, victims and the public generally have a legitimate expectation that those convicted of a criminal offence should be subject to a judicially imposed sentence, which might be a custodial sentence, appropriate for the crime, its gravity and the circumstances of the case. It would be wrong and disproportionate to allow an offender's sense of grievance outweigh all these other considerations in every case.

88. A critical question, therefore, is whether, having correctly identified the appropriate headline sentences and having discounted time served on remand from them (assuming at this point that she was correct to only backdate to the relevant date in January 2019, a point we will return to), the sentencing judge could justifiably in the circumstances of this case, and on the evidence, have suspended the entirety of the unserved balance. If we conclude that it was within the range of her legitimate discretion to do so, this court will consider whether an interference in favour of the appellant to restructure the sentences is

merited at this point. However, if, upon any view of the matter a suspension of the entirety of the unserved balance could not have been justified, we will not interfere.

89. The sentencing judge clearly felt that in the light of the guidance provided by the Casey and Byrne decisions she would not be justified in suspending the entirety of the unserved balance. It is not a wholly correct analysis to suggest that the guidance provided by Casey and Byrne jurisprudence is solely concerned with the appropriate assessment of gravity in such cases and with providing indicative ranges in which to locate a particular case for the purposes of sentencing. They certainly do all of that, but guidance is also given concerning how sentences involving multiple offences committed in the course of a spree or sprees might be structured. While it is not explicitly stated that the norm for such offences, which are already aggravated by definition by virtue of having been committed in the course of a spree, and which exhibit other aggravating factors, such as in this case the producing or carrying an article such as a knife or broken bottle for the purpose of frightening or intimidating victims, and having previous relevant convictions, will be a substantial post-mitigation custodial sentence, the indicative ranges for headline sentences indicated in the *Casey* and *Byrne* jurisprudence reflect that that will be the reality in very many of these cases, unless there is quite exceptional mitigation.

90. We would remark at this point that the appellant has been well advised in not seeking to complain about the headline sentences nominated in this case. Although noting that the sentencing judge sought to anchor her selection of headline sentences in the *Casey/Byrne* jurisprudence we consider that the headline sentences actually nominated were very much at the lenient end of her range of discretion. In noting that, we readily acknowledge that there has been no application by the respondent to review the sentences ultimately imposed on the grounds of undue leniency. If such a case had been made, it might have been argued that higher headline sentences were merited, and that greater use should have been made of consecutive sentencing. Be that as it may, we will proceed on the basis that the headline sentences, and the decision to impose concurrent sentences save in the single instance where a consecutive sentence was required by statute, were within the sentencing judge's legitimate range of discretion. However, it is a relevant consideration that the headline sentences selected were very much at the lenient end of that range.

91. There is no doubt that the appellant was entitled to a significant discount for mitigation, in circumstances where he had pleaded, had been co-operative and had made admissions, was expressing remorse (albeit in circumstances where he had presented to the Probation Officer as having limited victim awareness) and had a demonstrated track record of progress towards his rehabilitation. It is also relevant that it was accepted by the State's witnesses that the appellant, a chronic recidivist criminal, is addicted to drugs, and that there was a direct relationship between his commission of the offences with which we concerned, i.e., robbery type offences, and his addictions, in that they were his means of funding the purchase of drugs in order to feed his habit. It is a reasonable inference on the evidence that if the appellant could successfully address his drug addiction problem, he would be unlikely, or very much less likely, to continue offending in the same way. If

that could be achieved it would be very much in the appellant's interest but also, importantly, in the interests of society.

92. There is well established jurisprudence which it is unnecessary to rehearse as to the importance of rehabilitation and reform as a penal objective in general, and to the effect that the prioritisation of those objectives may be justified in an appropriate case, but that it will not be justified in every case. We have said many times that for a court to metaphorically "go the extra mile" in showing leniency to an offender in the interests of promoting rehabilitation and reform and incentivising continued progress in that regard there requires to be a sound evidential foundation for doing so. In practice, what is required is evidence both as to a genuine desire to reform and rehabilitate and a track record showing concrete steps already taken that regard. There is no doubt that in the present case there was an evidential foundation such as would have allowed the sentencing judge to to show considerable leniency in furtherance of the objective of promoting and incentivising rehabilitation and reform.

93. However, even where there is a basis for showing considerable leniency in furtherance of those objectives, there may be normative limits on the extent to which that can be done, having regard to the gravity of the crimes involved. To give an example in a different context, namely in the context of rape offences, in *The People (Director of Public Prosecutions) v Tiernan* [1988] IR 250, Finlay C.J. stated:

> *"Whilst in every criminal case the judge must impose a sentence which in his (sic) opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional".*

94. While the cardinal seriousness of robbery offences does not equate to that of rape offences, they are nonetheless very serious offences as is evident both from the fact that the maximum available sentence is one of life imprisonment and as is clear from the indicative ranges in which the gravity of most such offences will fall to be assessed as guided by the *Casey* and *Byrne* jurisprudence. While there may well be exceptional cases in which wholly suspended sentences could be justified for a succession of robbery cases with multiple aggravating circumstances, such cases are likely to be rare indeed.

95. In truth, of course, the sentence which the sentencing judge was minded to impose on this appellant could not on any view of it be regarded as a wholly suspended sentence, because his time spent in custody on remand, however it was calculated, was going to be taken into account as time served. Arguably, the penal objectives of retribution and deterrence could be treated as having been addressed by the time served thereby allowing the objectives of rehabilitation and reform to be prioritized in dealing with the unserved balance. To arrive at any fair assessment as to whether what was done in that regard was within the sentencing judge's legitimate range of discretion, it is necessary to be clear as to the proportion of the overall sentence that was being treated as time served. In this instance, the sentencing judge was only prepared to backdate the

sentence to January 2019, which would have meant that the allowance for time served would be somewhere between five and six months - a relatively small proportion. The appellant argues that the sentencing judge was incorrect in this approach for the reasons already rehearsed. We are inclined to agree. But for geography and the local jurisdictional rules pertaining to the Circuit Court, there would been no reason to separate out the Clane robbery from the cases with which we are concerned on this appeal. If the jurisdictional rules had permitted it to be also dealt with as part of the present group of cases, rather than separately before a different judge at Naas Circuit Criminal Court, while its addition would undoubtedly have had the potential to influence the extent of the overall sentencing package (and we acknowledge that there might have been greater use made of consecutive sentencing), we do think it is likely that all sentences that were not being made consecutive would have been backdated to the date on which the appellant went into custody, namely the 20th of July 2017. In those circumstances we think that the sentencing judge in this case erred in not backdating the sentences in the cases before her to the 20th of July 2017, and in only backdating them to the date in January 2019 when the sentence for the Clane robbery expired.

96. One effect of not backdating the sentences to what we regard as the appropriate date was that a much smaller proportion of the overall sentence was available to be attributed to time served than would otherwise be the case, making it difficult to justify the immediate suspension of the unserved balance or a substantial part thereof. If the sentence had been backdated to the correct date, a much greater proportion of the overall sentence would have been attributed to time served, making the incorporation of a substantial suspended element into the sentence structure in the interests of promoting rehabilitation and reform potentially easier to justify in the circumstances of the case. We are therefore satisfied that there was an error of principle in the sentencing judge's approach, and that the sentences imposed by the court below should be quashed.

97. We have already made the point that we regard the sentences as structured by the sentencing judge to have been extremely lenient, albeit that the case has not been made by the respondent that they were unduly lenient. In that context it is important to make the point that we are at large regarding any re-sentencing, and that we do not consider that our hands are tied in any way by the lenient view taken in the court below. That having been said, we are re-sentencing as of today and it cannot be ignored that the appellant has served a further sixteen months in custody since his sentencing at first instance and while prosecuting and awaiting a decision on this appeal. Accordingly, he has now spent a period of more than three years and three months in custody.

98. In the circumstances what we propose to do is to quash the sentences imposed by the court below but to re-impose them identically, including the requirement that the sentence on Bill No 1098/2017 should be consecutive to the sentence on Bill No 581/2017, but subject to the variation that the sentences which were backdated by the court below to a date in January 2019 will now be backdated to the 20th of July 2017. In light of our view on the leniency of the sentences imposed at first instance, we do not propose to suspend any further portion of the sentences beyond the 18 months

suspension imposed by the judge in the court below in respect of the sentence on Bill No 1098/2017. For the avoidance of doubt the conditions of that suspension will remain the same.

99. The practical effect of the sole change that we are disposed to make, namely changing the date to which there is to be backdating, is that the appellant's release date (assuming standard 25% remission) will on our calculations move forward from a date in the early summer of 2022 to a date in early December 2020. His precise release date will fall to be calculated by the prison authorities in the normal way on the basis of the new committal warrant to be issued in respect of the appellant following this appeal and reflecting our order altering the date to which there is to be backdating to the 20th of July 2017. We consider that no further order is required, and for the avoidance of doubt that no new bond is required. Moreover, all matters taken into consideration in the court below will again be taken into consideration.

100. Finally, we wish to express the hope that upon his release the appellant will avail of the opportunity to take up residential treatment. It is very much in his interest and in the interests of society, that he should do so, and we wish him well in that regard.