THE COURT OF APPEAL

Record No.: 04/2019

Birmingham P.
McCarthy J.
Donnelly J.

BETWEEN/

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

RESPONDENT

-AND-

STEFAN SCHAUFLER

APPELLANT

JUDGMENT of the Court delivered on the 6th day of November, 2020 by Ms. Justice Donnelly

1. The appellant pleaded guilty to a number of serious offences arising out of a single but ongoing incident that occurred on the 20th June, 2018 and into the 21st June, 2018, in the property he had rented from the 81 year old victim of these offences. He was sentenced as follows:

   (a) In relation to Count 1, causing serious harm, fifteen years imprisonment with the final six years suspended;

   (b) In relation to Count 2, false imprisonment, fifteen years imprisonment with the final six years suspended;

   (c) In relation to Count 3, robbery, seven years imprisonment;

   (d) In relation to Count 5, unauthorised taking of a vehicle, two and a half years imprisonment.

2. All sentences were to run concurrently. The sentences were backdated to the date of the arrest of the appellant; the 26th June, 2018.

3. Garda Kevin O'Hara gave evidence of the circumstances of the offence. The appellant resided in a rented property in Cartron Point, Sligo. He was a tenant of the injured party, Mr. Michael Lally. On the 20th June, 2018, the appellant and Mr. Lally met at the property at the appellant's request. The appellant told the victim that there was a leak in an upstairs bedroom. Mr. Lally went upstairs to inspect the leak but there was no leak. The curtains were drawn in the room. The appellant asked Mr. Lally to sit on the bed and demanded money from him. Mr. Lally stated that he had no money but could get him money. The appellant drew an iron bar which he had in his hand and he hit Mr. Lally a number of times across the head and his back. The appellant took Mr. Lally's bank cards

and demanded his PIN number for the card. Mr. Lally was subsequently tied up. Mr. Lally's two legs were tied and his two arms were tied. Mr. Lally's phone was smashed. His hearing aids were out and his glasses were knocked off as well. The appellant locked the bedroom door and left the injured party.

4. Mr. Lally's family reported him missing on the 21st June, 2018. Mr. Lally's car was subsequently observed in Sligo town. Gardaí reviewed CCTV. As a result of their investigations, they went to the rental property. Gardaí found that the back door of the house was left open and upon entering the house discovered that the upstairs bedroom was locked. Having broken into the room, Mr. Lally was discovered in the locked bedroom lying on the floor. He was disorientated and his face was covered in blood. Garda Kevin Quinn stated that his face was very swollen and he was badly injured. Mr. Lally was nearly 29 hours in the room before he was discovered.

5. Mr. Lally was taken by ambulance to Sligo University Hospital. Dr. Karen Harris of the Emergency Department reported on Mr. Lally's injuries. She noted that he had remarkable swelling on his forehead and face. Mr. Lally had five lacerations on his face. On his right forehead, there was a four-centimetre full thickness laceration which required five sutures for closure. There was a further one centimetre vertical laceration directly above this which was dressed. He had a three centimetre horizontal laceration over his right eyebrow which was full thickness and required four sutures for closure. There was a further 2.5 centimetre laceration over his left eyebrow which was closed with five sutures and a one centimetre laceration on the right side of the bridge of his nose, closed with two sutures. All of these lacerations were deep and the skin surrounding them was bruised and injured.

6. Dr Harris went on to state the following:

> *"Mr Lally went on to have extensive imaging due to the extent of his injuries. He had a CT of his brain which showed widespread intracerebral bleeding of both frontal lobes. He also had a small subdural haemorrhage and a small epidural haemorrhage. He had multiple fractures of his nasal bones, orbits, zygoma and skull. The X ray of his right shoulder confirmed a fracture of his clavicle. He was seen by ophthalmology on call and referred also to the maxillofacial surgeons in Altnagelvin Hospital who agreed to see him there for a follow up once he was stable. He was admitted under the care of Mr ... general surgeon on call that day. I see he went on to have a repeat CT brain two days later, which showed some worsening of the bleeding. He also went on to have X rays of his lumber spine which showed an L3 fracture which was confirmed on MRI scan. This was treated in a brace by orthopaedic team. He was seen in Derry by the maxillofacial surgeons who advised treating him with antibiotics but there was no role for surgery in managing his fractures. He was discharged home on the 4th of July 2018 which follow-up arranged with orthopaedic and ophthalmology teams. In summary, Michael Lally is an 81-year old gentleman who was assaulted and brought to the emergency department with very serious injuries. He had multiple facial bones and*

skull fractures with underlying intracerebral haemorrhage. He also had a right clavicle fracture and an L3 fracture. His brain injuries were certainly life threatening. I would expect he will recover fully from his shoulder and spinal injuries, but it's likely he'll have some long term symptoms from his facial and brain injuries".

7. The victim's daughter read his victim impact report at the hearing. The report detailed both the significant immediate impact on the victim of his injuries but also the ongoing problems he had. After a long initial recovery period, Mr. Lally was no longer able to live his life as before, he could not carry out DIY as he had done, his eyesight was affected, his sleep affected, he had vertigo and headaches every second day. He was also confused now. There is no doubt that his quality of life was severely affected by the ongoing impact of his injuries. Ongoing medical bills also had a significant financial impact.

8. It appears that the appellant had requested a neighbour to take care of his cats on the morning of the incident as he said he had to return to Germany where his daughter had been involved in a road traffic accident. He was described as "very emotional" at this time. After the attack on the victim the appellant then made two withdrawals from the victim's bank account in the total sum of €400.00. (€200.00 in Sligo and €200.00 in Wexford). He left the car in Sligo and the appellant then travelled to Dublin and onto Rosslare, Co. Wexford by train. The appellant did not leave the jurisdiction however but 6 days after the event, he called into a local shop in Rosslare and asked for the Gardaí to be called and the appellant voluntarily turned himself into An Garda Síochána on the 26th June, 2018. Due to the state he was in the Gardaí felt that an intervention under the Mental Health Act was required. The appellant was arrested under the Mental Health Acts and brought to Wexford Garda Station, where he was medically assessed. He was transferred to Wexford General Hospital and was hospitalised for a number of days for treatment. The appellant was then detained, he made full admissions and expressed remorse and apologised and he was subsequently charged. The appellant did not apply for bail and was returned for trial at Sligo Circuit Court on the 6th November, 2018, where he pleaded guilty at the earliest opportunity having indicated at all times his intention to offer guilty pleas.

9. It was accepted by the Garda that the appellant was co-operative, he had stated the appellant had a "bad conscience" and that he was remorseful. He had no previous convictions. He was a 51 year old German national who had been a qualified engineer working in Formula 1 Motor Racing for 23 years. He was divorced with one daughter and he had retired to Ireland in 2016 living for a time in Belfast and Galway before moving to Sligo. At the time of these offences, the appellant was in financial difficulties and he was behind with his rent and believed he was in danger of being evicted. The appellant asserted through counsel at the sentence hearing that he was also concerned for the well-being of his daughter who had been involved in a road traffic accident. In the absence of proof of his daughter's involvement, this was not accepted by the Garda and the only evidence to support this came from the fact that the appellant had apparently told some

neighbours the day before that his daughter was in a road traffic accident and he was worried she was seriously injured.

10. It was also put forward in mitigation that he was a foreign national with limited English and no family or friends in this jurisdiction having lived here for a relatively short period.

11. A probation report was prepared. In that report it appears that the appellant downplayed the manner in which the assault occurred, professed ignorance about the extent of the injuries and the length of time that the injured party had been in the house. He did accept that he had locked him in the house but said he thought he could pull the curtain back and get help. He was assessed as being at low risk of further offending. The probation officer said she did not envisage a role for the probation service at that time.

Sentencing Judge's Remarks

12. In sentencing the judge made clear that he viewed this as a premeditated attack by the appellant on an 81 year old man in order to gain funds to leave the country. He referred to the serious and prolonged nature of the assault and false imprisonment. He was left with life threatening injuries which had left life altering consequences. The victim has also suffered significant financial loss because of his injuries. He found it hard to envisage how anyone could carry out the attack on an 81 year old and also how anyone could leave him in such a perilous position for such a long period of time.

13. He noted the appellant's movements after the event and the surrender to the Gardaí. He noted that he had told the Probation Officer he had suicidal thoughts but did not act on that as he did not want to cause grief to his daughter. The judge said that no psychiatric evidence had been put forward in the case at all.

14. The sentencing judge referred to the basic principles underpinning sentencing, of punishment, deterrence and rehabilitation. He also indicated that he was going to identify a "headline indication" as to the level of sentence an offence of this gravity could attract and then address the mitigation factors.

15. The sentencing judge took the view that motivation fed into the gravity of the offence. He said two aspects of that were put forward by the appellant. He did not accept that there was evidence as to his daughter being in a car crash or being injured but said that in any event, that did not impinge on his decision to inflict life threatening injuries on another. In relation to the financial constraints on the appellant, he accepted that the small sum actually taken demonstrated a type of irrationality to the behaviour and he said this went to gravity. It was not done for major financial gain. It was also a one off event and not part of a settled pattern of gaining money through criminal activity. In assessing the offences, he said that they all "cross-aggravate" each other but that he would deal with it by making the sentences concurrent.

16. The sentencing judge identified the s. 4 offence of causing serious harm and the false imprisonment offence as the most serious offences and said that the false imprisonment seems to be near the top of the scale as was the s. 4 offence. He was satisfied that the

weapon was there as a means of attack and not picked up on the spur of the moment. It was a premeditated attack on an 81 year old leaving life threatening and life altering injuries.

17. He said that the factors that go against imposing the highest level of sentence available for the offences were that the offences were irrational, not part of settled criminal activity, was a first aberration in an unblemished life, although these were relative factors set against the other factors. He nominated a headline sentence of 16 years.

18. He took into account the plea, his surrender to the Gardaí of his own volition, the personal circumstances including that he was a foreign national and the difficulties he has in prison as a result, his good behaviour in prison, the view of the Probation Officer that he was at low risk of reoffending in the next 12 months. The sentencing judge imposed the sentence as set out above.

The Appeal

19. The appellant lodged a number of grounds of appeal but in written submissions the main thrust of the grounds were that the headline sentence was unduly severe and excessive. The appellant in related submissions argued that undue emphasis was placed on the aggravating factors in the matter and that the sentencing judge failed to have sufficient regard to the mitigating factors.

20. It was also submitted that the sentencing judge failed to pay any due regard to the penal objective of rehabilitation and that the appellant queried the methodology of the sentencing judge.

The Submissions

21. The main submission of the appellant was that the headline sentence or headline indication of the sentencing judge was materially out of line with the sentencing range for comparable offences. It was submitted that the 16 year headline sentence indicated, instead of being less than the top of the range, was in fact in excess of it. The appellant relied upon *The People (DPP) v. Fitzgibbon* [2014] 2 I.L.R.M 116. In that case three sentencing ranges were identified as appropriate for the offence of causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act, 1997 as follows;

> *"However, in the absence of … unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between 4 and 7 ½ would seem appropriate. In the light of authorities to which counsel referred, and which have been analysed in the course of this judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of 7½ to 12½ years."*

22. The appellant referred to the supplemental judgement in *The People (DPP) v. Fitzgibbon* [2014] 1 I.R. 627 delivered on the 17th July, 2014, in which the Court of Criminal Appeal reinforced the sentencing ranges identified above while emphasising the importance of achieving consistency in sentencing for offences of this nature:

> *"Before going on to deal with the mitigating factors it is important that the Court makes a number of points. First, the Court is aware, not least from an additional victim impact statement from the Meaney family, of the understandable frustration which that family feels concerning the criminal process in the light of the appalling assault inflicted on Kevin and the permanent consequences which he has suffered. However, this Court must emphasise that there is an importance in consistency. The analysis which this Court conducted of a large number of previous sentences for serious assaults was designed to attempt to improve consistency between sentences for broadly like offences. As pointed out in the Court's initial judgment, the upper end of the most serious range of sentences which have been imposed for like offences (which in the main also involved persons who had suffered significant permanent injury) was 12½ years. To depart from that figure in this case would be to create greater inconsistency where what is required is more consistency".*

23. The appellant referred to the decision of this Court, *The People (DPP) v. O'Sullivan* [2019] IECA 250. The Court here was inclined to view the figure of 12 ½ years as the pre-mitigation figure for high-end offences as too low and should therefore be increased to 15 years with exceptional cases higher again. That change however is limited in that the Court considered the guidelines applicable when the sentence was imposed. Therefore, this Court must approach this case as one which is covered by the principles set out in *The People (DPP) v. Fitzgibbon*.

24. The appellant submitted that while accepting this was a serious offence, it fell far short of the type of exceptional case that would merit a headline sentence of beyond the 12 ½ years indicated in *The People (DPP) v. Fitzgibbon*. The judge had accepted it was not top of the range. He had identified a number of factors that went against the highest placement: it was irrational, not part of a settled system of wrongdoing and a first aberration in a blameless life. The appellant submitted that despite that, he wrongly identified 16 years as the headline indication or sentence.

25. Moreover, the appellant submits that in only taking a year away from the total despite the large number of mitigating factors such as the early plea, the surrender, the remorse and the previously blameless life, the trial judge erred. Counsel submits that the correct headline sentence should have been between 7 ½ and 12 ½ years and submitted that 10 years would have been more appropriate.

26. Counsel submitted that he also erred in imposing the same sentence for the false imprisonment in circumstances where he had earlier said it was a less grave sentence.

27. Counsel also submitted that if this was a sentence being imposed on the basis of an exceptional situation, that should have been identified by the judge and it was not.

28. The respondent referred to the factors identified in Fitzgibbon that would normally play a significant role in the assessment of gravity. These factors are:

    (i) the severity or viciousness of the assault;

(ii) the degree of injury suffered;

(iii) the degree of culpability of the accused;

(iv) the general circumstances surrounding the assault, such as potential commission in the context of other criminality; and

(v) the use of weapons or other objects likely to make more severe the injuries.

29. Despite recognising that the range of sentencing parameters as applied in *The People (DPP) v. O'Sullivan* did not apply to the present case, the respondent spent a great deal of time outlining the facts therein and of subsequent cases. The respondent relied heavily upon the fact that in the present case there were a number of offences committed which aggravated this offence and it was a premeditated one. The respondent also submitted that there was a margin of appreciation to be left to a trial judge and it was only in the situation where the sentence was so severe or so lenient as to amount to an error in principle that this Court should intervene. The respondent submits that there was no such error in the present case.

30. The appellant submits that the sentencing judge had placed too great a weight on the aggravating factors and too little on the mitigating factors. In particular, counsel submitted that the probation report should have been taken into account in that he was at low risk of reoffending. The respondent replied saying this was a matter of balance and the sentencing judge identified and applied the correct balance to those factors.

Analysis and Determination

31. The sentencing judge structured his sentence by focussing on what he considered was the most serious offence, namely the s. 4 offence of causing serious harm. He noted that although the offences cross-aggravated each other, it was appropriate to sentence concurrently. Although counsel for the appellant submitted that the sentencing judge gave no reasons for imposing the same sentence on the false imprisonment, we are satisfied that in the course of his sentencing remarks he indicated that both offences were at the high end of the scale of gravity and that he would concentrate on one set of offences. As discussed further below, he indicated he found it difficult to identify which was the more grave offence. There is no error in principle in the approach he took which was to impose the same sentence on each of the two interrelated but cross-aggravating offences of significant gravity, where he had indicated that the sentences would be concurrent.

32. In all those circumstances, it is appropriate that this judgment also focuses on the s. 4 offence as that was the primary offence for which the appellant was sentenced and it is the offence for which guidelines for sentencing are in existence. We confirm that the guidelines set out in *The People (DPP) v. Fitzgibbon* are the appropriate guidelines to be applied in this case. The decision in both *The People (DPP) v O'Sullivan* and *The People (DPP) v. Curtis* [2019] IECA 259 indicate that, where the offence was committed and the

sentence imposed was prior to the change in guidelines, the previous guidelines are applicable.

33. In the present case, the sentencing judge gave a headline "indication" of 16 years for the gravity of the offending in the s. 4 assault. It is worth commenting that the sentencing judge takes issue with the phrase "headline sentence" as he says that a sentence can only take into account the circumstances of the offender as well as the offence. This may be a misunderstanding of what is the purpose behind the indication of a "headline sentence". As this Court pointed out in *The People (DPP) v. Flynn* [2015] IECA 290:

> *"There is a strong line of authority starting with The People (Director of Public Prosecutions) v M [1994] 3 I.R. 306; and continuing through The People (Director of Public Prosecutions) v Renald (unreported, Court of Criminal Appeal, 23rd November 2001); The People (Director of Public Prosecutions) v Kelly [2005] 2 I.R. 321; and The People (Director of Public Prosecutions) v Farrell [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in The People (Director of Public Prosecutions) v McCormack [2000] 4 I.R. 356."*

34. The headline sentence should represent the gravity of the offending taking into account the moral culpability of the offender and the harm caused by the offence. The headline sentence is a figure that is arrived at prior to the assessment of the personal mitigating factors such as a plea of guilty or remorse but it does take into account aggravating features in the case. From the headline sentence, the mitigating factors are applied to arrive at the figure which is proportionate to the offence being committed by this particular offender.

35. It should be recalled what was said in *The People (DPP) v. Fitzgibbon* concerning the headline sentences appropriate to offences of causing serious harm:

> *"… in the absence of such unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between 4 and 7½ years would also seem appropriate. In the light of the authorities to which counsel referred, and which have been analysed in the course of this judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of 7½ to 12½ years. It must, in addition, be acknowledged that there may be cases which, because of their exceptional nature, would warrant, without mitigation, a sentence above 12½ years up to and including, in wholly exceptional cases, the maximum sentence of life imprisonment. (For an analysis of the circumstances in which the maximum sentence may be*

imposed, see again the judgment of this Court in Director of Public Prosecutions v. Z.).”

36. We find that in the present case there is a lack of clarity in how the sentencing judge reached the headline figure of 16 years. On the face of it, this figure exceeds the maximum set in *The People (DPP) v. Fitzgibbon* of 12 ½ years. That figure is not to be exceeded save in exceptional circumstances. The sentencing judge did not allude to the *Fitzgibbon* principles at all in his judgment, but it appears he was not referred to them in the course of the sentence hearing. Although not stated by the sentencing judge, it is possible to infer that he did so because he took the view that the false imprisonment aggravated the offence so significantly that it constituted an exceptional circumstance requiring him to increase the headline sentence. It must be noted however, that the Court of Criminal Appeal in *The People (DPP) v. Fitzgibbon* emphasised the importance of the sentencing judge identifying the factors to be taken into account and specifying the approach that was required to be taken.

37. Counsel for the appellant submitted that the sentencing judge did not consider the matter to be an exceptional circumstance because in the course of his subsequent sentencing remarks, he said that the s. 4 offence was not to be placed within the highest category. We do not accept that analysis however, as the trial judge gave careful consideration as to whether the sentences would be concurrent or otherwise. He identified that each of the offences aggravated the other and said that concurrent sentences would follow. He went on to say that he found it difficult to say “whether it's worse to stand over an 81-year old man and inflict the range of injuries as were inflicted by repeated blows of an iron bar, or whether it's worse having done that, to falsely imprison the 81-year old man leaving him in an injured and helpless state, so that he will not receive treatment for his life threatening injuries, with the effect of leaving him at risk of dying alone and untended.”

38. From the foregoing, it is apparent that the additional element of the false imprisonment weighed heavily in the sentencing judge’s consideration of what had occurred. We agree that it was a significant additional factor. Moreover, this was an additional factor in this case that did not apply in *The People (DPP) v. Fitzgibbon*. The false imprisonment was of particular significance because it involved the locking up of an elderly man for over a day without access to a phone or being able to call for help and leaving him tied up (even though it appears he was able to untie himself) despite having beaten him with an iron bar to such an extent that he suffered significant facial and other fractures and a bleed on the brain. This was the type of additional factor that justifies an increase in sentence over and above the limit imposed in *The People (DPP) v. Fitzgibbon*.

39. Yet in this case the sentencing judge accepted that this was not a case of causing serious harm which deserved the highest sentence. He said so because of the three factors identified (irrationality, not part of settled criminal activity and a first aberration in an unblemished life) although he said that these factors were relatively minor in the context. We note that the fact that a person has no previous convictions is not generally a factor

that goes to setting the gravity of the offence although relevant previous convictions are an aggravating factor. Indeed, the sentencing judge appears to accept that when he said that if it were not a first aberration the offence would be more grave. In assessing gravity, the aggravating factor of the false imprisonment had to be added.

40. Another matter that the appellant urged upon this Court was the manner in which the sentencing judge reduced the sentence primarily through the use of a suspended sentence. We do not believe that there is merit to that submission. This Court has on a number of occasions rejected the contention that a judge is not entitled to reflect mitigation through the use of a wholly or partially suspended sentence. The most recent recital of this was in the case of *The People (DPP) v. Broe* [2020] IECA 140. In that case, the Court also stated that the option to use a suspended sentence must be carefully considered so as to ensure that it will not be used to operate unfairly in relation to a particular individual. The Court stated as follows:

> *"Having carefully considered the submissions in this case we are not satisfied that the sentencing judge erred in principle in reflecting mitigation solely by means of suspending eighteen months of the uncontroversial headline sentence. It is well established that a wholly suspended sentence is still a sentence, and in the case of a part suspended sentence both the portion required to be served in custody, and the suspended portion, together comprise the sentence. However, it cannot be gainsaid that where a court sees fit to suspend a sentence in whole or in part, it involves a more lenient sanctioning or punishment of the offender than would be the case where a sentence is required to be served in full. The imposition of the suspended portion still communicates society's deprecation of, and desire to censure, the offending conduct, while sparing the offender (providing he/she adheres to the conditions on which the sentence was suspended) the "hard treatment" that would otherwise have to be endured if the suspended portion were required to be served. Accordingly, suspending a sentence in whole or in part will often be an appropriate way of reflecting mitigating circumstances, particularly where amongst the factors which the sentencing judge wants to reward is progress towards rehabilitation or reform to date, and where he/she also wishes to incentivise continuation along that path. The reward for mitigating circumstances which require to be acknowledged including progress towards rehabilitation or reform to date, may be provided by the leniency associated with suspension, while the incentive to continue with rehabilitation or reform is provided by the conditionality associated with the suspension. Often, where this mechanism is used, the length of the suspended period may be somewhat greater than it would be if recourse was to be had to a straight discount, as an extra incentive towards future desistence having regard to the consequences of non-compliance with the conditions of the suspension.*
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> *What a judge must strive to avoid, however, is unconsciously setting up an accused to fail. Before a suspended sentence is used to reflect mitigation and as an incentive to rehabilitation/reform, a sentencing judge should satisfy himself or*

herself that there is a least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence, because of the risk that, if a condition of the suspension is breached, the accused could lose all of the earned mitigation to which (s)he is entitled. To take a plea of guilty as an example, a person who is hopelessly addicted to drugs and facing sentencing for a burglary should get an appropriate discount for his/her plea regardless of whether (s)he is willing to address or, if willing, he has yet succeeded in addressing, the root cause of his offending behaviour, namely the need to feed his/her drug habit. If the plea is reflected in the part suspension of a sentence, and the suspension is conditional on the accused being of good behaviour and not re-offending, if (s)he then re-offends (which in the circumstances may be highly likely) (s)he will potentially lose all of the credit which (s)he was entitled to for having pleaded guilty. (S)he will, in effect, have been set up to fail."

41. In the present situation the trial judge used both a reduction (of one year) and a lengthy period of partial suspension. This was in circumstances where there was clearly an early plea following on from a voluntary surrender to the Gardaí. These are matters that would usually merit a discount from the headline sentence. It may in many cases be preferable to reflect the mitigation by means of a "straight" reduction from the headline sentence but, as the decision in *The People (DPP) v. Broe* indicates, it is not necessarily an error in principle to reflect this (in part or in whole) by use of a suspended sentence. We note in the present case that the overall period given in mitigation of the headline indication of the trial judge was particularly generous to the accused in this case. Indeed, the deduction in sentence to be served was almost 44% from that headline indication. It would not be usual to give more than a third reduction in sentence for a plea of guilty and while there were benefits to this plea, it was far from a case where there were exceptional benefits to it. His remorse and his previous good record and the fact that he was a foreign national with few ties to this jurisdiction and with apparently limited English, were therefore all generously reflected in the mitigation from the headline indication.

42. We have considered the second aspect of the decision in *The People (DPP) v. Broe* i.e. whether the appellant was unconsciously set up to fail by the imposition of the suspended sentence. We do not consider that was the position in this case. From the appellant's perspective he was urging on the Court that this was an aberration in a life (now at middle age) which had been previously unblemished and constructive. He has no addiction issues. He was also assessed as at low risk of re-offending and his behaviour while in custody reflected his ability to keep out of trouble and to work hard. Against this background the suspended sentence in this case is highly unlikely ever to be an issue. We are quite satisfied that there was no error in principle in the circumstances of this case where the partially suspended sentence, together with the straight reduction of one year, reflected the importance of censuring the egregious conduct while balancing the mitigating aspect of the case.

43. Therefore, in the present case, there was only one possible identifiable error. That was an apparent failure to state why a 16 year headline sentence was appropriate without

identifying the exceptional circumstances of gravity to warrant a sentence in excess of the usual upper range sentence set out in the *Fitzgibbon* guidelines. We do accept however that it is possible to infer such exceptional circumstances by reference to the judge treating the false imprisonment as a matter which aggravated the offence.

44. Having identified the above as a potential factor that might go towards establishing an error in principle, it is important to take a step back and identify the sentence actually imposed. The appellant in this case received a 15 year sentence with 6 years suspended on both the false imprisonment and the s. 4 serious harm charge. This was a sentence to be served amounting in effect to 9 years. Against the background outlined above, the suspended sentence in this case is highly unlikely ever to be an issue.

45. The question arises as to whether an effective sentence of 9 years imprisonment is excessive in the circumstances. These circumstances are that pre-meditated, life threatening and life altering injuries on an 81 year old man were inflicted for the purpose of financial gain and the victim was tied up and left locked up for 29 hours where only the diligence of his family and the Gardaí ensured his rescue, which must be balanced against the fact that the appellant made an early plea of guilty, was remorseful, he had a previous unblemished character as well as difficulties in prison as a foreign national and the offending behaviour was characterised by the trial judge as irrational.

46. This was a sentence at the available outer extent under the *Fitzgibbon* guidelines taking into account the aggravating factor of the additional consideration of the offence of false imprisonment. We are of the view that it was permissible to go beyond those guidelines because of the additional factor of the extended false imprisonment in this case. It is important in this case to consider the effective sentence actually imposed. We are satisfied that this sentence of 9 years was within the margin of discretion permitted to a sentencing judge. This was a particularly serious offence of causing serious harm which had a significant aggravating feature of an extended false imprisonment of an elderly victim who had been badly beaten and clearly in need of medical assistance. In particular, the reduction from the headline sentence of around 44% was a generous reduction in mitigation in the particular circumstances that presented here.

47. If we were imposing sentence ourselves we would in all likelihood have reflected mitigation by way of a "straight" reduction from the headline sentence. We are satisfied however, that in the circumstances present in this case, the sentence actually imposed was not excessive and was not unduly severe. An effective sentence of 9 years imprisonment in respect of the offence under s. 4 of causing serious harm, when aggravated by the offence of false imprisonment was, even under the *Fitzgibbon* guidelines, within the margin of discretion of the trial judge. We therefore dismiss the appeal.