



THE COURT OF APPEAL

Record No: CCOT008/2021

**Edwards J.
McCarthy J.
Donnelly J.**

Between/

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

RESPONDENT

V

MARIO TACHE

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 5th day of October 2021 by Mr Justice Edwards.

Introduction

1. The appellant in this case appeared before Judge Ó'Donnabháin for sentencing in Cork Circuit Court via video-link from Wheatfield Prison on the 15th January, 2021 on a signed plea of guilty from 17th September, 2020, relating to a single count of Robbery contrary to section 14 of the Criminal Justice (Theft and Fraud Offences Act, 2001).
2. The appellant was sentenced to two years imprisonment backdated to the date upon which the appellant affirmed the plea of guilty in the District Court, namely 20th October, 2020. The appellant now appeals against the severity of his sentence.
3. On the 15th January 2021 the court heard from Garda Diarmuid O'Neill, who stated that on the 30th June, 2018 the appellant entered a '3 Mobile' phone store in Midleton Co. Cork and attempted to pull a display phone from a counter in the shop. Having observed this, the manager of the store attempted to intervene and was punched a number of times by the appellant. A female shop assistant was also pushed by the appellant as he fled the shop with a phone to the value of €900. The mobile phone in question has never been recovered.
4. Garda O'Neill stated that the appellant had previous convictions including one for robbery, thirty three for theft, four for s.2 assault, one for criminal damage and multiple road traffic offences.
5. With reference to the previous conviction for robbery, the appellant was arrested in respect of this on the 9th August, 2018. Being under the age of 18 years at the time, he

was remanded in custody to Oberstown Detention Centre. On the 11th January, 2019 Her Honour Judge Greally in the Dublin Circuit Criminal Court imposed a four year Detention and Supervision Order under s.151 of the Children Act 2001 in respect of that offence of robbery. Such an order consists of detention in a children detention school followed by a period of supervision in the community. Half of the overall period must be spent in detention and half under supervision. The appellant was due for release on the 6th November 2020. The order directed a two-year period of supervision with the following conditions to be complied with by the appellant:

- 1) Comply with all the directions of the probation officer.
- 2) Attend all appointments with the Probation Service.
- 3) Comply with all the directions of the Probation Service with regard to his education, employment and accommodation needs.
- 4) Attend counselling.
- 5) Address any further victim empathy or insight issues the Probation Service consider appropriate.
- 6) Advise the Probation Service of any change of address.

In considering the relevance of this regime to the case now before him the sentencing judge held that the custodial element to the sentence imposed by Judge Greally had expired and the post release supervisory element to that sentence could be regarded as defunct, as the appellant would be in jail in consequence of having committed the present offence.

6. On turning 18 years of age the appellant was transferred from Oberstown Detention Centre to Wheatfield Prison.
7. The appellant was arrested in respect of the present offence in September, 2020, while he was still in prison. However, he had been interviewed by gardaí and was shown CCTV footage of the incident in the '3 Mobile' phone shop by gardaí in May 2019, and made full admissions. Despite this he was not charged until September 2020. Following being charged he was brought before Midleton District Court on the 22nd October, 2020, where he signed a plea of guilty and was sent forward to Cork Circuit Criminal Court for sentencing. He first appeared there on the 16th of November 2020, when he was further remanded in custody to appear again on the 15th January, 2021 for sentencing. A Probation Report was directed.

Impact on the victims

8. Neither the manager of the '3 Mobile' phone store who was punched a number of times, nor the shop assistant who was pushed during the incident gave evidence as to the impact of the appellant's crime on them, or provided victim impact statements. However,

it is reasonably to be inferred that they found the incident to be frightening and unpleasant.

Personal circumstances of the appellant

9. The appellant is a Romanian national who was born on the 13th of January, 2001. He is the second eldest of twelve children and moved to Ireland with his family when he was approximately eight years of age. The appellant left school following the completion of his Junior Certificate in Balbriggan Community College and was subsequently referred to Youthreach but failed to attend. The appellant states that his parents were resistant to him continuing in the education system as his assistance and support was required in the family home. From the geographical spread of his juvenile offending it would appear that his parents had limited influence over his behaviour which was evidenced when he travelled to the UK without informing them of where he was going. A missing person alert was broadcast resulting in a number of media appeals. His mother was ill at the date of his sentencing and the appellant viewed his offending behaviour as contributing to her upset.
10. A pre-sentencing Probation Report dated the 6th January 2021 stated that the appellant had never been employed but that during a previous sentence he had worked in the prison laundry. Also during a previous sentence, he had completed his Safe Pass and Manual Handling Certificate and a number of QQI (Quality and Qualifications Ireland) courses in the prison school. He stated to his probation officer that he plans to undertake a Fork Lift course on release, to enable him to find employment in the construction industry. However, he has not engaged with employment support services in the past while in the community.
11. The Probation Report noted his large number of convictions as a juvenile and that he was first referred to the Probation Service in 2015. His probation file indicates a mixed to poor history of engagement with the service, with limited progress in addressing his risk factors when on probation in the past.
12. The appellant began using illicit substances at the age of 16 years when he started associating with drug using peer groups. He has stated that on the date of the present offence he was under the influence of cocaine, ecstasy, cannabis and unprescribed drugs and used the proceeds from selling the stolen phone to buy drugs. He told the probation officer that he had completed a drug awareness course while in prison but was unsure as to whether he had an addiction problem. His probation file details that he has in the past attended appointments with the service while appearing affected. According to his probation officer the appellant has never engaged with addiction services in the community.
13. The Probation Report further outlines that the appellant provided a history of poor mental health, and recalled having depression and anger issues as a child. The appellant felt that these may have contributed to his illicit drug use as a young adult. The report recommended that he engage with mental health services on release.

14. Application of a risk assessment tool used by the Probation Service assessed the appellant as being at high risk of re-offending . The main areas of risk identified included the appellant's pattern of previous offending behaviour, his history of substance misuse, his association with a criminally active drug using peer group, his unemployment and lack of structure and the absence of pro social supports. The report concluded that should the court consider probation supervision as part of sentencing, that similar conditions be imposed to those imposed by Judge Greally in 2019.

The Plea in Mitigation and Remarks of the Sentencing Judge

15. The court heard that although the appellant had a history of offending, all the offences were committed as a juvenile and often under the influence of drugs and alcohol. In the interim, the appellant had undertaken prison courses, had admitted to the offence committed in Midleton in his first interview with the gardaí, and had entered a plea of guilty when he was brought before Midleton District Court. Counsel suggested that if the appellant had been charged sooner this matter could have been dealt with alongside the robbery offence for which he was sentenced in 2019, in which event he might possibly have received a concurrent sentence.
16. Acknowledging the appellant's young age at the time of the offence and the early guilty plea as mitigating factors which he would take into account the trial judge stated, *"Notwithstanding his young age, he entered this shop, pulled a phone from the stand, punched the man in charge of the phone, then pushed an assistant, and the phone was never recovered."*
17. In response to a request by counsel for a concurrent sentence to be considered, given the fact that all the offences were committed when the appellant was a juvenile, the trial judge enquired, *"Well what's that got to do with it?"* The trial judge noted that the Probation Report indicated that the appellant was at a *"high risk of reoffending"* and that the appellant *"...hasn't a hope of getting a concurrent sentence. Not a hope."*
18. Counsel for the appellant asked the court to consider the fact that the appellant had not been given *"an opportunity to show how much he has changed post release"*, to which the trial judge responded, *"Because every time he gets out, he commits more offences."*

Continuing;

"Anyway. I'll take into account that he's young, that he's pleaded guilty and he pleaded guilty very early on. They appear to be the major leniency factors that I can take account of. Thanks. Anything else?"

19. In imposing a two year sentence the trial judge stated;

"Notwithstanding his plea, even though he's very young the probation report is lamentable given the number of the offences, the nature of his addictions. Whether or not he has mental health difficulties, I don't know; I don't know do the Probation Service know either. But they regard him as being a high risk of reoffending. He did get a chance from a Dublin judge in relation to a partially suspended sentence."

Unfortunately, he has now lost that chance, and I sentence him to two years' imprisonment dated from sometime in October?"

20. It was clarified that he had been arraigned on the 22nd October, 2020, and the trial judge backdated the sentence to that date. He refused to backdate it to the date the appellant went into custody, as the appellant was already in custody serving a sentence.

Grounds of Appeal

21. The appellant appeals his sentence on the following grounds:

- i. In all the circumstances, the sentence was excessive.
- ii. The amount involved in the theft offence was of relatively minor value. The trial judge did not take this into account when sentencing and therefore erred in identifying two years as the appropriate sentence.
- iii. The trial judge erred in not reducing the sentence by taking certain mitigating circumstances into account such as the appellant's youth when the offence was committed.
- iv. The trial judge erred in only backdating the sentence to the 28th of October 2020. The appellant had spent a significant period of time in custody in both Oberstown Detention Centre and also in adult prisons and is currently in Wheatfield Prison. The appellant has been in detention since the 9th of August 2018 and has received further sentences from various courts since. The appellant was due for release in early November 2020 to be released under the [supervision of the] Probation Service for a period of two years post release. On the 16th of November 2020 the trial judge remanded the appellant in custody and adjourned the matter for sentence which came before Cork Circuit Court on the 15th of January 2021 for sentence. None of this time in detention was taken into account by the trial judge. The sentence was backdated to the 28th of October 2020 when the appellant was in custody in Wheatfield Prison.
- v. The trial judge erred in failing to take into account adequately, or at all, the mitigating circumstances.

Submissions of the appellant

22. It is contended on behalf of the appellant that the sentencing judge in arriving at what he regarded as an appropriate sentence failed to attach sufficient weight to the mitigating factors and the personal circumstances of the accused in respect of the offence. It was said that insufficient account was taken of the appellant's cooperation with the investigation, his addiction issues and efforts to address them, and his educational achievements while in prison.

Appellant's age and the delay in charging him

23. The appellant further contended that the sentencing judge failed to take into consideration the 26 month delay by the prosecution in charging the appellant, who was 17 years of age on the date of the offence. The appellant points to the fact that when arrested on the 25th May 2019 in Wheatfield Prison, following his review of CCTV footage, he made a full admission to having committed the offence on the 30th June, 2018. It is submitted that it was open to the prosecution to charge the appellant earlier and have the matter dealt with expeditiously. Given his youth and the fact that he was already in custody where he had turned 18 the previous January, an opportunity had been lost to argue for the sentence to be made concurrent with the sentence the appellant was already serving.
24. In this regard we were asked to note Denham J.'s approval in *Cullen v. DPP* [2014] IESC 59 [at para 82] of Quirke J.'s remarks in *Jackson and Walsh v. DPP* [2004] IEHC 380 where he held that:

"It is no secret that persons in their late teenage years have particular vulnerabilities. And all these vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them. The interests of the community would surely be better served by the efficient action on the part of State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity. Whilst the right of the community to have criminal offences prosecuted is a right which must, if appropriate, be vindicated by the court the state authorities also have responsibility to take such steps as may be necessary to vindicate that right."

25. It was submitted that the sentencing judge erred in failing to take into account the appellant's age when the offence was committed as a mitigating factor. In that regard, reliance was placed on the following exchanges:

"COUNSEL: All those offences were committed as a juvenile Judge, he hasn't been in the...

JUDGE: Well what's that got to do with it?"

Assumption on the Judge's part that this offence was committed following release from prison.

26. The appellant further contends that comments by the sentencing judge indicate that he erred in fact in assuming that the offence with which we are presently concerned was committed following his release from a previous sentence:

"COUNSEL: Well, he hasn't been given an opportunity to show how much he has changed post release Judge.

JUDGE: Do you know why this is?

COUNSEL: Because he's...

JUDGE: Because every time he gets out, he commits more offences."

Later in his sentencing remarks the trial judge added:

"Notwithstanding his plea, even though he's very young the probation report is lamentable given the number of the offences, the nature of his addictions. Whether or not he has mental health difficulties, I don't know; I don't know do the Probation Service know either. But they regard him as being a high risk of reoffending. He did get a chance from a Dublin judge in relation to a partially suspended sentence. Unfortunately, he has now lost that chance, and I sentence him to two years' imprisonment dated from sometime in October."

The reference to a suspended sentence was not strictly speaking correct. There was no evidence that the appellant had received a suspended sentence. However, it was to be inferred that the sentencing judge was referring to the detention and supervision order made by Judge Greally under s.151 of the Children Act 2001. It is submitted that the trial judge appears not to have appreciated that the offence with which we are presently concerned was committed prior to the imposition by Judge Greally of her "detention and supervision order", and therefore it was not the case that the appellant had failed to avail of a chance given to him.

Failure to take time spent in custody into consideration

27. It was submitted by the appellant that the trial judge erred in failing to apply as a mitigation factor the fact that the appellant had been in custody since the 9th August, 2018 which was only two weeks after the offence herein was committed.

Procedural fairness

28. It was submitted that certain of the trial judge's comments indicated pre-judgment on his part, in that they suggested that he had decided before hearing submissions from counsel for the appellant or any plea in mitigation that the appellant would be going to jail, and that the supervision element to Judge Greally's Order would necessarily be rendered defunct.

"DEFENCE COUNSEL: He has been in custody to the--he was to be in custody until the 6th of November of this year--of 2020, Judge. He was to be released on the 6th of November 2020 and then he would have come onto the care of the Probation Service for two years—

JUDGE: So that's gone now.

DEFENCE COUNSEL: No, the—yes. But the point —he hasn't—the two-year post release hasn't kicked in yet. Judge, because you remanded him in custody. Judge.

JUDGE: Did I?

PROSECUTING COUNSEL: Okay, but may the Court take it that in fact that sentence has expired?

DEFENCE COUNSEL: Oh, it has expired, yes.

PROSECUTING COUNSEL: I wanted to—that is a fact that despite custody—

JUDGE: The custodial part of it has expired?

PROSECUTING COUNSEL: Correct.

DEFENCE COUNSEL: Yes, Judge.

PROSECUTING COUNSEL: There's a question ... sentencing will arise...

JUDGE: And because of—

PROSECUTING COUNSEL: It must be right.

JUDGE: Unfortunately because of the commission of this offence the supervision part of it will be defunct because he'll be in jail.

DEFENCE COUNSEL: That is correct."

29. During the imposition of sentence there were then the following further exchanges:

"DEFENCE COUNSEL: Well, I'm asking that the Court would consider—

JUDGE: Anyway. I'll take into account that he's young, that he's pleaded guilty and he pleaded guilty very early on. They appear to be the major leniency factors that I can take account of. Thanks. Anything else?

PROSECUTING COUNSEL: No, Judge.

DEFENCE COUNSEL: No, Judge."

30. We have been referred to *State (Stanbridge) v. Mahon* [1979] I.R. 214 where Gannon J. held that a failure in procedure affecting one of the basic principles in the administration of justice occurs when counsel for a convicted person is not heard on a substantial matter pertaining to a sentence.
31. It was submitted by the appellant that the trial judge failed to allow his representative the opportunity to make submissions in respect of his client or draw attention to aspects of the Probation Report and his progress while in prison, or any mitigating factors such as his age, background and drug addiction issues.

Submissions of the respondent

32. It was submitted by the respondent that the trial judge had adequate and appropriate regard to the mitigating factors associated with the appellant's youth and the early plea of guilty as was evidenced in his comments:

"Anyway, I'll take into account that he's young and that he pleaded guilty and he pleaded guilty very early on. Those appear to be the major leniency factors that I can take into account."

Other factors urged upon the judge as deserving of credit

Addiction issues

33. The respondent submitted that in referencing the fact that the Probation Report was "lamentable" given the nature of the appellant's addiction issues, the sentencing judge was fully alive to the appellant's addiction and his claim that he refrained from all drugs while in prison, and accordingly didn't need to hear counsel on this issue. However, he also would have been aware of the probation officer's contention that there remained a need for the appellant to meaningfully address this area of risk through engagement with an addiction service. There was nothing in the evidence to suggest that he had done so.

Co-operation with the investigation

34. In relation to the appellant's cooperation with the investigation it was submitted that although in principle it constitutes a mitigating factor, in the present case the weight to be attached to such co-operation fell to be considered in light of the fact that there was good CCTV footage of the robbery.

Engagement in educational courses

35. It was submitted that the engagement with educational courses by the appellant whilst in custody constitutes the absence of an aggravating factor rather than a mitigating factor and that in the absence of a Governor's Report the trial judge acted correctly and proportionately in considering such matters to be ancillary.

Time elapsed between commission of the offence, charging and sentencing

36. It was submitted that the prosecutorial delay complained of by the appellant, which is not admitted by the respondent, was a matter to be ventilated either at trial or in appropriate circumstances, by way of judicial review. It was not a matter to be ventilated at sentencing.

Attainment of majority by the appellant

37. In circumstances where the appellant attained majority before he was charged, arraigned and sentenced the respondent submits that the trial judge acted correctly and proportionately in treating the appellant's youth as a mitigating factor and imposing a sentence of two years for an offence which carries a maximum sentence of life imprisonment.

Account of time spent in custody

38. The respondent submitted that the trial judge acted with an abundance of leniency in backdating the sentence imposed in the instant case to 22nd October, 2020. The appellant was given credit for time spent in custody despite the fact that he was both remanded on the instant charge and serving a sentence of imprisonment on the other charges up to a date subsequent to the 22nd October, 2020, namely to a date in November, 2020.
39. The respondent submitted that a sentencing judge is not obliged to back-date a sentence to account for time spent on remand so long as appropriate credit is given for said remand period. It is submitted that the trial judge credited the appellant for time spent on remand by imposing a lenient sentence of two years for an offence of violent robbery.

Procedural fairness

40. The respondent contends that there was no procedural unfairness by the trial judge in relation to the convicted person and his representative not being heard on substantive matters pertinent to sentencing, where the prosecuting member was cross-examined by counsel for the appellant and, thereafter, a plea of mitigation was made on his behalf. Having concluded his remarks in relation to the plea of mitigation the trial judge asked counsel for the appellant if there were further matters which he wished to canvass to which he replied in the negative.

The Court's Analysis and Decision

41. There are a number of concerning aspects to this case. At the outset it requires to be stated that by any yardstick the appellant here was guilty of the commission of a significant offence. This was not merely a robbery involving theft with the threat of violence. It involved a theft accompanied by actual violence against not just one but two individuals, namely the store manager and the shop assistant. Although the appellant claims that he was significantly intoxicated at the time with various drugs, it was self-induced intoxication. He claimed that he robbed the phone, which was never recovered, in order to sell it to buy more drugs. The evidence did not, however, go so far as to suggest that he acted under a chemical compulsion.
42. The appellant was not a first-time offender, albeit that he did not have a previous conviction for robbery. In that regard however, it does require to be recorded that the sentencing judge was under the mistaken impression that this offence post-dated the other robbery offence dealt with in the Dublin Circuit Criminal Court. That was not in fact the position. The offence in this case predated the robbery for which he was sentenced in the Dublin Circuit Criminal Court. This is a point we will come back to. Be that as it may, if this appellant had been an adult when he committed this offence, and had the same record, this is an offence that would have attracted a headline sentence of 4 years imprisonment.
43. The appellant was not, however, an adult at the time of the offence although he was an adult at the time of sentencing. It would be appropriate in circumstances where he was a

minor at the time that the offence was committed to start with a somewhat lower headline sentence than would otherwise apply. We think that the appropriate starting point would be 3 year imprisonment before discounting for mitigation.

44. It is highly relevant in this case that at the time at which the appellant was sentenced he was still in custody against the following background. He had been sentenced to a four-year term of detention and supervision by Judge Greally in the Dublin Circuit Criminal Court in January 2019. An order for detention and supervision is a unique form of sentence order provided for under s.151 of the Children Act 2001. On foot of that sentence the appellant was required to serve 2 years in custody and a further 2 years under supervision in the community. He was due to be released from the custodial element of that sentence on the 6th November, 2020. However, in the meantime he had been charged with the present offence, had signed a plea of guilty before Midleton District Court on the 22nd October, 2020, and had been sent forward to Cork Circuit Criminal Court for sentencing. The consequence of this was that he remained in custody after the 6th November, 2020, notwithstanding the expiry of the custodial portion of Judge Greally's detention and supervision order. He was still in custody on the 15th January, 2021 when he was sentenced for the present offence.
45. While it is accepted that his status while in custody between the 6th November, 2020 and the date of his sentencing, was that he was merely remanded in custody to await sentencing, the reality of his position was that he had been continuously in custody from a date in January, 2019 until the 15th of January 2021, partly as a sentenced prisoner during the period from January, 2019 until the 6th November, 2020, and partly as a remand prisoner, from the 6th November, 2020 until the 15th January, 2021. What is significant here was the continuous and uninterrupted nature of the appellant's custody. If the sentencing judge in the present case had it in mind, as he clearly had, to impose a further custodial sentence for the present offence, it was incumbent on him to have regard to the totality principle doing so. Again, this is an aspect of the case that we will come back to.
46. A further concerning feature of this case is the delay between the interviewing of the appellant in May, 2019, when he admitted the offence, and the charging of the appellant in September, 2020, a delay of 15 months in circumstances where he was a minor. We accept that the principle outlined by Quirke J. in the conjoined cases of *Jackson v. DPP* and *Walsh v. DPP* (cited earlier), subsequently approved by Denham C.J. in the Supreme Court in *Cullen v. DPP* (also cited earlier) and consider that we are bound to apply it. We expressly reject the submission made on behalf of the respondent that prosecutorial delay cannot be raised at sentencing. Where it has a relevance, and in the case of a minor offender who is approaching his majority it clearly has the potential relevance, it is a legitimate matter to ventilate at sentencing. We note with concern that although this offence was committed on the 30th June, 2018 the appellant was not charged until the autumn of 2020, in circumstances where the appellant had been interviewed, had been shown CCTV, and had admitted the crime to gardaí, in May 2019. While it is noted that

the respondent does not accept that there was culpable prosecutorial delay, no explanation had been put before us seeking to justify the delay in charging this appellant.

47. The appellant makes the point that if he had been charged sooner there was at least the possibility that both the present offence and the Dublin offence could have been dealt with together, and that even if they were not dealt with together that the appellant would have received concurrent sentences, or at least have been able to make the case for the sentences in both of those matters to run concurrently. We are not impressed with this argument because it was always open to the appellant to seek to avail of s.8 of the Criminal Justice Act 1951 when he was being sentenced for the Dublin offence. That statutory provision allows for what is colloquially known as a "clearing of the slate" in respect of uncharged matters, on the basis that they would be taken into consideration. It does require the consent of the DPP, but the fact of the matter is that the appellant did not seek to avail of it. The explanation put forward of not seeking to avail of this facility was that the appellant did not advise the legal advisors representing him before Dublin Circuit Criminal Court, of the fact that there was an uncharged matter in respect of which he must have had an expectation of being ultimately prosecuted.
48. In the circumstances, we regard the significance of the delay factor to lie in the fact that it is well established and stated judicial policy that minor offenders should be charged without undue delay, and there was an ostensible failure in that regard in the present case; rather than in any specific prejudice caused to this particular appellant. This case provides us with a timely opportunity to reiterate the policy in question.
49. We said we would come back to the point about the sentencing judge's misunderstanding of the facts, and his mistaken belief that the offence in this case post-dated the Dublin offence. This mistake on his part is of significance because it is clear from the sentencing judge's remarks that he regarded the appellant as having spurned a chance given to him by Judge Greally. That was simply not the case. Moreover, he seemed to equate the order made under s.151 of the Children Act 2001 with a suspended sentence. Again, it was not correct to do so. They are wholly different sentencing options.
50. Also of significance in the context of this appeal is the fact that the sentencing judge appears only to have taken into account the early plea of guilty and the appellant's youth. We are satisfied from the transcript that counsel felt discouraged from pressing the court to hear a full submission in respect of other potentially mitigating factors such as his client's cooperation with the investigation, his addiction issues and how he was dealing with them, the courses he had done in prison and so on. Be that as it may, we are satisfied that the sentencing judge was alive to such issues by virtue of having read the Probation Report, which he clearly had done. Nevertheless, counsel was entitled to make full submissions and it would have been better if the trial judge had expressed a greater openness to being addressed more fully. Ultimately, however, in so far as this aspect of the matter is concerned, we do not think that much weight could have been attached to those additional, potentially mitigating factors in the circumstance of this case. If this was the sole complaint it would not cause us to interfere in this case.

51. However, the court is seriously concerned that no consideration appears to have been given to the totality principle in the sentencing of this appellant. This point has not been raised by the appellant and it is a concern raised by the court of its own motion. It is nevertheless a clear error on the part of the sentencing judge. Moreover, it is an error of such significance in our view that we feel obliged on account of it, and the other errors we have earlier identified, to interfere and quash the sentence imposed at first instant.
52. It is necessary in the circumstances to proceed to a sentencing. We are satisfied that the appropriate headline sentence in this case was 3 years imprisonment. This headline sentence takes account of the fact that the appellant was a minor at the time of the offence. But for that fact that headline sentence would be one of 4 years imprisonment. From our nominated headline sentence of 3 years we will discount by one third to reflect the early plea and the other mitigating circumstances which have a basis in the evidence. These are that the appellant was cooperative to a degree, although we do think there is force in the respondents point that he had little choice but to cooperate in circumstances where the robbery was captured on CCTV. There is also the fact of his substance abuse problem. However, his claimed efforts at addressing this must be given very little weight in circumstances where he has not produced a Governor's report, or urine analysis, or evidence that he engaged in any way with addiction services. The courses he has done in prison are to his credit but again the mitigating effect of them is ultimately slight in the circumstances of this case.
53. Having set a headline sentence of 3 years imprisonment, and having discounted from that by one year to reflect mitigating circumstances, leaving a 2 year post mitigation sentence, it is necessary to stand back and consider whether any further adjustment is required in the interests of totality. The sentencing judge in this case had been prepared to back date the sentence to the date on which the appellant signed a plea of guilty, namely 22nd October, 2020, but in our view that did not adequately take into account the fact that this appellant was now about to receive a 2 year custodial sentence on top of continuous custody from January 2019 until the date of sentencing. In our assessment it was not enough to backdate the sentence to the 22nd October, 2020. For the sentence to be proportionate there needed to be greater allowance either in terms of some further backdating, preferably by a further reduction of the term of imprisonment being imposed. In resentencing the appellant now, we are prepared to again backdate the sentence to the 22nd October, 2020 but to also reduce the two-year term that we had provisionally determined upon, to one of 18 months. We do so in application of the totality principle and to ensure a sentence which is ultimately proportionate.