



THE COURT OF APPEAL

UNAPPROVED

Record Number: CA106/2014

Bill No. CCDP 53/2011

Neutral Citation No: [2022] IECA 3

**Birmingham P.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

**RESPONDENT/
PROSECUTOR**

- AND -

ANDRZEJ BENKO

**APPELLANT/
DEFENDANT**

JUDGMENT of the Court delivered on the 13th day of January 2022 by Ms. Justice

Ní Raifeartaigh.

1. This is a case in which the court previously dismissed the appellant's appeal against conviction. This judgment deals with his appeal against severity of sentence.
2. The appellant was tried in the Central Criminal Court in March 2014. He was arraigned and pleaded not guilty to a sole count of attempted murder of his wife, Joanna Benko on the 5 July 2010. The appellant was found guilty by the jury in a unanimous verdict and remanded

until the 7 April 2014 for sentence and remanded further until the 11 April 2014, on which date a sentence of fifteen years was imposed. The facts are described in detail in the court's judgment in respect of the appellants' appeal against conviction and it will suffice to set out a brief summary here only. On the 5 July 2010 at about 10.15am, the appellant arrived at Blanchardstown Garda Station in an agitated state and reported that he had hurt his wife. He had already phoned emergency services but was concerned that he had not properly been understood and therefore had driven to the Garda Station to confirm the report. The ambulance and Gardaí having been earlier alerted had gone to the property in Mulhuddart and found the accused's wife, Joanna Benko alive but severely injured. She was lying on the bed in the main bedroom of the house and had significant injuries to her head. She was rushed to Blanchardstown Hospital and then to Beaumont Hospital where she was treated in a specialist neurological unit. It emerged that she had suffered a comminuted fracture of her skull, bruising and injury to her brain, with the result that she would be permanently left confined to a wheelchair for most of her day, was rendered more childlike, had severely limited communication, and would require full-time care for the rest of her life.

3. The appellant on arrival at the station spoke to a Garda Caul and upon being brought to a consultation room he immediately informed her that he had hit his wife on her head with a lump hammer while she lay sleeping. Thereafter there were a number of interviews in which he made admissions to having done this and providing contextual details. He said that he had left early in the morning for work, had completed a number of errands, and had then purchased flowers for his wife on his way home because it was her birthday. There was a history of drug abuse by his wife and when he arrived back at the house, he was confronted by a scene which brought the situation home to him. He took their three-year-old son from where he was sleeping next to his mother in her bed downstairs where the boy fell asleep on

the couch. The accused then took a small lump hammer from a downstairs room, came upstairs and hit his wife in the left temple “three times, not more than four”.

4. The basis upon which the murder trial was contested was in relation to the narrow issue of intent. He relied upon the fact, as he said, that his intention was equivocal and was coming and going in the moments before he hit her. For example, one of his admissions was as follows: -

“When I was going upstairs, I intended to kill her. During when I already hit her once, I kept hitting. I didn't want to anymore. It was coming I wanted to, then didn't want, then want, then didn't want”.

He also said that he had hit her with perhaps 20% of his force but the hammer was heavy.

5. This was the only issue in the trial. At the outset of the trial admissions were made pursuant to s.22 of the Criminal Justice Act 1984 on his behalf so that there was no issue in relation to his arrest and detention, the lawfulness and chain in relation to forensic and bodily samples, any searches carried out during the investigation, custody of the exhibits, proof of CCTV footage or phone calls, and the transfer by ambulance of the injured party and her subsequent medical treatment. The only issue in dispute was whether he had an intent to kill which was the required *mens rea* for attempted murder.

6. During custody the appellant gave his accounts on video tape and during his interview he answered all questions and gave further details. He identified the hammer he had used. He gave an account of the history of his wife's drug taking and how he felt this was impacting on her care of their son. The Gardaí confirmed that the appellant had expressed concern for his wife and a hope that she would survive and had become upset and cried.

7. On the date of sentence, 7 April 2014, there was an updated medical report before the court from Mr. Mulrooney, Senior Clinical Neuropsychologist, who had assessed her on the 27 March 2014. She had improved in her mobility and was able to walk slowly for short distances, but generally was transported by wheelchair. Because of damage to the left hemisphere of her brain, there was significant disruption in her language structures. She could only communicate through Polish, whereas she had spoken English before, and even while communicating through Polish she was not communicating in a verbal sense; rather she could answer simple questions by signalling answers. There was a deterioration in her general social competence that would prevent her from engaging in the role of a parent although she saw her son on a regular basis. The report said that the injuries to her were “devastating and significant, constituting life altering changes”, and that “her capacity to function as an adult has been removed, save in with direct support of a competent adult”. It was confirmed that she would be unable to care for her child independently and would have difficulty communicating her needs, including independent movement, and that she would require direct support and care for the rest of her life.

8. It was confirmed that the appellant had no previous convictions. It was also confirmed that the defence had offered a count of causing serious harm prior to the trial but that this was not acceptable to the DPP.

9. After being charged, the HSE had become involved in the care of their son who was three years old at the time and the appellant was assessed to address whether he could safely access him, given what had happened. Following that assessment, he was allowed to have very substantial access to his son in the region of 36 hours per week although that was cut

down substantially coming up to his trial. It was considered prudent to step down the level of access so as to make the ultimate separation easier from his son's perspective as it was envisaged that the appellant would be receiving a substantial custodial sentence. The boy was at the time of sentence in foster care with the HSE. It was confirmed also that the injured party's mother had relocated to Ireland and acts as a carer for her daughter. Victim impact statements from the injured party's mother and brother were read to the court.

10. The prosecution, in response to the judge's request to be addressed in respect of any relevant authorities on sentencing, submitted there were five cases of relevance as follows: *DPP v. Larkin* [2009] 2 IR 381, *DPP v. Duffy* [2009] 2 IR 395, *DPP v. Crowe* [2010] 1 IR 129, *DPP v. Whelan* [2003] 4 IR 355, and *DPP v. Belousova* [2009] IECCA 49. The Court will return to those decisions later in this judgment.

11. The court was asked to receive two letters, one from the company by which the appellant was employed which was positive, and one from his direct employer who also spoke well of him despite knowing what he knew about the court case.

12. The court was asked to have regard to the manner in which the appellant had met the case, in particular while that there had not been a guilty plea, none of the essential facts had been contested and he did offer a plea to a serious offence. It was submitted that this was to be distinguished from a situation where somebody simply puts the head down and fights the case for no good reason. It was indicated that this was not merely indicative of a level of contrition but also had to be seen in the context of the extraordinary level of cooperation by the appellant and the fact that it was he that had reported the offence and sought medical assistance.

13. It was also submitted that the question of intention was relevant and that the appellant's intention appeared to be "somewhat transient" and that this was in contrast to other cases of attempted murder where there had been pre-meditation, planning, and an intention that was held and acted upon over a substantial period of time.

14. The court was asked to have regard to the absence of any ulterior criminal motive in the case and the fact that he appeared to have been genuinely of the misguided belief that what he was doing would in some way protect his son. Emphasis was laid on the fact that he had never come to the adverse attention of the Gardaí, that he was in his forties with an unblemished record, and that the offence was very much out of character. He had also sought to engage in employment and education in the prison since his remand in custody, and some regard should be had to the fact that he was a foreign national who would be serving his sentence in an Irish prison.

15. It was indicated that the appellant had continued in employment until the trial took place and that it was intended to arrange to have the house filled with tenants to service the debt and retain the asset.

16. It was submitted that the court had very real evidence of remorse and that there was room for suspending a substantial portion of his sentence. There was also a public apology from the appellant in person in the court.

17. In the course of the sentence hearing, an exchange took place between the judge and counsel for the prosecution. Initially it seemed that a sentence of 15 years was being put forward as a pre-mitigation sentence (or a headline sentence) by counsel for the prosecution,

but in response to something said by the judge, it then seemed that 15 years was being suggested as a post-mitigation sentence. However, we do not consider this to be of any great moment one way or another; this Court must assess the appropriateness of the sentence irrespective of the prosecution's view.

The sentencing judge's remarks

18. Having recounted the evidence heard and the matters advanced on behalf of the appellant, the court made reference to the finding of the forensic psychologist that the appellant represented a low risk of reoffending. He had no previous convictions and had not come to the adverse attention of the Gardaí. He said: -

“There does not appear to be any meaningful basis for concern about future criminality, including violent criminality. It seems to me that this must be taken into account now in sentencing, and accordingly it is not merely a question of making provision for rehabilitation. In a sense, the position, as a matter of substance, is that rehabilitation cannot advance beyond the position as it presently stands”.

19. The court referred to certain authorities on the desirability of consistency in sentencing and then engage in an analysis of the authorities concerning attempted murder. He then said as follows: -

“I am of the view that the extent of the injuries and their consequences are of the highest importance. And indeed in this case, even though the... in this case, the position is that even though the moral culpability ... for an attempted murder is of the most grave kind, when a victim remain – is still alive after the offending act, it has been held that the sentence will be a lesser one that might – than that which

might be considered appropriate for murder and accordingly a life sentence would be very rare.”

20. He went on to say that the case of *Belousova* was a most helpful case and that in terms of moral culpability, an attempted robbery or a motive of robbery “*cannot render that case more serious than the present one*”. He also said that the fact that other offences were charged in a given case in one transaction, such as for example possession of firearms, whilst aggravating the offence, would not ultimately in the ordinary course of events give rise to a more severe sentence. He said that the long-term consequences were of the utmost seriousness.

21. He referred again to *Belousova*, mentioning that the accused was a foreign national, that he pleaded guilty, and that there was genuine remorse.

22. He said that the case falls into “a more serious category”. He then said as follows:
“I have considerable difficulty in affording any mitigation on the basis of the manner in which the case was contested. On the one hand, it is the law that one cannot impose a more severe sentence on persons because they vindicate their constitutional rights or seek to do so by proceeding to a contested trial. Nonetheless on the authorities, I will accept that it is relevant to the question of the extent of the remorse. In all of the circumstances of the case, it seems to me that this case lies on the range of sentence between 15 and 20 years.... It seems to me that the appropriate sentence in the circumstances would accordingly be given the maximum level of credit in respect of the mitigating factors, a sentence of 15 years’ imprisonment”.

The submissions of the appellant on this appeal

23. The appellant contends that the sentencing judge erred in relying on the authorities cited to him without sufficiently distinguishing those cases from the facts of this case which differed in many clear respects, including the nature of the *mens rea* on the part of the appellant. It is submitted that the judge erred in principle in imposing a sentence which failed to reflect the cooperation and admissions provided to the appellant and failed to impose a sentence which reflected the appellant's personal circumstances.

24. The appellant relies on a particular passage in the transcript in which there was a discussion between the judge and prosecution counsel about the five authorities earlier cited. Counsel conceded that none of the cases were "directly analogous" and mentioned that four out of the five involved a guilty plea which was not present in the present case; but he also acknowledged that three of the cases involved a shooting which was "perhaps in a different league, and that none of them were "the familial relationship that was between the parties and that may be a factor for the court". There was also reference by counsel for the prosecution as to the other cases involving "other criminality, which led to the violence" whereas this was "an otherwise domestic scenario, in which the violence used was not part of a larger crime, or a larger criminal intent".

25. Prosecution counsel then submitted to the court that the court should perhaps start at 15 years. The judge intervened to say that in a number of the cases, 15 years was the end result after taking into account the mitigating factors. Counsel accepted that this was the case. The judge said: "Whereas you were saying 15 in your view on the authorities it is in or about the correct figure, to start, in or about?" Counsel, somewhat ambiguously, replied "it is, no, I hear what the court says in terms of that being an end result in those cases".

26. Counsel on behalf of the appellant contends that the prosecution was correct at that time to say that the authorities were in a more serious category than the present one because of additional factors such as multiple victims (*Whelan, Crowe*), and offender who had a previous conviction for murder (*Duffy*), and the use of a firearm (*Larkin, Crowe*). He submits that the sentencing judge erred in saying that the fact that *Belousova* was the most helpful case, given that the attempted murder in that case had occurred in the course of a robbery. The case involved an offender who was lurking late at night with a knife, waiting for a suitable victim. The attack was frenzied, brutal and involved multiple stabbings to the neck of the victim. The offender pushed her into the stairwell and left her to bleed to death which, counsel submits, stands in stark contrast to the actions of the appellant who immediately sought medical attention for his wife and drove directly to the Garda Station to hand himself in and confess his actions.

27. Counsel also says that the evidence of intention which was contained in the appellant's own admissions suggests that the intention was "momentary, fleeting and deeply ambivalent". He submits that the sentencing judge erred in failing to consider the fluctuating nature of the appellant's intention which is a significant point of contrast with the other cases also. The decision to actually inflict the blows was formed in an instant and followed immediately by profound regret and a call for assistance. There is also reference to the comment of the appellant that he used only 20% of his force which, it was argued, supported the equivocal nature of his intention.

28. Counsel also suggests that there were elements akin to provocation which should have been taken into account by the sentencing judge. The evidence before the court appeared to

show beyond doubt that the victim had a significant drug problem and that her behaviour as a result of that had been a cause of significant stress to the appellant in the marriage and caused him extreme concern about the safety of his son.

29. Counsel for the appellant also says that while the appellant did not enter a plea of guilty to attempted murder, he accepted the facts, offered to plea to causing serious harm, and conducted the trial on the basis of the narrow issue of whether he had the intent for murder. In those circumstances, he submits, the appellant should have been afforded substantial credit for the manner in which the trial was conducted, albeit less than would apply if he had pleaded guilty to the offence. He submits that the manner in which the trial was conducted fulfilled the objective of giving the court time to deal with other cases, frees the prosecution from having to establish all the necessary proofs in a case, and avoids a necessity of witnesses to have to give evidence, all of which were matters identified in *People (DPP) v. O' Donoghue* [2007] 2 IR 336 as reasons for giving someone credit for a guilty plea. He submits that while credit for admissions normally arise following a plea of guilty, in the particular circumstances of this case, the appellant ought to have been afforded credit for the manner in which he approached the aftermath of the offence and the subsequent trial. Counsel cites the decision in *People (DPP) v. Sheehy* [1999] 7 JIC 1202 where it was said that in imposing sentence in a rape case, the court was not bound to disregard the fact that the accused based his defence on an allegation that the victim was to blame for, or the instigator of, what happened between them.

30. Counsel also submits that while the report of the forensic psychologist indicated that he was in a low risk category, he does not appear to have been given credit for that in the sentence. The court would frequently suspend a portion of a sentence to incentivize further

rehabilitation, but it was anomalous if an offender who was already effectively rehabilitated would not be afforded a portion of suspension or reduction on the basis that it was unnecessary to rehabilitate him because his rehabilitation was already complete. All of the appellant's actions and expressions of remorse showed that he did not require rehabilitation but this was not reflected in the sentence imposed.

31. Counsel for the prosecution disagreed on the issue of to credit for the way the appellant ran the trial in circumstances where he had not pleaded guilty. He emphasised the importance of the finality and closure offered by a guilty plea. He submitted that the appellant had resiled from the admissions he had made by running the trial. The court was entitled to take the view that because he had contested the issue of intent, which the jury ultimately found he had, this was of considerable importance in sentencing the appellant.

32. Counsel also emphasised the circumstances of the injured party; she was utterly vulnerable, sleeping in her own bed in her own home at the time of the attack. She was in a place where she was entitled to feel safe and to place trust in her husband. The attack on her involved the infliction of serious, catastrophic injuries. In those circumstances, the case was on a par with those in the other authorities, even though the facts were not analogous.

33. He submitted that the trial judge did in fact take into account the manner in which the appellant had run the trial and gave him a degree of credit for it.

34. Concerning the appellant's submissions regarding remorse and low risk of reoffending, he pointed out that the appellant appealed and therefore did not accept full responsibility for his intent to murder. At the time of the sentencing hearing, the judge had

taken into account that he did accept responsibility and expressed remorse from the reports, but his appeal had demonstrated that he had resiled from that also.

35. Counsel also sought to refute the question that he had engaged in a U turn on the issue of the starting point of sentence.

36. Counsel on behalf of the DPP reminded the court that the maximum penalty available was life imprisonment and the sentence of 15 years must be viewed in that light. Counsel stood over the comparison with the *Belousova* case, saying that the moral culpability was very grave insofar as the appellant had tried to kill his wife with a lump hammer while she was sleeping in her bedroom in her home. He said the moral culpability was not reduced because the appellant debated whether or not to do so in advance of inflicting the catastrophic injuries. He also said that there was no evidence of provocation in any legal sense and submitted that the injured party was asleep at the time of the assault, and the action taken by the appellant was no way an excuse for the actions he took. There were other ways of addressing any issues of marital discord and there was no imminent danger to his son which required to be addressed in this manner.

Report submitted on behalf of the appellant

37. A forensic psychologist report was prepared by Ms. Niamh O'Connor under the supervision of Dr. Patrick Randall in Forensic Psychological Services. This was available to the sentencing judge and was therefore available to the Court on appeal. The psychologist report gives a detailed description of the appellant's background. He had a normal childhood in Poland and was particularly close to his sister, mother and grandmother. He attended school and started studying in Germany after school (Computer IT and Mathematics), but

was persuaded by his father to leave his college studies and come home to work for him. He did that for some time and then came to Ireland working as a truck driver and as a drainage engineer at different periods of time. He had a relationship with another woman for three years but this was discontinued because they were in different countries and it was difficult to maintain the relationship. He then started seeing the injured party in 2001. He had some suspicions that she may be using drugs after some months but she denied it and they were subsequently married in April 2002. He came first to Ireland and was working hard, living on small amounts of money, while sending most of his earnings to his wife who was living with his parents in Poland. A history is given of her constantly looking for more money and selling off assets such as their car, TV set and DVD player. There is a detailed history of his gradual awareness of her drug addiction and various promises to discontinue it. By January 2010 she had become involved with a particular woman and was leaving the family home on his return from work every day and not arriving back until the early hours of the morning. This distressed their son. There seemed to have been difficulties with drug debt and the appellant maintained that his wife asked him to engage in violent actions against her drug dealer in order to get her out of those difficulties. At one point he went to the Gardaí to report the buying and selling of drugs by the woman with whom his wife was associating but was informed that the Gardaí could not offer any help. It indicated in the report that he had made a substantial suicide attempt in May 2010, some months before the offence, and that he had been advised to attend with his GP for follow up treatment which he did not ultimately engage in as he was afraid that his son might be taken into the care of the State. He describes that there were various threats of violence from drug dealers and that in early June 2010 she moved some of her friends into their home for a ten-day period in order that they could hide out from other drug dealers. At another point she left with their son and stayed with other people in order to avoid the threat from drug dealers. At various points he described finding

different drugs in their home or in their car including ecstasy tablets and heroin. On the night before the incident in question they had a row which made him realise that his wife did not love him anymore and she went out, coming home in the early hours of the morning with a strong smell of cannabis in the house.

38. The psychologist said that he presented as an “emotional, sensitive and sincere individual”. He fully cooperated with all aspects of the assessment procedure and became visibly upset and distressed many times during his interviews. She said the appellant had a well-developed capacity for empathy and was willing to accept responsibility for the offence. He regularly expressed remorse for the incident and his desire to act in the best interests of his wife and son. He showed high levels of remorse and regret for the assault and became deeply distressed when discussing it. She found that his clinical presentation during his interviews in 2012 was consistent with his clinical presentation during his original assessment in 2010 and congruent with his presentation during the video recorded garda interviews. She said that he was undefended and honest in his answers and did not try to skew the outcome of the interview in any discernible way, although his tendency to portray himself in a positive manner undoubtedly impacted on his results across all the measures he completed. She said that he presented as a gregarious man who related easily to other people and showed concern for the wellbeing of others. He had a positive view of human nature and trusts others somewhat naively. He had an elevated need for approval and affirmation of those around him and was easily led. He was also sensitive to rejection. He may at times abdicate his needs in favour of meeting those of others especially if he feels morally or duty bound to do so. She said that he was a sensible, practical and prudent man who was generally rational in making decisions. He was punctual and well organised and highly dependable and reliable in meeting his obligations. He had a high level of self-discipline with regard to

carrying tasks through to their completion and was highly cautious, tending to deliberate the consequences of his actions before acting.

39. She says that his previous relationships with females had led him to anticipate they would be supportive, loving, caring and that they would devote a great deal of their energy to raising children and maintaining a household. However, his relationship with his wife was marred by her habitual drug use and her involvement in criminal activities, his fear of rejection and his low level of assertiveness in the context of his marriage meant that he was unable to confront his wife about her criminal activities in an effective manner. He was increasingly frustrated by his inability to motivate her to stop her drug use, by concern that she did not love him and was only using him for financial reasons to support her drug use, and to make her understand the risk that she was exposing their son to the drugs that were in the house and which on one occasion the child found in the back of their car and had attempted to ingest. She said that the incident occurred because he had accumulated high levels of frustration and pent up provocation [this is her word] which eventually surpassed his level of coping resources. She administered a structured risk assessment measure and came to the conclusion that he was on the low risk for committing a future violent offence which was the lowest level of risk on a scale which measured from low to moderate to high. She recommended that he would be placed in a prison setting where he would be able to have appropriate and constant access visits to his son and that he engage in individual therapy in order to support him in dealing with the trauma of the crime he committed and the consequences of his actions.

A discussion of the authorities cited to the Court

40. A number of authorities were cited to the sentencing judge and to this Court. One has to be careful when considering a small number of appellate decisions in a particular area of sentencing. A small sample of cases in which sentences were imposed for the particular offence cannot necessarily be taken as indicative of overall patterns of sentencing. Nor has there been any judgment to date in the nature of a “guideline” judgment with regard to the offence of attempted murder. These caveats must be borne in mind when looking at the authorities cited to the Court, although of course such authorities are useful in general terms for giving some indication of what the Court has previously considered appropriate in terms of length of imprisonment and the type of relevant factors to be taken into account.

41. It may be noted at the outset that none of the authorities cited to the Court involved an attempted murder in a domestic context, as we shall now see. In *DPP v. Belousova*, a sentence of 15 years’ imprisonment was imposed (and upheld on appeal) in respect of the attempted murder of a female French student who was 24 at the time of the offence. She was entering her apartment building when the accused attacked her. She was extensively stabbed in the neck and while she was bleeding from her wounds, she was thrown into a stairwell and would have bled to death but for the intervention of a third party. She was left with significant scarring and other serious long-term health problems. The accused was also prosecuted for attempted robbery and assault causing harm, and a sentence of 10 years was imposed in respect of the attempted robbery and the assault causing serious harm, with all three sentences to run concurrently. The accused had pleaded guilty on the second day of his trial and was afforded some credit for the late plea.

42. The points of dissimilarity and similarity with the present case include: (a) that Mr. Belousova pleaded guilty (albeit that it was a late plea on the second day of trial) (a mitigating factor that is not present in the case of Mr. Benko); (b) that the offence of attempted murder was committed in the context of a robbery (an aggravating factor in the case of Mr. Belousova); (c) that although there was remorse by the time of trial, there was no immediate show of remorse nor the taking of any action to save the life of the victim or alert the authorities (in contrast to the behaviour of Mr. Benko, where this was a matter to be taken into account in mitigation); and (d) the injuries of the victim were very serious (although not as serious as those in the present case).

43. In *DPP v. Whelan*, the accused pleaded guilty to the murder and attempted murder of two young women. He received the mandatory life sentence in respect of the murder, and a sentence of fifteen years in respect of the attempted murder. The circumstances of the case are notorious; the accused was a neighbour of one of the women but there had been no previous interaction between them and there was no explanation as to why he behaved as he did. He broke into her house while her parents were away and engaged in a frenzied knife attack on the two women (the other woman being a friend of the first young woman). The accused was unable, or unwilling, to give any account of why he attacked the women in such a vicious fashion. He said “it was in my head, it was anybody”. No medical or psychiatric evidence was advanced by way of mitigation. He pleaded guilty to both counts.

44. The issue on appeal was the consecutive nature of the sentences and the fact that the 15-year sentence had been made consecutive to the life sentence. On appeal, the Court of Criminal Appeal reversed the sequence of the offence so that the 15-year sentence would be

served first. For present purposes what is most relevant is that the Court upheld the sentence of 15 years imprisonment in respect of the attempted murder.

45. Again the points of dissimilarity with the present case may be noted: (a) there was a guilty plea (a mitigating factor which is absent in the present case); (b) there were two victims (an aggravating factor which is absent in the present case); (c) the absence of any attempt to assist the victims, who were simply left at the house with their stab wounds (in contrast to the actions of the appellant in the present case); (d) the absence of any explanation for why the accused had acted as he did (in contrast to the present case; which is not to say that Mr. Benko's explanation provides justification for his actions). A point of similarity may be noted insofar as the stabbing took place inside the family home of one of the victims, although it was not a case of "domestic violence" because the accused was not a member of that family unit nor was he even known to the victim other than by sight. Further, the injuries to the victim were severe, not to mention the fact that she suffered the trauma of witnessing her friend being stabbed to death as well as suffering the long-term loss of her friend.

46. In *DPP v. Larkin*, the accused was convicted the attempted murder of a security guard at a Leisureplex premises by shooting him with a sawn-off shotgun in the early hours of the morning at those premises. There was no guilty plea and he was convicted following a trial at which the victim gave evidence of recognition. The accused shot a first shot from a distance of approximately seven or eight metres, which hit the victim on the side of the head, and fired a second shot at the victim as he tried to hide. He then fled the premises. CCTV footage assisted with the identification of the accused. While the victim made a good physical recovery from his head wound, his family life deteriorated and he lost his job as a result of the event.

47. The trial judge heard evidence that, upon garda review of files related to gun crime, there was a strong prevalence of firearm-related instances in the area of the shooting (Blanchardstown) at that time. The trial judge carried out a weighing exercise with regard to the aggravating and mitigating factors and concluded that *“had the accused been convicted of murder, the mandatory sentence would have been life imprisonment, and it would, in my view, be a logical absurdity to avoid a life sentence merely because the accused is a bad shot”*. He was sentenced to life imprisonment. He also received 20 years for counts of possession of a firearm, and ammunition, with intent to endanger life, each of to be served concurrently.

48. In the course of the appeal against the severity of sentence, the accused submitted that the increased prevalence of a particular type of crime did not justify an increased sentence, but the Court found that that a judge in passing sentence was entitled to take this factor into account to justify a sentence which contains a deterrent element. The Court also took into account the fact that the 23-year old accused had 35 previous convictions. However, the Court considered that the trial judge had erred in imposing a life sentence and reduced the sentence for attempted murder to 15 years.

49. The points of dissimilarity and similarity with the present case may be noted: (a) there was no guilty plea and the matter went to trial, although it was a “full fight” unlike (to some degree) the present case, where the case was defended solely on the issue of intent; (b) the appellant had 35 previous convictions (the appellant in the present case none, and an unblemished record of employment and good character prior to this offence); (c) A firearm was used in a public place and two shots were discharged at the victim leaving no ambiguity

about the intent of the accused whatsoever; (d) there was no attempt to alert the authorities or assist the victim. The victim did not suffer severe long-term physical injuries, although there were of course mental effects for him and members of his family, and he lost his job as a result of the incident also.

50. The case of *DPP v. Duffy* was another shooting case. The shooting took place in a bar in front of numerous witnesses and was captured on CCTV. The accused used a double-barrelled shotgun and shot the victim twice, but the latter managed to escape to the building next door. He made quite a good recovery but was left with a severely handicapped hand and was no longer able to continue working as a bricklayer or take up any other manual work.

51. The accused pleaded guilty to one count of attempted murder and one count of possession of a firearm with intent to endanger life or cause serious injury. Significantly, he had a previous conviction for murder and firearms offences in Belfast. He had received a life sentence in that regard, with a recommendation that he serve at least 25 years, but was released under the terms of the Good Friday Agreement. A sentence of life imprisonment was imposed for the attempted murder and upheld on appeal.

52. Although there was a guilty plea, the outstanding features of the case are the discharge of a shotgun in a busy, public bar and the fact that the appellant had a previous conviction for murder. To that extent, the case is very different from the present one.

53. In *DPP v. Crowe*, the accused pleaded guilty to manslaughter on the grounds of diminished responsibility in respect of one victim, attempted murder in respect of a second,

and assault causing harm to a third, all offences having taken place at the same time. The offences occurred at a party which was taking place at a third party's home. The accused became aware that certain people were attending the party and travelled there by car in the small hours of the morning to the location. He and another man arrived at the party wearing balaclavas armed with two shotguns, one a sawn-off shotgun and the other a pump action shotgun. One victim was shot at point blank range in the face by the co-accused and death was instantaneous. The accused entered the kitchen and shot the second victim, who managed to distract the accused momentarily, as a result of which he was shot in the upper right arm, suffering serious injuries. The third victim, a woman, was struck by the butt end of one of the weapons. Both gunmen then fled the scene leaving behind one of the shotguns.

54. The sentencing judge imposed a sentence of life imprisonment in respect of the murder; 15 years in respect of the attempted murder; and 5 years for the assault, all to run concurrently. While the Court reduced the manslaughter sentence, the sentence for attempted murder was upheld on appeal.

55. Points of dissimilarity include; (a) that there was a guilty plea (mitigation); (b) that there were multiple offence and victims (aggravating); (c) that he acted in concert with another accused (aggravation); (d) that a shotgun was used and that the venue was a party and therefore in the presence of many people (aggravation).

56. Having regard to the above cases, and emphasizing again that this is a very small sample of cases from which to draw general conclusions, one can discern the factors which a court should take into account in a case of attempted murder, as set out below; although to

a large extent, they mirror the kinds of factors that are relevant in all sentencing cases. We would suggest they are as follows:-

- (1) The extent of the victim's injuries; this is particularly relevant in attempted murder cases (as it is, for example, also in assault-type offences). This is because the offence ingredients are defined by reference to the intent of the offender, thus leaving room for a wide variety of outcomes in terms of the injuries caused; ranging all the way from a victim who escapes without injury to a victim who suffers serious and long-term injuries. While the intent to kill is common to all attempted murder cases, the outcome of the accused's conduct may vary widely, and the actual outcome in terms of the impact on the victim's physical and mental health is highly relevant to sentencing. This is not of course to say that it must outweigh all other factors, but it must be properly weighted in the sentencing exercise within the parameters of proportionality laid down in the sentencing authorities in this jurisdiction.
- (2) Whether the offence was committed in the context of a criminal enterprise or other criminal offences (such as a robbery, or possession of a firearm) and/or whether there were multiple victims;
- (3) Whether the offence was committed alone or with another;
- (4) The venue of the crime (for example, a victim's home where they are entitled to feel safe or where children might witness the event, or a crowded public place where others might be also put at risk, and so on);
- (5) The overall context or motivation for the offence, insofar as this can be gleaned from the circumstances and/or admissions made;
- (6) Whether or not there was a guilty plea and/or the manner in which the accused ran the trial;

- (7) Whether or not there were indications of genuine remorse after the offence, and when these first manifested themselves. For example, immediate remorse and actions indicating that such remorse was genuine would be expected to be given greater weight in sentencing than an expression of remorse which first emerges in the mitigation speech of counsel at the sentencing hearing;
- (8) Providing assistance to the Gardai, making admissions, and so on;
- (9) The personal circumstances and background of the accused person.

57. We do not suggest this list to be comprehensive, but merely a brief summary of the kinds of factors that were referred to in the five authorities cited to the Court as well as in the facts before the Court in the present case.

58. We referred at point 6 in the list above to the question of whether there was a guilty plea and/or the manner in which the accused ran the trial. One of the points of dispute in the present case between counsel was whether a sentencing court was entitled to take into account the fact that an accused has run a trial on a narrow basis (such as putting the question of intent in issue only), or whether a person should receive credit only where he or she has entered a guilty plea as such.

59. It is true that the full benefits of a guilty plea, both for the injured party (if there be one) and for the system (in terms of resource savings) are only fully obtained if a person enters a guilty plea, and the Court has signalled that guilty pleas can expect to receive reductions within the range of 25-30%. A factor that can be relevant in this regard is *when* the plea was entered; an early plea is recognized as attracting greater discount than a later plea; and the later the plea, the less the discount.

60. However, the Court is not of the view that there is necessarily a “bright-line” rule whereby a sentencing court is *never* permitted to take into account the manner in which a trial has been run. Obviously, this is a matter to be approached with care and caution. The basic principle that an accused may not be penalised for exercising his or her constitutional right to trial remains in place. However, if an accused has instructed counsel to run a case in a particular manner, namely one which causes the least use of resources and/or the least distress to a victim, that is a matter which may be taken into account in sentencing, in mitigation of sentence, in an appropriate case. It may not lead to the same kind of discount as an early plea, but it may lead to some discount. (A question which does not arise in this case but may arise on another occasion is whether in extreme and exceptional cases, the conduct of a defence may in fact aggravate a sentence; this is an issue which must be approached with great caution in light of the constitutional right to trial and the right to defend oneself; nonetheless, even the Constitution might be thought to subject this right to certain limits and to permit some aggravation of sentence if the right has been abused e.g. by oppressive cross-examination of vulnerable witness, by time-wasting, by reason of unreasonable requests for adjournments or lack of preparation not be abused.)

61. We are of the view in any event that the trial judge in the present case did take into account the manner in which the trial had been run, notwithstanding the somewhat ambiguous comments at the sentence hearing, which have been referred to earlier.

The present case

62. We wish to start by noting that the fact that the appellant was convicted of attempted murder necessarily means that the jury was satisfied beyond reasonable doubt that he intended to kill. A sentencing court cannot go behind the jury’s conclusion in that regard.

That said, however, a sentencing court is of course entitled to take into account the evidence regarding the lead-up to, and the immediate aftermath of, the offence, in order to ascertain why the intent was formed in the first place, for how long the offence had been planned (if it all), and whether remorse sprang up immediately afterwards.

63. Secondly, the Court rejects the submission of counsel for the prosecution that, by failing to enter a guilty plea, the appellant “resiled” from the remorse that he expressed to the Gardai and/or failed to follow through on his early co-operation and assistance. In his admissions, the appellant said certain things, and although he ran the trial, it was not on the basis that he had not said those things; rather he sought to persuade the jury that what he said did not amount to intent. We do not consider this to be a “resiling” from the position he had adopted during Garda interview. This was the mounting of a legal defence (denial of intent at the time of the killing) which was neither inconsistent with his expressions of remorse after the killing nor his co-operation with the Gardai.

64. Accordingly, the Court can sum up its view of the relevant factors in the case as follows:

Aggravating factors

- a) The severity of the injuries of the victim, which were catastrophic in nature; this is one of the outstanding features of the case;
- b) The fact that the person who tried to kill her was the victim’s own husband, and that the location was in her own home, while she was asleep and utterly defenceless, and while their young son was in the house, thus involving a gross breach of trust and violation of the family home and the family unit, perhaps one of the gravest breaches of trust in the family home imaginable;

- c) The fact that the appellant (himself a large man) used a weapon (a hammer) upon his defenceless, sleeping wife;
- d) That the matters which had led to the appellant's behaviour on that day had built up over a long period of time and that he had ample opportunity to take various steps of a non-violent nature to deal with them prior to this date.

Mitigating factors

65. In mitigation, the following factors were relevant:

- a) His hitherto blameless life, he being a person who had always worked hard, made and saved money, and who had no previous convictions of any kind;
- b) The suddenness of the formation of the intent to kill, evidenced by the fact that he went to work that morning, bought flowers for his wife on the way home, and formed the intent only when confronted at home with a particular situation; this was not an action which was planned over a number of hours, days or months;
- c) There appears to have been genuine, immediate remorse, evidenced by his actions in ringing for help and then driving to the Garda station to alert them to what he had done, followed by admissions to the Gardai;
- d) The reports submitted to the Court suggest that this remorse is both genuine and continuing;
- e) That he co-operated with the Gardai immediately with admissions, albeit that this was followed by a trial in which he submitted that his admissions did not show an intent to kill;
- f) That he conceded various technical matters at the trial and ran it only on the "intent" point (relevant to a limited degree, as discussed above);
- g) His low risk of re-offending; as evidenced by the forensic psychologist's report.

66. The sentencing judge did not mention what the headline sentence might have been. This makes it difficult to assess what proportion of a discount he gave for the mitigating factors. For example, did he discount from a life sentence, or did he start notionally from 17 or 18 years, before he arrived at 15 years? The situation is particularly blurred by the exchange between the sentencing judge and counsel described earlier, where 15 years appears to have been first discussed as a starting point (or headline sentence), and then as an ‘arrival point’ (or post-mitigation sentence).

67. This was a case where an appalling crime was committed by a man who had hitherto led a perfectly ordinary, crime-free life. Pressure appears to have built up in his mind in response to his wife’s lifestyle and behaviour, and instead of dealing with it through ordinary channels prior to the date in question, a particular situation presented itself to him on a particular day whereupon he quickly formed an intention to kill and struck her several times with a hammer as she lay sleeping. The results were catastrophic for her. He then immediately regretted what he had done and alerted the authorities, and has regretted it ever since. The Court accepts that his remorse was genuine then, and is genuine now; the Court also accepts that he had led a blameless, crime-free life before that. However, in view of the seriousness of the crime in question, the Court has reached the view that there was no error in principle in the ultimate sentence of 15 years the sentencing judge arrived at, even taking into account all the mitigating factors urged on behalf of the appellant. If those mitigating factors had not been present, a much higher sentence, whether a life sentence, or a determinate one of 20 years, would have been appropriate. The fact that the offence was not committed in the context of a criminal lifestyle or enterprise is a point of distinction from some of the cases discussed; so too is the fact that there was no use of a firearm, nor danger to the public generally, nor multiple victims. Yet the case presents alarming features of a

different kind. The accused took a hammer to a sleeping woman, his wife and mother of his child, while she was in her bed in the family home, and she has been left with lifelong serious debilitating injuries such that she will never lead an independent life or be able to care for her own child. A headline sentence of life imprisonment or one of 20 years would not have been inappropriate if the appellant did not present with the mitigating factors that he did; but given the mitigating factors that presented themselves, we consider that 15 years was an appropriate post-mitigation sentence.

68. The Court will therefore dismiss the appeal against severity of sentence.

69. As this judgment is being delivered electronically, I wish to record that both Birmingham P. and Donnelly J. have indicated their agreement with it.