



THE COURT OF APPEAL

Appeal No: 21/2023

**Birmingham P.
Edwards J.
McCarthy J.**

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

Respondent

V

GARRETT SMITH

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 4th of July 2024.

Introduction

1. Before this Court is an appeal brought by Mr. Garrett Smith (i.e., "the appellant") against the severity of the sentence imposed on him by the Central Criminal Court on the 19th of December 2022. On the 28th of October 2022, a jury found the appellant not guilty of murder but guilty of manslaughter (count no. 1 on Bill No. CCDP0077/2020), and further found the appellant guilty of one count (count no. 2) of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994. Following a sentencing hearing held on the 21st of November 2022, the Central Criminal Court sentenced the appellant to a global custodial term of 14 ½ years to date from the 11th of October 2022, and further suspended the final 12 months thereof for a period of one year following release.

2. The appellant appeals against the severity of the said sentence and has advanced seven grounds in his Notice of Appeal dated the 19th of January 2023 in support of his appeal. In essence, those grounds complain:

- I. That the sentencing judge erred in law and in fact in his assessment of the headline sentence (ground no. 1), and complaint is particularly made of the sentencing judge's placement of the appellant's offending within the "worst" category of offences under *People (DPP) v. Mahon* [2019] IESC 24 (ground no. 4), and the undue weight which is said to have been attached by the sentencing judge to the aggravating factors in the appellant's case (ground no. 5);

- II. That the sentencing judge erred in law and in fact in his assessment of the weight to be attached to the mitigating factors at play in the case (ground no. 2), most particularly his condition of "*extreme intoxication*" at the time of the offending (ground no. 3), and also the pre-trial offer of a plea to manslaughter (ground no. 6);
- III. That the sentencing judge imposed a sentence which was disproportionate in all the circumstances (ground no. 7).

Factual Background

3. At the sentencing hearing of the 21st of November 2022, a Garda Inspector James O'Brien (otherwise "G/Insp. O'Brien") gave evidence in relation to the factual background to the appellant's offending and further detailed some of the investigative history of the case.

Discovery of the deceased

4. G/Insp. O'Brien described that following an emergency service call made shortly before 4:30am on the 6th of February 2020, members of the regional Armed Support Unit of An Garda Síochána, including a Garda Sergeant Curry (otherwise "G/Sgt. Curry") attended at an residential apartment at 18 High Hayes Terrace, situated in Castlecomer, County Kilkenny. There, G/Sgt. Curry noticed a Mr. Edward O'Sullivan, otherwise known as "Liam" or "Lem" O'Sullivan, (i.e., "the deceased") lying in "*a pool of blood*" just inside the door to his apartment. Paramedics attended at the scene shortly thereafter, and they found Mr. O'Sullivan with very serious head and facial injuries. While efforts were made to treat Mr. O'Sullivan at the scene, his condition deteriorated very rapidly and he stopped breathing, which necessitated the administration of CPR and his removal by ambulance to St. Luke's General Hospital where he would later be pronounced dead.

5. The deceased was aged 46 years at the time of his death. He was then living alone in the apartment at 18 High Hayes Terrace but was in a relationship with a Ms. Pauline Farrell with whom he had had five children. The deceased was known to a Ms. Rebekah Walsh, who was in a relationship with the appellant at the time. It was said that it was through this connection to Ms. Walsh that the appellant came to be in the home of the deceased on the night of the offending.

The fracas inside the deceased's apartment

6. Mr. O'Sullivan had been drinking the evening before the offence with a number of people including the appellant and Ms. Walsh. During the course of this evening, several people including the deceased's son had attended at the premises at different times. There was evidence of alcohol consumption on the part of all who had attended at the property that night, and there were different, and to some extent, inconsistent accounts of the events that had taken place there. As a consequence, it was difficult for the Garda investigation to establish with any certainty the timing of the events and also the precise order in which people arrived at and left the premises. Notwithstanding this difficulty, there appeared to have been a measure of agreement that at some point during the course of the evening, and at a remove relatively proximate in time to the events leading to Mr. O'Sullivan's death, there was "*a row*" in the apartment that was said to have culminated in a physical altercation.

7. It was G/Insp. O'Brien's evidence that the initial focus of this fracas was between the appellant and the deceased, and the deceased's son and a fourth male, a Mr. Connor Martin. Mr.

Martin would go on to give evidence at the trial of the appellant, in which testimony he stated that during the course of this incident he had struck the appellant over the head with a saucepan. There was also evidence of some punching that had occurred, and reference was made to "wrestling" that took place between the bedroom and the kitchen of the apartment. The initial fracas "quietened" after a time but this reprieve from violence was short lived, as will be described shortly.

CCTV footage from the Circle K petrol station

8. At this juncture in G/Insp. O'Brien's evidence, the sentencing judge, who had also presided over the trial of the appellant, asked the prosecution for some insight into the timing of the events, particularly with reference to CCTV evidence which was harvested from a Circle K petrol station on the Castlecomer Road. This footage, which was taken at around 3:00am on the 6th of February 2020, showed the appellant and the deceased walking to the petrol station together. The sentencing judge remarked on the significance of this footage:

"JUDGE: *And there was no evidence of animosity, in fact, quite the contrary. They seemed to be on good terms. I mean I think personally, that that's very important piece of CCTV (sic), having regard to the outcome, because it shows the depth of intoxication of the accused. And we know that he was drinking from around ten o'clock the previous morning and taking, well, whatever.*

COUNSEL FOR THE PROSECUTION Yes, yes.

JUDGE: *And by the way, it shows that Mr O'Sullivan was nowhere near that intoxicated. He seemed to be reasonably normal to all appearances".*

9. G/Insp. O'Brien confirmed that the CCTV footage in question contained that which was indicated by the sentencing judge, and further that the footage was taken at a remove temporally proximate to when contact was made with emergency services (approximately an hour and a half earlier to the said emergency call).

The appellant's state of intoxication

10. The focus of G/Insp. O'Brien's evidence then turned to the appellant's intoxication. It was said that the appellant was obviously intoxicated and had difficulty walking in a straight line. There was evidence from Ms. Walsh, which was supported by CCTV evidence, that she and the appellant had been drinking in a public house from approximately 11:00pm, and that following this they drank together in a public space near a river. Having purchased alcohol, the pair made their way to the deceased's apartment.

The fracas outside the deceased's apartment

11. Resuming his evidence relating to the physical altercation that was said to have quietened, G/Insp. O'Brien described that one of the accounts that was given, which was not substantially disputed, was that what had happened was that the deceased had reached a point where he had asked everyone to leave his apartment. There was evidence to the effect that at this remove in time the deceased was holding a knife, but that, having been reminded by Ms. Walsh that a mutual acquaintance of theirs had lost his life through knife violence, he immediately put it down. G/Insp. O'Brien confirmed that there was no suggestion that the deceased had used the knife thereafter, nor was there any suggestion that he had brandished it in any way. It was the case

that the deceased having asked, in somewhat forceful terms, the people in attendance at his home to leave, the fracas either resumed or continued on the street outside his home. The appellant, who had egressed from the apartment, was present outside and participated in this second or resumed altercation. The second count on the indictment, that is the count of violent disorder, was said to relate both to these events and to what had occurred inside the apartment.

12. The events that transpired outside of the deceased's apartment were described in greater detail by G/Insp. O'Brien. It was said that the appellant was struck "*a couple of times*", and reference was made to the evidence of Mr. Martin who had averred that he had broken a sweeping brush over the appellant's head, and that he had kicked the appellant in the face or head, which actions were said to have resulted in the appellant falling to the ground.

Eyewitness testimony of Ms. Walsh

13. The evidence of Ms. Walsh was that she had become aware whilst the resumed or continued fracas outside of the property was ongoing, that the appellant was no longer with the group of people that were outside the deceased's apartment. Her evidence was that she went back towards the apartment in search of the appellant, and on returning to the property she there observed that the deceased was already on the ground and was quite badly injured. She found the deceased inside the door of the apartment in a position consistent with that in which he was later found by G/Sgt. Curry.

14. Ms. Walsh provided eyewitness testimony of the conduct of the appellant, whom she found standing proximately to the deceased. She stated that she had witnessed the appellant "*stamping repeatedly*" on the head and face of Mr. O'Sullivan, and that the appellant was punching Mr. O'Sullivan too, but that the blows which the appellant dealt to the deceased comprised of "*mostly stamping*". She described how Mr. O'Sullivan's face was already badly swollen and bleeding, and she referred to a "*gurgling sound*" that she had heard coming from the deceased. Ms. Walsh heard the appellant utter words to the effect, "*you're a big man now without your friends*", which she took to be a reference to the earlier part of the fracas that had taken place inside the apartment. Ms. Walsh's attempts at intervention were met with threats by the appellant to the effect that he would inflict the same treatment upon her.

15. At this juncture it should be stated that reliance by the prosecution on Ms. Walsh's evidence was a point of contention for the defence. It was said that at the trial of the appellant on *inter alia* a count of murder, the prosecution had heavily relied on Ms. Walsh's evidence not solely to prove causation, but further to demonstrate the requisite intent to kill or cause serious injury. To reference this strand of evidence in the context of a sentencing hearing in respect of a manslaughter conviction was problematic, counsel for the defence would later argue at the sentencing hearing, because "*[h]ad that [i.e., the promotion by the prosecution of Ms. Walsh's evidence to demonstrate the requisite intent for murder] been accepted beyond reasonable doubt by the jury [...] then Mr Smith would not [...] be before this Court on the offence of manslaughter*". This argument was not accepted by the sentencing judge, who had presided at the appellant's trial. In the first place, the sentencing judge was of the view that the injuries and the forensic evidence in the case could speak for itself without Ms. Walsh's evidence. He would later remark that in any event the manslaughter verdict which was returned by the jury was a "*nod*" or concession to human frailty in circumstances of extreme self-intoxication. Accordingly, the judge

refuted counsel for the defence's argument, stating, "*I'm not sure if that's right at all. The defence in this case was that he didn't form the intention due to intoxication. That doesn't affect the validity or the view of Ms Walsh as to these events*".

Evidence of the State Pathologist

16. The injuries of the deceased were described in greater detail by Dr Heidi Okkers, State Pathologist. Dr Okkers described damage to the deceased's abdomen, multiple rib fractures that were not consistent with the administration of CPR; multiple bony injuries to the head and face, including the skull, the jawbone and nose, which bony injuries caused internal bleeding resulting in asphyxiation by inhalation of the bleeding into the mouth (the evidence of Ms. Walsh as to the gurgling sound she had heard was said to be consistent with this particular finding of Dr Okkers), and; severe traumatic brain injury, which the pathologist described as being "*akin to a road traffic accident*". Dr Okker's evidence was that any of the injuries to the face, head and body sustained by Mr. O'Sullivan could have been fatal. The injuries that Dr Okkers identified were said to be consistent with stamping from a person standing over the deceased who was laying on the ground.

Garda Investigation

17. The appellant was arrested by a Garda Mark Nolan for an offence of causing harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997. The locus of the appellant's arrest was situated at a very short distance away from the scene of the offending. At the time of his arrest, blood was observed on the appellant's clothing, noticeably on his trousers and footwear; and the appellant was found to be in an intoxicated state. Following the appellant's arrest, he was thereafter conveyed to Kilkenny Garda Station. In cross-examination, G/Insp. O'Brien confirmed that the appellant was co-operative with Garda Nolan and his colleagues when the member effected the appellant's arrest.

18. As alluded to previously, initial Garda inquiries at the crime scene revealed a large amount of blood on the floor of the apartment, and blood spattering was also observed on the wall of the apartment. Technical and forensic examinations yielded a number of features of evidence that were of assistance to the case. The first of these was that the pattern of blood staining on the appellant's clothing and footwear was consistent with him having stood over the deceased, with his left foot planted on the ground while stamping with his right foot. It was said in this regard that the right shoe had "*contact blood staining*" on it, whereas the left shoe had "*spattered blood staining*". Further to this forensic evidence, photographic evidence of the deceased's injuries taken at the time of the post-mortem examination revealed a pattern of bruising on the deceased's head and face that was both striking and consistent with the pattern on the soles of the appellant's footwear. DNA profiles obtained from the bloodstains on the appellant's clothing confirmed that the blood in question was the deceased's blood.

Interviews of the appellant

19. Having been conveyed to Kilkenny Garda Station, in a state of intoxication, the appellant was initially unfit for interview and so he was not interviewed for a period of time. It was said that the appellant also required medical treatment. Having returned to a state of sobriety, the appellant was interviewed on a number of occasions and gave a limited account of the events of the evening of the 5th of February 2020 / early morning of the 6th of February 2020. This limited account,

based on G/Insp. O'Brien's evidence contained in the transcript of the 21st of November 2022, appears to have been confined to what the appellant stated was the last thing that he remembered from the night in question, namely him leaving the deceased's apartment. It was confirmed by G/Insp. O'Brien in cross-examination that the appellant was co-operative with gardaí throughout his detention, and that he facilitated the taking of samples by gardaí.

The trial

20. The appellant offered a plea to manslaughter a number of days before his trial commenced. However, this was not a position that was maintained on arraignment, and the trial was subsequently contested in full. In presenting his defence the appellant's legal team did not contend that he had acted in self-defence or that he had been provoked. The case that went to the jury was one in which intoxication, causation, and intent generally, were in issue. There was no positive case made in respect of causation, other than simple denial that the appellant had by his actions (in respect of which there were no admissions) unlawfully killed the deceased.

21. Ultimately, the jury at trial found the appellant not guilty of murder but guilty of manslaughter, and they further convicted him on the violent disorder count.

Victim Impact Statement

22. In the course of the sentencing hearing of the 21st of November 2021, the sentencing court received victim impact evidence from Ms. Pauline Farrell, the deceased's partner and mother of his children; and victim impact statements from Mr. Christopher Farrell, the deceased's son; and from Ms. Lisa Whelan, the deceased's daughter. Ms Whelan's victim impact statement was tendered on behalf of the O'Sullivan family.

Ms. Pauline Farrell

23. Ms. Farrell detailed how she had met the deceased when she was attending college in Waterford, and that following this the deceased had become a "*very big part of [her] life*", the two ultimately starting a family together. She described how the deceased had temporarily moved out due to personal matters between the couple, but that she and him were still on the best of terms, and he continued to play an active role in his children's lives. She recalled how even up to the night of his death, they had been planning a day out with their youngest children. Ms. Farrell detailed how life would not be the same for her and her children. She spoke of how she recalled being subjected to jeering by other children after she had lost her own father at a young age; and she lamented that her own children would now no longer have their father feature in their lives.

24. Ms. Farrell spoke of how following the appellant's death she had struggled with "*the genuine fear of losing someone all over again*"; and that she had pushed herself away from everyone, including her kids, owing to a fear of being close to anyone. She stated that even though she was no stranger to bereavement, she had "*never been through anything so traumatic*" as the appellant's death. She said that the appellant was missed "*so much*", that his children were "*barely coping*", and that she was trying to hold it together every single day with the help of medication to which she had never resorted previously. She continued, alluding to what she had witnessed on the 6th of February 2020:

"Liam's death will never, ever leave my mind. It was so extremely traumatic, seeing all that blood around him, seeing runner footprints on his face, bloody runner footprints on

the ground next to him will never leave me. Even if I see a shoe or a runner print on the ground from the rain, I get flashbacks to it all. It really impacted my life. I barely sleep, I'm full of anxiety all the time. Unable to work, so I can't provide properly for my kids".

She would also later allude to the "gurgling" or "gargling" sound which she had heard from Mr. O'Sullivan, referenced earlier in the respective testimonies of Ms. Walsh and Dr Okkers, and stated that she will never forget the sound of it.

25. Ms. Farrell's statement then addressed how the circumstances of Mr. O'Sullivan's death impacted upon funeral arrangements and the difficulties the family faced in terms of grief in the immediate days and weeks following his death. She spoke of how the family had to wait eleven days before the deceased could be laid out at home, and that when he finally was laid out the coffin had to be closed due to the extent of his facial and head injuries. Ms. Farrell stated that this really impacted their younger children who queried, *"how do you know daddy was really in the coffin if we didn't see him"*.

26. Ms. Farrell spoke of the deceased as having been a loving and kind person, who would help anyone out. She stated that he lived for her and their five children, and three grandchildren. She said that the deceased was entitled to live in his own home without fear. Ms. Farrell spoke of how she and her children would never be the same following the deceased's death. She stated that her and her children's experience of the trial process *"was like waiting for the funeral all over again"*, and that she was distressed from trying to protect the younger children in the family during this time. She lamented that at some point in the future, those children will have to be told the circumstances of Mr. O'Sullivan's death. She stated that he will *"never rest in peace"*, that he was buried in a closed coffin with no kiss goodbye. She concluded:

"He did not want to or deserve to die the way he did in these horrific circumstances. It will always impact our lives forever. Our kids now have to grow up without a father, because his life was taken from us all. It must be nice to [not] remember anything horrific about that night".

Mr. Christopher Farrell

27. The victim impact statement of Mr. Farrell was read into evidence by counsel for the prosecution. Mr. Farrell wrote:

"[...] The day my father was killed changed my whole life. I've been going through so much pain and emotion. I genuinely feel like I only have half of myself left. When my father was killed it caused a pain inside me that I never felt or experienced before. I've lost family members before but losing my father is a completely different experience. I always looked up to my father and half of me was ripped away when he died. It's still not real to me. For my mind, I still feel like I could just walk down and call into him, but I can't. I feel like I could have done more to help him, and the regret and hurt I feel over that is like no other. I've put everything to the back of my head and virtually this is opening up emotions I don't want to feel. I used to work full-time and now I can't focus and can't bring myself to get back working. I've been silently depressed and hurt. I don't go far from home anymore. I never had anxiety, but now it's through the roof. I went from a normal full-time worker to having the doctor put me on illness benefit. I'm not the same person that I was before. As much as I blocked out my feelings and emotions, the truth of

my father's death was traumatising. I can't go to sleep without dreaming about the events of what happened. Sometimes I dream my father is still alive, and I wake up confused and upset. I can't back to normal life. My heart is broke, my head is all over the place. My father should still be here, I shouldn't be writing this. None of my family members should be going through this trauma. [Mr. Farrell then described how the experience of having a pathologist "study" the deceased's injuries, and then explain them to him, "absolutely broke his heart"]. I was my father's first child out of five kids, now I have my own child, he's five months old and my father never got to meet him. I never met my own grandfather, and I know how it feels. It's not fair. [...] I look at my son and I think he'll never get to meet his grandfather and it's devastating because his life was taken. It's not as if it was an accident and that's what hurts the most. [...] It's after changing me completely and I don't know how to deal with it. Writing this is very tough because when it's out loud, it's real. I'd give anything to have my father back [...] My father's killing has devastated me. I want to live a potential to do good for my life and now I'm stuck. It has impacted me so much. I'm on tablets for anxiety from the doctor and I fear the worst all the time. The pain and trauma is never-ending and I'll never be the same".

Ms. Lisa Whelan, on behalf of the O'Sullivan family

28. The final victim impact statement of Ms. Whelan was made on behalf of the O'Sullivan family, and was read into evidence by counsel for the prosecution. The beginning of this statement spoke of the trauma experienced by members of the O'Sullivan family arising from Mr. O'Sullivan's discovery, identification, and forensic examination:

"In the early morning of the 6th of February 2020, our lives changed forever with one phone call to tell us Liam was viciously attacked and was on his way in an ambulance to St Luke's Hospital. Little did we know the extent of his injuries. We waited for hours in the family room of the ICU ward, while they tried in vain to save Liam, clinging onto hope that he would be saved. Now we know that he did not stand a chance. He was already gone before he was taken from his apartment, the attack had been that brutal. When we finally got to see him in ICU it was shocking. The injuries were so severe, Liam was unrecognisable. We could only tell it was him from the mom and dad tattoo on his arm. We spent as much time as we could with him in those last few hours, taking us in two's (sic) as that was all that was allowed in to sit with him. We were all around his bed for the last few minutes before his heart stopped. When that happened, we had to leave quickly, as Liam's body had to be swabbed for evidence. That was extremely difficult. In normal circumstances, we would have had the opportunity to stay with him for a bit longer. We lost that opportunity, we never really got to say goodbye".

29. The statement then turned to the impact that the loss of Mr. O'Sullivan has had on the lives of the O'Sullivan family. The statement spoke of the heartbreak and "immeasurable" pain that has been felt by the O'Sullivan family, and to the legacy of losing a family member in "a horrendous attack". Ms. Whelan's statement referred to how members of the O'Sullivan family have experienced nightmares, panic attacks, depression, and insomnia since Mr. O'Sullivan's death, as well as other serious health complications experienced by certain members of the family. She wrote that the family had hoped that Mr. O'Sullivan did not feel much pain as he died, and

that it was quick, but that such thoughts were “*shattered*” by the knowledge that the deceased had defence wounds on his arms which were indicative of a struggle to stay alive.

30. Ms. Whelan then spoke of the trauma arising from having to wait for a time before Mr. O’Sullivan could be buried and how his children were denied the opportunity to see him one last time. She reflected on the void that his death had left in its wake:

“The whole left in our family (sic) can never be filled, he always looked out for us. He was the first born son, a big brother, the father of five kids. An uncle to many and had just become a grandfather before he was taken from us in such a vicious and inhuman way for no reason. To lose someone you love in such a brutal way is just so heart wrenching. You can never come to terms with it. If a person dies from an illness or an accident, you will eventually have some closure, but we will never have that. This will be our third Christmas without him. We clock every occasion Liam is missing. The pain never goes away, we have just had to live with it. Everything we write does not seem enough. The physical pain is unbearable, hearts still broken. We think about Liam every day”.

31. She concluded:

“We cannot remember what it feels like to not be stressed or anxious. We cannot remember what it feels like not to grieve. We have spent three agonising years in limbo, waiting to hear what really happened and for some justice for Liam. Our last images of Liam will stay in our minds forever, our hearts will forever be broken. Liam will not be forgotten. He gave us so much to remember”.

Personal Circumstances of the Appellant

32. The appellant was aged approximately 33 years at the time of offending; and he was aged approximately 36 years on the date of his sentencing in the Central Criminal Court.

33. Originally from Waterford City, the appellant was the youngest of seven children. His parents separated when he was 13 years of age, and he left secondary education at the age of 15 years. He returned to education later, between the ages of 16 and 18 years, to complete his Junior Certificate, following which he found employment as an apprenticed painter and later worked in a furniture shop in Waterford for two years. Thereafter, the appellant secured work for a contract cleaning service provider, which work he had completed on a “*casual basis*” for a number of years prior to the events the subject matter of the indictment. He had moved to Carlow shortly before the time of the offending, and had done so with his partner, a Ms. Stacey Foley, in respect of whose children the appellant had assumed a parenting role. At some point before the date of offending, he and Ms. Foley suffered a personal tragedy when their daughter died three days after birth. His relationship with Ms. Foley maintained for a time following this, but it had broken down a number of months before the date of offending. Counsel for the defence would submit in the course of the plea in mitigation that the appellant’s life then went into “*somewhat of a spiral*”, in which alcohol abuse heavily featured. It was said that this lifestyle was reflected in his movements with Ms. Walsh in the days leading up to the date of the offending. At the time of sentencing the appellant was in a relationship with a Ms. Emma Kelly, who tendered a letter in support of the appellant at the sentencing hearing. The appellant has five children that he is involved in raising; and at the time of sentencing he had been in a relationship with Ms. Kelly for approximately two years.

34. The appellant has eight previous convictions to his name, which were detailed by G/Insp. O'Brien at the sentencing hearing with reference to a document detailing same that was furnished to the court below. It should be stated that this Court has not had sight of this document, and information regarding his previous convictions has been gleaned from the text of the transcript of the 21st of November 2022. It should be noted that four of the appellant's previous convictions post-dated the offending in this case; whereas the remaining four on the appellant's record pre-dated the present offending. The convictions that post-dated the present offending arose out of two charges of threatening, abusive or insulting behaviour in a public place contrary to s. 6 of the Criminal Justice (Public Order) Act 1994, and one charge of intoxication in a public place contrary to s. 4 of the same Act. Having been convicted in respect of these matters on the 8th of December 2021, he received a two-month suspended sentence. There was also an allusion to a road traffic matter, but no further detail regarding same was forthcoming. Earlier convictions included an assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997, and trespass on a building contrary to s. 13 of the Criminal Justice (Public Order) Act 1994. He was tried on indictment in respect of events giving rise ultimately to those two earlier convictions, which events transpired in March 2009 with his convictions in respect of same being recorded in May 2012. With exception to the convictions recorded in 2012, which were on indictment, all of the appellant's previous convictions were summary in nature.

35. At the sentencing hearing, an apology to the O'Sullivan family was tendered on the appellant's behalf by his counsel. It was couched in the following terms:

"COUNSEL FOR THE DEFENCE: [...] Mr Smith, Judge, is very sorry for what the O'Sullivan family has had to go through and experience. He says this was never meant to happen, it's a terrible thing that they've had to deal with, and that he wouldn't have wished it upon anyone. And that he is extremely remorseful for his actions. To this day, Judge, he has no memory or recollection of the fateful events on the night in question in terms of what occurred between himself and Mr O'Sullivan, but obviously has to accept responsibility for his actions and what they led to".

Sentencing Judge's Remarks

36. The sentencing judge declined to give a ruling on sentence at the conclusion of the hearing on the 21st of November 2022, and instead adjourned the matter until the 19th of December 2022 on which date he passed sentence on the appellant.

37. The sentencing judge's remarks began with an acknowledgement of the evidence that was tendered at the sentencing hearing, and following this he embarked on a summary of the evidence tendered at trial, expressly referring to *inter alia* the extent of the appellant's intoxication, the circumstances in which the attack on Mr. O'Sullivan occurred, and the evidence of Dr Okkers as to the deceased's injuries. He also noted the history of the appellant's arrest and time in Garda custody, and he further noted the defence case at trial, which centred *inter alia* on the effect of extreme intoxication on the formation of intent, which the sentencing judge noted was accepted by the jury. On the extent of the appellant's intoxication, the sentencing judge made the following remarks:

"For approximately 18 hours prior to the death of Mr O'Sullivan Mr Smith was in the company of Rebecca Walsh and over that period consumed prodigious amounts of alcohol.

It is also likely that he abused prescription medication. This odyssey was recorded by various CCTV systems operative in Kilkenny city at the time. The extent of his final intoxication is best gauged by the footage recorded at the Circle K filling station on the Castlecomer Road at 3 am approximately one and a half hours before the fatal event. At the time he was in the company of Mr O'Sullivan and apparently upon on good terms with him. However, unlike Mr O'Sullivan who was relatively normal in demeanour Mr Smith was repeatedly and visibly stumbling around the garage forecourt. In addition, Dr Tadgh Crowley gave evidence of examining Mr Smith at Kilkenny Garda Station at approximately 7.30 am, about three hours after the fatal event. He found that Mr Smith was completely unfit for police interview at that time due to intoxication and further certified him as remaining unfit from that time for a further period of six hours up to 1.35 pm".

38. The sentencing judge further acknowledged the great harm, trauma and loss experienced by members of the deceased's family as a result of the appellant's actions.

39. On Ms. Walsh's evidence, the sentencing judge made the following comments:

"I have to be circumspect about relying on the evidence of Ms Walsh as to the later stages of this incident. Mr Cody's submission is probably correct in the sense that it is unlikely that the jury could have accepted the entirety of her evidence insofar as it related to the latter stages because if they did a murder conviction might well have followed. However, it is not surprising that the jury might have approached Ms Walsh's evidence with some circumspection given the omission of these significant matters from her initial statement and her bizarre actions in the letter that she wrote to the accused on the same date that she made the second statement regarding these matters, which incorporated a narrative regarding the actual infliction of the injuries on the deceased. But having said that, many of her observations as to the assault are in fact corroborated by the medical evidence and the findings of the investigators. One thing that is certain from those findings is that Mr Smith was the author of this assault irrespective of the – any of the aspects of the testimony of Rebecca Walsh and the absence of intent due to self-intoxication does not necessarily preclude a view that Rebecca Walsh's evidence as to the entirety of the incident might be accepted in full. If Mr Smith is to be taken as not intending the acts of assault he may equally be taken as not intending the contents of the contemporaneous statement alleged to have been made by him by Ms Walsh.

I wish, however, to make it clear that I do not have to rely on the evidence of Rebecca Walsh to any extent whatsoever in terms of an explanation of a narrative behind the manslaughter verdict. [...]"

40. Before identifying the relevant aggravating factors, the sentencing judge noted the submissions that were made to him on the issue of where the appellant's offending fell on the scale of offending, having regard to the Supreme Court's decision in *The People (DPP) v. Mahon* [2019] 3 I.R. 151 and other cases *The People (DPP) v. Ward* [2015] IECA 18 and *The People (DPP) v. Rice* [2018] IECA 61. He noted that the Director had expressed a view that the case falls within the "worst cases" category identified by the Supreme Court in *Mahon* due to the severity of the violence that was involved; and he noted that the defence had disagreed with this assessment,

and had argued that absent wider criminality or the use of a weapon or implement the case belonged in one of the lower categories of offending identified in *Mahon*. The sentencing judge acknowledged himself bound by *Mahon*, and then proceeded to identify the following aggravating factors:

"In addition to the extensive harm caused by this unlawful killing, I accept that the accused did not bring a weapon to the scene but availed himself liberally of the use of his feet, which can be a very dangerous weapon in themselves particularly when used by somebody so far gone in drink and drugs that they did not possess the normal faculties required to form intention on the occasion in question. I should add that had this death been caused by Mr Smith bringing a weapon to the scene the return of a manslaughter verdict would not have saved him from a life sentence but I don't believe that such a sentence can be justified by reference to the facts of this case as they appear to be. Secondly, there was an extreme degree of violence deployed against the deceased as is evidenced by the nature and extent of the injuries listed above. Thirdly, in this case and unlike in some of the comparators urged upon me at the sentence hearing, the deceased was killed in his home, a place where he ought to have been safe, even if he was somewhat irritable or intoxicated there on the night himself. One is quite entitled to be irritable and intoxicated in one's own home and one is entitled to withdraw invitations which have been extended earlier to persons who are present on the premises. These were all of his entitlements and as I have said he was entitled also to require previously welcome guests to leave. Mr Smith was no doubt upset by this, having nowhere else to go in the early hours of the morning, but this provided no excuse whatsoever for what followed".

41. The sentencing judge built upon what he had said in relation to the deceased's entitlements in respect of being safe in his own home, noting that apart from the interest protected by the criminal law in terms of his right to life and right to bodily integrity, his right to be safe in his dwelling or living place under the Constitution was also engaged by the facts of the case:

"If one is lucky to have – enough to have a living place, one is entitled to feel safe in it whatever about the dangers that are involved in stepping outside the front door and I regard this provision as having a meaning extending beyond search warrants issued to the law enforcement community who are looking into cases of suspected crime and looking for evidence within the dwelling. The kind of incident and the kind of invasion that is involved in this case is far more serious than that and is a significant aggravating factor in this offence".

42. The sentencing judge continued to identify further aggravating factors:

"Fourthly, I take into account the fact that Mr Smith left the residence when required to do so along with everybody else but quite unlike everybody else he opted to return to confront Mr O'Sullivan. The fact that his judgment was considerably clouded by intoxicants does not alter this particular fact. It is also the position that the attack on Mr O'Sullivan took place without reference to any possible question of provocation offered by him or Mr Smith being required to act in self-defence. Fifthly, I take into account that this incident

was preceded by a significant instance of violent disorder in which Mr Smith participated both inside and outside Mr O’Sullivan’s dwelling place. All of the lawful defences to such a charge were left to the jury in this case and they were unanimously rejected. So, there is absolutely no basis for inferring that any of Mr Smith’s actions were justified by self-defence, by being picked on or any of the other kinds of suggestions that were made in this case. I am satisfied that the violent disorder which is linked with the death in the sense that it set the scene immediately preceding it is a relevant aggravating circumstance and I’m going to take it into account in imposing sentence on the manslaughter charge although I am imposing a concurrent and therefore really non-effective sentence on the separate count on the indictment”.

43. Having regard to the foregoing factors identified by him, the sentencing judge situated the appellant’s offending in the lower end of the “worst cases” range identified in *Mahon*. However, and before nominating a headline sentence, the sentencing judge made the following remarks in relation to the appellant’s intoxication:

“As I have already noted, a case of this type is by definition mitigated from a murder verdict by a concession to human frailty. Consequently, it is my view that the accused has already received consideration for the circumstances in which he carried out this killing by reference to the finding of the factual absence of the necessary intention for murder that would otherwise naturally and probably arise from his actions by reason of the extremity of the effects of his prolonged and profound self-intoxication. In my opinion, and it’s only my opinion for the moment, such case cannot be viewed in any other way. However, I am fortified in this opinion by a sentence from the judgement of Charleton J in the judgment of the Supreme Court in the Director of Public Prosecutions v. Celyn Eadon [2019] IESC 98 and in paragraph 29 of the judgment at that point Charleton J summarises the future instruction to juries to be given in terms of cases which involve the voluntary consumption of alcohol or other intoxicants such as drugs. He went on to note, however, as follows: “Voluntary consumption of alcohol where the accused did not in fact intend to kill or cause serious injury can reduce the crime of murder to manslaughter. The culpability associated with killing another person by getting oneself into such a state where there are predicted consequences of labile emotions and violence can be reflected in the sentence.” I think this last sentence is particularly important and I do not invite or read it as an invitation to a lenient approach or to an invitation to count the excessive consumption of alcohol on the double in terms of a mitigating factor. It has been counted in reducing what would otherwise be a murder verdict to that of manslaughter. It cannot therefore be seen as mitigating the crime of manslaughter separately in any additional way and I reject any submission to that effect”.

44. The sentencing judge accordingly nominated a headline sentence of 16 years’ imprisonment in relation to the manslaughter verdict.

45. As regards mitigation, the sentencing judge identified the following factors enuring to the appellant’s benefit: the offer to plead guilty to manslaughter at a late stage just before the commencement of the trial on its second trial date; the positive personal testimonials provided to the court below in the form of a reference from the appellant’s employer and a letter from his

partner, the contents of which suggested that the appellant is not a bad person, particularly when sober, which the court below was prepared to accept; the expression of sorrow for the O'Sullivan family, however the sentencing judge noted that for the deceased's family this expression "*rings a little bit hollow*", and; the expression of remorse and acceptance of jury verdict. In relation to the offer to plead, the sentencing judge regarded it as not being worth any more than approximately 10% credit in the particular circumstances of the case. The sentencing judge made further minor allowance for the fact that while the appellant has previous convictions, what occurred in this case went way beyond anything that was in his previous record; however, the sentencing judge noted that he could not do so unconditionally. He observed that there was a "*surprising omission*" in the plea in mitigation, inasmuch as there was not "*the faintest acknowledgement*" of the appellant's difficulties with substance abuse and issues of anger whilst in an intoxicated condition. There was no reference to these difficulties nor suggestion that the appellant was voluntarily proposing to address these matters, which the sentencing judge stated must be addressed both in his own interest and in that of society. The sentencing judge concluded by stating that he was entitled to see that there is a period of good behaviour following release and that the appellant, whether he wants to or not, engages with the Probation Service in relation to addressing the difficulties referred to.

46. The sentencing judge applied an absolute discount of 1 ½ years in respect of the offer to plead guilty, resulting in a net post-mitigation sentence of 14 ½ years' imprisonment. To facilitate rehabilitation and to reflect any other minor mitigating factors, the final year of that sentence was suspended on certain terms which included *inter alia* that the appellant places himself under the supervision of the Probation Service and complies with all their terms, conditions and requirements for a period of one year following the date of his release.

47. On the violent order count, the sentencing judge regarded the offending as mid-to-high level as it was a preamble to and was linked with the fatality that followed. He imposed a 6-year custodial sentence in relation to it, to be served on a concurrent basis with the sentence imposed in respect of the manslaughter verdict. The commencement of both sentences was backdated to the 11th of October 2022, on which date the appellant entered into custody.

Submissions to the Court of Appeal

Submissions on behalf of the appellant

48. In relation to the headline sentence nominated by the sentencing judge, counsel for the appellant submitted that the figure identified was excessive. He argued that the sentencing judge erred in placing the case in the category of "*worst cases*" identified by the Supreme Court in *Mahon*, and instead submitted that the case falls in the category of "*high culpability*" cases attracting a headline sentence of between 10 and 15 years.

49. In support of this argument, counsel for the appellant has referred this Court to a number of authorities which he submits are relevant comparators. Those authorities, to which this Court has had regard, include *The People (DPP) v. D.D.* [2011] IECCC 3, *The People (DPP) v. Ward* [2015] IECA 18, *The People (DPP) v. Thornton* [2015] IECA 202, *The People (DPP) v. Kelly* [2005] 2 I.R. 321, and *The People (DPP) v. McAuley* [2001] 4 I.R. 160. Counsel observed that notwithstanding certain factual similarities between the present case and the foregoing authorities, lighter headline sentences were nominated. Counsel also noted, having regard to *Ward*, *Kelly*, and

McAuley, in particular, and the commentary of Tom O'Malley SC In his treatise *Sentencing Law and Practice* (3rd edn, Round Hall 2016) para. 7-08, that the absence of premeditation or planning was a factor to which the sentencing judge attached insufficient weight when fixing the headline sentence that he ultimately nominated, in circumstances where it was clear from the evidence that premeditation was not a feature in the present case.

50. In respect of the sentencing judge's treatment of the level of the appellant's intoxication, it was said that the sentencing judge (in a passage quoted above at para. 37, above) made it clear that the appellant's excessive alcohol consumption did not constitute a mitigating factor for the purpose of sentencing; rather that it applied *a fortiori* in circumstances where a concession for same had already been made in reducing what would otherwise have been a murder verdict to one of manslaughter. While counsel for the appellant concedes that intoxication will ordinarily not constitute a mitigating factor at sentencing (and acknowledgment is made in this regard of the Court of Criminal Appeal's decision in *The People (DPP) v. Keane* [2008] 3 I.R. 177 to that effect); it is submitted that the appellant's level of intoxication in this case indicates a lack of premeditation, which it is said suggests a somewhat lower level of culpability. Reference is made once more, in this regard, to O'Malley's commentary, in particular at para. 6-27 of O'Malley's aforementioned work, to the effect that intoxication may also indicate that the offence was spontaneous rather than premeditated, thereby suggesting a somewhat lower level of culpability. Counsel further says that the fact that intoxication may have been considered by the jury in acquitting the appellant of the murder charge does not mean that intoxication can be ignored for the purpose of the manslaughter sentence. It is submitted that excessive intoxication is a relevant sentencing factor to be considered, as it points to a lack of premeditation and lower level of culpability, it is said that if the absence of premeditation is considered as the absence of an aggravating factor, the headline sentence would fall in the 10 to 15 year range, i.e., the "*high culpability*" category of offending as identified in *Mahon*.

51. Further complaint is made by counsel for the appellant of the sentencing judge's treatment of the violent disorder offence as an aggravating factor when sentencing for the manslaughter offence. Referring the Court once more to O'Malley's treatise on sentencing (in particular at paras. 7-04 and 7-05 thereof), and also to the dicta of Charleton J. in *The People (DPP) v. F.E.* [2021] 1 I.R. 217 (at para. 33), it is submitted that the sentencing judge stepped into error in taking account of the circumstances of the violent disorder offence as a factor aggravating the appellant's manslaughter offending. Counsel say that the effect of this was to contribute to the finding that the appellant's offending fell in the "*worst cases*" range such as to warrant the fixing of a higher headline sentence than what would otherwise have been nominated in the circumstances.

52. Counsel for the appellant also complains of what he submits was insufficient regard on the part of the sentencing judge to the mitigating factors prevalent in the case. Referring the Court to *The People (DPP) v. O'Sullivan* (Unreported, Court of Criminal Appeal, 22nd of March 2002), it is submitted that the Court of Criminal Appeal had previously held that a failure by a sentencing judge to have adequate regard to any and all the mitigating factors concerning a particular accused can be an error in principle. It is said that the sentencing judge in the present case erred in applying a discount of "*around 15%*" in respect of all mitigating factors, and that the cumulative merit of the mitigating factors in the case, in particular the offer of a guilty plea (albeit at a late

stage), the lack of serious previous convictions, and the appellant's personal circumstances, warranted a more significant reduction from the headline sentence. It is further stated in connection with this argument, that while the appellant did not have an unblemished record, he did not have previous convictions for serious offences, and it was evident from the mitigatory material furnished to the court below that he is a father with a strong work history.

Submissions on behalf of the Director

53. In reply to the submission that the headline sentence nominated by the sentencing judge was excessive, counsel for the Director argues that the sentencing judge was correct in his characterisation of the offending as involving violence of "*extreme brutality*", having regard to the pathological evidence of Dr Okkers, eyewitness testimony, and forensic and technical evidence. It is said that the repeated stamping on the deceased's head and face as he lay prone, helpless and injured on the ground, and the infliction of multiple separate injuries, each of which was sufficient to be fatal, particularly aggravates the case, even within the hierarchy of manslaughter cases of this nature. While counsel for the Director concedes that significant premeditation was not a feature of the appellant's offending, he emphasises that the appellant had been involved in earlier acts of violence which culminated in his conviction for violent disorder. Returning to the brutality of the violence, counsel for the Director observes that there was no evidence of any provocation nor of any need for self-defence; that the appellant had left the apartment to engage in violence with other persons, only to return to the apartment to attack the deceased, and; that he persisted in his attack even after the deceased was lying prone on the floor of his hallway.

54. In relation to the comparators to which this Court is referred by the appellant, counsel for the Director suggests that the appellant's reliance on the *Ward* decision may be misplaced. He observes in written submissions,

"It is not clear what headline sentence, if any, was nominated by the Court of Appeal, Mahon J. as being appropriate, but it stands to reason that this must have been more than 15 years given the post mitigation sentence, imposed by the Court of Appeal, prior to any portion being suspended was 13 years on a guilty plea. Bearing in mind that the accused had pleaded guilty, and had significant additional mitigation, the total reduction including the suspended portion appears to be in the region of approximately 35% range (sic), from a headline sentence of at least sixteen years".

He notes that the Supreme Court appears to have confirmed this in *Mahon* by identifying *Ward* as an example of a case in the "*worst cases*" category. He further notes that a key distinguishing feature, between *Ward* and the present case, is that whereas in *Ward* the accused had very significant addictions in respect of which he had made significant efforts to address and was accordingly afforded significant mitigation; in the present case, there was no suggestion that any history of addiction, or that addiction to alcohol, as opposed to recreational self-induced intoxication, was a causative factor in the appellant's behaviour.

55. As regards mitigation, counsel for the Director makes the following submissions. In the first place, it is stressed that the appellant had pleaded not guilty simpliciter to all matters in front of the jury who would later find him guilty of manslaughter and violent disorder following a contested trial. While a plea of guilty to manslaughter was offered *ex ante* the trial, it was rejected

by the Director; and in the currency of the contested trial that followed, it was not accepted by the defence that the appellant had caused the death of Mr. O'Sullivan. The circumstances and author of the unlawful killing were put totally in issue before the jury, and eyewitness accounts and forensic evidence were challenged. The verdict which was returned, that of manslaughter and not of murder, resulted from the defence of intoxication which was accepted by the jury.

56. Counsel submits that though the appellant was entitled to some mitigation for his pre-trial offer to plea to manslaughter, his position was not analogous to someone who had pleaded guilty to manslaughter, who had accepted responsibility for the unlawful killing, and who had left a net issue of murder versus manslaughter to the jury. Counsel says that the appellant's offer to plead was contingent on the murder charge being withdrawn and that it was made just days before the commencement of his trial on its second date. The original trial date had passed without any such offer being made.

57. Counsel for the Director refutes the appellant's suggestion that the sentencing judge had stepped into error in considering the violent disorder conduct as an aggravating factor in sentencing for the manslaughter verdict. He submits that the violent incident preceded the manslaughter, and that the court below employed the correct methodology as identified by Charleton J. in *The People (DPP) v. F.E.* (previously cited, at para. 35), namely, to impose a separate sentence but to make it concurrent to that imposed for the most serious offence, rather than impose consecutive sentences. It is said that the violent disorder incident involved significant violence being both given and received by the appellant, but against other persons; and it is said that the catalyst for it was the appellant and Ms. Walsh being asked by the deceased to leave his home. It is submitted that the sentencing judge followed the practice cited by Charleton J. in *F.E.*, and that in doing so the court below was entitled to, and in fact obliged to, consider the violent disorder offence as an aggravating factor; it was an act of significant violence against other victims, albeit it within close proximity to the fatal attack, which was a separate offence although linked to manslaughter.

58. On the issue of premeditation, it was observed that neither the Director nor the sentencing judge considered this to be a feature of the case; however, it was noted that the appellant's remarks to the deceased whilst carrying out the assault on the deceased's person were to the effect that "*you're a big man now without your friends*". It is said that these remarks might have left it open to the court below to consider the decision of the appellant to return to target the older and more vulnerable deceased, as opposed to the younger men with whom the appellant was engaged in the violent disorder incident, as being in some manner linked.

59. Finally, on the issue of the appellant's level of intoxication, counsel for the Director emphasised that the appellant had already benefited from the concession made by the jury for his condition at the time of the offending, which concession manifested as a verdict of not guilty of murder but guilty of manslaughter. It was argued that it is not open to the appellant to further argue that he is owed additional mitigation arising from his self-induced intoxication. To do so, it was submitted, would effectively amount to double-counting of the issue of intoxication in favour of the appellant.

60. Counsel for the Director concludes by submitting that even if this Court takes the view that the sentence imposed could have been higher or lower, the sentence imposed by the court below

was within its margin of appreciation and the discretion that is afforded to the sentencing judge at first instance.

Discussion and Decision.

The appropriateness (or otherwise) of the headline sentence nominated

61. Our starting point is that manslaughter is the subject of a sentencing guideline judgment by the Supreme Court, i.e., *The People (DPP) v Mahon* [2019] 3 I.R. 151. In giving judgment for the Supreme Court in that case Charleton J. acknowledged (at para. 52) that:

“**[52]** *Covering, as it does, a broad band of conduct from intentional killing under provocation, to excessive force in self-defence, to criminal negligence in the management of a machine or of a car, to assault without intent to kill or cause serious injury, manslaughter is a notoriously difficult crime on which to achieve an appropriate sentence”.*

62. The wide range of potential sentences available to sentencing judges in manslaughter cases, ranging from possible non-custodial disposal up to and including imprisonment for life, reflects widespread recognition that manslaughter may arise in myriad circumstances which, although always involving significant harm being done, i.e., the loss of a life, may vary widely in terms of the moral culpability to be attributed to the offender. The guidance provided in *Mahon* was intended to assist sentencing judges in charting an appropriate course in any sentencing for a manslaughter offence by, *inter alia*, identifying appropriate sentencing bands based upon the Supreme Court’s assessment of existing sentencing practice following an extensive survey of precedential cases and materials (i.e., precedential in the sense of being considered illustrative of existing practice, but not in the *stare decisis* sense of representing legally binding precedents). On the basis of the material surveyed, the Supreme Court proposed four bands, namely those falling into the category of “*worst cases*”, those falling into the category of “*high culpability*”, those falling into the category of “*medium culpability*” and those falling into the category of “*lower culpability*”.

63. Nobody in this case has suggested that the culpability of the appellant could properly rest in either the “*medium culpability*” category or the “*lower culpability*” category, and it is not necessary for the purposes of this judgment for us to concern ourselves with those categories. However, the sentencing judge considered that this case fell into the category of “*worst cases*” and the correctness or appropriateness of that assessment is disputed by the appellant, who contends that the case ought properly to have been adjudged as falling within the category of “*high culpability*” cases. It is therefore necessary to consider both of these latter categories in some detail.

64. In the judgement in *Mahon*, the “*worst cases*” category is addressed at paras. 54 to 61, inclusive. Charleton J. commences with noting that some unlawful killings are close to indistinguishable in culpability from murder and that cases involving the highest level of culpability attracted an appropriate sentence of between 15 to 20 years, with a life sentence also possible. The Irish cases surveyed in this section include *The People (DPP) v. Conroy (No. 2)* [1989] I.R. 160; *The People (DPP) v. McManus (aka Dunbar)* [2011] IECCA 68; *The People (DPP) v. Egan* [2017] IECA 95; *The People (DPP) v. McAuley and Walsh* [2001] 4 I.R. 160; *The People (DPP) v. Crowe* [2010] 1 I.R. 129; *The People (DPP) v. Ward* [2015] IECA 18; *The People (DPP) v. Hall* [2016] IECA 11; and *The People (DPP) v. Griffin* [2018] IECA 257. It is fair to say that what served to characterise these cases as falling within the worst category was a particularly high level

of viciousness or brutality in the manner in which the killing was effected and frequently (although not invariably) accompanied by either significant premeditation or extreme recklessness, justifying an assessment of moral culpability at the highest level. In surveying case law from other jurisdictions, Charleton J. cited with approval the observation of Fraser CJA in the Alberta Court of Appeal case of *R v Laberge* (1995) 165 A.R. 375 where he stated:

"[t]he nature and quality of the unlawful act itself, the method by which it was committed and the manner in which it was committed in terms of the degree of planning and deliberation are all relevant to this inquiry".

65. Such cases are to be contrasted with cases falling into the "high culpability" category discussed by Charleton J. at paras. 62 to 67, inclusive, of his judgment. Before looking at these, we think it is helpful to recall the remarks of Birmingham P. in this Court's own guideline judgment with respect to sentencing for burglary cases, i.e., *The People (DPP) v. Casey and Casey* [2018] 2 I.R. 337, suggesting that the boundaries between guidance categories, or indicative sentencing bands, may be somewhat fluid in practical terms. He stated in *Casey*:

"[49] [...] *Again, the Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed".*

66. In discussing cases in the "high culpability" category, Charleton J. notes that these tend to attract punishment of between 10 and 15 years as a headline sentence and tend to involve aggravating factors, which may include previous convictions of the accused for assault or other relevant convictions, history of violence between the accused and the victim, callousness towards the victim, confrontation involving a potentially lethal weapon, and death resulting from an unlawful act carrying a high risk of serious injury of which the accused was aware or ought to have been aware.

67. The cases surveyed in this segment of the Supreme Court's guideline judgment included *The People (DPP) v. Horgan* [2007] 3 I.R. 568; *The People (DPP) v. Kelly* [2005] 2 I.R. 321; *The People (DPP) v. Thornton* [2015] IECA 202; *The People (DPP) v. Princs* [2007] IECCA 142, and *The People (DPP) v. DD* [2011] IECCC 3.

68. The appellant has argued that the headline sentence nominated for the manslaughter offence in the present case was excessive and, curiously, his counsel has cited as relevant comparators not just cases relied upon by Charleton J. as indicative of cases falling into the "higher culpability" category, such as *DD*, *Thornton* and *Kelly*, but also the cases of *Ward*, and *McAuley* which were proffered by Charleton J. as being indicative of the type of cases which fall into the "worst cases" category. The ostensible basis for the latter is that although Charleton J. had placed those cases in the "worst cases" category, the sentences imposed at first instance were in each case varied by the substitution of new sentences that fell within the range appropriate to cases falling into the "higher culpability" category according to the *Mahon* classification. The point requires to be made, however, that the varied sentences were post-mitigation sentences and, in the case of *McAuley* it was implicit that the headline sentence would have been greater than 15

years. The position with respect to what may be inferred to have been the headline sentence in *Ward* is less clear, although we are inclined to accept the point of distinguishment made by counsel for the respondent, referenced previously at para. 54, above. *Kelly, Ward* and *McAuley* were all further relied upon as cases in which the existence or lack of premeditation was an important factor, the appellant in this case pointing to his lack of pre-meditation. However, the presence or absence of premeditation, while a relevant factor, will not of itself be determinative as to whether a case falls within or without the category of “*worst cases*”.

69. We think that the characterising features of the assault in the present case that resulted in the death by manslaughter of the deceased were its sheer viciousness and brutality, and its intensity and frenzied nature. What occurred may not have been a premeditated assault in the sense of having being pre-planned, but the jury by its verdict accepted that the appellant had the general *mens rea* for assault manslaughter and intentionally assaulted the deceased, albeit that he did not have the specific *mens rea* (involving an intention to kill or cause serious injury) that would have rendered it murder. Any suggestion that the accused did not know that he was assaulting the deceased, or by what means and in what manner he was doing so, is not tenable having regard to the verdict, notwithstanding that he may have been significantly intoxicated. We do not in the circumstances think that the sentencing judge erred in regarding this case as belonging in the category of “*worst cases*” or in nominating sixteen years as being the appropriate headline sentence. In truth, the case could be located anywhere in the penumbra on either side of the dividing line between the upper end of the “*higher culpability*” range and the lower end of the “*worst cases*” range, and starting at sixteen years (i.e., just slightly above the dividing line) was within the sentencing judge’s legitimate margin of appreciation. We find no error of principle.

The Intoxication Factor

70. On the issue of intoxication, the general rule is that self-induced intoxication provides no mitigation of culpability at sentencing, and indeed in certain circumstances may even be aggravating (such as where an offender has consumed alcohol knowing from previous experience that he is prone to aggression in a disinhibited intoxicated state). That has long been the position in Ireland (see O’Malley, *Sentencing Law & Practice*, (3rd edn, Round Hall 2016) at para 6-27). It is also generally the position in the neighbouring jurisdiction of England and Wales (see the detailed discussion in Padfield, Nicola “Intoxication as a sentencing factor: mitigation or aggravation?” in Roberts, Julian V (ed.), *Mitigation and Aggravation at Sentencing*, Cambridge University Press, 2011). If at a contested trial the evidence suggests that a person’s state of intoxication was at such a level that it raises a reasonable doubt in the mind of the jury as to the existence of the mental element of the crime (e.g., in the case of a murder charge, the specific intention to kill or cause serious injury), then a jury may act on that and acquit. However, that represents a decision with respect to criminal liability, not moral culpability. It is a finding that there was a deficit in the proofs required for a conviction of murder; it is not a finding of diminished responsibility. Indeed, consistent with this view it is to be noted that while s. 6 of the Criminal Law (Insanity) Act 2006 (i.e., “the Act of 2006”) provides for a possible partial defence of diminished responsibility to a charge of murder where a person is suffering from a mental disorder not such as to justify finding him or her not guilty by reason of insanity, the accompanying definition of a “*mental disorder*” in s. 1 of the Act of 2006 expressly excludes intoxication. In this

case the appellant was found not guilty of murder (in circumstances where he had relied on extreme intoxication as raising a doubt concerning whether he had the necessary specific *mens rea* for murder), but the jury nonetheless found him guilty of assault manslaughter. We consider that the trial judge was right in approaching the matter on the basis that his state of self-induced intoxication, while it may have enabled him to escape criminal liability for murder, provided no mitigation of his moral culpability for his involvement in the manslaughter and violent disorder offences of which he was found guilty, and could not be further taken into the reckoning.

Participation in associated violent disorder as an aggravating factor

71. Insofar as the appellant also complains that the appellant's participation in the violent disorder that preceded the assault, and which was ongoing at the time that the appellant assaulted the deceased (albeit that the appellant had detached himself from the group of people who were still engaged in so much of the fracas as was taking place outside the house and had moved back indoors, according to the evidence of Ms. Walsh) was treated as an aggravating factor by the sentencing judge in sentencing the appellant on the manslaughter offence, we do not find any error in the trial judge's approach.

72. The decision of the Supreme Court in *The People (DPP) v F.E.* [2021] 1 I.R. 217 makes clear that the circumstances of the commission of an offence inform its gravity. Where the event involves an aggravating factor which is also a crime, the totality of the circumstances informs the seriousness of the offence. Separate offences committed in temporal proximity (i.e., either together or in series/close succession) may be viewed as a single event and should not be isolated from each other. Rather they should inform the seriousness of the overall circumstances.

73. In *F.E.* the principal or gauge offence was a marital rape. Prior to the rape there had been threats by the husband to cut open his wife's face with a knife made in the kitchen of the matrimonial home. He then ordered her upstairs and raped her. There were also similar threats either to kill or injure the victim made both earlier, i.e., in a shopping centre, and subsequent to the rape, the latter communicated to her by telephone. The rape charge and related charges of threatening to kill or cause serious injury, were contested before a jury, but guilty verdicts were returned. There were also pleas of guilty to a hammer attack on the victim's mother at her home some weeks after the rape, charged both as an attempt to cause her serious harm and as an assault causing her harm. Accordingly, the rape was only one of a series of connected crimes, arguably committed in temporal proximity.

74. At first instance in the Central Criminal Court, Kennedy J., in her sentencing remarks, considered the aggravating factors for the offences in respect of which she was required to impose sentence. These, she said, included "*the threat of violence with a weapon, the breach of trust, the violation of the injured party in her own home while her son was asleep, the fear that he instilled in her and the severe effect on his victim*". The following sentences were then imposed: 14 years on the rape, a headline sentence reduced to 10 years through 2 years reduction in respect of mitigation and 2 years being suspended; 5 years for the threat to kill on the occasion of the rape; 3 years for the threat to kill, delivered by phone the day after; 5 years for the threat to kill at the shopping centre; 7 years and 6 months for the attempt to cause serious harm at the wife's parents' home on 7 August; and of 3 years and 6 months for assault causing harm to the wife's

mother on that same day. These sentences were all concurrent. The trial judge also imposed a 5-year post-release supervision order.

75. The husband appealed the severity of his sentences to this Court. The Court of Appeal reduced the headline sentence to 12 years and took off 2 years for mitigation, the same as the trial judge, and suspended 18 months. Giving judgment for the Court in that case, I said (at para. 34):

"While we accept that the circumstances of the case were egregious, and that it was very serious crime, we also agree with the submission made by counsel for the appellant that, viewed in isolation, the sentence on the rape appears to be somewhat out of kilter with sentences imposed in comparable cases. We have therefore concluded that the sentencing judge was incorrect to have assessed the case as meriting in the first instance a headline sentence of fourteen years. Our conclusion is that while the gravity of the offence, (determined with reference to the appellant's culpability, and the harm done) certainly merited the imposition of a substantial custodial sentence, it did not merit a headline sentence of that severity. We therefore uphold the first ground of appeal".

76. The Director of Public Prosecutions sought to appeal to the Supreme Court on a point of law of general public importance, and such leave was granted. The certified point of law was cast in these terms:

"The Director's primary complaint relates to the reference by the Court to "viewing the offence in isolation". She submits that the rape should have been seen as part of a pattern of violent and abusive behaviour, and the sentence should have reflected the totality of that behaviour. This could have been done by imposing consecutive sentences, and indeed the Court of Appeal observed that if that course had been taken, and the trial judge had come to the figure of twelve years, it might well not have been disturbed. However, the Director's preferred proposal is that the sentence for the most serious offence should be set at a level reflecting the surrounding circumstances. It is said that this would be particularly appropriate in cases of marital rape, where there may well be a pattern of violence and abuse".

77. The Supreme Court held that the Court of Appeal had been wrong, in reviewing the sentence for the rape offence, to have considered it in isolation. The threats in the kitchen led to the rape and the Supreme Court considered that they informed the seriousness of that offence. In their assessment, also aggravating the rape offence were the threats of violence immediately prior to the rape, domestic dominion exercised during the night preceding the offence, the presence of a small child nearby, and the breach of matrimonial trust.

78. Charleton J. stated the following at paras. 29 to 30 of his judgment as being the correct approach:

"[29] In so far as a problem in relation to separate crimes and whether these are part of and should inform the same incident, the following may be stated: where the event involves an aggravating factor which is also a crime, the admission of the accused to the event, or conviction on the event, as including the aggravating factor informs the seriousness of the offence. Where a separate crime is charged together with another crime, if the accused is acquitted of one offence, that verdict must be respected. The

background and circumstances of the accused may be mitigating. So are the background and circumstances and consequences of the crime in determining its seriousness. In attempting to judge what is the event of the crime, that should be looked at with good sense.

[30] *Here, the example presents itself of a threat, a rape and of keeping a victim overnight. All of these are the event which the judge will sentence on whether false imprisonment and threat to kill are separately charged. Where separately charged and convictions entered, all these offences inform the seriousness of each other crime. The threat occurred to facilitate rape, the rape occurred because of the threat, the rape was sought to be covered up by the captivity of the victim. Where time passes and the accused decides to commit another crime, such as threatening the wife in the supermarket or the horrible assault months later, these are separate crimes. The accused, after all, had a separate choice as to whether to pursue such crimes. It is of course relevant to sentencing that the accused was attempting to harm his wife so that no prosecution would take place, if that be the case, or that the threats and attacks were part of a violent disposition to dominate women. Where the events are later in time and not proximate to the main charge, these should be separately charged. Even where there is no separate charge, if an accused pleads good character in mitigation, his actions after an offence, but not part of the circumstances of the crime, may undermine that plea".*

79. The judgment concluded:

"Ruling in this case

[72] *On the authorities, there were a number of separate events in this series of crimes. The threats in the kitchen on 25 May 2014 led to the rape and informed the circumstances of this sexual violence. The threats with the knife and rape incident only ended when the victim left the house the next morning. Aggravating that rape offence is the threat of violence, the domestic domination overnight and the presence of a small child nearby and the breach of matrimonial trust. The Court of Appeal was wrong in considering the rape alone and the prior offence of threat alone. The subsequent threats were separate. The violent attack on 6 August can give rise to a consecutive sentence as can the threats after the rape, but the totality principle should be observed as to the justice and rehabilitative effect of the overall sentence".*

80. The Supreme Court ultimately quashed the order of the Court of Appeal, and replaced it with the sentence originally imposed by Kennedy J. at first instance.

81. Applying the *F.E.* jurisprudence to the circumstances of the present case, we are satisfied that the trial judge was right not to sentence for the manslaughter in isolation but to regard the participation by the appellant in the associated incident of violent disorder as relevant, as informing the seriousness of the offence of manslaughter which occurred in close temporal proximity to it, and as an aggravating circumstance. We reiterate that we have not identified any error of principle in the sentencing judge's approach in that regard.

The allowance made for mitigation

82. The appellant further complains that the sentencing judge had insufficient regard to the mitigating factors in the case. These are accepted to be the offer of a plea to manslaughter at a

late stage in the lead up to the case (albeit that it was not followed through upon arraignment, and that the trial was fully contested); the appellant's lack of a significant prior criminal record, the apology offered to the victim's family in court (albeit late in the day), and; his personal circumstances, including his having lived a generally pro-social life, having a good work record, his family circumstances and labouring under the adversity of being addicted to alcohol. There were also positive testimonials proffered from people who knew him. It is suggested that cumulatively these mitigating circumstances warranted a more significant reduction from the headline sentence than was in fact given.

83. We are not persuaded that the level of discount afforded by the trial judge was outside his margin of appreciation. The appellant was entitled to some modest level of discount for having offered to plead to manslaughter but much of the benefit to the prosecution, to the victims in this case and to the people of Ireland was rendered nugatory by the failure of the appellant to follow through on his offer and to actually plead guilty on arraignment. The trial proceeded. The victims were not spared the ordeal. The trial was not shortened. Certainty was not provided until a jury had rendered its verdict. The State was put on proof not just of murder but also with respect to there having been an unlawful killing at all. There was no facing up to responsibility of any sort. It would have been open to the appellant to have entered a plea of not guilty of murder but guilty of manslaughter, but he did not enter such a plea. In those circumstances only very modest mitigation could attach to the fact that at one point in the run-up to the trial he had intimated a willingness to plead guilty to manslaughter. The sentencing judge estimated that the offer to plead guilty could be afforded no more than approximately 10% credit in the circumstances of the case, and we agree with him in that respect.

84. With respect to the appellant's prior criminal record, while it is not an exceptionally bad criminal record, he was not entitled to be treated as a person who had no previous convictions. He had a number of previous convictions, at least some of which were arguably relevant previous convictions namely public order offences associated with being intoxicated and an assault. Even if his previous convictions were not to be treated as aggravating, the law is that previous convictions at a minimum result in progressive loss of mitigation. There were a number of previous convictions over a number of years. Again, in the light of that circumstance, the amount of mitigation to which he was entitled for being of previous good character would only have been very modest, if any.

85. We think that the sentencing judge's commentary on the late offered apology to the victim's family was entirely apposite, and we would not criticise it in any respect.

86. Turning then to the appellant's personal circumstances. As noted earlier in this judgment, he had had some tragedy in his life, and he was entitled to have this taken into account. He had also been employed and had lived pro-socially for much of his life. The issue, however, is the extent to which this provides actual mitigation. They are certainly factors to be weighed in the balance in any sentencing exercise because, as has been stated many times, the appropriate sentence to be imposed is a sentence appropriate not just for the crime but for the crime as committed by the offender in question in his/her particular circumstances. A sentencing court therefore needs to have a rounded view of the person before them, involving not just the bad things that can be said about them but also the good things. Account must therefore be taken of a good work record and of periods in which an accused has led a pro-social life. That having been

said, the actual mitigating effect of such matters will again, in most cases, only be modest. It is expected as part of the social contract that a person who is lucky enough to have employment will work hard and accrue a good work record. It is also expected that people will not live anti-social lives, but rather will behave pro-socially. Evidence that an offender has lived up to these expectations allows a sentencing court to avoid taking a one-dimensional view of the accused, and it assists in the formulation of a proportionate sentence. However, in serious matters, particularly cases involving the infliction of serious harm or the taking of a life, such factors can, absent exceptional circumstances, only influence the sentence to a very modest extent.

87. Moving then to the circumstances of the appellant's addiction to alcohol. This is an adversity in his life that he is entitled to have taken into account. If there was evidence before a sentencing court that an offender had taken concrete and positive steps to address his addiction to alcohol, and cogent evidence of a genuine resolve on the part of the person concerned to overcome it, that court might have scope to incentivise rehabilitation through the suspension of a portion of the otherwise appropriate sentence. In this case, however, no such evidence was put before the court below. The observations offered by the sentencing judge in that regard were entirely justified and apposite. That is not to say that the appellant's addiction to alcohol was to be ignored, and it clearly was not. It still required to be taken into account as part of the appellant's personal circumstances, but again the extent to which it, in isolation, could reasonably have been expected to influence the overall sentence could only be regarded as modest.

88. Taking into account cumulatively all of the mitigating factors in the appellant's case, we do not believe that the sentencing judge erred in discounting from the headline sentence of 16 years by 18 months and then suspending a further 12 months. While the sentencing judge might have had some scope within his margin of appreciation to be more generous, we do not believe that he operated outside his margin of appreciation. We consider that we would not, therefore, be justified in interfering in regard to the level of discount that he afforded. We are satisfied that the discount granted in this case was within the sentencing judge's legitimate range of discretion, and that he was not guilty of any error of principle in that respect.

Conclusion

89. Having not seen fit to uphold any of the appellants grounds of appeal, the appeal against the severity of his sentence is dismissed.