APPROVED JUDGMENT
NO REDACTION NEEDED

THE COURT OF APPEAL

Record No: 293/2023

Neutral Citation: [2025] IECA 19

Edwards J.
Kennedy J.
O'Moore J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

IAN CONNAGHAN

Appellant

JUDGMENT of the Court delivered *(ex tempore)* by Mr. Justice Edwards on the 21st of January, 2025.

Introduction

1. This is an appeal brought by Mr. Ian Connaghan (i.e., "the appellant") against the severity of the sentence imposed on him by the Central Criminal Court on the 4th of December 2023.

2. The appellant was charged with the offence of murder contrary to common law and as provided for by s. 4 of the Criminal Justice Act 1964. Following trial, the appellant was found not guilty of murder but guilty of the manslaughter of a Michael Mulvey (i.e., "the deceased").

3. A Mr. Danial Connaghan, the appellant's brother and co-accused was also convicted on the 1st of August 2023 after trial of causing serious harm contrary to s. 4 of the Non-Fatal Offences against the Person Act 1997, to Mr. Mulvey on the 14th of November 2019.

4. On the 4th of December 2023, the Central Criminal Court passed sentence, ordering that the appellant serve a term of 9 years' imprisonment with the final twelve months suspended for a period of three years.

Factual Background

5. At the sentencing hearing of the 6th of November 2023, the Court heard evidence from a D/Sergeant Maeve Ward in respect of the offence.

6. On the 14th of November 2019, Mr. Mulvey who was 55 years of age at the time, was driving home from a visit to the shops shortly before 5 pm with his partner, a Ms. Pauline Matthews. At the traffic lights outside the church on the Navan Road, an altercation occurred between Mr. Mulvey and the appellant, arising from the appellant stepping onto the pedestrian crossing and whether, or not, he had a green man signal to do so.

7. The appellant then came over to the driver's door shouting at the deceased: "*I'm going to wait for you. I'm going to burn your house down. I'm going to kill you*".

8. It is noteworthy that evidence was given of some history between the two men. In previous years there had been an incident where the decease had complained to the parents of the Connaghan's about some children throwing stones at trains and some windows had been broken. During cross-examination, D/Sergeant Ward stated that she could not prove anything and did not know who was involved in this incident, only that it was reported to gardaí in

relation to previous interactions. Two years prior to the incident involved in this case, there had also been a verbal altercation between the deceased and the appellant at the Halfway House which is a public house on the Navan Road. As a result of this incident, the appellant was barred from the pub.

9. Following the incident at the traffic lights, Mr. Mulvey proceeded to drive to the Halfway House, parked his car in the car park there and entered the pub. He left the premises within minutes leaving Ms. Matthews there, apparently to check on his house which was close by. In the meantime, the appellant had walked 1.1 kilometres, which was the distance from the scene of the altercation up to Darlington Estate where Mr. Mulvey lived. CCTV footage showed the appellant walking down towards Mr. Mulvey's house on Darlington Estate. Within minutes he is then seen walking back from the direction of the deceased's house towards the Navan Road.

10. Two witnesses, a Ms. Olwyn O'Connor and a Mr. Tony McKenna gave evidence on the first attack in Darlington Estate. Ms. O'Connor looking out her window observed the appellant walking on her side of the street and the deceased approaching on the other side. She heard the appellant shout at the deceased: "*who's the effing muppet now?*". The appellant then stepped off the path and over towards the deceased. They met in the middle of the road. The appellant proceeded to attack Mr. Mulvey, punching him and then kicking him when he was on the ground. Mr. McKenna, looking out his upstairs window gave evidence that "*out of the blue*", the deceased was struck on his face by the appellant's fist. The appellant then kicked Mr. Mulvey on his side and on his stomach while he was on the ground. Mr. Mulvey rolled over from his left side and he was then further kicked on his left side with powerful kicks. Both witnesses gave evidence that Mr. Mulvey put up very little, if any resistance to the attack.

11. The appellant made his way towards the Navan Road. After getting to his feet, Mr. Mulvey headed in the same direction.

12. Shortly after, Mr. Mulvey was standing on the traffic island outside the Halfway House pub when he was attacked by the appellant and his brother, a Daniel Connaghan. Daniel Connaghan had driven to the Navan Road following a telephone call from the appellant made before the first attack. A witness, Ms. Mary Kelly stated that Daniel Connaghan jumped on Mr. Mulvey from behind and wrapped his arms around his neck and pulled him to the ground. Danial Connaghan placed a leg either side of him and punched him repeatedly in the face with his right hand; these punches were described as "*very forceful and aggressive*" and that they came very rapidly one after the other. Mr. Mulvey lay on the ground and offered no resistance. At the same time, the appellant had his legs astride Mr. Mulvey's waist area and he was also punching him. He then started to deliver very aggressive, forceful kicks to Mr. Mulvey's stomach and groin area.

13. A further witness, Mr. Thomas Maher, stated that he noticed a fight on the island and described it as "*two men throwing an awful lot of punches at an older man*". He stated that the older man (Mr. Mulvey) came towards his car and that he was bleeding from the mouth. As Mr. Mulvey was nearing his car he received a "*ferocious*" punch to the side of his face from the appellant.

14. After the attack, the appellant and Daniel Connaghan fled the scene, leaving Mr. Mulvey to make his way beaten and bloodied to the Halfway House pub on the other side of the road.

15. On entering the pub, Mr. Mulvey sought assistance from a Mr. Fagan who helped tend to his facial injuries which were apparent. Mr. Fagan contacted An Garda Síochána to report the matter and gave the phone to Mr. Mulvey to talk to the gardaí.

16. Later that night in the early hours of the morning of the 15th of November 2019, Mr. Mulvey attended at Connolly Hospital in Blanchardstown. He got a taxi to the Accident and Emergency department there. It was noted that he had sustained bruising and injuries to his face and had also sustained two fractures in the area of his eye socket. His nasal septum was deviated to the left and he had extensive bruising. There were photographs taken the following morning by a D/Garda Fennessy in the hospital of the bruising to his face. Mr. Mulvey also sustained fractures of the right/left lateral eighth and ninth ribs. It also transpired during a post-mortem that he had sustained a fracture to the 10th rib. These fractures had caused a small hemopneumothorax. Evidence given described that a haemothorax is blood in the lung and pneumothorax is air, meaning there was a mixture of air and blood in Mr. Mulvey's chest cavity.

17. Mr. Mulvey was kept in hospital for three days and was discharged on Monday the 18th of November 2019, with a prescription for pain medication for his fractured ribs. He attended a follow-up appointment on the 19th of November 2019 to deal with his eye injury in the Maxillofacial Unit of St James's Hospital.

18. In the immediate aftermath of the assault of the 14th of November, the appellant sent a message to a WhatsApp group which comprised a number of his friends, and it said that he was: "*Just after opening Mulvey's face up. Won't try and knock me down in his car or call my Ma and Da scumbags again*". Later that evening Daniel Connaghan sent a message to his friend David saying: "*Ye hear about Mulvey?*". He went on to say: "*Tried to knock down Iano. Two of us left him in an awful state*".

19. Mr. Fagan, who had helped him on the evening of the 14th of November by wiping his face and walking him home, rang Daniel Connaghan that night and asked if they could "*put this to bed*". Daniel Connaghan responded that he would have to talk to the appellant, and

that Mr. Mulvey would need to come down to their parents and apologise because he had called them names on some occasion. Mr. Fagan spoke to the appellant the next morning on the phone and the appellant spoke to Mr. Mulvey the following day. On the phone call with Mr. Fagan the appellant stated that things could be put to bed if Mr. Mulvey apologies to his parents but ended the call stating that he would "*bully and batter*" Mr. Mulvey any time he saw him.

20. Mr. Mulvey spent approximately two weeks trying to recover from his injuries. He rarely left the house because he was in pain and seemed to be suffering from fatigue.

21. On the 26th of November 2019, Mr. Mulvey and Ms. Matthews went to the Halfway House pub together. People who were present noticed he seemed to have breathing difficulties and his face was coloured grey.

22. Mr. Mulvey had a job interview the next morning, the 27th of November 2019. At around 6 am, a Paul Matthews, Ms. Matthews son met Mr. Mulvey outside the bathroom. They acknowledged each other but there was no conversation as such. Paul Matthews went to work, and Mr. Mulvey went back to bed. Later that morning, at around 9 am, Ms. Matthews awoke to discover Mr. Mulvey beside her in the bed, but unfortunately, he was dead at this stage.

23. A post-mortem carried out by a Dr. Okkers revealed severe narrowing of his coronary arteries and chronic lung disease. The hemopneumothorax had increased in size and now there was 800 millilitres of liquid blood present in his chest cavity. Dr. Okkers stated that the death was due to the hemopneumothorax sustained as a result of the blunt force injuries to the chest, and that contributing factors were the ischemic heart disease and the chronic obstructive airway disease (the lung disease).

24. A Dr. Hamilton, a pathologist from the UK, gave evidence for the prosecution and in his view the immediate cause of death was the ischemic heart disease, but he said the presence of fractured ribs represented a significant factor in why Mr. Mulvey died on the 27th of November 2019. He also stated that the presence of bloodstained fluid and air in the chest cavity would further interfere with his breathing.

25. A further pathologist, a Professor Crane, gave evidence for the defence and initially said that he was satisfied the cause of death was ischemic heart disease simpliciter and that he did not believe that either the hemopneumothorax or the broken ribs were a factor in Mr. Mulvey's death. He did concede that the presence of 800 millilitres of bloodstained fluid in the chest cavity would interfere with the breathing of Mr. Mulvey. He also agreed that that would limit the amount of oxygen which could be taken into Mr. Mulvey's lungs and this would lead to a strain on the heart.

Victim Impact Statement

26. A Mr. Gerry Mulvey, brother to the deceased gave an oral victim impact statement at the sentencing hearing as follows:

> *"Our brother, Michael Mulvey, was born on the 12th of November 1964. Two days after his 55th birthday, he was savagely assaulted by two men, 24 and 14 years his junior, and died 13 days later. To this day, his two assailants have not shown a single shred of remorse. Michael was affectionately known as Mick. He was the seventh of eight sons, born to our parents, Frank and Margaret Mulvey. The eldest was born in January '51, the youngest in January '66. This meant all eight of us grew up very closely together, with an average of less than two years between each of us. Another brother, Joe, passed away last February, before he could see justice being served. Our eldest brother Frank now suffers from Alzheimer's. He and Mick*

were particularly close, especially during his period of unemployment leading up to his killing. Mick regularly picked Frank up and drove him to the Halfway House where he could be seen socialising and enjoying a quiet drink together. Frank misses Mick terribly, and seldom does a week go by without him asking where Mick is. We tell him that Mick is working abroad and will be home soon. Frank doesn't even remember attending Mick's funeral. Frank's son Garrett passed away in March 2021. He also never got to see justice for his uncle Mick. Mick was a plumber by trade and also an electric welder. Whenever construction was slow in Ireland, he never hesitated to travel abroad in search of work. His work abroad included stints in Germany, Sicily, and even as far afield as Singapore. He was a hard worker. So much so, that as a single man, he was able to buy his own house in 1992, at the age of only 27. They say there's something special about a seventh son, and this was very true of Mick. He was a very kind and charitable man. There are many stories of him doing odd jobs and repairs for neighbours and friends and refusing payment, despite sometimes having paid for materials. He would wave them away saying, "sure, get me a large bottle next time you're in the Halfway". Each year, he would receive two tickets to the All-Ireland final from a contact he had made through work. Every time he would give them away free of charge, saying, "sure, they haven't cost me a penny". Our parents purchased the family home 70 years ago, and we've all remained in or returned to the area since then. Not a day passes when some or all of us pass the spot where one of the assaults that took Mick's life, was carried out, the one that involved the two cowardly assailants. Mick's partner Pauline only has to open her front door, to see the spot where he was first assaulted. Our mother's sister, Phyllis, is now in her 80s. She was Mick's godmother. Phyllis and Mick were extremely close, and he would often drive her to

get her shopping and to do other errands, like attending for medical and dental appointments. Phyllis has missed Mick greatly, and the nature of his killing has deeply impacted upon her. Mick was godfather to Gerry's son, Frankie, who also misses him dearly. The fact we managed to keep our emotions in check is not an indication that the trial itself and the evidence we had to digest did not greatly affect and impact upon us all. By that time, we'd already buried the first of our brothers to be taken from us. Despite the four years that have passed since his killing, Mick still lives in our hearts, and he always will. During the trial, we quickly came to the realisation that Mick himself was every bit as much on trial as the two accused. The big difference was that Mick was dead. He had been killed and he wasn't –
... He wasn't in the courtroom to defend himself. It is our fervent hope that the Court will consider the devastating consequences of this crime on our family when making its decision. And that's from Frank, Anthony, Gay, Gerry, Christie, and Brendan Mulvey."

27. Ms. Matthews also prepared a victim impact statement which she read out to the Court as follows:

"On the 27th of November 2019, the stable, comfortable life that I lived, changed dramatically overnight. I now live every day with stress and anxiety that I never had to experience. I never had to worry. I miss all the maintenance jobs Mick did both in our house and garden. I now have the worry of paying strange maintenance services to do jobs for me. I now live on one wage and struggle with this as Mick and I were together, financially comfortable. I fear that I may have to sell our big, beautiful home that I thought we would share together for years to come. I miss Mick as a loving partner, with whom we did everything together; nights out, weekends away and holidays abroad. I experienced Covid alone with no comfort or hugs. I miss Mick beside me

every night. I especially hate November. The nights are getting darker. The 12th of November is Mick's birthday. His anniversary is the 27th of November, and the nights are continuing to get even more darker, colder and lonelier. I have an awful loneliness and fear and anxiety inside me which I am now on medication for which I never had to take in my life. I will grow old alone now with a scary, insecure future. Mick will never experience the joy of our first grandchild in January. He loved children and it would have been such a joy for us both. Mick always told me that he would be lost without me, and I said we would be lost without each other, but I got the raw end of the stick. So, not only on the 27th of November 2019, was Mick's short life taken away, but mine was also. Rest in peace, dear Mick."

Personal Circumstances of the Appellant

28. The appellant was born on the 23rd of May 1989 and at all relevant times has resided in the vicinity of the Navan Road in Dublin City.

29. The appellant is in a long-term relationship with his partner Laura, he is in loco parentis. He is a stepfather, effectively, to her daughter and he has a son himself from a previous relationship.

30. The appellant has five previous convictions. On the 14th of June 2021 he was convicted for having possession of drugs on the 29th of November 209 and was fined €200 in relation to that. On the 11th of January 2018 he was convicted of an offence for no insurance and failure to produce insurance on the 20th of June 2016 and was fined €400, and the failure to produce was taken into consideration. On the 24th of October 2011 he was convicted for an offence on the 23rd of July 2011 for threatening, abusive and insulting behaviour, and for intoxication in a public place. He was fined €200, and the intoxication was taken into consideration.

Sentencing Judge's Remarks

31. On the 4th of December 2023, the judge in the Court below passed sentence on the appellant. The sentencing judge noted the factual background of the case as described in evidence by D/Sergeant Ward. He then noted the case of *People (DPP) v. Mahon* [2019] IESC 24, per Charleton J. as setting out the guidelines as to how a sentencing court should approach sentence in respect of manslaughter.

32. The sentencing judge then identified the relevant aggravating factors at play in this case as follows:

> *"The accused attacked Mr Mulvey on two separate occasions at two different locations, albeit proximate in time and place. The accused bore a degree of animosity towards the victim, arising out of previous interactions between them. In the first attack, the accused continued to attack Mr Mulvey while the latter lay on the ground. The second attack involved a degree of planning or at least premeditation and he procured the involvement and assistance of Daniel Connaghan. Again, the attack continued after the victim was on the ground.*
>
> *The victim was considerably older than the assailants and was of slight build. He did not appear to fight back. The initial attack on Mr Mulvey outside his home was a largely one-sided affair with Mr Mulvey being beaten by a younger and fitter man. The subsequent attack at the traffic island can only be seen as a cold blooded and cowardly attack, carried out by two younger men upon an older and weaker man who had already received a beating shortly beforehand. While the assaults were vicious in their nature, no weapon was used and both attacks lasted for a relatively short period.*
>
> *He suffered from severe and chronic lung and heart disease and were it not for these underlying conditions, the injuries inflicted upon him might not have proved fatal and*

he might not have been expected to die."

33. In relation to mitigation, the sentencing judge made the following remarks:

"Turning to mitigating factors, the accused man is 34 years old and has no significant previous offences. It is submitted on his behalf that his behaviour on the day in question was out of character. An unusual feature of the case is that at trial, he admitted being the person who first attacked Mr Mulvey outside his home and did not really dispute, being involved in the second attack at the traffic island. To that extent, he accepted his culpability for attacking Mr Mulvey, and the real issue at trial was whether the attacks were a cause of death which occurred some weeks later. The question of causation was always going to be a live issue.

He had some support for his stance on the causation issue from a consultant pathologist. Albeit that it seems to me to have been something of a long shot and was ultimately rejected by the jury. While a letter expressing his apology was read out in court, this may have been of greater value if remorse had been expressed earlier, even if only for the assaults while disputing causation. The probation report also notes that his remorse was limited. However, counsel for the defence indicate to the Court that the accused accepts the verdict of the jury.

A psychological report was presented to the Court. It was noted that prior to the incidents with which we are concerned, he suffered from anxiety and panic attacks. I accept the evidence of the psychologist as to his low risk of re-offending. He is in a long-term relationship and is effectively in loco parentis to his partner's daughter. He has a son from a previous relationship who suffers from ADHD, with whom he has maintained contact and support. He helps out in relation to the needs of his parents

who have health difficulties.

A number of testimonials were handed into Court. As a man of 34 years old who has not previously served a sentence in custody and who suffers from debilitating anxiety, imprisonment will be particularly difficult for the accused. I do not believe that he set out to cause death or permanent injury to Mr Mulvey. But I do believe he was undoubtedly reckless in that regard."

34. The sentencing judge nominated a headline sentence of 11 years imprisonment and discounted 2 years for mitigation. Ultimately, imposing a sentence of 9 years imprisonment with the final 12 months suspended for a period of three years. The sentencing judge noted that suspending the final year was to encourage rehabilitation and to as a determent in respect of future offending.

Notice of Appeal

35. By a Notice of Appeal lodged the 12th of December 2023, the appellant now appeals to this Court against the severity of the sentence imposed by the Central Criminal Court. In support of this application the appellant has advanced three grounds which are as follows:

"*The trial judge erred in law or in principle:*

1. *Imposing a sentence which failed to take adequate account of the following mitigating factors, notwithstanding that they were expressly adverted to by the sentencing judge: his lack of previous convictions for violent offences or significant previous convictions; his acceptance of the verdict; his remorse; and his personal circumstances.*
2. *Nominating a headline sentence from the "high culpability" band, as set out in DPP v Mahon [2019] 3 IR 151, of between 10-15 years, given the absence of aggravating factors such as relevant previous convictions or use of a weapon, and*

that the unlawful acts engaged in by the appellant would not normally be expected to result in death.

3. *Imposing a sentence which in all the circumstances is excessive and disproportionate*."

<u>Submissions on Appeal</u>

<u>*Appellant's Submissions*</u>

<u>*The headline sentence*</u>

36. The appellant maintains that the facts in the present case bring it within the category of cases identified as being "medium culpability" and not "high culpability" as was identified by the sentencing judge when applying *Mahon*. The appellant states that the assaults on the deceased were unpremeditated in that they happened very shortly after an angry verbal confrontation between two individuals who were already on bad terms with each other. It is also noted that no weapons were used. As such, it is submitted that the evidence in this case brings the case significantly more "*in line*" with the range of sentences for "medium culpability".

<u>*The post mitigation sentence*</u>

37. The appellant submits that the sentencing judge failed to properly credit the appellant for a number of heads of mitigation and this led to a further error in the sentencing process. The appellant submits that the mitigation might be more correctly considered as follows:

(i) *"The Appellant gave an early indication that he accepted the fact that the injuries diagnosed when the Deceased attended for medical assessment were caused by him during the two assaults. While, of necessity, he contested certain aspects of the prosecution evidence this was in the context of the defence of provocation*

being raised in a murder trial. The defence also sought to show, in the context of the issue of causation, that the injuries sustained by the Deceased on the 14th November were more consistent with the offence of assault causing harm rather than those ordinarily expected in a case where the accused was on trial for murder or manslaughter.

(ii) *Arising from the above, the Appellant agreed certain facts and indicated that witnesses were not required to ensure an efficient conduct of the trial and as a means of reducing the stress on the Deceased's family. In effect, the guilt of the Appellant was not in issue – the trial was concerned with the particular offence of which he would be convicted. There is no doubt that the Appellant gave a large amount of co-operation in relation to the progress of the trial and for this he was entitled to receive significant credit.*

(iii) *The fact that the Appellant could be considered to be, in a general sense, a man of good character and his other personal circumstances. This fact merited significant credit.*

(iv) *The learned Sentencing Judge was the trial judge in this case. It should have been apparent that the Appellant regretted his involvement in the assaults on the Deceased. An expression of his remorse in the course of the trial would have been an unlikely expectation on the part of the Judge where the defence of provocation was being relied on by the Appellant."*

<u>Disparity of sentences</u>

38. The appellant accepts the verdict but argues that it led to a disparity in the sentences given to both accused "*that is difficult to understand having regard to the evidence in the trial*". The appellant accepts that the sentencing judge was required to respect the verdict of the jury and to deliver sentence in accordance with that verdict and that a person who has

been convicted of manslaughter rather than causing serious harm can expect to receive a more significant sentence, but argues that the disparity in the sentences imposed in the present case shows an unfairness towards the appellant in the circumstances of the case.

Respondent's Submissions

The headline sentence

39. The respondent submits that given the nature of the offending at issue, the sentencing judge acted correctly and appropriately in fixing a headline sentence of 11 years, which brought the case within the category of "higher culpability".

40. The respondent maintains that there was evidence of premeditation on the part of the appellant. The respondent refers to the evidence that: following the initial interaction between the appellant and the deceased at the traffic lights, the appellant walked for more than a kilometre, past the entrance to his own house to the deceased house in Darlington Estate. The location of the first attack. Additionally, the respondent refers to the evidence that the appellant called his brother prior to the first attack, which resulted in his brother meeting him prior to the second attack, which they carried out together.

41. It is submitted that another factor which justified the placement of the current offending in the "higher culpability" category was the history of animosity between the parties. The respondent does concede that no weapon was used during the attacks.

42. It is further submitted that while the appellant does not have a substantive history of previous offending, this does not take the offending out of this band but rather places it in the lower end of said band.

43. The respondent references a number of comparator cases referred to in the *Mahon* decision. The respondent also refers this court to the case of *People (DPP) v. Garrett Smith* [2024] IECA 184 in support of this.

The post mitigation sentence

44. The respondent submits that the sentencing judge paid proper heed to the mitigation in the case and reflected said mitigation by reducing the headline sentence of 11 years to an actual sentence of 9 years imprisonment.

45. The respondent notes that while the appellant did accept that he caused the injuries diagnosed upon the deceased's attendance at Blanchardstown Hospital, he did not accept causing his death.

46. The respondent submits that the while the appellant did agree on certain facts during the trial, this factor alone does not necessarily comprise a source of mitigation. Ultimately, the trial was contested and numerous witnesses, both civilian and members of An Garda Síochána were required to give evidence.

47. It is also submitted that the complaint that the sentencing judge failed to give sufficient credit for the fact that the appellant was a man of good character is without merit. The sentencing judge referred to the appellant's lack of significant previous convictions and the fact that his behaviour on the day was out of character.

Disparity of sentences

48. The respondent wholly denies that the disparity in the sentences handed down to each accused was unjustifiable. It is maintained that given the different offences in respect of which the accused were convicted, and the differing degrees of culpability involved, it was entirely appropriate that the appellant was sentenced to a longer term of imprisonment.

Court's Analysis & Decision

49. The focus of the oral arguments at the appeal hearing was primarily upon the issue as to whether the sentencing judge had been correct to locate a headline sentence in the high culpability range per the Supreme Court's guideline judgment on sentencing in manslaughter cases in *The People (DPP) v. Mahon* [2019] 3 I.R. 151, rather than in the medium culpability range.

50. As we read paragraph 62 of the *Mahon* case, which is then illustrated by indicative examples provided in paragraphs 63 to 66 inclusive, comprising *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. D.D.* [2011] IECCC 3, the type of cases which are properly to be placed in the high culpability category cases which involve (frequently multiple) 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."* It is clear that the matters listed are not exhaustive and that the overriding criterion is significant aggravation by either a serious single aggravating factor or, perhaps more commonly, multiple aggravating factors.

51. Conversely, it is clear to us from the judgment in *Mahon* that the type of cases which are properly located in the medium culpability are those where there is a high level of culpability but where aggravating factors are either absent or are considerably lesser than in the higher range. Further, cases which fall into this middle category include those where the offence involves an unlawful act which would not normally be expected to result in death and where the act was not premeditated but where there was still a degree of culpability.

52. These statements of general principle are to be found in paragraph 67 and 68of the judgement and, again, drawing on previous case law indicative examples are given in paragraphs 68 to 72 inclusive, including *The People (DPP) v. O'Donoghue* [2007] 2 IR 336, *The People (DPP) v. Millea* [2016] IECA 137, *The People (DPP) v. Hutchison* [2017] IECA 154, *The People (DPP) v. Shanley* [2017] IECA 340, *The People (DPP) v. Rice* [2018] IECA 61, *The People (DPP) v. Black* [2009] IECCA 91 and *The People (DPP) v. Colclough* [2010] IECCA 15.

53. Counsel for the appellant argued doughtily his client's case was more akin to those indicative examples listed in support of location in the medium category than in the high category. We cannot agree. We are satisfied that, certainly in respect of the second incident on the traffic island close to the Half Way House, there was significant premeditation. There was also callousness towards the victim. The appellant had enlisted the help of a second person in assaulting the victim, namely his brother, and they had lain in wait for a victim. Moreover, the nature of the assaults was aggravating in and of itself. The sheer viciousness of the attacks, and their frenzied nature, particularly the second one, was aggravating. In a recent case, *The People (DPP) v. Smith* [2024] IECA 184 we commented that the assault causing death could be characterised by "its sheer viciousness and brutality and its intensity and frenzied nature." While in that case it was found that the sentencing judge had not erred in regarding that case as belonging in the category of "worst cases", and we are not suggesting that the present case belongs in that category, the Smith case does illustrate the court's view that the nature and quality of assault is relevant in the assessment of culpability. There was an intensity and frenzied aspect to the present case, albeit that it was not as vicious and brutal as the assault in the *Smith* case. Nevertheless, referring back to paragraph 62 of *Mahon*, the nature and quality of the assaults in this case, particularly the latter one, qualifies in our view

as unlawful action carrying a high risk of serious injury of which the accused was aware or ought to have been aware.

54. We are completely satisfied that the existence of multiple aggravating factors in the present case justifies its placement in the higher culpability range, albeit towards the lower end of that range. It might be said that this was a "cusp" in the sense of one straddling the upper end of the mid -range in terms of culpability and the lower end of the higher range. In that regard, as we did in the *Smith* case, we recall the remarks of Birmingham P in *The People (DPP) v. Casey and Casey* [2018] 2 I.R. 337 where he stated:

> *"[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".*

55. In the circumstances we are completely satisfied that it was within the sentencing judge's discretion to locate this offending at the lower end of the high culpability range, and we find no error of principle on his part in doing so.

56. Some reliance was placed on the fact that the appellant's brother received a much lesser sentence, in circumstances where he was convicted of assault causing serious harm. The principle of parity does not apply as their cases were not the same. While this was conceded by counsel for the appellant it was urged upon us that the level of disparity was still such as to give rise to concern about proportionality. We are not persuaded by this. As we stated the circumstances of each case were different, not least that this appellant was involved

in two incidents involving the victim in close temporal proximity whereas the other person, his brother, was only involved in one.

57. There was yet a further aspect of the sentencing at first instance which was criticised in oral argument before us, albeit that it was given what might colloquially be referred to as "a light rub". It was suggested that there had been insufficient discounting for mitigation. We have considered the evidence in support of mitigation and we are satisfied that an adequate discounting was afforded and that this complaint is not made out.

Conclusion

58. We are not disposed to uphold any of the appellant's grounds of appeal and the appeal is dismissed.