UNAPPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Record No: 53/2020

Neutral Citation: [2021] IECA 178

Edwards J.

McCarthy J.

Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

JEFFREY CROWLEY

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 24th of June, 2021.

Introduction

1. On the 17th of December, 2019, the appellant came before the Circuit Criminal Court to be sentenced in respect of offences on three Bills of indictment, numbers 326/18, 1228/19

and 1222/19 to which he had pleaded guilty. The sentencing judge heard the relevant facts and adjourned the matter until the 27th of January, 2020, and then to the 21st of February, 2020, on which date the following sentences were imposed:

(i) An overall sentence of 2 years' and 3 months' imprisonment on Bill No 326/2018, which contained three counts, to date from the 21st of February, 2021 (the date of sentencing); the overall sentence consisting of:

a) 8 months' imprisonment, in respect of Count No. 2, which charged criminal damage involving a mobile phone belonging to a Ms Deborah Preveaux;

b) 2 years' and 3 months' imprisonment, in respect of count No. 3, which charged assault to the said Ms Deborah Preveaux causing her harm, to run concurrently with the sentence on Count No. 2.

c) Count No 1, which charged attempted theft of a mobile phone belonging to the said Ms Deborah Preveaux, was taken into consideration.

(ii) A sentence of 3 years' imprisonment on Bill No 1222/2019, which contained a single count, i.e., Count No. 1, which charged assault to a Mr Jason Kidd causing him harm. This sentence was to run consecutive to the sentence imposed on Count No 3 on Bill No 326/2018.

(iii) An overall sentence of 4 years' imprisonment on Bill No. 1228/2019, which contained five counts, the overall sentence consisting of:

a) 14 months' imprisonment, in respect of Count No. 1, which charged theft of a mobile phone belonging to a Mr Darren McGivney;

b) 8 months' imprisonment in relation to Count No. 2, which charged criminal damage to a bicycle lock belonging to a Ms Gabriella Osti.

c) 14 months' imprisonment in relation to Count No 3, which charged theft in respect of a bicycle belonging to a Mr Fabio Fulci.

d) 4 years' imprisonment in relation to Count No 4, which charged the endangerment of a Ms Christine Booth. The final 15 months of this sentence were suspended.

e) Count No 5, which charged unlawful possession of a pedal cycle belonging to Ms Gabriella Osti, was taken into consideration.

The sentences on counts 1 to 4 were to run concurrently *inter se*, but consecutive to the sentence of 3 years' imprisonment imposed on Count No 1 on Bill No 1222/2019.

2. The appellant now appeals against the severity of his said sentences.

Background to these matters

Bill No 326/2018

3. The court heard evidence from Garda Catherine Byrne, who informed the court that on the 11th of December, 2016, the injured party, Ms Deborah Preveaux, a French student who had come to Ireland to improve her English while also working as an *au pair*, was at the Smithfield Christmas market in Dublin. She was speaking on her phone to her mother when the appellant, who had approached her from behind while riding a bicycle, grabbed her arm and took her phone. Showing considerable fortitude, Ms Preveaux jumped on the appellant before he could move forward on the bicycle and make his escape, causing him to fall off the bicycle, at which point she wrestled with him in an attempt to retrieve her phone. The appellant pushed and kicked her, causing her to fall to the ground. A bystander who had seen the incident then grabbed the appellant. Five or six persons had gathered at the scene at this

point. Ms Preveaux's phone was returned to her after she was picked up off the ground. She noticed that the phone had been broken during the incident but was still able to take a picture of the appellant which she later provided to Gardai.

4. The appellant was subsequently arrested, detained and interviewed. The interview yielded nothing of evidential value. He was charged with the three offences on Bill No 326/2018 on the 4th of September, 2017, and was on bail for those matters when he committed the further offences the subject matter of Bill No 1222/19 and Bill No 1228/19, respectively.

Impact on the victim

5. Ms Preveaux prepared a victim impact statement for the court. The appellant caused €150 worth of damage to her phone which had otherwise been worth €280. She said she could not afford to get it repaired at the time. Ms Preveaux described how the appellant had repeatedly kicked and pushed her, which resulted in bruises as well as a cut to her knee. She also said she didn't have enough money at the time to get medical treatment for these injuries. She was terrified and traumatised by the event and has since developed a nervous disposition. Ms Preveaux was further distressed by the fact that she had been speaking to her mother on the phone, and she had been able to hear the incident taking place. She was staying not far from where the incident occurred, and after the incident she became fearful travelling to and from her accommodation. Since the incident she is nervous and alert at all times and rarely uses her phone in public anymore. She has taken up martial arts in order to better defend herself in case such an incident occurs again.

Circumstances in which the appellant pleaded guilty

6. The sentencing court heard that the appellant entered a guilty plea in respect of Count 3 on this bill of indictment, that being the assault on Ms Preveaux causing her harm, on the 14th of November, 2019, which resulted in a trial date which had been set for the 27th of January, 2020, being vacated. That vacated trial date had subsequently been availed of for the benefit of another case. Moreover, the guilty plea had obviated any necessity for the prosecution to arrange for Ms Preveaux to return from France, to which she had by that stage returned, in order to testify. The appellant also entered a plea of guilty in relation to Count 2, being the count of criminal damage to Ms Preveaux's phone, on the 17th of December, 2019, which was the date of the first sentencing hearing.

Bill No. 1222/19

7. Garda James McNeill informed the court that on the 24th of October 2018, at 3.30 a.m. at Merchant's Quay, Dublin 8, a Mr Jason Kidd was walking past the Dublin City Council building on Wood Quay in the company of his girlfriend. They had been socialising in the city centre earlier and were on their way home. At a certain point Mr Kidd turned around momentarily and observed three men, one of whom it was later established was the appellant, about 20 metres away from him. Moments later, as Mr Kidd and his girlfriend were continuing to walk in the direction of Heuston Station, he perceived these men to be approaching him from behind. He turned to his right and saw a male who was wearing a bright orange jacket standing beside him. This was the appellant. Suddenly and without warning the appellant then punched Mr Kidd in the face, and one of the others shouted, "*take his fucking wallet".* Mr Kidd heard ringing in his ears following the punch, and felt very disorientated as a result of the attack. He attempted to check with his tongue to see if any of his teeth had been knocked out, but fortunately they were all in place. He was, however, bleeding profusely from his nose. Mr Kidd's girlfriend screamed loudly, resulting in staff

from the nearby Merchant's Quay Clinic opening the door and ushering Mr Kidd and his girlfriend inside. The injured party and his friend stayed there for two hours until they were certain that the assailants were no longer waiting for them outside. Mr Kidd later attended a clinic in Tallaght where he was diagnosed as having suffered a broken nose and bruised lips, and he was put on a course of antibiotics.

8. The appellant was identified in CCTV footage by gardaí. The appellant acknowledged himself in the video during his interview. He claimed not to remember the incident due to his level of intoxication at the time. He stated that he was a chronic drug addict, taking heroin and "*every type of drug*". When asked why he had struck Mr Kidd, he replied *"I was just frustrated. My family is not well"*. Garda McNeill accepted under cross-examination that the appellant had made admissions and had apologised in the interview for his conduct.

Impact on the victim

9. Mr Kidd neither made a victim impact statement nor gave specific victim impact evidence at the sentencing hearing. Accordingly, all that is directly known concerning his physical injuries and other possible impacts of the assault on him comes from his statement of complaint to the gardai in the aftermath of the incident.

Circumstances in which the appellant pleaded guilty

10. Garda McNeill further accepted under cross-examination that an early plea of guilty had been entered to the charge by the appellant on the first mention date before the Circuit Court. We understand that that plea was entered on the 4th of December 2019.

11. The court heard evidence from Detective Garda Shane Connolly. In respect of Count 1 on Bill No 1228/19, Detective Garda Connolly stated that on the 24th of July, 2019, on Queen Street, Dublin 7, a Mr Darren Mc Givney was walking home holding his mobile phone, valued at approximately €600, when the appellant rode by on his bicycle and snatched the phone out of his hand. No physical contact was made. The injured party made some attempt to chase the appellant but was unsuccessful in catching up with him and ultimately proceeded to the Bridewell Garda station where he reported the incident.

12. The court also received evidence that on the 2nd of August 2019, Ms Gabriella Osti, a Brazilian student studying in Ireland, travelled by bicycle to the youth hostel in Smithfield to meet up with friends there. On arrival at around 5.30 p.m. she locked her bicycle to a pole in Smithfield Square. At 9.20 p.m. she went outside to smoke a cigarette and noticed that her bicycle had been stolen. She asked the receptionist at the hostel to check the hostel's CCTV footage and was told that in fact they were already checking it in relation to another incident which occurred, for which the gardaí had been summoned and were on their way. Ms Osti then went back outside and encountered a group of people around an ambulance, and a woman being lifted from the ground into an ambulance on a stretcher. It transpired from CCTV footage recovered by gardaí that the appellant had interfered with the lock on Ms Osti's bicycle and had stolen the bicycle. These crimes were the basis of Counts No's 2 and 5 respectively on this bill of indictment.

13. It transpired that after stealing Ms Osti's bicycle, the appellant had cycled up behind a Mr Fabio Fulci in Smithfield Square at 8.45 p.m. and grabbed his phone, worth approximately €900. This crime was the basis for Count No 3 on this bill of indictment.

14. Mr Fulci had attempted to pursue the appellant as he cycled away but fell in the course of doing so. As he fell, Mr Fulci could see the appellant turn his head and look back at him. In the course of doing so, the appellant crashed into a Mrs Christine Booth while she

was using a pedestrian crossing, and seriously injured her. Mrs Booth, a British lady in her 70's, was visiting Ireland as a tourist accompanied by family members. Notwithstanding colliding violently with Mrs Booth, and causing her serious injuries, the appellant neither stopped, nor went to her aid, but disgracefully continued to make his escape. The incident involving Mrs Booth was the basis for Count No 4 on this bill of indictment.

15. Mrs Booth described seeing the appellant coming towards her and believing he would stop or maneuver away from her, before he struck her with significant force due to his speed. She fell to the ground, impacting her hip and right elbow, resulting in serious injuries to both. During the fall, she was also struck in face by the bicycle as it sped forward.

16. The incidents involving Mr Fulci and Mrs Booth were captured in full on CCTV footage recovered during the garda investigation, and the appellant was clearly identifiable to investigating gardai.

17. The appellant was subsequently arrested in relation to the various incidents. He made full admissions during his interview and again claimed to have been intoxicated at the time, and he expressed disgust with himself for his actions. Pleas of guilty were entered at an early stage.

Impact on the victims

18. Neither Mr McGivney, nor Ms Osti nor Mr Fulci made victim impact statements or gave victim impact evidence. However, a victim impact report was furnished to the court on behalf of Mrs Booth, who recalls her own distress and that caused to her daughter and grandchildren. Mrs Booth had to travel in the ambulance alone so her daughter could take care of her children. Immediate surgery was required to deal with the multiple fractures in her elbow and hip. The surgeon informed Mrs Booth that he had never seen such a bad elbow break, and that it could be lifechanging given her age. She was told that she would also likely

need a plate or screw in her hip. Mrs Booth had previously had two knee replacements and was greatly worried that she might have also damaged them in the incident. Fortunately, that was not the case. She underwent surgical fixation of her fractured hip in Tallaght hospital, and also received stabilizing treatment there in respect of her shattered elbow, pending further surgery for fixation of her elbow injury by an orthopaedic surgeon specializing in elbows upon her return to the UK. Ultimately, the injured party was hospitalised for one month arising from her injuries and subsequently required full-time support upon her eventual return home. At the time of the sentencing hearing she was still in pain and unable to walk without crutches and required to use a wheelchair to travel any distance. She has constant pain in her elbow and has been advised that the injury to it may take up to two years to recover to the extent that recovery is possible, but that she will never recover use of her elbow joint to the same extent as she enjoyed prior to the injury.

19. Mrs Booth has also suffered severe psychological effects from the incident and is now afraid to leave her house alone. She is terrified of people on bicycles and will likely never be able to leave the house unaccompanied again. She is haunted by how easily her grandchildren could have been fatally hit had the crash happened a few moments earlier. The family were stuck in Dublin following her hospitalisation and incurred significant expenses having to purchase clothes, food and various items, and having to travel by taxi back and forth to be with her while she was in hospital and in distress. The family had travelled to Ireland to explore their Irish roots but now refuse to return and associate this country with pain and fear.

The circumstances in which the appellant pleaded guilty.

20. It was accepted that the appellant had entered a plea to the most serious count on this bill of indictment, namely that of endangerment, at a very early stage, i.e., on the 4th of December, 2019. Then, on the first date on which that matter was listed for sentencing, i.e.,

the 17th of December, 2019, the appellant further pleaded guilty to counts 1, 2 and 3 on the same indictment, being counts relating to the theft of mobile phones from Mr McGivney and Mr Fulci, respectively, and criminal damage to Ms Osti's bicycle lock.

Circumstances of the appellant

21. The appellant was 24 years old at the time of sentencing and had ninety-two previous convictions, six of which involved prosecutions on indictment before the Circuit Court. The sentencing court heard that in summary he had:

(i) 22 for theft;

(ii) 1 for attempted robbery;

(iii) 6 handling stolen property;

(iv) 3 for possession of stolen property;

(v) 2 for unauthorised taking of an MPV;

(vi) 5 for unauthorised taking of a pedal cycle;

(vii) 1 for assault causing harm;

(viii) 1 for assault;

(ix) 3 for possession of knives;

(x) 10 for criminal damage;

(xi) 5 for supply of drugs contrary to section 15 MDA;

(xii) 6 for simple possession of drugs contrary to section 3 MDA;

(xiii) 1 for an obstruction offence under the Misuse Drugs Act;

(xiv) 2 for obstruction of a peace officer;

(xv) 9 for section 6 public order offences;

(xvi) 2 for intoxication in a public place;

(xvii) 3 for failing to comply with a direction from a member of An Garda Siochana;

(xviii) 3 for section 11 trespass;

(xix) 2 for section 13 trespass;

(xx) 1 for littering; and

(xxi) 3 for failing to appear.

22. The appellant had committed the offences charged on Bill No's 1222/19 and 1228/19, respectively, whilst on bail in respect of the offences charged on Bill No 326/18.

23. Furthermore, at the time of sentencing, the appellant was serving a sentence for assault causing harm. He had previously been sentenced by the Circuit Court to 2 years' and 6 months' imprisonment for this offence with the final 20 months suspended. The conditions on which his sentence was part suspended included conditions: (1) that he would cooperate fully with prison-based services while in custody to address all aspects of his offending behavior; (2) that he would place himself under the supervision of The Probation Service for a period of two years and six months from the date of his release; and (3) that he would attend a drug treatment program and such other programs as might be directed by The Probation Service. He had engaged with The Probation Service whilst incarcerated but following his release he failed to continue this. Following re-entry of the matter in October 2019 pursuant to s. 99 of the Criminal Justice Act, 2006, and at the behest of The Probation Service, the Circuit Court heard evidence concerning the appellant's failure to engage with The Probation Service after he was released. There was also evidence that following his release the appellant had committed, and had pleaded guilty to, further offences involving assault, assault causing harm, and making a threat, contrary to s. 2, s. 3 and s. 5, respectively, of the Non-Fatal Offences Against the Person Act, 1997. In light of the evidence received, on the 11th of November, 2019, the Circuit Court Judge concerned removed the suspension and made an order requiring him to serve the period of 20 months that she had originally suspended. However, she backdated that to the 7th of August, 2019.

24. The sentencing court in the present case heard evidence that the appellant had been exposed to drugs from a young age, and was stealing phones and selling them on to pay for his drug habit. He claimed to be addicted to every type of drug, but particularly tablets and heroin. He expressed disgust with himself in relation to the injuries caused to Mrs Booth and indicated a desire to seek treatment for his addiction. He attributed the collision with Mrs Booth to his desperation to get away in circumstances where he realized that he was being pursued by Mr Fulci. He accepted that he was not looking ahead and had not seen Mrs Booth in front of him. Moreover, he said he was *"out of his head on drugs"*, i.e he was in a state of substantial drug-induced intoxication.

25. Prior to going into custody, the appellant resided at a Dublin inner city flat complex and was originally from Dublin south inner city. A psychological report submitted by the defence indicates that the appellant had learning difficulties in school and was expelled from school at 15. However, it seems he did sit and pass his Junior Certificate examination. It is not known if he has any further educational attainments. In so far as employment history is concerned, the psychologist's report states that the appellant has never held a job. Such evidence as is available suggests that much of his time after leaving school was spent in custody in Trinity House, Oberstown House and in various prisons. We note that it was asserted by his counsel in the plea in mitigation that he had recently been doing some Leaving Certificate courses while in prison; the psychological report refers to him attending English classes in Wheatfield prison, and the Probation Reports that were before the sentencing judge provide some further support for the suggestion that he has returned to education at least to some extent in as much as they confirm that he *"is currently attending the school"* in the prison.

26. The appellant is a father to a two-year-old son and has a partner. According to the plea in mitigation presented by his counsel, he wished to rehabilitate for his son and partner.

The sentencing court was informed on the ultimate sentencing date, i.e., the 21st of February, 2020, that the appellant was by then on 50mls of methadone per day and free from other illicit substances. However, apart from brief references in a Probation report of the 11th of November, 2019, to the fact that the appellant had recently started on methadone maintenance, and in a later Probation Report of the 21st of February 2020 to the fact that the appellant *"reports* (ie., self reports) *to being drug free"* no actual evidence was adduced to support these assertions. The sentencing judge nevertheless gave him the benefit of the doubt on this, stating:

> *"I note that I have not been provided with urines but the accused says he is now clean other than for the methadone that he is taking. The fact that he (sic) has not been provided with urines is not the fault of the accused. I think there has been a disconnect between them being provided and the Court or [his counsel] requesting them."*

27. In relation to the appellant's claimed determination to address his addiction issues the sentencing court was furnished with a letter from Merchants Quay Ireland confirming that the appellant had in recent times attended three counselling sessions between 13/02/21 and 19/02/21 (the sentences now appealed were imposed on 21/02/21). However, the Probation Reports, to be reviewed in more detail below, suggested a historical pattern whereby the appellant would present as motivated to engage in drug treatment services at report writing stage but would then fail to follow through when given the opportunity to do so.

28. At the hearing of the appeal this Court enquired as to whether there was up to date information concerning how the appellant was getting on, in circumstances where we were conscious of the appellant's claim at the time of his sentencing that he had been making efforts to address his substance abuse issues, conscious of the evidential deficit in the court below in respect of which the benefit of the doubt had nevertheless been afforded to the

appellant, and conscious that the sentencing judge had seen fit to suspend the final fifteen months of the aggregate sentence to incentivise his continuing rehabilitation. However, we were informed by counsel for the appellant that no reports, either as to the appellant's claimed participation in a methadone program and his claim to have become free from other illicit substances or concerning how he was getting on generally in prison, could be obtained *"due to the situation in the prisons"*. When the bench sought to probe further into this, counsel stated that he was alluding to difficulties in obtaining reports associated with COVID-19 related restrictions. However, when counsel was pressed to explain how exactly such restrictions had inhibited the obtaining of reports, it transpired that the appellant's solicitor had neither written to the prison governor, nor to the prison medical officer, seeking reports as to the appellant's up to date status so that this Court could be apprised of the situation. The Court was informed that it had been left to the appellant to request such reports himself and that he had not been able to obtain any. We feel obliged to comment that we view it as disconcerting that, in a case as serious as this one, the solicitor on record for the appellant, and to whom a legal aid certificate had been granted, did not see fit to make a request in writing for appropriate reports. Moreover, if following a request in writing there had been a genuine difficulty in obtaining reports, that difficulty could have been flagged to the President at a management list in advance of the hearing of the appeal, and the assistance of the court requested in that regard. However, that was not done.

29. Some more detailed information concerning the appellant's personal circumstances was gleaned by the sentencing judge from the previously referred to psychological report and the Probation Reports which will be reviewed separately.

30. It was asserted by the appellant's counsel in his plea in mitigation that the appellant had been self-harming around the time when the matter was first listed for sentencing, and that he now bears scars as a result. Although no direct evidence to support this assertion was

adduced, the psychological report refers to the appellant presenting with *"a large number of cuts on his left arm which he told me were self-inflicted in response to his distress over his mother's recent death and in response to being refused permission to attend her funeral."*

The Probation Service Reports

31. The sentencing judge at first instance had the benefit of two Probation Reports concerning the appellant. The first was a report dated the 11th of November, 2019, which had been prepared in connection with the re-entry at the behest of The Probation Service of the case in which the appellant had initially been afforded the benefit of a part suspended sentence. The second was an updating report, dated the 21st of February, 2020, provided in advance of the sentencing hearing to be resumed on the same date.

The Report dated 11th of November, 2019.

32. The probation officer reported that the appellant claimed to have very little memory of the matters which had led to his appearance before the court. He blamed his drug addiction and asserted that he wanted to attend drug treatment. However, he struggled to take any level of personal responsibility for his current situation and resultant behaviour. The appellant was assessed using a standard Probation Service risk assessment tool as being very high risk of reoffending within the following twelve months, with the main area of concern being his pro criminal attitudes, negative peer influences, history of drug misuse, court employment record and lack of employment training.

33. The appellant was noted to have a complex addiction history and that while verbalising a desire for change had done very little to address his drug use over the previous two years while on probation. Despite extensive efforts from The Probation Service he had failed to engage in any meaningful way in addressing his addiction. His impetus for change in relation to his addiction difficulties appeared to manifest itself most strongly while he was in custodial setting but quickly diminished once he returned to the community. The report

confirmed that the appellant had recently started on methadone maintenance which was a step in the right direction and had completed a referral form for a residential drug treatment centre. However, the probation officer had concerns concerning the appellant's motivation and readiness for treatment at that juncture.

34. Further concern was expressed concerning the appellant's reported behaviour in custody. He was on a basic regime (as opposed to the enhanced regime) due to receiving disciplinary P19 notices. He had been advised that the path to treatment from custody required not being a management issue in custody.

35. The probation officer reported that following the section 99 re-entry he had visited the appellant in custody in circumstances where the Circuit Court judge had adjourned the matter to give him a last chance to re-engage with probation supervision. Unfortunately, the appellant refused on three occasions to accept visits from the probation officer which meant that progress had not been possible. Further, the appellant had refused to meet with a caseworker from Merchant's Quay Ireland for the purposes of being assessed for possible residential treatment. On the probation officer's fourth attempt to meet with the appellant in the prison he finally succeeded in doing so. The appellant was due for release the following week, and was provided with an appointment to attend at the probation officer's office following his release. However, he failed to attend this appointment and made no attempt to engage with treatment services. Further, he was reported as accruing several new charges during this period.

36. The probation officer noted that following the issuance of a bench warrant the appellant had been rearrested. He expressed serious concerns that the appellant would not cooperate with The Probation Service upon release. He stated that while in the community and on supervision the appellant's pattern was to completely disengage with probation supervision and swiftly come to negative attention of the gardai through criminality.

The Report dated 21st February, 2020

37. In this report the probation officer concerned that the appellant was still considered as being at very high risk of reoffending. The appellant claims to have no memory of any of the offences for which he faced sentencing at that point. He attributed them to his chaotic drug use at the time. He was reported as struggling to take any level of personal responsibility for his actions, and to see his own role in his behaviour, preferring to focus instead on blaming his addiction difficulties. While he did not wish to engage in discussion about what he had done, he asserted that he was ashamed of the offences. However, he seemed to struggle to understand the full impact his behaviour was having on others. In the view of the probation officer, the appellant's unwillingness to discuss the offences was a concern and demonstrated a poor level of remorse. While asserting that he needed help to stop using drugs he was dismissive of previous attempts to engage him with drug treatment services. There was little to indicate that he recognised the role of his own behaviour and consequences of same.

38. Due to his previous offending history the appellant had been identified as an agreed target of The Probation Service, Irish Prison Service and An Garda Siochána in the joint agency response to crime initiative (JARC). This was a joint agency program offering a multi-agency response to targeted individuals in an effort to reduce their offending. In this context the appellant was placed under high-intensity probation supervision with added support from the other agencies in an effort to address his offending behaviour. Unfortunately the appellant did not avail of the supports provided to him and failed to engage in any meaningful way.

39. The probation report notes that the appellant has also continued to present a management issue in the prison, despite advice to engage positively with prison-based services, and has received several P19s for behavioural misconduct. In recent months the appellant suffered a bereavement in that he lost his mother, and this seemed to have had a

significant impact on him. There had been some improvement in his behaviour and the report noted that he was attending the school and working as a cleaner. He was reporting as being drug-free and had told his probation officer that he was working towards becoming an enhanced prisoner with a view to progressing to a more open prison setting. The report indicates that the appellant would need to fully engage with prison-based services for a sustained period of time before progressing to a more open prison setting with the possibility of entering a residential drug treatment program upon release.

40. In conclusion the probation officer's view was that the appellant was a young man who continually demonstrated poor decision-making and coping skills. He has a poor understanding of his behaviours and struggles intellectually. He had spent a considerable amount of his adult life in a custodial setting which had done little to stem his drug use or offending behaviour. The appellant presented as motivated to engage in drug treatment services. However, it was concerning that despite being provided with several opportunities to engage with The Probation Service and drug support service both in the community and in custodial settings the appellant had failed to do so.

The Psychologist's Report

41. The psychologist reports that the appellant's performance on the Wechsler Adult Intelligence Scale indicated that his verbal ability is in the extremely low range. His scores on verbal tests were at the 2nd percentile. On the Wide Range Achievement Test his performance on the word reading test and the spelling test were in the extremely low range. Again his scores were at the 2nd percentile. It was said that on interview he had difficulties in comprehension and in articulating his experience. While he claimed to have passed his junior cert, this was within his level of ability. In the psychologist's opinion his assessed level of ability indicates that he would know right from wrong because he was told something is right or wrong but he would have difficulty in reflecting on his behaviour and thinking through the

consequences of his actions. A person with this level of ability is more likely to act on impulse without thinking. Drugs will further impair judgment.

42. The appellant had presented as a young man with limited coping skills as indicated by his drug addiction and self-cutting. The psychologist opined that he would benefit from bereavement counselling as part of a drug treatment program. He had expressed remorse over the injuries caused to the woman he knocked down and in the psychologist's view it was possible that this remorse might finally lead him to address his drug addiction.

The Sentencing Judge's remarks

43. After correctly identifying the particulars and maximum sentences in relation to each count, the sentencing judge drew attention to the fact that the appellant had *"preyed upon unsuspecting individuals, whether going about their lawful business and engaging with people on their phones or walking along the street at night after night out, interfering with no one but attempting to get home safely."* She then summarised the injuries inflicted, and the impacts felt by the various victims, noting that in the case of Mrs Booth these had been life altering to a significant extent. She concluded that the appellant *"has treated this offending as a way of life and carries on without regard for his victims or the rule of law."*

44. Turning to aggravating factors, the court identified the following: the series of each of the offences in and of themselves; the previous convictions for assault causing harm; the previous convictions for theft; the previous convictions for criminal damage; and the commission of the offences on Bill No 1222/2019 and on Bill No 1228/2019 whilst on bail for the offences on Bill No 326/2018.

45. In terms of mitigation, the sentencing judge noted: (1) the plea of guilty in respect of Bill No 326/2018, which had particular value in that it ensured that Ms Preveaux did not need to travel for a trial, and (2) the early pleas and full cooperation and admissions to gardaí in

relation to Bill Nos 1222/2019 and 1228/2019 respectively. The sentencing judge also noted the existence of the following further mitigating circumstances: (3) the appellant's long standing drug addiction; (4) the appellant's recent engagement with addiction treatment by participation in a methadone program; (5) the appellant's child and partner, and her support; (6) his significant recent bereavement; (7) the contents of a psychological report handed in to court on the 27th of January 2020; (8) the remorse expressed by the appellant to Gardai, particularly in relation to Ms Booth, as well as a letter from the appellant handed in to court, again expressing remorse. However, in considering these expressions of remorse the sentencing judge also noted comments by the appellant's probation officer to the effect that the appellants unwillingness to discuss the offences was concerning and demonstrated a poor level of remorse; (9) the appellant's recent engagement with a cleaning job in custody and his engagement with educational services and completion of a number of course; (10) his attendance at three counselling sessions between 13/02/2020 and 19/02/2020, and his claim to be clean and drug-free other than the methadone that he was taking. The court accepted that the non-availability of urinalysis was not his fault.

46. Regarding the most recent probation report, the sentencing judge called it disheartening. Various agencies had been unable to divert the appellant from his path and he remained at very high risk of reoffending. He had showed a poor history of engagement and had failed to avail of the high support deemed necessary for him by the J.A.R.C.

47. It was also noted that all previous opportunities afforded to him to address his addiction difficulties were wasted, and that while the appellant had become a cleaner in the prison and had been engaging in courses, he nevertheless had received several P19s. The sentencing judge noted the observation by the probation officer that the appellant has a pattern of disengagement from services and a return to offending upon release.

48. The sentencing judge stated that she was very concerned at the serious level of offending which took place while the appellant was on bail. At a time when he should have been engaging with the services offered to him, he had chosen instead to terrorise innocent people and cause long-lasting distress. The sentencing judge said that the court was required to mark this level of repeat offending as unacceptable to the society in which he lives.

49. The following sentences were arrived at post-mitigation:

(i) Bill No 326/2018 (the offences involving Ms Deborah Preveaux):

a) 8 months' imprisonment, reduced from a headline sentence of 12 months imprisonment, in respect of count No. 2 (criminal damage).

b) 2 years' and 3 months' imprisonment, reduced from a headline sentence of 3 years' imprisonment, in respect of count No. 3 (assault causing harm) to run concurrently with the sentence on count No 2.

c) Count No 1 (attempted theft) was taken into consideration.

(ii) Bill No 1222/2019 (the offence involving Mr Jason Kidd):

a) 3 years' imprisonment, reduced from a headline sentence of 4 years' imprisonment, in respect of count No 1 (assault causing harm), consecutive to count 3 on Bill No 326/2018.

(iii) Bill No 1228/2019, (offences involving several other injured parties):

a) 14 months' imprisonment, reduced from a headline sentence of 18 months' imprisonment, in respect of count No 1, the theft of a phone of Mr Darren McGivney.

b) 8 months' imprisonment, reduced from a headline sentence of 12 months' imprisonment, in relation to count No 2, involving criminal damage to Ms Osti's bicycle lock. Count No 5, involving the theft of

the bike itself, was taken into consideration in the sentencing for count No 2.

c) 14 months' imprisonment, reduced from a headline sentence of 18 months' imprisonment, in respect of count No 3, involving the theft of Mr Fulci's mobile phone. The sentencing judge mistakenly referred to this count as involving the theft of Mr Fulci's bike, but we are satisfied that nothing turns on this misdescription of the stolen property.

d) 4 years' imprisonment, reduced from a headline sentence of 5 ½ years' imprisonment, in respect of Count No 4, being the endangerment of Mrs Booth.

e) The sentencing judge directed that all sentences imposed in respect of counts on this bill were to run concurrently *inter se* but consecutive to the sentence imposed in relation to count No 1 on bill No 1222/2019.

50. The sentencing judge indicated that in imposing these sentences she was cognisant of the following: (1) the considerable time spent in custody already; (2) the fact that the appellant was already serving 20 months, following re-activation of a suspended sentence; and (3) the obligation of the court to consider the principles of totality and proportionality. Alluding to the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Yusef* [2008] 4 I.R. 204, and to s. 11 of the Criminal Justice Act of 1984 (the application of which would have been required consecutive sentencing at least as between either the second bill of indictment, or third bill of indictment, and the first bill of indictment) the sentencing judge said that she was satisfied that this was an appropriate case in which to also make the sentences for the offences on the second and third bills of indictment, respectively, consecutive albeit that it was not mandatory. The sentencing judge said that she was doing this given the circumstances of the case and the wilful, blatant

disregard shown not alone for the court but for the community at large. In particular she noted that the aggravating features had included grant wishes the violence used late at night in the case of the assault on Mr. Kidd. The repeat offending was of concern when one noted the extensive services who had attempted to engage with the appellant all of which had no avail. The appellant had refused numerous visits from a probation officer whilst in prison, which would have been to his benefit, and the sentencing judge condemned the contempt shown for the service.

51. The sentencing judge took note of the sentence which the appellant was already serving following the reactivation of the period of twenty months which had previously been suspended. In considering the principles of totality and proportionality, the sentencing judge stated that whilst the total sentence was not inconsiderable, each individual sentence was balanced and proportionate given the circumstances, and to reduce the sentence would do an injustice to the victims. The court was satisfied that the cumulative sentence of 9 years and 3 months imprisonment reflected a sequence of egregious individual acts, numerous of which had been committed while on bail. The sentencing judge said she was fortified in her approach by the decision of this Court in *The People (Director of Public Prosecutions) v. McGrath* [2020] IECA 41.

52. Nevertheless, the sentencing judge was mindful that the appellant was relatively young and, notwithstanding that he had shown neither appetite nor aptitude to rehabilitate in the past, she said *"I feel bound, mindful of the duration of the sentence, to incentivise"*. Accordingly, she suspended the final 15 months of the sentence imposed in respect of count 4 on the final bill for a period of 15 months on the basis that he keep the peace and be of good behaviour. She declined to further burden the Probation Services. The court imposed the sentence from that date (i.e. the 21st of February, 2020) and not from the date on which the appellant was required to serve the sentence of 20 months in respect of which the suspension

had been lifted. Credit was afforded in respect of time served solely in respect of the matters then before the court, a period of approximately four months.

Grounds of Appeal

53. The appellant has appealed against the severity of his sentences on the following grounds:

(i) The sentencing judge erred in principle by imposing multiple consecutive sentences;

(ii) The resulting overall sentence was disproportionate and excessive.

(iii) The sentencing judge did not take adequate account the mitigating factors and placed undue weight on the aggravating factors in the case.

(iv) In respect, *inter alia*, of the sentence imposed for the offence of endangerment the sentencing judge did not place the offence correctly upon the range of offending for this particular offence. This resulted in a sentence that was disproportionate and excessive.

(v) The sentencing judge erred by imposing several consecutive sentences upon the appellant for this episode of offending.

(vi) The sentencing judge placed undue emphasis on the victim impact statements in sentencing the appellant resulting in an excessive and unduly severe sentence.

Submissions

54. We have received helpful submissions from both sides for which we are grateful and will allude to these to the extent that we consider necessary.

Analysis

Grounds (i), (ii) and (v): The complaint that sentencing judge

erred in principle by imposing multiple consecutive sentences

55. Notwithstanding the terms in which these grounds of appeal were pleaded, it became apparent at the oral hearing that the gravamen of the appellant's complaints with respect to how consecutive sentencing was employed in this case related in substance to the fact that ostensibly no adjustment was made to the aggregate total, and (of necessity) to the components comprising it, to take account of the totality principle. Indeed, it was conceded by counsel for the appellant at the oral hearing that he could have no complaint concerning the appropriateness of the individual sentences imposed by the sentencing judge if proper account had been taken of totality. He said that in his view while the individual sentences might perhaps be regarded as harsh, he had to accept that they were not so harsh as to render it likely that this court would interfere with them on that account alone. We will return to this concession later in this judgment as it would seem to be dispositive of grounds (iii), (iv) and possibly (vi) as pleaded.

56. Counsel very fairly explained that his principal complaint related to the aggregation of a series of individually severe sentences, through the sentencing judge's resort to consecutive sentencing, and indeed consecutive sentencing upon consecutive sentencing, with no amelioration of the cumulative total in the interests of overall proportionality through application of the totality principle.

57. It is certainly the case that the sentencing judge referenced and acknowledged the requirement that the overall cumulative or aggregate sentence should be proportionate, and the totality principle, but she did not make any reduction expressly on that account. While she did suspend the last fifteen months of the sentence imposed for the crime of endangerment, her rationale for doing so was that, *"I feel bound, mindful of the duration of the sentence, to incentivise."* This remark followed immediately from her observation that, prior to the appellant's very recent attendance at counselling offered by the Merchant's Quay project and

his engagement with the methadone project in prison, he had shown *"neither appetite nor aptitude to rehabilitate"*, and she was essentially welcoming evidence, tenuous though it was, of some lately acquired resolve to address his addiction issues. While it might be suggested, as counsel for the respondent has sought to do, that the decision to suspend the final fifteen months of the sentence imposed for the endangerment offence was a step taken for the dual purposes of adjusting for totality and to incentivise rehabilitation, particularly in the light of the judge's reference to *"the duration of the sentence"*, a careful reading of the transcript suggests the contrary. Rather, the context in which the remark was offered suggests that the primary focus in the decision to suspend fifteen months was the desire to modestly incentivise rehabilitation, in circumstances where the appellant, who was facing in to a long sentence, had belatedly shown some willingness to seek to address his underlying drug problem; rather than on a need to adjust the aggregate sentence downwards to avoid a crushing sentence. It was classically a case of, to use an over-employed cliché, leaving some light at the end of the tunnel.

58. We are compelled to this conclusion because the sentencing judge had earlier expressly observed that:

> *"the Court has reflected upon the principles of proportionality and totality and given serious consideration as to whether it applies in the instant case. A sentence of nine years and three months is not an inconsiderable sentence to impose. However, each individual sentence I believe to be balanced and proportionate in terms of the very significant incidents of offending taking into account his personal circumstances.*
>
> *In those circumstances, I believe it would do an injustice to any individual injured party to further reduce the sentence which I believe already reflects the totality of the*

mitigating factors. Indeed, these same mitigating factors have already been given full credit in each of the three separate bills."

59. It is clear from these remarks that, having considered the proportionality requirement and whether an adjustment was necessary in application of the totality principle to give effect to that, the sentencing judge had concluded that no adjustment was in fact necessary.

60. The sentencing judge was right in understanding that a downwards adjustment will not be required necessarily in every case. The aggregate of consecutive sentences will not always result in a disproportionate overall sentence. However, where consecutive sentences are resorted to resulting in a lengthy overall sentence, and particularly where it has been considered appropriate to impose consecutive sentences upon a consecutive sentence or sentences, a decision not to make a downwards adjustment in the interests of proportionality requires to be properly justified and explained. It does not seem to us that it was properly or justifiably explained in this case, and this is a matter we will return to.

61. The key question, however, is whether the sentencing judge was ultimately right to conclude that no adjustment was required for totality in the circumstances of this case. As the remarks quoted at paragraph 58 above indicate, the sentencing judge was significantly influenced by a concern that *"it would do an injustice to any individual injured party to further reduce the sentence which I believe already reflects the totality of the mitigating factors"*.

62. The overall conscientiousness and care with which the sentencing judge approached her task is manifest from the transcripts of the sentencing. However, the remarks just quoted are suggestive of an erroneous approach by the sentencing judge on one aspect, namely on the totality issue, and in two respects. The first is that the duty to impose a just and proportionate sentence on an accused can be subjugated to a perceived obligation to provide justice for an individual victim or victims. The second is to equate application of the totality

principle in the interests of arriving at a proportionate sentence with the affording of further mitigation. On the contrary, a post-mitigation adjustment is made, not to afford yet more allowance for mitigating circumstances, but rather to ensure compliance with the constitutional requirement that any aggregate sentence must be distributively proportionate to the gravity of the overall offending conduct as committed by the offender in question in his/her circumstances.

What is the Court's obligation towards a victim or victims at a sentencing?

63. To put it in very general terms, a court's obligation is to ensure that victims are properly acknowledged as having a legitimate interest in the proceedings, and that they are treated with respect within the process. Moreover, there is a statutory requirement to facilitate them in being heard, if they wish to be heard, concerning the effects of the crime upon them, and to take that evidence into account in assessing the gravity of the offending conduct.

64. However, in so far as victims have an entitlement to see justice done, that entitlement inures to them not as individuals but rather as members of society. The court's obligation to do justice at sentencing is owed, firstly, to the public at large, including the victims in the case; and secondly, to the accused who has an individual constitutional right to expect and receive a sentence that is proportionate (in the distributive sense) to the gravity of the crime as committed by him in his personal circumstances. The right of an accused to receive such a proportionate sentence was recognised in the case of *State (Healy) v O'Donoghue* [1976] I.R. 1 as being an aspect of the right of every citizen to a trial in due course of law as guaranteed under Article 37 of the Constitution. However, as the law presently stands, the victim of a crime has no entitlement to expect that a sentence will be crafted to provide individual justice for her.

65. The role of the victim in the sentencing process, and indeed in the Irish criminal justice system generally, is an important one but it is sometimes misunderstood. Unlike in

civil litigation where an injured person can directly sue the person who has done them wrong and can seek individual redress for the wrong done to them, our criminal justice system does not allow a victim to either initiate or prosecute criminal proceedings, nor to seek individual redress, as a party to those proceedings. Criminal cases are brought by the Director of Public Prosecutions on behalf of society (of which individual victims are of course members) and in the name of the people of Ireland, rather than on behalf of individual victims.

66. There are good legal and constitutional policy reasons for this. Criminal penalties are not meant to be retaliatory or restitutive either at the behest of, or on behalf of, an individual. On the contrary, it is for the courts to punish the offender appropriately on behalf of society, rather than on behalf of any individual, and the objectives of the selected punishment as generally understood may include retribution, deprecation, deterrence, incapacitation, reform/rehabilitation, and restitution, or some combination of those objectives. In the *People (Director of Public Prosecutions v M.S.*, [2000] I.R. 592 Denham J., phrasing it slightly differently, suggested that the objectives of sentencing included retribution, deterrence, protection of society, reparation and rehabilitation. Ultimately, as the renowned sentencing scholar, Thomas O'Malley, puts it (in Sentencing Law and Practice, 3rd ed, para 10-03), whatever objectives are being pursued, *"penalties imposed on those convicted were (and are) supposed to reflect a rational and dispassionate assessment of the offender's culpability and other relevant circumstances"*.

67. In times past, it was thought by some that the best way of ensuring dispassion and avoiding claims that a court might have behaved arbitrarily in sentencing, or worse still that it had allowed itself to be unduly influenced by a victim to exact vengeance (or occasionally to show mercy), was to displace the victim to a large extent from the process, and relegate her status to that of a mere witness as to matters of fact where liability was in contest, and often

not to require evidence from her at all where the offender was to be sentenced following a plea of guilty.

68. Unsurprisingly, many victims felt that as they were the ones whose rights were violated by the accused, the fact of that violation rendered them primary stakeholders in any prosecution brought on behalf of society and they should receive greater recognition of their role in that regard, and be afforded greater participant rights, even accepting that criminal proceedings and a sentencing in consequence of a conviction in such proceedings could not be, or be allowed to become, a privatised contest between an offender and his/her victim.

69. Happily, it is no longer the case that victims are displaced from the process in the way in which they were in the past. A first step was taken in that regard with the enactment of s. 5 of the Criminal Justice Act, 1993 (the Act of 1993), which provided that in respect of certain limited categories of offences a court in determining the sentence to be imposed on a person for an offence to which the section applied, should, upon being requested to do so by the victim, hear his or her evidence as to the effect of the offence on them. In practice, while the "evidence" received was sometimes oral evidence given, either on a sworn or unsworn basis from the witness box, it more usually took the form of a victim impact statement being read into the record. This tentative role afforded to victims was considerably firmed up on in a new s. 5 of the Act of 1993 substituted by s. 4 of the Criminal Procedure Act, 2010 (the Act of 2010), that placed an obligation on the part of a sentencing judge to take into account, and where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed. The list of offences to which it applied was also expanded. The Act of 2010 further made provision for victim impact evidence to be given other than by the victim himself or herself if the victim was deceased, or underage, or if he/she was mentally infirm. In the case of a victim who had died as a result of the crime, evidence could be received from a family member

concerning the effect on the deceased's family members. Importantly, a new subsection 4 of s. 5 of the Act of 1993, added by s. 4 of the Act of 2010, provided that where no evidence is given by or on behalf of a victim the court should not draw an inference that the offence had little or no effect (whether long-term or otherwise) on the person in respect of whom the offence was committed or, where appropriate, on his or her family members.

70. The coming into force of the Victim's Directive, i.e. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 1 OJ No. L315, 14. 11. 2012, establishing minimum standards on the rights, support and protection of victims of crime saw further changes. The Criminal Justice (Victims of Crime) Act, 2017 (the Act of 2017), was enacted to transpose that Directive. Most of the Act of 2017 is concerned with setting forth the rights of a victim with respect to the trial process. However, with specific reference to sentencing, the application of s. 5 of the Act of 1993 was expanded by s. 31 of the Act of 2017 to include any "offence where a natural person in respect of whom the offence has been committed, has suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused by that offence". The definition of "family member" was further greatly expanded.

71. We have previously said in the case of the *People (Director of Public Prosecutions) v C. (J.)* [2014] IECA 1 that the purpose of victim impact evidence or a victim impact statement is *"for the victim to inform the court of the effects that the crime has had on her"* and in so doing to assist the court in assessing the gravity of the offence. However, it does not begin and end there. In his work on *Sentencing Law and Practice* (previously cited) Mr O'Malley offers the following eloquent description of some of the other functions served by hearing directly from victims in the sentencing process:

> *"Victim impact evidence, especially when tendered directly by the victim orally or in writing, also has an expressive function and this, in reality, may be more important*

than the apparent statutory purpose of assisting the sentencing judge. It provides an opportunity for the victim to address the offender directly, and perhaps for the first and only time. Even in cases of repeat offending, such as serial childhood abuse, this may be the first opportunity the victim has had to tell the offender and others about the impact of the offences both at the time of their commission and in the years that followed. The victim's evidence therefore brings home to the offender the harm that he or she has inflicted. This is surely an important dimension of the sentencing process, and for at least two reasons. First, there is a respected view that sentencing is a communicative exercise. The court, as an agent of society, communicates to the offender its view of the gravity of the crime and its consequences. Offenders have an opportunity to respond by, for example, expressing remorse and making an apology. Until the sentencing stage of the trial (where one has taken place), the contest or dispute has been between the defendant in the state. It is only of sentencing that the victim, as the party directly wronged, can participate in a communicative process by telling the court, and the offender, in plain language what the impact of the offences been. The second reason, closely connected with the first, is that offenders who are made so directly aware of the consequences of their conduct may be less inclined to repeated. Being provided with an opportunity to give evidence at sentencing is sometimes said to have a therapeutic or cathartic value for victims. Again, research suggests that victims feel better when the judges sentencing remarks include indirect reference to their evidence, even if they are not entirely satisfied with the outcome."

72. The effect of the sentencing process on a victim may be profound, and clearly judges must be empathetic and sensitive towards them, but at the same time must deliver the proportionate sentence that the Constitution requires. In the passage just quoted, Mr O'Malley alluded to the view that sentencing is in part a communicative process, a

characterisation with which we agree, and he gives some practical examples of how that is so. We would, however, venture to go further and suggest that sentencing must be viewed as a multi-participant communicative process, although it would not be correct to describe it as a dialogue. It is such because in every case information is provided and exchanged relevant to the sentencing process by various stakeholders including the police, the victim(s), relevant professionals and the offender. Importantly, the court itself also seeks to communicate important information to those stakeholders, and indeed to the community at large, concerning the reasons for the sentence it ultimately decides to impose.

73. Difficulties may arise where victims have unrealistic expectations concerning the severity of the sentence that might have been imposed. Sometimes a victim will implore a judge to impose an exemplary sentence although such occasions are thankfully rare. We hasten to add that there is no suggestion that that has occurred in this case, and in alluding to this possibility we are speaking in the abstract merely for the purpose of elucidating an aspect of the judge's role *qua* the victim at a sentencing. Where that occurs, the judge's obligation is to sensitively explain that sentencing is not an exercise in vengeance, and that he/she is obliged by law to impose a sentence that reflects the gravity of the offence, including the harm done to the victim, but which also takes into account the circumstances of the offender. While direct victim requests for a severe sentence are rare, it now occurs with increasing frequency that victims give steps of the court interviews to print and broadcast media after a sentencing hearing has concluded, and sometimes they express disappointment with the sentence imposed in trenchant terms. That is their entitlement, and there may be no doubting the genuineness of their immediate subjective disappointment, particularly in traumatic and emotive cases, but where it is the result of an insufficient understanding of why the sentence in question was imposed, or appropriate time has not perhaps been taken to reflect in a reasonable way on a judge's careful explanation for his/her sentence, it unfortunately may

feed into the populist agenda of certain interests, some of whom may be concerned only with exploiting the story in a sensationalist way for commercial gain, and others of whom may use it to fuel hostility to the judiciary and even to the rule of law.

74. Criminologists who have conducted extensive research into public attitudes to sentencing in other countries have found time and again that dissatisfaction with the perceived leniency of sentencing is greatly reduced where public opinion is informed (see for example Roberts, J.V., Stalans, L.J., Indermaur, D., and Hough, M., (2003) *Penal Populism and Public Opinion : Lessons from Five Countries* (Oxford: Oxford University Press); Gelb, K., "Myths and misconceptions: public opinion versus public judgment about sentencing" in Freiberg, A., and Gelb, K., (eds), (2008) *Penal populism, Sentencing Councils and Sentencing Policy* (Cullompton: Willan Publishing); and various essays in Roberts, J.V., and Hough, M., (eds) (2002) *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Cullompton: Willan Publishing)).

75. This suggests that the judge's role in explaining his/her sentence, and the rationale for same, may be of critical importance with respect to maintaining confidence in the sentencing process on the part of those interested in and affected by it, including victims. Most victims are reasonable people and the way to cater for a victim's expectation of justice, whether realistic or not, is to properly explain what is being done, and why it is being done. What is not appropriate is to fail to apply the law on proportionality in sentencing, or some other key principle, lest a victim should feel that they have been deprived of individual justice.

76. It is but common sense that a victim, an accused, and indeed the public more widely, will be less likely to perceive undue leniency and to feel aggrieved because of it if provided with a careful explanation, anchored in principle, as to how a sentence that concerns them has been arrived at. We suggest that comprehensive and sensitive explication is particularly

desirable in a case involving a sentencing for multiple offences, involving multiple victims, where resort has been had to consecutive sentencing and it has been considered necessary to make some downwards adjustment to the aggregate sentence in application of the totality principle to arrive at an overall sentence which is proportionate.

The totality principle

77. The totality principle has its origins in the widely held view that in the case of a multiple offender the total sentence should, in general, be greater than the proportionate sentence for any one of the offences. However, the question that arises in every such case is by how much should it be greater? Clearly, a purely arithmetic approach could lead to significant injustices, and the greater the number of offences the greater the likelihood of such injustices being perpetrated. For example, suppose a burglar commits six non-aggravated break-ins during a single night, the result of which is, in each case, the theft of small amounts of cash and jewellery, and the causing of some minor criminal damage. He is then apprehended by police and is charged with six burglaries and six counts of criminal damage, to which he pleads guilty. If the appropriate proportionate sentence for each one of those offences, considered alone, would be a year in prison, the application of consecutive sentencing on a purely arithmetic basis would see him receive an overall sentence of twelve years' imprisonment.

78. In practice, several factors render such an eventuality unlikely to occur, at least in such an extreme way. For example, sentencing judges will frequently apply a single transaction, or substantial degree of relatedness, rule which would see the imposition of concurrent sentences to multiple offences committed as part of a single transaction or which were otherwise related in a significant way, e.g. temporal contiguity, or involving the same victim. Accordingly, in the example given, it is likely that concurrent sentences would be imposed for each instance of burglary and criminal damage committed as part of the same

incident or which at least bore a significant degree of relatedness. Even if consecutive sentencing was still applied to individual incidents, the adoption of such an approach would see the overall aggregate or cumulative sentence of imprisonment drop from twelve years to six years.

79. Moreover, a purely arithmetical approach is rarely applied (at least on this side of the Atlantic), with the result that in practice, as has been observed by respected academic commentators, in many jurisdictions multiple offenders tend to receive an incremental overall increase for each subsequent offence, with the size of the increment diminishing as the number of offences rises. (See, Ashworth, A., and Wasik, M., (2016) "Sentencing the Multiple Offender: In Search of a 'Just and Proportionate' Total Sentence" in Ryberg, J., Roberts, J.V., and De Keijser, J.W., (2018) *Sentencing Multiple Crimes* (Oxford: Oxford University Press).

80. While this also represents *de facto* judicial practice in very many sentencings in this jurisdiction, it ought to be observed that it operates very informally here, and entirely *ad hoc*. It constitutes no more than a frequently adopted informal convention in sentencing, rather than a legal rule, and it is not a convention that is universally, or indeed always uniformly, applied. Moreover, there has been no judicially promulgated guidance, or indeed discourse, far less does any consensus exist amongst judges, concerning what typically should be extent of an incremental increase *qua* the number of additional offences. Be that as it may, there is considerable enthusiasm for this approach in certain other countries, notably in Sweden where many judges apply a highly refined and formalised version of it known as the "Borgeke model" (designed by the Swedish Supreme Court judge Martin Borgeke). Just for illustrative purposes, the Borkege model proposes the following progression, for more serious crimes:

Sentence for the 1st offence	Sentence for the 2nd offence	Sentence for the 3rd offence	Sentence for the 4th offence	Sentence for the 5th offence	Sentence for the 6th offence
1/1	1/3	1/6	1/9	1/12	1/15

(For more on this, see: Von Hirsch, A (2016) "Multiple Offense Sentencing: Some Additional Thoughts", and Vibla, Natalia (2016) "Towards a Theoretical and Practical Model for Multiple-Offense Sentencing", both in Ryberg et al (previously cited); also Vibla, N., (2015) "More Than One Crime: Sentencing the Multiple Conviction Offender" in Roberts, J.V. (ed), *Exploring Sentencing Practice in England and Wales* (Basingstoke: Palgrave MacMillan).

81. Another convention sometimes applied is to treat the gravest offence as providing the gauge for overall culpability, and to construct a series of sentences for the lesser offences, using concurrent or consecutive sentences, or a mix of both, that ensures that any enhancement to, or additions to, the gauge sentence by virtue of those lesser sentences should not in themselves exceed the sentence appropriate to the gauge offence.

82. Yet another approach is to treat the gravest offence as having been in effect aggravated by lesser offences committed at the same time, and to impose an enhanced sentence for that offence appropriate to the totality of the offending conduct while imposing concurrent lesser sentences for the other offences. Clearly this can only be done where there is a significant relationship between the offences and they arise from a single criminal event, as was the case in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 85.

83. Regardless of the approach adopted, and we have sought to illustrate that there are potentially many, the totality principle represents a bulwark against unrestrained judicial discretion in sentencing. It operates to ensure that whatever approach is adopted, the ultimate sentence will be a proportionate one and not a "crushing" one. In that regard it is ultimately a determining principle rather than a limiting principle. It requires a sentencing judge who has

determined upon a regime of sentencing which he/she deems appropriate to the case, to treat that determination as being a provisional one only in the first instance, and to then stand back and consider whether the overall aggregate length of sentences proposed is in fact distributively proportionate to the overall level of the offending conduct as committed by the particular offender in his/her circumstances. If the judge concludes that it is not proportionate he/she must appropriately adjust the component figures of which the provisionally set ultimate sentence figure is comprised and, in this way, determine upon a new and, on this occasion, proportionate sentence. Frequently, this may involve downward adjustments to some or all component figures.

84. There are various views as to what may constitute a "crushing" sentence. One commentator has offered the perhaps contestable view that because human lives are short no punishment should deprive individuals of a large fraction of what remains. In the Canadian case of *R v M* (CA), 1996 1 SCR 530 it was said that a multiple offence sentence could be considered unduly harsh when *"the effect of the aggregate sentence … is to impose on the offender a crushing sentence not in keeping with his record and prospects."*

85. The sentencing scholar Martin Tonry has written:

> *"I found no literature that offers criteria for knowing when a sentence should be considered crushing. Retributive ordinal proportionality offers guidance for sentencing single offenses, but provides no obvious answers for multiples. Consequentialists could justify a general crushing offence doctrine. Lengthy sentences cannot be justified on the basis of evidence about deterrence or incapacitative effects, except possibly for a tiny number of chronic dangerous offenders. There is compelling evidence that longer sentences have no greater deterrent benefit than shorter ones and that incapacitative effects are small to non-existent. … Traditional ideas about parsimony and use of the least restrictive alternative posit that no punishment is*

justifiable that exceeds its expected benefits. However, most modern punishment theory involves retributivist premises, so consequentialist analyses do not signify.

Canadian and Australian cases refer to crushing sentences but offer no useful law-like generalizations. Likewise, in Canada, … and in England, ... Case law standards in all these countries resemble Justice Potter Stewart's pornography test in Jacobellis v Ohio, *378 US 184 (196):* 'I know it when I see it.'*"*

(Tonry, M (2016) in "Solving the Multiple Offense Paradox" in Ryberg et al (previously cited)).

86. The totality principle potentially applies whether sentences are imposed concurrently, consecutively, or there is a mix of both. That having been said, in most cases involving sentencing for multiple offences where all sentences are made concurrent, there is rarely a problem with totality. It might be argued in any particular case that an individual sentence or perhaps sentences amongst concurrent sentences is/are unduly severe, or unduly lenient, but such concerns rarely arise from considerations of totality *per se*. However, where during a sentencing for multiple offences committed as part of a single criminal event, for reasons such as those elucidated in our recent judgment in *The People (Director of Public Prosecutions) v. X* [2021] IECA 168, (and in the Supreme Court's judgment in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 85), the sentence for the most serious offence is provisionally set at an enhanced level to take account of the inter-relationship between that offence and offences attracting lesser sentences, with a view to ensuring that the totality of the accused's offending behaviour is reflected in the sentence for the most serious offence, it might occasionally be necessary, following a stepping back and consideration of overall proportionality, to make a downwards adjustment to that sentence in the interests of proportionality.

87. For the most part, however, the totality principle is much more likely to be engaged where all sentences have been made consecutive, or where, as in the present case, there is a mix of concurrent and consecutive sentences. As it frequently will involve the making of a downward adjustment, the need to do so, where it arises, requires to be carefully explained both to interested parties, and to the public at large.

Did the totality principle require to be applied in the present case?

88. At the outset we feel it necessary to say that we agree with the sentencing judge that this was a serious case. It involved multiple instances of serious offending, involving no less than six separate victims, by a chronic recidivist who had been given previous chances. Moreover, the sentencing judge was mandated by statute (i.e., by s. 11 of the Criminal Justice Act, 1984) to have at least some recourse to consecutive sentencing, because the offences covered by Bills No's 1222/2019 and 1228/2019 were committed by the appellant while he was on bail for the offences on 326/2018. On any reasonable view of the case, the appellant's offending was deserving of a significant custodial term.

89. The sentencing judge's approach was to make the sentences on each multi-offence bill concurrent *inter se*, but to make the sentence for the single offence on Bill No 1222/2019 consecutive to the overall sentence on Bill No 326/2018, and then in turn to make the sentences on Bill No 1228/2019 consecutive to the sentence on Bill No 1222/2019. Although the statute did not oblige the sentencing judge to impose consecutive sentences upon a consecutive sentence (the statutory requirement would have been met by making a sentence or sentences on either of Bills No's 1222/2019 and 1228/2019 consecutive to a sentence on Bill No 326/2018) it was within the sentencing judge's discretion to structure an overall sentence in this way providing there was going to be a rigorous examination of totality in the interests of ensuring overall proportionality at the end of it.

90. A further circumstance, potentially relevant in that regard, was the fact that the appellant was already serving a sentence, i.e. the re-activated 20-month period in respect of which the appellant went back into custody on the 11th of November, 2019. The net effect of this, the sentencing judge in the present case having refused to backdate the sentence on Bill No 326/2018 to that date, and requiring instead that the sentence on Bill No 326/2018 should run from the date of sentencing, i.e., the 21st of February, 2020, is that by the time of his eventual release the appellant will have been continuously in custody for a total of 8 years and 2½ months approximately (comprising 2½ months (approximately) from the 11th of November 2019 to the 21st of January, 2020; plus 2 years and 3 months on Bill No 326/2018; plus 3 years on Bill No 1222/2019; plus 4 years, with the final 15 months thereof suspended, on Bill No 1228/2019) less whatever remission he may be entitled to. However, remission is not a matter to which we are entitled to have regard.

91. We have no hesitation in saying that in those circumstances, notwithstanding that the individual component sentences comprising the aggregate sentence of 9 years and 3 months with the final 15 months thereof suspended may have been proportionate, as appears to be accepted by the appellant, it was nevertheless incumbent on the sentencing judge to stand back and rigorously consider the proportionality of the overall custodial requirement. She declined to do so, not because she was of the belief that the overall custodial requirement was in fact proportionate but because *"I believe it would do an injustice to any individual injured party to further reduce the sentence"*. That was not a legitimate reason to refuse to consider overall proportionality, and her failure to do so represented an error of principle.

92. The sentencing judge went on to add that her unadjusted aggregated sentence *"already reflects the totality of the mitigating factors"*, suggesting, as has already been commented upon, that in her mind the possible making of downward adjustments in application of the totality principle so as to achieve a proportionate overall sentence was to be

equated with the affording of mitigation, which it is not. Again, this was not a legitimate reason for not considering overall proportionality.

Applying the totality principle, was the overall cumulative or aggregate sentence in fact proportionate?

93. In considering overall proportionality, we have considered the individual component offences, and the individual proposed sentences for those offences which, it is accepted, were proportionate. We have also considered the most serious of the individual offences, and the sentence proposed for it (being 4 years' imprisonment with the final 15 months suspended for the offence of endangerment on Bill No 1228/2019) and have treated this as the gauge offence. The aggregate custodial periods from the other offences, and which must be added to this, amount to 5 years and 3 months (i.e., 2 years and 3 months in the case of Bill No 326/2018; and 3 years in the case of Bill No 1222/2019). The "add -on", so to speak, well exceeds the sentence imposed for the gauge offence and raises a warning flag for us concerning overall proportionality. While it is not the case that exceeding the sentence imposed for the gauge offence will always necessarily suggest a disproportionate overall sentence, there needs to be a clear justification for doing so, and none is provided by the sentencing judge. Of further concern in the context of overall proportionality, is the extra time (admittedly just 2½ months) by which this appellant's uninterrupted time in custody will be extended on account of the re-activation of the 20 months that was originally part suspended.

94. We have come to the conclusion that while the overall sentence in this case was not "crushingly" disproportionate in a dramatic or hyperbolic sense, it was disproportionate and crushing in the sense of being more than the circumstances of this appellant's case merited. Accordingly, some modest downward adjustment of the overall sentence is required, with

consequential adjustments to component sentences, and we will address this presently when we come to re-sentence.

95. In conclusion, we will allow the appeal on ground (ii), but we are not disposed to do so on grounds (i) and (v). Given the existence of three individual Bills of indictment, the large number of individual incidents, the multiplicity of victims, the nature of offences, the fact that some were committed whilst on bail, and the appellant's bad record, it was a matter within the sentencing judge's discretion whether to have resort to consecutive sentencing, and even consecutive sentencing upon consecutive sentencing. We do not criticise her for doing so. The problem from our perspective lies with her failure, having done so, to properly consider totality, resulting in an overall sentence that was disproportionate and excessive as complained in ground no (ii).

Grounds (iii) and (iv) – the claims that inadequate account was taken of mitigating factors and undue weight attached to aggravating factors, and that quite apart from totality the individual sentence on the endangerment count was disproportionate.

96. In these grounds of appeal, it is pleaded that the sentencing judge did not take adequate account of the mitigating factors and placed undue weight on the aggravating factors in the case. Moreover, it is complained that the sentencing judge did not locate the offence of endangerment correctly upon the available scale of sentences for this offence resulting in a sentence that was disproportionate and excessive.

97. It seems to us that neither of these pleas can be sustained in light of counsel for the appellant's concessions at the oral hearing that he could have had no complaint concerning the appropriateness of the individual sentences imposed by the sentencing judge if proper account had been taken of totality; and that while the individual sentences might perhaps be

regarded as harsh, he had to accept that they were not so harsh as to render it likely that this court would interfere with them on that account alone.

98. In the circumstances we are not disposed to uphold grounds of appeal (iii) and (iv) respectively.

Ground (vi) – the claim that undue emphasis was placed on the victim impact statements

99. Once again, we are of the view that having regard to the concession that the individual sentences determined upon by the sentencing judge were appropriate, this complaint cannot be entertained. In any case, as will have been apparent from our detailed consideration earlier in this judgment of the role of a sentencing judge *qua* a victim, a sentencing judge is statutorily obliged to have regard to victim's impact statement, and the information contained therein concerning the harm done and the effect of the victim in assessing the gravity of the case. We have already dealt with what we consider to be the sentencing judge's erroneous approach to application of the totality principle based on concerns that to reduce for totality might *"do an injustice to any individual injured party".* However, we find no error in the sentencing judge's treatment of the victim impact evidence *per se*. We are not therefore disposed to uphold ground of appeal no (vi).

Conclusion:

100. The appeal must be allowed on ground no (ii) only, but dismissed on all other grounds. We will now proceed to re-sentence the appellant.

Re-sentencing:

101. We will re-impose all of the individual sentences nominated by the sentencing judge at first instance but ignoring her part suspension of the sentence on Count No 4 on Bill No 1228/2019. We consider that these individual sentences were appropriately selected. We will also, given the egregious circumstances of the case, respect the sentencing judge's decisions with regard to consecutivity, and again will make the sentence on Bill No 1222/2019

consecutive to the sentences on Bill No 326/2018, and the sentences on Bill No 1228/2019 consecutive to that on Bill No 1222/2019. As before the cumulative total comes to 9 years and 3 months imprisonment.

102. We would urge the victims in the case to take comfort from knowing that the wrongs done to them were individually considered, and that appropriately merited individual sentences were nominated, but to understand that the law then requires a re-consideration of the cumulative total in the interests of ensuring overall proportionality. Although that may possibly lead to a reduction in the overall custodial sentence we would ask them to understand that, if there is a perceived need to do so, it in no way diminishes the appreciation of this court of the extent of the suffering and losses that they were caused by this appellant's disgraceful offending conduct, nor is it intended to show disrespect to them as victims. However, the court is constitutionally mandated to ensure that any overall sentence is proportionate in the sense of not just taking into account the gravity of the offending conduct, but as one that also takes into account the circumstances of the offender.

103. Having stood back and considered the provisional cumulative total of 9 years and 3 months imprisonment from the point of view of what might be a proportionate overall sentence in the circumstances of the case, we think it is appropriate to adjust the overall figure downwards by 1 year, leaving a revised overall total of 8 years and 3 months. We do this in circumstances where, notwithstanding the sentencing judge's characterisation of the appellant's behaviour as having been wilful and involving a blatant disregard for our laws and for the community (a characterisation with which we completely agree), we nevertheless feel that the society would ultimately be best served if this appellant, given his circumstances, were able to re-join his community while still in his mid to late 20's. He has committed serious crimes, and must be punished for them, but we would hope that the combination of a not insignificant custodial term, treatment and support for his substance abuse issues while in

prison and following his release, and the prospect of being re-united with his partner and daughter while the latter is still young, may induce his desistance from re-engaging in these type of crimes, or indeed in any crime. If that could be achieved, it would be in everyone's interest.

104. To give practical effect to that reduction in the overall custodial figure we will make the following consequential adjustments to individual sentences:

- The individual sentence on Count No 3 on Bill No 326/2018 is reduced from 2 years and 3 months imprisonment to 2 years imprisonment.
- The individual sentence on Count No 1 on Bill No 1222/2019 is reduced from 3 years imprisonment to 2 years and 9 months imprisonment.
- The individual sentence on Count No 4 on Bill No 1228/2019 is reduced from 4 years imprisonment to 3 years and 6 months imprisonment.

105. All that remains is to consider whether a suspension of a portion of the total figure might be appropriate. We are satisfied that the approach of the sentencing judge to that issue was correct, and that she had a sufficient evidential basis for her decision to suspend 15 months of the sentence on Count No 4 on Bill No 1228/2019 in the interests of incentivising the accused to continue with the steps he had taken to address his substance abuse issues. We will do likewise and suspend 15 months of that sentence for the same period and on the same conditions as set by the court below.

In summary, the appellant is sentenced to a cumulative sentence of 8 years and 3 months imprisonment with the final 15 months thereof suspended