An Chúirt Uachtarach

The Supreme Court

Charleton J
O'Malley J
Woulfe J
Hogan J
Murray J

Supreme Court appeal number: S:AP:IE:2023:000039
[2024] IESC 16
Court of Appeal record number: CCAOT0085/2021
[2022] IECA (ex tempore)
Circuit Criminal Court Cork record number: CKDP0028/2020

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

John Faulkner
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Thursday 25 April 2024

1. On 19 October 2019, an elderly couple left their house in rural County Cork to attend evening Mass. Anticipating a burglary, and with their permission, gardaí had taken their place. Two men broke into their home. They were arrested, leaving the getaway driver, John Faulkner, outside on the roadway. He was not content to submit to being caught red-handed. He raced off in the direction of Cork city, driving recklessly and pursued by the gardaí. The intruders pleaded guilty, receiving 7 year sentences on 24 April 2020, reduced by mitigation from a headline sentence of 9 years. John Faulkner went to trial and was found guilty by a jury on 22 April 2021. Judge Seán Ó Donobháin sentenced him that day to 12 years for the burglary with concurrent sentences of 2 years for the offences of endangerment and of dangerous driving arising out of his fleeing the scene.

2. This appeal concerns, therefore: how a single criminal transaction that involves a number of crimes may be properly regarded as the event in respect of which a sentence is imposed on one count; the level of appropriate sentence for burglary; proportionality as between offenders in sentencing; what level of discount should a plea of guilty attract; the sentencing record where several offences are dealt with; and whether this sentence should be adjusted on appeal.

Determination

3. John Faulkner appealed against the severity of the sentence imposed on him. That was dismissed by the Court of Appeal; judgment of McCarthy J, with Birmingham P and Edwards J concurring, on 15 December 2022. Further leave was sought to appeal to this Court. Leave was granted by Determination dated 12 June 2023, [2023] IESCDET 77. A further appeal was allowed on these grounds:

> 1. Do the criteria set out in *The People (DPP) v Casey and Casey* [2018] 2 IR 337 constitute definitive sentencing guidelines for the disposal of burglary cases and is there any further research, to be presented on the appeal, which might bear on these guidelines including analysis done by the Judicial Research Office, as was, or other precedents, which might enable this Court to approve of same or to alter either the relevant suggested bands or criteria involved?
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> 2. On what basis may a headline sentence be set where there is already the disposal on a guilty plea by a co-accused and by what general proportion should a sentence be diminished to take account of the accused not contesting guilt?
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> 3. Is it always required, where a sentencing judge is dealing with two or more findings of guilty by a jury or two or more please of guilty on different counts by an accused, to fix an appropriate sentence for each such offence, or is it sufficient to take one offence as constituting a transaction which of which other offences are part and to look at the totality appropriate to all offences as part of the same event?
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> 4. To what extent, if any, should these sentences be adjusted?

Burglary

4. Burglary is a grave crime with upsetting, though often concealed, consequences for its victims. The offence carries a maximum sentence of 14 years imprisonment and a fine under s 12(3) of the Theft and Fraud Offences Act 2001. Burglary is defined in s 12(1) as "entry into any building or part of a building as a trespasser with intent to commit an arrestable offence" or can also be committed through "having entered any building or part of a building as a trespasser, commits or attempts to commit an arrestable offence therein." The concept of building encompasses all forms of structures where business or commerce may be carried on, the mental element extending to the purpose of committing all offences which carry a potential penalty of 5 years imprisonment or more. But, the most usual commission of burglary, and the type relevant here, is entry into a home in order to steal, or in terms of the technical language of criminal law with the mental element of intent of committing theft.

5. As Hardiman J noted in *The People (DPP) v Barnes* [2006] IECCA 165 [42], [2007] 3 IR 130, crime is a violation of the human rights of the victim. In entering another person's home for the purpose of crime, a fundamental intrusion occurs which offends against Article 40.5 of the Constitution which provides "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." The spirit behind that declaration of rights is not, as Hardiman J said, new:

> This is a modern Irish formulation of a principle deeply felt throughout historical time and in every area to which the Common Law has penetrated. This is that a person's dwellinghouse is far more than bricks and mortar; it is the home of a person and his or her family, dependents or guests (if any) and is entitled to a very high degree of protection at law for this reason. Most of the cases on the topic relate to the restrictions which this puts on the State itself (most obviously the police force) in entering a person's home. But the home is, of course, also entitled to protection from criminals. This form of protection, indeed, was to the forefront of the concern of law makers in the early days of the Common Law.

6. It was also made clear in that judgment that to enter someone's home, purposed to steal their property or otherwise, cannot be classified as anything other than an assault upon their right to be left to the peace of the domestic space they have created for themselves. In *Barnes* it was argued by the defence that burglary, while serious, was not an aggressive action, especially where, as in this case, the intruding group had done everything by way of surveillance beforehand to ensure that they were entering an empty home. This was dismissed by Hardiman J in emphatic terms:

> 51. It seems clear to us that a burglar would prefer, in his own interests, to enter empty premises rather than an occupied house. But that cannot take from the fact that every burglar runs the risk that the householder may be present even though the burglar thinks he is not, or that the occupant, though at first absent, may return to his own house as he is manifestly entitled to do.
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> 52. An occupier in the presence of a burglar (whether the burglar knows that he is there or not), is in a position of very acute difficulty. Firstly, his dwellinghouse has been violated and this is not merely a crime at law but an invasion of his personal rights. Such a thing, especially if repeated, may in itself gravely undermine the wellbeing even of a strong and healthy occupant, and still more that of an older or feeble one. The offence of burglary committed in a dwellinghouse is in every instance an act of aggression, an attack on the personal rights of the citizen as well as a public crime and is a violation of him or her.
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> 53. Furthermore, particular circumstances may gravely worsen the position of the householder. He or she may have the care of and responsibility for children or old and sick people in the house or likely to come there. He may himself be aging or elderly, apprehensive or even terrified out of his wits. He has no idea what the burglar will do or whether he is violently disposed or not. Common knowledge will have told him that certain burglaries are committed by drug addicts whose behaviour may be randomly vicious or wholly unpredictable. The circumstances may be such as render it difficult or impossible to summon assistance: he may have no telephone or be afraid to attract the attention of the burglar, or provoke his rage, by using one.

7. Further, the effects of burglary can be life-changing. In a 1989 study, drawn by the Court to the attention of the parties to the appeal, Professor O'Neill considered health changes due to criminal intrusion into the home; O'Neill et al, Effects of Burglary on Elderly People BMJ 298, 6688, 1618 (1989). This study mirrors the remarks of Hardiman J. Of a group of 272 people examined, with a mean age of 74 years, 80 had been burgled, some several times, reporting 122 burglaries through the group of 80, and of those 29 suffering multiple intrusions, 22 were not independently mobile. Of the group of 272, 11 had required

medical treatment, and 72 reported psychological after effects, including fear of repetition for 57, depression or anxiety for 36, disordered sleep for 46 and fear of leaving the home for 32. Further 17 reported decreased mobility. Of the group, 11 had departed their home, of those 8 to lodge with relatives, 7 eventually returning, but 1 moving home and 3 entering long-term nursing care. The authors comment:

> We found an increased vulnerability to burglary among elderly people. The main factors underlying this phenomenon are social isolation, poor mobility, little use of security equipment, and an overtrusting attitude to callers. Elderly victims report particularly high objective (medical attention, decreased mobility, social disruption) and subjective (psychological markers) markers of stress and illness after burglary. The violation of the home seems to be particularly distressing: the home assumes increased importance with decreasing mobility and reduced social contacts.

The duration of an offence

8. At issue is the duration of the offence for which the 12 year sentence for burglary was imposed by the trial judge on John Faulkner. Was the event that constituted the offence simply the entry by the two participants while John Faulkner waited outside? On criminal law participation principles, it is axiomatic that the getaway driver is equally a principal offender with those entering the home of the victims. Or, on the other hand, does the offence of those entering end when they are arrested by the gardaí, since the offence is then over, but does the crime of the getaway driver extend the burglary into his reckless escape and the danger that created?

9. In *The People (DPP) v FE* [2020] 1 ILRM 517, [2021] 1 IR 217, [2019] 12 JIC 0602 that question was analysed as were the fundamentals underpinning the law of sentencing. It is worth reiterating the principles enunciated in that decision. There, a woman having been raped at knife-point and threatened and held against her will through coercion, a decision of the sentencing judge to consider the offence as an overall occurrence incorporating those elements of the event was reversed by the Court of Appeal. Instead, on appeal, the component parts of the offence were individually analysed and a sentence imposed on appeal that reduced the penalty on the most serious of the charges, which was of rape, imposing separate sentences for the other criminal aspects of false imprisonment and threat. This Court emphasised in overturning that decision that a crime is an event which can incorporate other offences beyond that for which a sentence is imposed. The judgment may usefully be reduced to these propositions:

1. A judge may not sentence an offender for a crime to which he or she has pleaded not guilty, or one which has been the subject of a trial with the result of an acquittal or of a disagreement by the jury on that count.
2. This principle holds, and is most obviously applicable, where an accused is tried on offence A and on offence B, but is only convicted on one offence, A and not B or B and not A.
3. At the request of an accused, who has been found guilty on offence A and also on offence B, a judge may, in choosing which offence was the most grave, and hence would carry the heaviest penalty, agree to take a lesser offence or offences into account when sentencing for that primary offence.
4. When embarking on a crime, it is commonplace that several offences may be committed. As well as sentencing for a crime, a judge is sentencing for the event that makes up a sensible, or commonsense, view of the crime. A crime should not

be split up into sections which render it no longer an event. Hence, it should be remembered that two people planning a crime are already, through their agreement to commit it, guilty of conspiracy; a burglar may come equipped with instruments for breaking into a home, which is already an offence, may enter the curtilage of a building with intent to steal, which already is the offence of burglary; may maliciously damage locks, which is also an offence; may take several items of commercial and, often more importantly, sentimental value inside, which is theft; may encounter and threaten an occupant with death, which is also a separate offence; may assault the owner or, as in *The People (DPP) v Quilligan and O'Reilly (No 3)* [1993] 2 IR 305, may savagely beat and intimidate elderly brothers living in isolation so that one dies in his home and the other is rendered unfit to live independently but dies in nursing care 6 months later. That intrusion in *Quilligan and O'Reilly* was, nonetheless, a burglary. In itself, the fact of intrusion, or worse, confrontation, can be such as to lead to death without any actual violence for those of vulnerable health; *The People (DPP) v Casey and Casey* [2018] IECA 121.

5. A crime may be committed in a moment, as where a person spontaneously steals in a jewellery shop by pocketing a watch, or may last a considerable time, as in storing explosives for use in terrorist outrages, or holding a victim overnight in the commission of sexual violence.
6. A clear line may be enunciated as between the principle that it is wrong to punish a person for conduct in respect of which the presumption of innocence has not been displaced (no finding of guilty) and conduct which though constituting a separate crime is part of the event comprising the offence for which there is a finding of guilty and for which, therefore, the sentence properly encompasses.
7. Planning, leadership in a criminal enterprise, and the engagement of deliberate aggravating conduct in its commission are all relevant factors as to how a crime is committed and, hence, how a sentence is to be framed.
8. While sentences should take account of the disposal of co-offenders in terms of what sentence has been handed down to them, appropriate differences in culpability may legitimately differentiate sentence.
9. Before review on appeal is possible, a burden is borne by the accused to demonstrate an error in principle by the sentencing judge. It is not enough that a different approach might have been taken by any judge considering an appeal but, rather, that an error in legal approach to a sentence handed down is manifest.
10. Respect towards the analysis of the sentencing judge is proper in an appellate court. The judge at first instance may have heard the entire case or, otherwise, will have had a first-hand opportunity to view the reaction and approach of the accused, of the victim and to consider the evidence on sentencing as live testimony.
11. It is appropriate to commence a sentencing analysis, either by a trial judge or on appeal, by judging the gravity of the event comprising the crime, or events comprising the crimes, and the individual culpability of the offender. This is the properly called the headline sentence; *The People (DPP) v Mahon* [2019] IESC 24, [2019] 3 IR 151, *The People (DPP) v M* [1994] 3 IR at 315, *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, and *The People (DPP) v Flynn* [2015] IECA 290.
12. Thereafter, if there is mitigation, such as an early plea of guilty, or real evidence of contrition, as opposed to regret at being brought into the system of justice through detection and prosecution, that may in appropriate cases result in a reduction of the headline sentence; .
13. Where there is guidance through case-analysis of sentencing bands, the prosecution, as part of their duty to objectively guide the trial and sentencing

process, should assist the sentencing judge with a reasoned submission as to the category of seriousness into which an individual offender's conduct fits.

14. If necessary, the judge should make appropriate findings as to fact related to seriousness based on the jury's verdict. Usually that will be readily apparent. A judge may, on verdict, if there were two possible, and different in terms of culpability, paths to a verdict, ask the jury which of those cause them to reach their verdict; *The People (DPP) v Piotrowski* [2014] IECCA 17. Any such necessity very rarely occurs.
15. Appropriate totality, ensuring that the final sentence for two or more offences, whether concurrent or consecutive, is appropriate to the overall offending should be borne in mind; see Street CJ in in *R v Holder* [1983] 3 NSWLR 245 and in *R v MMK* (2006) 164 A Crim R 481.
16. Finally, the fundamental principle of sentencing should always be borne in mind. This is that the imposition of a sentence is not simply about punishing the offender and protecting society. Sentencing should also engage, even in the case of a life sentence, offering the possibility of rehabilitation within the penal system, even of a violent perpetrator. Prison offers much, including counselling, education, training and exercise. Sentencing is more than retribution; *The People (DPP) v MS* [2000] 2 IR 592, and the approach of Roach JA in *R v Warner* [1946] OR 808 at 815. In *The People (DPP) v M* [1994] 3 IR 306, Denham J at pp 316-8, on behalf of this Court reiterated that the "nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing". This approach she described as "the essence of the discretionary nature of sentencing."

10. In Wasick and Emmins, *Emmins on Sentencing* (London, 4th edition, 2001) and in other valuable texts such as O'Malley, *Sentencing Law and Practice* (3rd edition, 2016), it is common to find compilations of the factors which aggravate and which may mitigate culpability for a crime. While crimes may be similar, and the level of offending may be quite parallel as between offenders, thus justifying the use of sentencing precedents and sentencing guidelines, the involvement of each offender, and hence the gravity of the offence as regards his or her culpability, may differ. A court should always look at how serious the crime was, what the maximum sentence is that the legislature or common law has set, what sentencing precedents or guidelines may assist and how grave the involvement of an individual offender was. An appropriate guide is given in *Emmins on Sentencing* at pages 54-5:

> It is very difficult to define 'seriousness' in the abstract, and no attempt is made to do so in existing sentencing law. It is of great importance, however, for the sentencer to gauge the seriousness of one offence in relation to another, and to distinguish within each offence, for example one case of burglary from another case of burglary. Distinctions also need to be drawn between the respective roles played by co-defendants in a particular case. This is a demanding task for the sentencer, but it is central to the sentencing decision. It is perhaps not so difficult as it might sound. In assessing seriousness, the sentencer should have regard to the immediate circumstances of the offence, and the degree of the offender's culpability in relation to that offence… In determining the seriousness of the offence, the sentencer must always take into account any aggravating or mitigating factors which impinge upon the question of offence seriousness. Some of the factors apply across a range of offences. An example … is where the offender has committed the offence in 'breach of trust'. This has relevance in theft and

> deception offences, for example where a senior employee abuses his position of responsibility to embezzle funds or provide an outside team of offenders with a key to a storeroom. It also has relevance in sexual offences, for example where a schoolteacher or a social worker abuses that position of authority to commit a sexual offence on a child. An example of a general factor which tends to make an offence less serious is where there was provocation immediately before the offence. … There are other factors which are relevant to seriousness in a more restricted range of offending. Thus, if the offence is one involving dishonesty, the court, as well as considering any breach of trust, will also be influenced by matters such as whether the offence was carefully planned or was committed on impulse, the value of the property involved and by whether any, and how much, of it has been recovered. If the offence is one of violence, the court will be influenced by the severity of the injuries caused to the victim, the extent to which the victim has recovered, the offender's intention (or lack of it) to cause serious injury and the nature of the weapon (if any) which was used. By weighing up factors such as these, the sentencer will be able to reach a view on offence seriousness and hence a provisional view on the appropriate sentence.

11. In *The People (DPP) v Mulhall* [2010] IECCA 72, emphasis is placed by the Court of Criminal Appeal on finding and then observing "scrupulous respect of the dividing line" between offences which are not properly to be sentenced for, because there is no conviction (or request by the accused, following conviction for a number offences, that these be taken into account), and the proper analysis of the events that constitute the crime on which there has been a finding, or plea, of guilty. Thus, Macken J there stated that "it would not be possible to fix a precise "extent" to which such actions are to be considered, a "relevant or aggravating factor", in all circumstances, as the question seeks to do." Usefully, Macken J sets out the principle that "the closer the actions are related to the events giving rise to the charge in suit, the more evident it is that they can be taken into account in fixing an appropriate sentence."

12. Circumstances thus matter; *R v Kidd* [1998] 1 WLR 604. Furthermore, taking any unreal view of the narrative of what a conviction clearly enunciates offends against the principle that judicial decisions are ideally to be based on a clear view of the facts before a court. Judges are there as persons of experience to apply the law in a transparent and commonsense manner.

13. In *The People (DPP) v Gilligan (No 2)* [2004] 3 IR 87, the conviction by the Special Criminal Court was in respect of 5 counts of importation of cannabis resin for sale or supply, stretching over some nearly three years, but indicted as being "on a date unknown", those dates being differentiated by an approximate 6 month time-gap. There were also convictions for arms importation, including machine guns, but these were of course separate. To the submission that the record of the court on the drugs importation could be accounted for by individual acts of criminality on a gross scale, followed by repentance, with the accused being led into temptation on a sporadic and isolated basis, as separate and separated events, McCracken J rejected any proposition amounting to a court acting in any unreal manner; stating on page 91 that "quite clearly a sentencing court cannot act in blinkers." A sentence, he said, "must relate to the convictions on the individual counts" but an accused "must not be sentenced in respect of offences with which he was neither charged nor convicted and which he has not asked to be taken into account". There remains the principle that "nevertheless the court in looking at each individual conviction

is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction."

These circumstances

14. The victims of this offence were husband and wife, aged 89 years and 86 years. It is clear that they were chosen as targets because of their age and perhaps because of other factors that led the perpetrators to believe, and these assumptions are often wrong or even mythical, that theft at their home would be financially worthwhile. Why were these older people targeted? That is not known. Furthermore, the burglary was set for an October evening when the couple would be attending an evening celebration of Mass in a local Catholic church. It stands to reason that the identification of victims and the timing of the offence required either research, or as is more than unlikely, some knowledge garnered through observation or enquiry. However the facts are construed, this was a targeted and planned offence. As McCarthy J said of this offender in the Court of Appeal: "He had also been involved in identifying potential elderly victims for this type of crime in the area and had been engaged in assisting the co-accused in watching the [victims'] home over time and, by definition, the planning of the offence." The three perpetrators were driven from Cork city to the residence of the victims at Kilberehert in the countryside by John Faulkner. His role was as getaway driver. Two culprits were caught in the home of the victims. On realising they had been arrested, John Faulkner fled the scene of the crime.

15. This flight in a fast motorcar involved speeds of up to 150km per hour, shooting through a crossroads and on one occasion taking a blind bend on the wrong side of the road so as to avoid apprehension by gardaí. That was 93 miles per hour, or 42 meters per second, to put this dreadful conduct in context. During this reckless dash for freedom, distractions were offered in the form of two bags thrown out the car window. Clothing, a key fob and the mobile phones of his accomplices were also discarded as decoys while John Faulkner drove on. Control was eventually lost of the car before this invitation to a deadly accident led to a catastrophe for other road users and John Faulkner was apprehended. Sentencing him, Judge Ó Donnabháin, felt no need to adjourn for a probation, or other, report stating that he was:

> Amongst a gang who planned, detailed and organised burglary of a house in a remote area of north Cork, far distant from the city where the accused lives. Which burglary took meticulous planning, organised criminality and significant determination. In relation to all of those aspects, the accused was totally and completely involved. He was involved in every part of it, and I accept what the superintendent says: the trips to Drumcolliher on his own and the driving around was to finger or set up the unfortunates coming out of the post office. He knew his customers, elderly people perhaps drawing a pension, living in remote areas. Because there's no doubt about it; if you have any antenna for the community we're living in, there is no other type of offence the causes more fear and misery than gangs going abroad and burglarising houses in remote areas. It has communities reduced before the pandemic ever came into lockdown. And that's what he was involved in bringing terror to innocent people. And there's no doubt about it. And he went up there on a series of days setting it up and he brought the people who went into the house, to the house, and he was in the vicinity to collect them up. He didn't collect them up because he saw the gardaí and he took off. The idea that he might have been avoiding some feud is nonsense. He was in that house every bit as closely as [his accomplices] because they couldn't have gotten there

> without his active, conniving determination. It was a very deliberate crime and the evidence against him was overwhelming. …
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> I am fully aware of the organisation, the planning, the targeting, the watching and besetting. I'm fully aware of that now and I'm fully award of his part in it. …
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> Now, unless I am missing something, and unless I am missing a lot of that something, I see no element of remorse in the defendant. It's almost as if he's playing with the system. He knew how overwhelming the evidence was against him and he ran on. He wanted a jury. In fairness, the fact that he pleaded not guilty, the fact that he went to trial, is not an aggravating factor. I can't add one day to his sentence because he did it. . . .

16. There were 19 prior convictions recorded against John Faulkner, including two prior offences of burglary, one against elderly siblings in rural north Cork and one perpetrated whilst on bail. These merited sentences in 2005 and 2007 of 3 and 4 years respectively. The driving whilst fleeing apprehension on this offence merited, according to Judge Ó Donnabháin, on the dangerous driving offence 6 months imprisonment and on the reckless endangerment 2 years imprisonment. Disqualification for 20 years from driving was reduced on appeal to 10 years. The other sentences stood as handed down.

17. It is always a question of fact whether a criminal charge is broad enough to encompass a series of events where all or some of same would constitute a separate crime. Another point of principle emerges here in that the verdict of the jury encompassed a definite decision that John Faulkner had engaged in dangerous driving and in reckless endangerment, both at the level of maximum seriousness. While there was, in terms of the applicable principle, no consent from him for the trial judge to take the two offences engaged by his fleeing the scene of the burglary into account, these were nonetheless in the mix of events on which the trial judge was obliged to sentence him.

18. In reality, on the basis of the evidence presented, the analysis by the trial judge of what the event of the burglary encompassed cannot be regarded as wrong. The offender was engaged in the planning and in the conscious preparation of choice of victim and in targeting the offence; he drove with companions a considerable distance in order to prey on older members of the Cork community in an isolated area of the country; the vehicle was his primary responsibility for use as a getaway; his presence in that car, proximate to the scene of the crime, indicated that its use was to be deployed should the occasion arise; surprise is always part of the offence of burglary, where householders may return unexpectedly (had the religious service been cancelled or had one or other have felt ill, are examples here) and a means of escape is thus integral to a plan involving this form of intrusion and theft; not untypically, burglars often open several doors and windows to enable immediate flight from a householder; fleeing the scene with aid of a vehicle cannot be other than a precaution integral to a plan of burglary to cut and run where one offender is primed to drive in a proximate vehicle.

19. Hence, the situation can usefully be analysed by the application of a variation of the scenario. Had the accomplices of John Faulkner managed to reach the getaway vehicle, their flight could not have been considered as other than part of a continuation of the central event of burglary. By racing from the home of the victims and engaging the driver in flight, the event constituting the crime would have been continued. It is beyond argument that the niceties of road traffic law, essential for the safety of all road-users, such

as stopping at junctions, not breaking traffic lights, not going the wrong way through one-way systems, would fade into irrelevancy in such a scenario of making a break for it. In the event, it was only John Faulkner who took to his heels, but that in the context of what turned out to be a solo run.

20. Within that context, it cannot have been wrong for the burglary sentence to have reflected the gravity of the overall event which, as an introduction, engaged planning and targeting of elderly victims, which engaged a most serious intrusion into the home of vulnerable citizens as the core of the plan, and integral to which was a plan of flight that, as it turned out, was extended in a reckless attempt at escape that could easily have caused tragedy.

21. It may also be said that the totality principle, whereby several crimes fall for sentence, demands an assessment of the impact of an offence on the victims and of the final sentence on the offender, also supports the sentencing judge's analysis. Street CJ in in *R v Holder* [1983] 3 NSWLR 245 and in *R v MMK* (2006) 164 A Crim R 481 at 12 refers, appositely, to an evaluation that takes into account an "appropriate relativity between the totality of the criminality and the totality of the sentences."

Ordering precedent into guideline judgments

22. Heretofore, in this Court, in the Court of Appeal and in the Central Criminal Court, where the process started with the innovatory judgment in *The People (DPP) v WD* [2007] IEHC 310, [2008] 1 IR 308, [2007] 5 JIC 0406, the courts in this jurisdiction have confined themselves to the setting of principles upon which judges should properly approach determining a headline sentence for a case and to describing the circumstances which engage a level of seriousness in offending that may properly indicate that an offender falls within a band of gravity in terms of appropriate disposal. Sentencing band analyses are based on the law that experience demonstrates as being the correct approach to the division into tiers of three, or of four, levels of gravity and which have been demonstrated through no broader process than the gathering together, and analysis, of precedent. Added to that is the experience as practitioners and as judges of those involved in constructing such judgments.

23. That experience is far from inconsiderable and may engage by judges, at appellate level, the agglomeration of multiple professional lifetimes of engagement with the very offences under consideration. Such judgments, therefore, deserve considerable respect. Judicially, in this Court, *The People (DPP) v FE* considers sentencing bands in rape and this Court's decision in *The People (DPP) v Mahon* considered and set out all of the relevant sentencing bands for manslaughter. Demanding with menaces was considered by this Court in *The People (DPP) v Molloy* [2021] IESC 44, [2021] 3 IR 494 and again bands were suggested. There are no rigid norms for sentencing but, rather, the weight of experience and the persuasiveness of research-based analysis, command, experience has shown, appropriate respect; *The People (DPP) v Adam Keane* [2008] 3 IR 177.

24. In *The People (DPP) v PH* [2007] IEHC 335 and *The People (DPP) v WD* [2008] 1 IR 308 there is an analysis of rape sentencing which has been updated. In *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116 and *The People (DPP) v Ryan* [2014] IECCA 11, the Court of Criminal Appeal produced indicative bands for assault causing serious harm and firearms offences respectively. In *The People (DPP) v Casey and Casey* the index offence of burglary was considered by a panel of three judges. The question thus arises as to whether there is

any basis upon which that requires revision and whether this sentence accorded with what precedent and judicial experience guided.

25. This process, of compilation, of analysis of precedent and of putting order on decisions is within the judicial competence as part of the ordinary incremental changes which are inherent in any legal system such as ours using the standard case-by-case common law methodology. This was the very point made by Holmes J in *Southern Pacific v Jensen* 244 US 205 at 221 (1917), but this thinking also has deep roots in our case decisions: see for example the remarks of Henchy J in *Vone Securities Ltd v Cooke* [1979] IR 59 those of Lardner J in *RT v VP (otherwise VT)* [1990] 1 IR 545 at 558. Judges are applying principle to precedent, compiling principle out of precedent and organising masses of authorities into a coherent guide; a process which, in its proper exercise, cannot be regarded as any usurpation of the sole and exclusive legislative function of the Oireachtas under Article 15.2 of the Constitution; see also *The People (DPP) v McNamara* [2021] 1 ILRM 350, [2021] 1 IR 472, [2020] 6 JIC 2603, [2020] IESC 34 in particular at [23-30] where the relevant principles are set out.

Burglary sentencing analysis

26. In the course of argument in *Casey*, it was suggested by the prosecution that factors which "would put a burglary in mid-range, and more often than not at the upper end of mid-range" would include:

> (i) a significant degree of planning or pre-meditation;
> (ii) two or more participants acting together;
> (iii) targeting residential properties, particularly in rural areas;
> (iv) targeting a residential property because the occupant was known to be vulnerable on account of age, disability or some other factor;
> (v) taking or damaging property which had a high monetary value or high sentimental value.

27. The prosecution also contended that "to place a burglary in the highest range of gravity" there would be such factors as:

> (i) ransacking a dwelling;
> (ii) entering during the night a dwelling which was known to be occupied, especially if the occupier was alone;
> (iii) violence used or threatened against any person, whether the occupier or anyone else in the course of the burglary; and
> (iv) significant injury, whether physical or psychological, or serious trauma caused to a victim of the burglary.

28. In *Casey*, within the context of the acceptance of those submissions as according with judicial experience, the Court of Appeal concluded that the sentence imposed by the court of trial was unduly lenient. Birmingham P commented:

> 42. Among the factors that caused the Court to come to that view were that this was a burglary spree. Whatever arguments that might be advanced that the sentence would have been appropriate if there was only one burglary in issue, where what had occurred was a spree with four dwellings targeted, the sentences were simply not adequate. Not only was this a burglary spree but it was, as indeed

> the sentencing judge recognised, a carefully planned one. This is evidenced by the fact that each of the three involved had assigned roles and by the fact that a vehicle had been acquired shortly before for use in the burglaries and then registered in a false name.
>
> 43. Two of the burglaries were, even if viewed in isolation, serious in their own right; one particularly so. While neither respondent intended to harm Mr. O'Donoghue or foresaw his death, such a tragedy is foreseeable. Having one's home burgled is a deeply traumatic event. If one comes into contact with or into close proximity with an intruder, this is very likely to be frightening or stressful. That some individuals will react badly to extreme stress is not at all surprising. It is in fact all too predictable. Those risks are heightened if those targeted are elderly or for other reasons vulnerable. In the O'Donoghue case the harm done was very great and the culpability was high. The burglary at Kyle, Cappamore, was also a serious one. Property of monetary and sentimental value was taken. The Court agrees with the submissions of the Director that the ransacking of the dwelling should be seen as an aggravating factor. Though in that context the Court would observe that the trial judge would have been assisted had he been provided with some greater details as to what had occurred, as it was the reference to ransacking was really in the nature of a passing reference.

29. The Court of Appeal also regarded prior convictions of the offenders as a serious factor in setting a headline sentence. Birmingham P continued:

> 47. A confrontation with an occupant of a dwelling will be an aggravating factor. The more aggressive the confrontation, the greater the aggravation. Evidence that an intruder equipped himself with a weapon while in the dwelling will be a serious aggravating factor. This will be particularly so if the item availed of has the obvious potential to be a lethal weapon, such as a carving knife or a meat cleaver.
>
> 48. If a number of the factors to which reference is made are present, this will place the offence in the middle range at least, and usually above the mid-point in that range. The presence of a considerable number of these factors or, if individual factors are present in a particularly grave form, will raise the offences to the highest category. Cases in this category will attract sentences, pre-application of mitigation, above the midpoint of the available scale, i.e. above seven years imprisonment and often significantly above the midpoint. In considering the significance of a particular aggravating factor identified as present, it is necessary to view the significance of that matter in the context of the particular case. To take but one example, it has long been recognised that an offence is aggravated if property of significant monetary value or major sentimental value is taken. However, that is not to be seen in purely nominal or monetary terms. Taking what in absolute terms might be thought to be a fairly modest sum of cash becomes a matter of very great significance indeed, if the amount is taken from someone living alone who is entirely dependent on a State pension.

30. The court then, on the basis of appropriate analysis, and drawing on experience, set out the appropriate sentencing bands:

> 49. Against the background of those comments the Court would suggest that mid-range offences would merit pre-mitigation sentences in the range of four to nine

> years and cases in the highest range nine to 14 years. The Court recognises that the circumstances surrounding individual offences can vary greatly, and that is so even before one comes to consider the circumstances of the individual offender. While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed. There are just too many variables in terms of the circumstances of individual offences, but even more so in terms of the circumstances of individual offenders, for that to happen. 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 impose.

31. In prior cases where this Court considered sentencing bands, in *Molloy*, in *FE* and in *Mahon*, the parties presented a range of precedents decided by actual sentencing judges and in addition made available academic analysis. This was the process adopted in the initial sentencing bands judgment of *WD* and it has been followed since.

32. On this appeal, some 40 judgments of the Court of Appeal were gathered, helpfully summarised and presented in their original form. These demonstrate that burglary as an offence is consistently attracting headline sentences: of a mild term, or in cases where a chance might be justly given to an offender, of up to 4 years; for mid-range offences of 4 to 9 years; and for the worst offenders of 9 to 14 years. Further, the analysis provided demonstrates a consistent approach whereby those appeals tended to gravitate in accordance with the sentencing bands set out in *Casey*. What, in this context, should not be forgotten, is that the original decision was based both on precedent and experience, that nothing in terms of the tendency of the courts in sentencing has been demonstrated on this appeal as having changed; and that many dozens of decisions at trial court level have passed without appeal, thereby demonstrating the merit of the consistency within the original analysis.

33. Thus, the *Casey* decision has not been demonstrated as departing in any from existing trends and the guidance given is indicative of sound reasoning.

Limitations on judicial guidance

34. Here, it is important to address the legitimacy of the current approach to sentencing band guidance by individual judges, whether at Central Criminal Court level, as in *WD* in respect of rape, or *The People (DPP) v PH* [2008] IEHC 235, which addressed the approach to older offences, or at appellate level. There are two reasons for considering where these type of judicial exercises in sentencing fit within the sphere of judicial competence under Article 35.2 of the Constitution. Firstly, it must be demonstrated where the limitations are in constitutional terms on what judges may do in compiling an analysis of sentencing. Secondly, the implications of statutory change to this judicial function mean that the existing decisions, reflecting as these do existing trends, are constrained within boundaries that the wider powers under the Judicial Council Act 2019 enables; but in favour of another body. It is not appropriate to consider any further analysis of this legislation as it is not germane to this appeal.

35. But, here we are concerned with the application of settled precedent, namely the *Casey* decision, to an individual offender. That decision, like *WD*, could be characterised as judge-made: but not accurately. All that any of the analyses, presented for the assistance of judges, that presented sentencing bands were no more than a gathering together of what was generally known to be the approach of the courts where particular levels of gravity were evident from either the level of participation of the offender in a crime or the seriousness of what was done from the point of view of the victim and of society. Hence, to take as a paradigm, in *Mahon*, the wide variability of sentencing in manslaughter was systemised into four bands where various indications as to gravity were set out and illustrated. This did not involve this Court in ordering other judges to apply particular factors: the factors were already there and established by precedent. Nor did this Court take rules, as it were, out of the ether and, ostensibly, because these seemed to be a good idea, impose them on sentencing judges.

36. Rather, the opposite is the approach, in both *Mahon*, and in *FE*, the materials were already there. That carried weight because of the depth of reasoning and because in addition to the analysis of precedent, at appeal level where three or five or seven judges are involved, literally over a hundred years of experience of practice and judicial administration are brought to bear on the final ordering of precedent.

37. Hence, it does not seem to be possible for judges, either at trial level or upon appeal, to do more than collate information, perhaps with research assistance to amplify the submissions of counsel, and to bring to bear their experience of judicial office and as practitioners, to state what precedent and appropriate analysis demonstrates, thereby assisting colleagues who have the task of sentencing in their work. That is what the decision in *Casey* does. In consequence, *Casey*, in the field of burglary, represents both guidance as to approach and a useful distillation of the law on sentencing in this area.

Discount by reason of a plea of guilty

38. Upon a suspect being arrested, it may be that a voluntary statement admitting guilt is alleged by the prosecution to have been made to the interviewing officers. That, ultimately, may be a matter of mitigation where the offender comes to court and does not contest his or her guilt but enters a plea accepting the prosecution case. But, often, a statement is contested, so that whatever mitigation might arise from an early admission is lost. That is why it is better to keep any issue of the attitude of the offender upon arrest as a matter of mitigation. Whether that mitigation is present or not depends upon an analysis of the available evidence, since admission against interest is a fundamental exception to the rule against hearsay. Therefore, it is part of the trial evidence.

39. In the face of the various stages at which an offender may plead guilty, it is clear that such a plea may speak to contrition, real regret coupled with a purpose of a reformed approach to life, or may merely indicate the acceptance of evidence overwhelming any defence that might be posited. There may be a wide variety to this. Mitigation may inform a situation where a person actually goes to a Garda station to confess a crime, perhaps even one unknown to the authorities and, having made a formal confession to that offence, may plead guilty, or through his or her advocate, publicly indicate on the first appearance in court, a settled intention to plead guilty to the offence. A person may have an intention to plead guilty in the face of a charge proffered but may feel that the offence has been proffered at the highest level that a category of wrong may classify, whereas he or she may wish, for honest reasons and despite regret, to have their lawyer submit that a lower

category of offending is represents the just disposal of the case. That may mean communication with the Director of Public Prosecutions. Finally, to take an example, a person may grievously assault or inflict sexual violence on a visitor from another country or continent, assert their right to a trial and, only upon the victim turning up on the trial date, then change their plea to guilty out of sheer pragmatism.

40. The Sentencing Council of England and Wales, on this issue, have issued their definitive guideline, issued on 1 June 2017, and binding unless the interests of justice require departure from the guideline, Reduction in Sentence for a Guilty Plea, https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf, and that body has a statutory mandate under s 120 of the Coroners and Justice Act 2009. Thereby, judges must under s 125(1) follow the guideline and may only depart if the 'interests of justice' require them to do so. Section 144 of the Criminal Justice Act 2003 represents the grounding legislation under which an approach to this problem is made in that jurisdiction. That, in itself, does no more than state in concise form the approach that common law courts have always taken. Thus, it is provided:

> (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that court or another court, a court must take into account:
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which this indication was given.

41. Those two subsections capture the wide range of circumstances where a plea of guilty may reduce a sentence: when there was a definitive indication that the prosecution was not being put on proof; and the circumstances that inform that indication. This quote from the definitive guideline is representative of the approach in England & Wales:

> Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:
>
> a) normally reduces the impact of the crime upon victims;
>
> b) saves victims and witnesses from having to testify; and
>
> c) is in the public interest in that it saves public time and money on investigations and trials.
>
> A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings. The purpose of reducing the sentence for a guilty plea is to yield the benefits described above.

42. It is impossible to disagree with the basic reasoning that underlies that analysis. An early plea of guilty assists victims, removes the burden of testifying from witnesses, including the victim, and assists in the administration of justice. The guidelines go on to indicate other principles which, most properly, it will be the task of the Judicial Council to analyse.

43. Section 29 of the Criminal Justice Act 1999 in this jurisdiction has the same wording as the later legislation from the neighbouring jurisdiction. The section, however, also adds that just because of a guilty plea a judge is not precluded from imposing, depending on the circumstances and the gravity of the offending, the maximum sentence provided for:

> (1) In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court, if it considers it appropriate to do so, shall take into account—
>
> > (a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and
> > (b) the circumstances in which this indication was given.
>
> (2) To avoid doubt, it is hereby declared that subsection (1) shall not preclude a court from passing the maximum sentence prescribed by law for an offence if, notwithstanding the plea of guilty, the court is satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence.
>
> (3) In this section, "fixed by law", in relation to a sentence for an offence, means a sentence which a court is required by law to impose on a person of full capacity who is guilty of the offence.

44. It is good sense that both timing and circumstance inform the degree of discount to a sentence which a plea of guilty, or firm indication, deserves. Hence, there are authorities that signing a plea of guilty while an indictable offence is being processed in the District Court may deserve up to a one-third reduction in the headline sentence; *The People (DPP) v Cambridge* [2019] IECA 133, *The People (DPP) v O'Callaghan* [2020] IECA 172. Nonetheless, every sentence should meet the gravity of the offending and the principle of proportionality prevails; *The People (DPP) v Stubbins* [2021] IECA 229. The England & Wales guidelines rule out any analysis by the sentencing judge of the strength of the evidence against an accused. It surely makes sense, however, since s 29 of the 1999 Act in this jurisdiction references circumstances that, as in the case of the offenders in this case, being caught red-handed in the action of burglarising the home of elderly people, somewhat diminishes the mitigation effect of an early indication of a plea of guilty; *The People (DPP) v Kenny* [2011] IECCA 16.

45. Circumstances will vary. Definitive indications within an area where the law is being applied sensibly is based on two simple premises, those of timing and circumstance. To those fundamentals will often be added complication. Experience demonstrates that perhaps one-third discount may apply where there is an early indication and the circumstances are such as to enable a real choice on the part of the offender. Later pleas of guilty, perhaps when the foreign witness is demonstrated to have travelled from abroad to take part in the trial, or perhaps after a victim has given evidence, will be deserving of a lesser mitigation; *The People (DPP) v McDonnell* [2022] IECA 200. No clear or hard rules are either discernible or necessary. The pattern seems to indicate a variable, based on timing and circumstance, from a potential 33% to perhaps as low as 10%; *The People (DPP) v Molloy* [2016] IECA 239, *The People (DPP) v Whelan* [2018] IECA 142, *The People (DPP) v Cambridge* [2019] IECA 133, *The People (DPP) v TD* [2021] IECA 289. While pursuant to the 1999 Act, a plea of guilty does not nullify the authority of the sentencing judge to impose a maximum sentence, ordinarily a plea of guilty will have some value, in the context of the

heavy burden of proof born by the prosecution and the need to marshal perhaps reluctant or worried witness and to establish accurate testimony; *The People (DPP) v Howlin* [2022] IECA 150.

Application to this offender

46. The circumstances of this burglary, targeting the vulnerable elderly in a rural area pursuant to an organised plan which was thought through with preparation and research, puts this offence into the higher category identified by the analysis in *Casey*. It is strongly urged on behalf of John Faulkner that the sentence while, as the Court has found, tending in terms of gravity towards what is very serious, is disproportionate to the sentences imposed on his co-offenders; citing *The People (DPP) v Foley* [2023] IECA 12, *The People (DPP) v Coade* [2023] 150. A headline sentence of 9 years imprisonment for the two burglars arrested at the scene of the crime, was considered appropriate by the trial judge. There was a discount of 2 years for mitigating factors. Hence, the argument is that a proportionate sentence on this offender could not exceed that level. While generally correct that proportion is desirable in sentencing, an aggravating factor properly moves a sentence out of a band set by precedent and into another category.

47. The record of this offender would have justified an approach similar to the two co-offenders. Each had respectively 48 and 70 prior convictions (precisely as to what apart from 8 years for armed robbery for that second offender, is not before us). Had it been the situation that John Faulkner had walked into the house of the victims and had been there and then apprehended, proportion as a principle of sentencing would come to the fore. But, here it was right for the trial judge to consider the offence of burglary as having not only been planned and targeted at the vulnerable but, in contradistinction to his co-offenders, this offender had brought to fulfilment the plan of escape that was integral to the ever-present possibility of being confronted. That flight from the scene of the crime, furthermore, was done in the most flagrant and dangerous manner that put all road users in peril. Since that was integral to the plan and was not abandoned by this offender notwithstanding the capture of his co-offenders, but put into operation in defiance of the duty of all to have regard to the rights of others, it is a core element of the offending.

Order

48. John Faulkner was within his rights to put the prosecution on proof of the offences with which he was charged: but not at all wise. There was in this instance no discernible mitigation on the evidence. Given the integration of the attempt at evasion with the burglary, the sentence was justified.

49. The order of the Court is that the appeal should be dismissed.

Summary

50. It is appropriate to now concisely address the issues posed at the start of this judgment:

> 1. The criteria set out in *The People (DPP) v Casey and Casey* [2018] 2 IR 337 constitute appropriate sentencing guidelines for the disposal of burglary cases. There is nothing in the decided cases since that time that would constitute a shift in the application of sentencing principles to those guidelines. Under our system, and

absent statutory review by the sentencing guidelines committee as approved by the Judicial Council, appellate courts may apply only experience and analysis to organise precedent into a useful judgment. The decision in *Casey* therefore represents the law.

2. The sentencing of a co-accused is relevant to the sentencing of a co-offender who either pleads guilty or, instead, requires the prosecution to prove his or her guilt. Generally, there should be proportion as between co-offenders. Variables may, however, be marked as between those who lead or plan offences and those who participate at a lower level. Culpability in committing the same offence, analysed as an event, may also vary as between offenders. The criminal record of offenders may differ. A discount from the sentence by reason of an indication of a plea of guilty, at an early or late stage of proceedings, may be another factor of difference.

3. It is good practice, where a sentencing judge is dealing with two or more findings of guilty by a jury or two or more pleas of guilty on different counts by an accused, to fix an appropriate sentence for each such offence. Where there is a finding of not guilty by a jury on an offence and a finding of guilty on another, it is never appropriate to sentence contrary to the jury's verdict. Where there are a number of findings of guilty by a jury, it may be appropriate to concentrate on the event that constitutes the most grave crime. Even still, where there are other serious offences, passing a sentence for these, but observing the totality principle as to the justice of the final outcome, is appropriate. At the request of the accused, in sentencing for the most grave crime, other offences may be disposed of as being taken into account.

4. For the reasons given in this judgment, the sentence on the main burglary offence was correct. That is because the plan to flee was inherent in the offence and therefore encompassed the dangerous conduct in fleeing.