



**THE COURT OF APPEAL**

**Record No: 209/2020**

**Edwards J.  
Kennedy J.  
Ní Raifeartaigh J.**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL  
JUSTICE ACT, 1993**

**Between/**

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

**APPLICANT**

**V**

**M. R.**

**RESPONDENT**

**JUDGMENT of the Court delivered on 29th July, 2022 by Mr Justice Edwards.**

**Introduction**

1. The respondent was sentenced to various punishments on the 7th of October 2020 by Tipperary Circuit Criminal Court, in respect of the offences charged on two bills of indictment, namely Bill No. TNDP0013/2020 ("13/20") and Bill No. TNDP11/2020 ("11/20"), respectively. The respondent had pleaded guilty to all of the offences on both bills. This is an application by the Director of Public Prosecutions seeking a review of the sentences imposed upon the respondent in respect of Bill No. 11/20 only, on the grounds that the sentences imposed in that matter were unduly lenient.
2. It requires to be stated at the outset that the respondent is a person with a long history of mental health issues. He has a long-standing diagnosis of paranoid schizophrenia, alcohol dependence and antisocial personality disorder. He has been under the care of psychiatric services for many years, mostly while in the community, but also from time to time in hospital acute psychiatric units and during periods in prison.
3. Because the appellant received sentences for offences on two separate bills of indictment during the same hearing, it is necessary to review the circumstances of both cases in order to provide a full context for the application which we are asked to consider.

**Bill No. 13/20**

4. Bill No 13/20 charged a single offence of arson contrary to section 2 (1) and (4) of the Criminal Damage Act 1991 in respect of which the following evidence was heard by the sentencing court.
5. Evidence on behalf of the prosecution at the sentencing hearing was given by Sgt Tommy Hanrahan. He testified that on the 6th of May 2019 gardaí had received a report of a house fire at No 1, Croagh Garden, Croagh Street, Thurles, Co Tipperary, an address described as being in the centre of the town, or the vicinity of the centre of the town. Garda Padraig Walshe had arrived on the scene and met the respondent outside the house. There was smoke coming from the house. The Fire Brigade were contacted and attended at the scene and the situation was brought under control. While the Fire Brigade were attending to the emergency Garda Walshe spoke with the respondent in an effort to ascertain what had happened. The respondent informed him that he was the resident of the house. He then proceeded to tell Garda Walshe that he had set fire to the curtains after a priest had put words in his head. He said that the priest had taken the code for his sperm and he wanted to go and see the devil.
6. The property was damaged both by the fire and by the process of extinguishing the fire. The ultimate landlord was a Ms Cantwell who had rented the apartment to Tipperary County Council. That local authority had then made the house available to the respondent as an individual who, because of mental health and other difficulties, had been homeless on and off for some time. We understand that this was done through the agency of an organisation called "NOVAS", an Outreach Support Service for homeless persons in Thurles.
7. As to the extent of the damage caused, gardaí had been informed that approximately €16,000 worth of damage had been caused to the property by the fire, including its furniture, furnishings and fittings. Sgt Hanrahan was unable to state the position with respect to insurance. Further, no vouching documentation was furnished to the court in respect of the asserted level of damage. However, Sgt Hanrahan stated that an estimate for repairs and renovation works had been provided (it was not specified by whom) which covered *"replacing toilets, washbasins, shower screens, electric showers."* Also, *"replacing of fitted kitchen, replacing all flooring, replacing front and back doors."*
8. Under cross examination it was accepted by Sgt Hanrahan that Garda Walshe had made a statement in which he had described the damage observed by him in these terms:

"I saw a wooden armchair which appeared to have suffered fire damage on its main cushion. I also observed that the curtain in the kitchen area of the property appeared to have suffered fire damage. And that the kitchen area appeared to have suffered some smoke damage as the walls were blackened in areas with sought (sic)."
9. While it was accepted by counsel for the respondent at the sentencing hearing that the damage observed by Garda Walshe had been caused, and that there would also have been water damage to the property, it was not accepted that damage at the level

indicated by Sgt Hanrahan had occurred. Notwithstanding that the extent of the asserted damage was being disputed, counsel for the DPP did not request the sentencing judge either to conduct a Newton hearing, or to adjourn the matter to enable the State to adduce further and better evidence of the damage caused. Further, although the landlord had been apprised of her entitlement to give victim impact evidence, alternatively to provide a victim impact statement, she had not availed of this.

10. The respondent was not arrested at the scene following his admissions to setting the fire. On the contrary, a power of detention available to gardaí under the Mental Health Act 2001 ("the Act of 2001") was invoked. Specific details were not given in evidence but, in circumstances where it is not in any sense controversial that this occurred, we infer that the power in question was that under s.12 of the Act of 2001 which provides:

"12.(1) Where a member of the Garda Síochána has reasonable grounds for believing that a person is suffering from a mental disorder and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons, the member may either alone or with any other members of the Garda Síochána—

(a) *take the person into custody, and*

(b) *enter if need be by force any dwelling or other premises or any place if he or she has reasonable grounds for believing that the person is to be found there.*

(2) Where a member of the Garda Síochána takes a person into custody under subsection (1), he or she or any other member of the Garda Síochána shall make an application forthwith in a form specified by the Commission to a registered medical practitioner for a recommendation.

(3) The provisions of sections 10 and 11 shall apply to an application under this section as they apply to an application under section 9 with any necessary modifications.

(4) If an application under this section is refused by the registered medical practitioner pursuant to the provisions of section 10, the person the subject of the application shall be released from custody immediately.

(5) Where, following an application under this section, a recommendation is made in relation to a person, a member of the Garda Síochána shall remove the person to the approved centre specified in the recommendation."

11. A medical report provided by the respondent's treating psychiatrist, Dr Lydia Kostanjsak, which was submitted in the course of the sentencing hearing, indicated that following the fire the respondent was brought by gardaí to Shannondoc in the first instance. On arrival there he was agitated, verbally and physically aggressive and hit the Shannondoc doctor on call. The respondent was then taken from Shannondoc to the Acute Psychiatric Unit

(APU) at Ennis hospital. Again, in circumstances where none of this is controversial, we infer that this was on the recommendation of the Shannondoc doctor on call. On admission there he was agitated, uncooperative, and shouting that he was a God. The history that accompanied his admission was that he had tried to set fire to his bedroom prior to the admission. Although the paperwork for involuntary admission was completed, after he was assessed by a consultant psychiatrist the next day, it was decided to keep him in the APU on a voluntary basis. His condition improved in the days following his admission and he was discharged back to community psychiatric care on the 15th of May 2019.

12. The respondent came to garda notice again on the 5th of June 2019 when he was arrested following the incidents giving rise to the charges later preferred on Bill No. 11/20, about which we will say more presently. During his detention in Thurles Garda station pursuant to s.4 of the Criminal Justice Act, 1984 for the proper investigation of those offences, he was also questioned, in circumstances permitted by the statute, about what was suspected to be an arson offence committed by him in setting fire to his house a month previously. He made a number of admissions, which were described during the cross-examination of Sgt. Hanrahan. The Sergeant agreed that he had told the interviewers that:

“I was lying on my couch and I lost my temper or something. I think I heard voices. I got up and I lit the curtain with my lighter. It went up in flames. I jumped out and I got some people to call the Fire Brigade. They came down and put it out.”

13. Upon being asked if there had been much damage he had stated:

“I don’t know because I was brought to Ennis to hospital. I haven’t been back there since. I’m homeless since, living in the laneway. I lit it with my lighter. I don’t know why I did it.”

14. He had added:

“I hear voices all the time driving me ‘effing’ mad. They’re saying things about me. I can have three or four people talking to me at the one time.”

**Bill No. 11/20.**

15. Bill No. 11/20 contained six counts arising out of a spree of incidents all committed within a short time at Liberty Square, Thurles, Co. Tipperary, on the 5th of June 2019.

16. The indictment in question charged:

Count No. 1 - an offence of assault causing harm, to one Justin Coman, contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997 (“the Act of 1997”);

Count No. 2 - an offence of theft, involving the keys of a mobility scooter the property of one James Browne, contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001,

Count No. 3 - an offence of assaulting the said James Browne, contrary to s.2 of the Act of 1997;

Count No. 4 - an offence of assaulting one Kevin Carey, contrary to s.2 of the Act of 1997;

Count No. 5 - an offence of using or engaging in threatening, abusive or insulting words or behaviour, contrary to s.6 of the Criminal Justice (Public Order) Act 1994 ("the Act of 1994");

Count No. 6 - an offence of being intoxicated in a public place, contrary to s.4(1) of the Act of 1994.

17. The circumstances in which these offences were said to have been committed was as follows. Once again, evidence on behalf of the prosecution at the sentencing hearing was given by Sgt. Tommy Hanrahan. He testified that the assault on Mr Justin Coman was the first crime to be committed on the date in question. Mr Coman, an elderly man at the time and now deceased, was a well-known person around the town of Thurles, having lived there all his life. He had suffered from scoliosis for many years as a result of which he was bent over or stooped in gait, and significantly disabled. He required the use of two walking sticks to move around. The assault on Mr Coman was captured on CCTV, and the recording was played during the sentencing hearing. It was also played to us during the appeal hearing. It shows a man, identified in evidence as Mr Coman, bent over due to physical disability, walking slowly on the street in Thurles with the aid of two sticks and in the company of a third party who was assisting him. Another man, identified to us as the respondent, is seen proceeding on foot in the direction of Mr Coman and, as he draws abreast of him, launches a kick at Mr Coman, knocking him to the ground. The respondent is then seen to kick at Mr Coman's upper torso/head area while he was on the ground. At this point passers-by are seen to come to Mr Coman's aid.
18. The sentencing judge was informed that Mr Coman suffered a broken shoulder in the incident and also a cut to his face involving his lip. Mr Coman had died approximately eight and a half months after being assaulted, and his death was unrelated to the assault. However, by reason of the injury that he sustained to his shoulder, he was unable to use a walking stick on the affected side for the remainder of his life. As he required the use of two walking sticks to move around, he was, in effect, never able to walk again.
19. The respondent was known to Mr Coman. When spoken to by gardaí while waiting for an ambulance to arrive following the assault, Mr Coman nominated the respondent as having been his assailant and stated that he, the victim, knew the respondent well and indeed stated that he had played hurling with the respondent's father.
20. Moments after assaulting Mr Coman, and before the arrival of the gardaí to the scene, the respondent turned his attention to another man, a Mr James Browne, who was also on Liberty Square in Thurles at the time, and who was riding a mobility scooter. The respondent approached Mr Browne, who was seated on the scooter, and kicked out at

him, striking him on his right hip. Mr Browne then went to get off his scooter, and as he did so the respondent reached out and grabbed the keys of the scooter and threw them into a nearby dustbin. This incident was partially, although not fully, captured on CCTV, and again the available recording was played both in the court below and before us. Following the incident Mr Browne complained of some soreness over his hip, but he was not otherwise injured.

21. Shortly after the incident involving Mr Browne, the respondent perpetrated yet another random assault, this time involving a Mr Kevin Carey, aged 66, who was also present on Liberty Square in Thurles at the time. The evidence in regard to this offence was that Mr Carey received a punch to the left side of his face, around the eye, from the respondent. He then staggered as a result of being so struck and as he was staggering he got, what he described to gardaí as, "a second slap" from the same person. He identified his assailant to gardaí as being "[R] from around the town". Mr Carey suffered no significant injuries.
22. In response to reports received from concerned persons who had observed these assaults a number of gardaí arrived quickly on the scene. They encountered the respondent, who was known to them, and who was heavily intoxicated. He was hurling abuse both at members of the public and at the gardaí to such a degree that gardaí formed the view that he was a danger to himself and others. He was accordingly arrested pursuant to s.24 of the Act of 1994 on suspicion of having committed offences under s.4 and s.6 of that Act.
23. As indicated earlier, the respondent was interviewed while in detention following his arrest in relation to the Liberty Square incidents. He told interviewing gardaí that *"I took a seizure yesterday. I fell down the lane. When I got up I did stupid things. I don't remember doing any of that."* When asked to explain what he meant by *"doing that"*, he responded: *"What you showed me on the CCTV, I don't remember."* He was asked, *"Who do you remember hitting first?"* and replied, *"The lad on the crutches."* He then volunteered: *"I have Schizophrenia."* Asked then to *"tell us"*, he responded, *"I know I lashed out at people. I fell down the lane. I think I banged my head. I get mad rushes and I don't know what I'm doing. I didn't know him, but I got jailed for hitting that man before. I just lashed out at him. I didn't know what I was doing. I kicked him in the face, and he fell down. And I went back up the lane."* He added, *"I lashed out at a few people yesterday. I fall over and when I get up it's like I'm being attacked. I don't remember touching a lad's keys and I shouldn't have, but I did. I got a bang on the head yesterday and that's what's happened. I also cut my hand and banged my elbow. It feels like I was attacked and when I got up, I just went on a mad one."*

**The respondent's personal circumstances (other than his mental health issues)**

24. Apart from setting out the respondent's previous convictions which we will come to shortly, Sgt. Hanrahan was not able to say very much about the respondent's personal circumstances. He was aware that he had some psychiatric history and that from time to time he had been sleeping rough.

25. As regards the respondent's previous convictions, Sgt. Hanrahan testified that the respondent had twenty-nine previous convictions for various offences under the Act of 1994, predominantly for intoxication in a public place contrary to s.4; threatening, abusive or insulting behaviour in a public place, contrary to s.6 of the same Act, and failing to comply with a direction of a member of An Garda Síochána, contrary to s.8 of the same Act. His most recent convictions were recorded on 04/09/2018 at Thurles District Court on three charges of criminal damage. He was further said to have nine previous convictions for assaults contrary to the Act of 1997. The witness was not specific as to the type of assaults for which he was convicted in this jurisdiction, so we must (taking the most benign view of the evidence) assume that those convictions were for assaults contrary to s.2 of the Act of 1997 rather than for the more serious offences contrary to s.3 or s.4. of that Act.
26. The overall number of the respondent's previous convictions is unclear. One of the psychiatric reports provided to the court below states that the respondent was said by his solicitor to have 54 convictions. However, in the court below, the State's witness merely said that the respondent had "*an excessive number of previous convictions*" and gave the numbers indicated above in respect of the convictions under the Act of 1994 and the Act of 1997, and his recent convictions for criminal damage, but no overall figure. Moreover, one of the medical reports submitted in the case suggests that in 2014-2015 he served a 13- month sentence for criminal damage, assault and production of an article. These (with the possible exception of the assault) do not seem to have been alluded to by Sgt. Hanrahan. Further, both the psychiatric reports and a probation report submitted to the court below refer to a conviction of the respondent in England in the 1990's for manslaughter, but the State's witness gave no evidence concerning this, nor of any enquiries having been made by the gardaí to their counterparts in England with a view to being able to provide the court with relevant details. Most significantly, no evidence was given by the witness as to what penalties were imposed for any of the respondent's previous convictions, either those committed here or in England. This is not a satisfactory situation.
27. It was incumbent on the prosecution to lead comprehensive evidence concerning the respondent's criminal record, and while we believe that in the unique circumstances of the present case the information deficits we have identified will not prevent us from dealing with it, it would have been better if fuller information concerning the respondent's antecedents (in terms of criminal convictions recorded against him, the circumstances of his previous offending, and the punishments previously imposed upon him) had been provided.
28. A sentencing court at first instance, and a reviewing court on appeal, needs to know not just the number and nature of the accused's previous convictions, but also what penalties were imposed. This information is needed because it is potentially relevant (i) to the level at which any new sentence might be set, (ii) concerning the type of sentencing options to which recourse might be had, and (iii) concerning how a further sentence should be appropriately structured. For example, if an offender is before the court as a recidivist

offender, notwithstanding having been treated leniently in the past, that information might influence the level at which a further sentence would be set. So, if non-custodial options had unsuccessfully been tried on one or more occasions in the past, a sentencing judge might conceivably take the view that the time had come for a custodial sentence to be imposed. Equally, if the offender had previously been given a chance or chances in furtherance of a rehabilitative objective and there was evidence that he/she had made genuine efforts and some verifiable progress towards rehabilitation before lapsing again, a court might conceivably be disposed to affording him/her a further chance.

29. Considerable further details concerning the respondent's personal circumstances were contained in a number of reports placed before the sentencing court at first instance, i.e., the aforementioned report (undated) of Dr Lydia Kostanjsak, Consultant Psychiatrist; a report of Professor Gautam Gulati, Consultant Psychiatrist, dated 16th of July 2020, and a Probation Report dated 1st of October 2020. The following further information concerning the respondent's background was gleaned from this material.
30. The respondent is from a rural village in Co. Tipperary. He was from a large family having originally four brothers and three sisters. He was the third eldest son. He had a dysfunctional childhood characterised by family strife, parental separation and physical violence within the family home at the hands of his late father. There was a family history of alcohol dependence syndrome and a sibling suicide (by one of his older sisters, at the age of 25). The respondent attended primary school and subsequently vocational school until 14 years of age, when he left school. He had struggled educationally, being poor at most subjects and finding mathematics particularly difficult. After leaving school he worked with his father in the solid fuel business until he reached the age of 17 years. At that point he became involved in an assault on a garda and as a result of which he moved, initially to Dublin and subsequently to London. While in London he worked as a labourer on building sites. He subsequently moved to Manchester and lived there from 1990 until 2001. It appears he served a period of imprisonment in Liverpool between 1991 to 1995 having received a six-year sentence following a conviction before the English courts for manslaughter. One of the medical reports submitted to the sentencing court suggests that the circumstances were that the respondent stabbed his victim with a screwdriver through the ear in the course of an altercation. The respondent formed a relationship with a girlfriend while in England in the 1990s and lived with her for a period. He has a daughter from this relationship, aged 29 at the date of his sentencing for the present offences, with whom he has no contact. He returned to Ireland in 2001, living initially with his late mother (who later died in 2007) and then in rented accommodation. Between 2011 and 2014 he lived in his brother's shed, and from 2014 onwards he was homeless for periods, alternatively living in the accommodation provided to him by, or obtained by him with assistance from, NOVAS. The house which the respondent set fire to represented accommodation in the latter category.
31. The respondent also has a history of abusing alcohol and other substances, most recently unlicensed benzodiazepines. Many of his offences were committed whilst under the influence of alcohol.



### **The respondent's mental health issues**

32. Dr Kostanjsak had provided her report for the respondent's solicitor in her capacity as the respondent's treating psychiatrist in recent years. Professor Gulati subsequently provided an independent report for medico-legal purposes having been retained to do so by the respondent's solicitors and in that connection interviewed the respondent on two occasions while he was on remand in Limerick prison in connection with the present case. When conducting the second of these interviews, Prof Gulati had to terminate it prematurely in circumstances where the respondent became suddenly irate and threatened to break Prof Gulati's jaw. Professor Gulati had the benefit of Dr Kostanjsak's report when providing his assessment.
33. The history provided by Dr Kostanjsak was that the respondent was first hospitalised in a psychiatric unit in south London around 1999 – 2000. However, she had no details as to his mental state at this time. The respondent was first admitted to St Michael's psychiatric unit in Clonmel in 2001 and since then he had had numerous admissions to that unit and also to the psychiatric unit at Ennis, Co. Clare following the closure of St Michael's. Professor Gulati had received a similar history. The respondent was noted to have also served several periods in prison and while in prison had been regularly assessed and reviewed by prison psychiatric services.
34. Psychiatric diagnoses recorded included paranoid schizophrenia, antisocial personality disorder and alcohol dependence syndrome. He has been on anti-psychotic medications for several years including Olanzapine and Haloperidol. Throughout 2018 and 2019 the respondent received regular psychiatric care on both an inpatient and outpatient basis. On some of those occasions he was found to be intoxicated as well as exhibiting psychiatric symptoms. During 2018 the respondent was admitted to an acute psychiatric unit on seven occasions, mostly because of having paranoid thoughts, audio hallucinations, erratic and threatening behaviour. While the exact chronology is unclear, the report of Dr Kostansjak suggests that he was likely provided with housing accommodation through NOVAS either in late 2018 or in early January 2019, in that she records that at an outpatient psychiatric review on 24/01/2019 he told his reviewer that *"he was happy to have new accommodation and good support from the NOVAS staff."*
35. In 2019 he was admitted to an acute psychiatric unit on a further two occasions. On the first of these occasions, on 12/02/2019, he had been significantly intoxicated. His mental state stabilised quickly following his admission. He accepted he was drinking alcohol excessively and that when he was drunk his paranoid thoughts and the voices he was constantly hearing became worse. He was discharged on an understanding that he would go to his father's house and stay with him, but he did not return there and instead returned to Thurles.
36. Approximately two months later the respondent was readmitted to the acute psychiatric unit in the circumstances described above at paragraphs 10 and 11 of this judgment. This admission was in the immediate aftermath of his setting fire to his NOVAS provided home. Upon admission he reported ongoing issues with local hooligans who he claimed had been harassing him almost every day. (This was against the background that at an

earlier outpatient review he had complained, *inter alia*, that local “young lads” had vandalised his window. He had also on this occasion described paranoid thoughts regarding the Catholic Church who, he thought, wanted to turn off his electricity.) He claimed that having reported his (perceived) harassment to gardaí and to NOVAS to no avail, and not knowing how otherwise to deal with his problem, he had set fire to his bedroom. Following his re-admission to acute psychiatric in-patient care his condition was again stabilised, and in due course he was again discharged back to community mental health care.

37. Upon being so discharged, the respondent continued to attend for outpatient treatment (including depot injections of his antipsychotic medication) and reviews. He was reported as continuing to drink alcohol frequently. He was now homeless again (his NOVAS provided residence having been damaged in the fire) but it was recorded that he was showering and washing his clothes in NOVAS.
38. Dr Kostanjsak concluded that the respondent was a psychiatric patient who had chronic, mainly positive, symptoms of schizophrenia (paranoid thoughts and audio hallucinations) which were changeable in their intensity from day-to-day. Alcohol consumption made his mental state worse, due on the one hand to the simultaneous effects of alcohol and psychiatric medication on his mental state, and on the other hand to the fact that his antisocial personality traits were more prominent under the influence of alcohol. Speaking of the first five months of 2019, she reported that the respondent was taking psychiatric medication (oral medication under the control of the NOVAS team and depot injection given by the community mental health team) and was drinking alcohol at the same time. Consequently, his mental health state was very changeable. He continuously had chronic positive symptoms of psychosis and, it was presumed, when he was drunk his level of control of his behaviour was significantly limited. Dr Kostanjsak did not offer any recommendations to the court concerning how it might deal with the respondent.
39. Professor Gulati’s assessment as to the respondent’s mental state was consistent with Dr Kostanjsak’s conclusions in that respect. He opined that the respondent was suffering with psychosis around the time of the current offences albeit alongside alcohol and benzodiazepine misuse. He asserts *“this may have been a case where the insanity defence was potentially applicable.”* Of course, while that may have been his view, it must be pointed out that no issue as to the respondent’s fitness to plead was raised either in the court below or before us, and the respondent pleaded guilty to the offences with which he was charged upon arraignment.
40. Be that as it may, Prof Gulati expressed agreement with a risk assessment in respect of the respondent apparently conducted by the Central Mental Hospital (“the CMI”) in 2015 while the respondent was in-patient there from the 16th of June 2015 to the 20th of August 2015. This assessment appears in the Discharge Summary from the CMI which accompanied the respondent’s discharge from there to the North Tipperary Mental Health Service on the 21st of August 2015, and it is summarised in Prof Gulati’s report. The summary provided there states:

"[The respondent's] mental state during the admission was described as psychotic, paranoid and guarded. Risk assessment in respect of the risk to others (HCR 20) recorded multiple risk factors for future violence including previous violence, young age at first violent incident, relationship instability, employment problems, substance use problems, major mental illness, early maladjustment, personality disorder, prior supervision failure, lack of insight, active symptoms of major mental illness, impulsivity, unresponsiveness to treatment, negative attitudes, a lack of feasible community plans, exposure to destabilisers, lack of personal support, non-compliance with remediation attempts, stress. The risk formulation for that outside of a custodial setting reported [the respondent] has a history of multiple acts of violence, including assault and arson. These events have occurred both in the presence and absence of psychotic symptoms. Risk increases with poor medication adherence and alcohol misuse, which are likely to occur outside supervised setting. [The respondent] was previously convicted of manslaughter and is currently serving a sentence for assault'. Assessment also noted potential risk factors for harm to self."

41. Somewhat unsatisfactorily, neither we nor the sentencing court were provided with a copy of the CMI's 2015 risk assessment, or any indication of the circumstances leading to the respondent's admission to the CMI.
42. Professor Gulati concluded that given the respondent's history of homelessness, substance and alcohol misuse, non-compliance with medication and level of hostility, a precipitous or unplanned return to the circumstances that obtained prior to his incarceration would pose a high risk both to others and increase the risk to the respondent himself of neglect, self-harm and suicide. He recommended that should the respondent receive a custodial disposal, that he would continue to receive input from visiting psychiatry services during his time in prison with referral to the Central Mental Hospital under s.15 of the Criminal Law (Insanity) Act 2006 ("the Act of 2006") should there be any significant deterioration in his mental state.

### **The Probation Report**

43. The probation officer's report provides a history of the offences as related to her, noting that, in the case of the unprovoked attacks the subject matter of Bill No. 11/2020, the respondent claimed to be unable to recall the incident and that according to gardaí he was intoxicated at the time of his arrest. She asserts that it is of concern that the respondent has a history of random unprovoked assaults and that two of his victims were vulnerable due to mobility issues. In her view the respondent demonstrated limited insight into the harm he had caused and was not open to discussing the incidents for long. She assessed the respondent as representing a very high risk of reoffending in the following 12-month period, pertinent factors in that respect being his previous convictions, homelessness, substance misuse, mental health issues and lack of family supports.
44. The report reviews available garda criminal records, and records of previous probation service involvement with the respondent. It provides some social history consistent with that described earlier in this judgement. The probation officer states that she had

discussed the respondent's accommodation options upon release with staff at NOVAS and the local county council. She had been told that, unfortunately, due to his assaultive behaviours and the arson charge, NOVAS would not be able to offer him accommodation in their hostel. A county council representative had indicated that the respondent would need to be reassessed for housing support but that it was unlikely he would be offered a property in circumstances where he had set fire to a property previously provided to him. It was therefore likely that the respondent would be homeless upon his release from custody.

45. It was noted that the respondent was on a standard regime while in custody and there had been no prison "discipline" problems. He had refused to attend school as, in his own words, "*he is not a child*" and was maintaining that he could not work due to his medical issues. The report goes on to review and describe his mental health issues and addiction issues.

46. The probation officer concluded that:

"...there are significant concerns regarding [the respondent] returning to the community without adequate supports in place. Prior to entering custody he was homeless and living in an alleyway and due to his assaultive behaviour and arson charges it is very unlikely that he will be accommodated by homeless services upon release as they do not have any appropriate accommodation options for his presenting issues.

Garda criminal records indicated that [the respondent] has previous convictions for violent behaviour. ... [H]e is assessed as a very high risk of offending in the following twelve month period. ... [T]here are multiple risk factors for future violence.

It is my assessment that [the respondent] does not present as stable enough for probation supervision once he returns to the community due to his significant mental health concerns. There are limited interventions available due to his unwillingness to address his substance misuse issues and being homeless. This service is likely to have minimal influence over [the respondent].

From the information available, it appears that [the respondent's] needs are best met by the mental health services, but I understand that he often has difficulty i[n] engaging with them and even when deemed stable he has demonstrated offending behaviour. Therefore, there are significant concerns for further offending."

**The sentencing judge's remarks and the sentences imposed**

47. The transcript records the following pertinent remarks of the sentencing judge and subsequent exchanges with counsel:

"JUDGE: Very well. Thank you. Well, I've heard the evidence from Sergeant Hanrahan and what's been advanced by the defence. And particularly, in regard to where these offences lie on the scale. Now, I'm going to deal with the most serious

aspect of this matter which is the section 3 assault on Mr Coleman. This man was an elderly man, he was only able to walk with two sticks, he had scoliosis and was bent over completely. He was kicked in the head as a result of which he received a broken shoulder and cuts to his lip. He was not able to walk after that because he needed to use both walking sticks and he didn't live independently after that. He passed away on the 28th of February of this year and that is unconnected to this incident. And I'm disregarding his passing from the point of view of the sentence. Certainly, with regard to this incident it has to be borne in mind that the most serious aggravating factor is the very high risk which the defendant poses. He's assessed as a high risk due to his previous convictions which include nine assaults. His homelessness, substance misuse, mental health issues and lack of family supports. Now, in mitigation he made early admissions and an early plea. The assaults were unpremeditated and at the time he was suffering from psychosis. He's 52 years of age, he's been diagnosed as having paranoid schizophrenia, antisocial personality disorder and alcohol dependence. Between the arson on the 6th of May on his own dwelling, and the assaults on the 5th of June, he was homeless. A factor in the assaults is he was drinking.

It's a difficult case to assess. The normal matters to be taken into account such as the offence itself and the circumstances of the offender, the effect of the crime upon the victim. The need to deter and effect [the need for deterrent effect??], and I know that [defence counsel] has advanced with the excerpt from Mr O'Malley [Sentencing Law and Practice, 3rd edn 2016] that the question of a deterrent effect isn't really of much relevance in this particular incidence [instance ??]. And the prospect[s] of rehabilitation during courses whether in custody or otherwise have to be tempered by the principle of proportionality. But I think a factor in this case that has to be taken into account, particularly having regard to the assessment of high risk and the unfortunate medical and mental health issues which the defendant has, is the protection of the public. I'm specifically talking about the protection of the public. I'm not talking about preventative detention here. And I think in the circumstances I will accept that it was in the mid-range. I'll [im]pose a sentence of three and a half years. I will suspend one and a half years of that sentence and backdate it to the date he entered into custody. And whilst in custody he is to receive psychiatric services. Professor Gulati has said he should receive input from visiting psychiatric services through his time in prison with referral to the Central Medical Hospital under section 15 of the Criminal Law Insanity Act 2006, should there be any significant deterioration in his mental state. The one and a half years will be suspended under his entering a bond to keep the peace for a period of three years.

The other two assaults, the section -- the two section 2's; I'll impose a sentence of four months each on those to run concurrent. The arson, given the frailties with regard to possible conviction and given the fact that at the time he was hallucinating. He told the garda that a priest had taken the codes to his sperm and he was obviously delusional at the time, I'm going to take that into account.

COUNSEL FOR THE PROSECUTION: Judge, just in relation to those matters just to keep us right, Judge.

JUDGE: Yes?

COUNSEL FOR THE PROSECUTION: There are some summary matters which were public order matters on counts 5 and 6. If the Court can just take those into account ... Into consideration.

JUDGE: I will take those into account as well.

COUNSEL FOR THE PROSECUTION: Now, with respect of the arson, Judge, I'm not urging upon you to change at all.

JUDGE: Yes.

COUNSEL FOR THE PROSECUTION: Just to facilitate to make sure the orders are correct. That is a separate indictment in the book of evidence. So, I understand what the Court's intention is to do but I don't think that the Court can say albeit that we've run them as effectively one sentence hearing.

JUDGE: Okay. Well then --

COUNSEL FOR THE PROSECUTION: I think the Court will have to impose some sentence that would give the same effective meaning, I think, Judge.

JUDGE: Yes. Well, what I'll do there is I'll impose a sentence of two years which I'll suspend for three years."

[commentary/redactions in square brackets by the Court of Appeal]

### **Applicant's submissions**

48. Although the Notice of Application seeks a review of all of the sentences imposed for offences charged on Bill No. 11/2020, the main focus of the applicant's complaints, both in written and oral submissions, has been in respect of the sentence imposed for the s.3 assault on Mr Justin Coman, that being the most serious of those offences.
49. In written submissions on behalf of the applicant, the court's attention was drawn to this court's decision in *The People (Director of Public Prosecutions) v. McGrath, Dolan and Brazil* [2020] IECA 50, a conjoined judgment involving three undue leniency reviews in respect of the sentences imposed in each case for serious s.3 assaults. In finding the sentences to have been unduly lenient in each instance, the court indicated that for high-end assaults, notwithstanding that the maximum available penalty for s.3 assault is five years, a five-year headline or pre-mitigation sentence was certainly not excluded. Moreover, we are reminded that we said that judges at first instance should not operate on the basis that a starting point of five years was not generally available and only to be considered in exceptional circumstances.

50. It was submitted that in the present case, in imposing an effective sentence of two years imprisonment, being three and a half years with the final 18 months suspended for three years, the sentencing judge failed to have adequate regard to the gravity of the offences and the significant aggravating factors in the case, and that he had undue regard to the limited mitigating factors in the case.
51. The applicant submitted that the aggravating factors in the case included:
- (a) the serious, violent nature of the offence(s);
  - (b) an unprovoked and vicious attack on a vulnerable victim;
  - (c) the injuries suffered by Mr Coman, i.e., a cut lip and a broken shoulder;
  - (d) the effect of the injuries on Mr Coman, i.e., he lost his independence and never walked independently again;
  - (e) that the assaults were committed in a spree involving multiple victims;
  - (f) that the respondent was assessed as being at a high risk of committing a similar violent offence within the next 12 months;
  - (g) the physical impact on the other victims;
  - (h) the previous convictions of the respondent for numerous assaults.
52. It was complained that the sentencing judge further failed to consider all the aggravating factors prior to identifying where the appropriate headline sentence lay. Although the sentencing judge had referred to the aggravating factors in a general way, he did not identify them in any list such as that above. Neither for that matter did he set out a list of the mitigating factors.
53. It was further complained that, whereas the sentencing court identified that this case fell into the mid-range, that was to under-assess the gravity of the case given the vulnerability of the victims, the manner of the assaults, the nature of the injuries suffered and their effect on the principal victim Mr Coman in taking from him, as they did, his ability to walk and live independently for the rest of his lifetime.
54. It was submitted that, notwithstanding having identified certain aggravating factors in the case, the sentencing judge erred in principle in placing the s.3 charge in the mid-range in terms of its gravity, and in nominating an effective headline sentence of three and a half years. It was submitted that, in view of the respondent's culpability and significant previous convictions, the case was not a mid-range case and that the sentencing judge should have started in the high range. Indeed, it was suggested, considering how this Court approached matters in the *The People (Director of Public Prosecutions) v. McGrath, Dolan and Brazil*, that it would have been open to the sentencing judge to have perhaps started at the five year maximum.

55. It was further submitted that the sentencing judge had also erred in attaching too much significance to the mitigating factors in the case, and that the discount afforded by the suspension of eighteen months of the three-and-a-half-year effective headline sentence was excessive.
56. Moreover, it was complained that the conditions attaching to the suspended portion of the sentence were insufficiently onerous. It was pointed out that whereas the sentencing court indicated that the respondent was to attend with psychiatric services when in prison, the part suspension of the sentence was only made conditional upon the respondent being of good behaviour and keeping the peace.
57. The applicant submitted that, even taking into account mitigation for the respondent's mental health difficulties, this case merited a significant custodial sentence; being one which gave sufficient consideration to the seriousness of the offending, the effect on the victim and the need for general and specific deterrence.
58. Having regard to all these matters the applicant maintains that the sentences ultimately imposed, and in particular that for the offence involving Mr Coman, were outside the norm and represented a substantial departure from what could be considered appropriate sentences, or an appropriate sentencing package reflecting the totality of the respondent's offending behaviour and were unduly lenient in the circumstances.

#### **Respondent's submissions**

59. It was argued on behalf of the respondent that the sentences imposed were not unduly lenient. Indeed, the point was made, although wisely not pressed with undue vigour, that the sentencing judge at first instance may in fact have gone too far in concluding that the respondent had kicked Mr Coman in the head. In fact, and counsel is correct in this, the evidence had been somewhat equivocal as to whether the kick which the respondent launched at Mr Coman when he was on the ground had connected with his upper torso or with his head. Be that as it may, counsel for the respondent submitted that the assault had not been premeditated. Moreover, it had not involved multiple assailants and had not involved the use of weapons such as the broken bottles and iron bars that had been used in the *McGrath, Dolan* and *Brazil* cases.
60. It was submitted that the respondent's mental health difficulties had been properly emphasised at the sentencing hearing, and that this had properly influenced where the offence was to be placed on the scale of gravity. A submission to that effect, supported by a quotation from O'Malley, *Sentencing Law and Practice*, 3rd edition, 2006 concerning the relevance of a mental disorder to sentencing, was made to the court below. The sentencing judge had taken that on board and had expressly acknowledged that at the time of the offences the respondent was suffering from psychosis.
61. Counsel for the respondent sought to join issue with the suggestion in the submissions on behalf of the applicant that the mitigation in the case was "limited". On the contrary, counsel for the respondent maintained that there was significant mitigation, which she identified as:



- (i) there were guilty pleas, entered at the first available opportunity;
  - (ii) the respondent had been fully cooperative with gardaí and had made full admissions;
  - (iii) the respondent had had a very difficult life, had no family support, was mentally unwell, was homeless and was dependent on alcohol;
  - (iv) the respondent had been in custody solely in relation to these matters for 16 months. He had not made a bail application as he could not provide a residential address;
  - (v) the respondent was a poor candidate for prison given the state of his mental health.
62. It was further submitted that in this case there was less need to provide for general and individual deterrence than would be true in the case of someone who committed such offences in circumstances of good mental health.
63. Counsel for the respondent submitted that in all the circumstances the ultimate sentence of three and a half years' imprisonment with 18 months suspended was not, as the applicant contended, so disproportionately low as to warrant the intervention of this Court.

#### **Analysis and Decision**

64. The law with respect to undue leniency appeals was not the subject of any dispute between the parties in this case. It was accepted that it is well established from cases such as *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279; *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 IR 356; *The People (Director of Public Prosecutions) v. Stronge* [2011] IECCA 79; and *The People (Director of Public Prosecutions) v. Mahoney* [2016] IECA 27 that the onus of establishing undue leniency rests on the applicant. Moreover, before a court would be justified in intervening on the basis of undue leniency it would have to be established that the sentence imposed at first instance represented a substantial departure from what would be considered the norm in such cases. It was in *McCormack* that the former Court of Criminal Appeal said:
- “In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, say perhaps in exceptional circumstances, have been caused by an obvious error of principle.”
65. As interpreted in *Mahoney*, the concept of “the norm”, to which the Court of Criminal Appeal referred to in *McCormack*, “refers to what might be predicted to be the result, within a reasonable margin of appreciation, of a faithful application to the facts of the individual case of the appropriate sentencing principles, whether or not there are any useful comparators.”

66. Moreover, McKechnie J. giving judgement for the Court of Criminal Appeal in the *Stronge* case stated *inter alia*:
- “(i)...
- (ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;
- (iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge’s discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate.”
67. The trial judge in this case was concerned with sentencing for a number of offences. In terms of cardinal seriousness, the most serious he was concerned with was the arson offence charged upon Bill No. 13/2020. However, the DPP has not sought to suggest that the sentence imposed for that offence was unduly lenient. In the context of the offences charged upon Bill No. 11/2020, the most serious of those in terms of its cardinal seriousness was the offence of assault causing harm to Mr Justin Coman, contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997. This is an offence which is capable of being tried both summarily and on indictment, and for which the legislature has specified that a person shall be liable on conviction on indictment to a fine or to imprisonment for a term not exceeding five years or to both. (We should say in passing that although the statute mentions only fine and/or imprisonment we do not believe that the legislature intended to preclude a court from having recourse in an appropriate case to other non-custodial sentencing options such as a wholly or partly suspended sentence, community service, or conditional discharge under s.1(2) of the Probation of Offenders Act 1907.)
68. There is no doubt but that the assault on Mr Coman was an egregious and vicious one when viewed objectively and without knowledge of the offender’s personal circumstances. Significant violence was used which, unless some special excusing circumstances existed, would suggest a high level of intrinsic culpability on the part of the offender. Moreover, significant harm was done.
69. Despite that being the case, the sentencing judge was not concerned with assessing the gravity of the offence by wholly objective standards and with sentencing on that basis alone. Rather, he was concerned with looking at the ordinal seriousness of the offence in the circumstances in which it was committed, and he was required to impose a sentence appropriate only to its ordinal seriousness. The concept of ordinal seriousness reflects the fact that there may be differing degrees of gravity associated with the commission of an offence, regardless of how it is cardinally ranked by the legislature, depending on both the actual culpability of the offender in committing the offence, and the harm done.

70. Moreover, in our jurisdiction it is a constitutional requirement to take account of the personal circumstances of the offender, including the degree of his/her individual culpability. It was expressly acknowledged by Henchy J. in *State (Healy) v. Donoghue* [1976] IR 325 (SC) 353, that cumulatively Article 38.1, Article 40.3.1o, Article 40.3.2o and Article 40.4.1o of the Constitution necessarily imply, "*at the very least, a guarantee that a citizen shall not be deprived ... where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances.*"
71. We accept that in principle, and in an appropriate case, it would have been open to the sentencing judge to have started at the five year maximum in determining his headline sentence. Our decision in *The People (Director of Public Prosecutions) v. McGrath, Dolan and Brazil* [2020] IECA 50, relied upon by the applicant, makes clear that potential recourse to the statutory maximum is not to be regarded as something reserved to exceptional cases. It is generally available to be applied in an appropriate (but not necessarily exceptional) case. However, the controversy in the present case revolves in large measure around whether this case was in fact an appropriate case in which to have started at the maximum penalty. Counsel for the applicant maintains that it was such a case, and counsel for the respondent vehemently disputes that that was so.
72. As stated above, there can be no doubt but that viewed objectively the level of violence meted out to the unfortunate Mr Coman would have been suggestive of a high level of intrinsic culpability on the part of the respondent, unless there had existed some special circumstances bearing on culpability and tending to mitigate it. However, counsel for the respondent has maintained, both before this Court and the court below, that special circumstances bearing on culpability and tending to mitigate it did exist in this case. In that regard counsel for the respondent points to the fact that the sentencing judge had evidence before him that the respondent was at the time suffering from serious mental illness, in the form of schizophrenia and was likely in the throes of an acute psychotic episode. However, in circumstances where the respondent did not seek to avoid legal liability for his offending conduct by pleading insanity, and indeed pleaded guilty before the Circuit Court, the case made on sentencing was in effect one of diminished moral responsibility resulting in greatly reduced culpability.
73. It has always been open to an accused to argue at his sentence hearing that his or her culpability for a crime was diminished on account of a cognitive impairment or mental health disorder, and to suggest that on that account a lesser sentence should be imposed than would otherwise be merited. For the avoidance of doubt, this is an entirely different thing from the concept of avoiding legal liability for an offence on the basis of diminished responsibility. The avoidance of legal liability for a crime on grounds of diminished responsibility is only possible where murder is charged. Section 6 of the Act of 2006 introduced a new partial defence, applicable only in cases where an accused faces a charge of murder, of diminished responsibility arising from "*a mental disorder*", defined in the legislation as including "*mental illness, mental disability, dementia or any disease of the mind but does not include intoxication*"; and where that defence is successfully

invoked in a murder case in which liability (i.e., the defendant's legal responsibility, as opposed to his culpability, for committing the homicide) is in issue, murder may be reduced to manslaughter. Manifestly, s.6 of the Act of 2006 can have no application in the present case.

74. That it is, and has always been, potentially open to any accused to contend at a sentencing that his or her culpability for a crime was diminished on account of the fact that he was suffering from a psychiatric condition at the time of committing the offence was put beyond doubt by the Supreme Court in *The People (Director of Public Prosecutions) v. Redmond* [2006] 3 I.R. 188 (a case which just predated the coming into operation of the Act of 2006), with Geoghegan J. stating (at pp205/206):

"I now turn to the question of sentencing. It has been suggested that given that there is no defence in Irish law of diminished responsibility the sentencing judge on the plea of guilty cannot take into account diminished responsibility. I would wholly reject this proposition. If, for instance, in the past a person who suffered from psychiatric condition of some kind but did not qualify to come within the rather narrow principles of the M'Naghten Rules was found guilty it could not have been the case, in my view, that the sentencing judge could not take into account whatever lessening of responsibility there may have been. The sentencing judge can take into account any factor at all whether physical or mental which might tender reasonably to either mitigate or aggravate a sentence."

75. A later re-iteration of this principle by the Court of Criminal Appeal is to be found in *The People (Director of Public Prosecutions) v. C* [2013] IECCA 91, and an example of its application by this Court is to be found in *The People (Director of Public Prosecutions) v. Kilmartin* [2015] IECA 54. In the C case, Fennelly J., giving judgment for the Court of Criminal Appeal stated:

"39. This Court accepts that, if it is shown that the offending behaviour of an accused person has been significantly caused or affected by his psychiatric condition, that is, depending on all the circumstances, capable of amounting to a mitigating circumstance. The culpability of a person for a particular act will always be considered in the light of the presence or absence of deliberation or malice associated with the act. Calculation and deliberation will aggravate, while inadvertence or accident may mitigate. Where the act has been significantly the result of a psychiatric condition, the moral guilt of the accused may be less, depending on the circumstances. That qualification is important. The sentencing court will have to take account of all the circumstances, which will include the extent to which the accused is aware of or responsible for his condition or careless in regard to its treatment."

76. Further, Professor Thomas O'Malley in his seminal work "*Sentencing Law and Practice*", 3rd edn, 2016, at 6-20, references a passage from a judgment of the Victoria Court of Appeal in *R v. Tsiaris* [1996] 1 V.R. 398 at 400, as illustrative of wide acceptance throughout the common law world of the notion that mental disorder may reduce

culpability but also potentially influence sentencing in other ways. It may be noted in passing that in the C case, Fennelly J. also references this passage as having been cited to the court. The court in *Tsiaris* observed:

“Serious psychiatric illness not amounting to insanity is relevant in sentencing in at least five ways. First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from a serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health.”

77. Professor O'Malley goes on to point out that these principles, sometimes referred to as the "*Tsiaris*" principles, have since been updated and reformulated by the Victoria Court of Appeal in *R v. Verdins* [2007] VSCA 102, becoming in that recasting the "*Verdins*" principles (i.e., they are referred to as such on the website of the Sentencing Advisory Council of the State of Victoria – see <https://www.sentencingcouncil.vic.gov.au/about-sentencing/mental-impairment-and-sentencing>). In so recasting them, that court has said:

“32. Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

1. *The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.*
2. *The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.*
3. *Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.*
4. *Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of*

*the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.*

5. *The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.*
  6. *Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."*
78. The evidential picture with which the sentencing judge in the present case was faced was complicated by further evidence that the respondent was also significantly intoxicated at the time of the offence, which intoxication was likely to have made his disturbed mental state even more pronounced, and that his intoxication was self-induced.
79. Moreover, Dr Kostanjsak's report suggested that at a point in time some months prior to the offences, when the respondent had been stabilized following an acute psychotic episode, he had shown that he had some appreciation (at least at that point, having returned to a stable mental condition) of the adverse effects of excessive alcohol intake on his mental state. In that regard, she records that in the course of his admission as an in-patient to the acute psychiatric unit in Ennis, following an acute psychotic episode in February 2019, approximately three and a half months prior to his assault on Mr Coman, the respondent, having been stabilised, *"accepted that he was drinking excessively and that when he is drunk all chronic paranoid thought and voices he has constantly, become worse."*
80. What is not known in the present case, or at least there was no evidence provided either to the court below or to this Court with respect to it, is whether the deterioration of the respondent's mental state in the lead up to his assault on Mr Coman was precipitated by prior heavy drinking, or the reverse. Moreover, if indeed the deterioration of the respondent's mental state on the occasion in question was precipitated by prior heavy drinking, it is also not known, no evidence having been provided either to the court below or to this Court with respect to it, the degree to which the appreciation of the dangers associated with excessive drinking in his condition which the respondent had previously been prepared to acknowledge, at least when mentally stable, would have persisted when he was subsequently once again not mentally stable; and, if so, whether it could have been expected to act upon him as a restraining influence. Given these evidential deficits, it is difficult to see how a court, either when sentencing at first instance or upon an appeal/undue leniency review, could be satisfied to the requisite standard that there was a culpable failure on the part of the respondent in this case to abstain from alcohol.
81. As to the standard of proof in regard to facts at sentencing, and in particular with respect to contested aggravating facts, Prof. O'Malley references a number of cases from Canada, Australia, New Zealand and England and Wales to the effect that when, at a sentencing

hearing, the prosecution seeks to prove aggravating factors which are contested, it must prove them beyond a reasonable doubt. That respected author then comments:

“There is no reason to believe that the law is any different in this jurisdiction, save that a defendant may discharge any onus resting on him or her on the balance of probabilities.”

(See: “*Sentencing Law and Practice*”, 3rd edn, 2016, at para 31-38.)

82. Since the publication of that edition of “*Sentencing Law and Practice*”, the Supreme Court has addressed, in *The People (Director of Public Prosecutions) v. Mahon* [2019] IESC 24, the somewhat different, but not wholly unrelated, issue of how a sentencing judge may resolve the difficulty arising where there is an ambiguity in the factual implications of a jury’s verdict. The judgment of Charleton J., on behalf of the Supreme Court, although not specifically on point with respect to the standard of proof that applies in relation to contested aggravating factors at sentencing, stated (at para 33 of the judgment ) that, “*the judge is entitled to come to an independent conclusion as to the relevant facts upon a consideration of all of the evidence presented before the jury. Any such fact must be found only if the trial judge considers that it has been proven beyond reasonable doubt during the course of the trial.*” The approach taken by Charleton J. in *Mahon* suggests to us that the opinion ventured by Prof. O’Malley, and which we have quoted, is correct.
83. Before proceeding to further discuss the merits of the undue leniency application before us and rendering a decision in that regard we wish in the first instance, and as a preface to doing so, to offer some general observations about sentencing in this difficult area, i.e., where the offender may have been suffering from a mental disorder, or indeed a significant cognitive deficit, at the time of committing the offence, and who may or may not still be suffering in that way.

*Recommended general approach to sentencing in cases  
involving a significantly cognitively impaired or mentally ill offender*

84. In circumstances where there is little guidance, apart from that already mentioned, in Irish jurisprudence concerning how a judge at first instance should approach the sentencing of an offender who may have had diminished (or, in some cases, no) moral (as opposed to legal) responsibility for their offending conduct, and in circumstances where there are as yet no guidelines in the area produced by the Judicial Council, we think it may be helpful to offer some observations in that regard.
85. In doing so, this judgment is not to be treated as a “formal” guideline judgement in the sense that we have spoken about previously in *The People (Director of Public Prosecutions) v. O’Sullivan* [2020] IECA 331, as we have not given advance notice of an intention to offer guidance, nor have we offered the parties an opportunity to make submissions of wider scope than those strictly necessitated by the circumstances of the case. Rather it should be treated as guidance of the more informal variety also spoken about in that case. Although it may not be, and does not purport to be, comprehensive in

its scope, we advance it in the belief that first instance judges, victims, accused, legal practitioners and other interested parties may still find it helpful.

86. We should perhaps preface our remarks by observing that in certain other jurisdictions there is considerable material available by way of formal guidance and/or information of potential assistance. For example, in England and Wales, the Sentencing Council there has published an overarching guideline on "*Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*", effective from 1 October 2020. Further, the Scottish Sentencing Council has recently published a literature review entitled "*Mental Health and Sentencing*", contained in a Sentencing Academy Report jointly authored by Ailbhe O'Loughlin; Jay Gormley; Lucy Wilmott; Jonathan Bild; Julian Roberts and Anna Draper (2022). We have drawn on this material, and on the guideline judgements of the Court of Appeal (Criminal Division) in England and Wales in *R v. Vowles* [2016] 2 Cr App R (S) 6, and *R v. Edwards* [2018] 2 Cr App R (S) 17, to the extent that they are relevant and apposite to the situation in this jurisdiction.
87. In doing so, we have used caution bearing in mind that the statutory framework for dealing with offenders with cognitive difficulties or mental health disorders in those jurisdictions is radically different to that in this jurisdiction. We would point to three differences of significant importance in that regard.
88. The first is that the statutory framework in the neighbouring jurisdiction of England and Wales equips judges with a much wider range of tools in their sentencing toolbox in terms of how they may potentially dispose of such a case and this allows them to consider more treatment-focused options. In that regard, the legislation allows, *inter alia*, for the making of a so-called "hospital order" in an appropriate case, on foot of which the person to be sentenced may be admitted to a hospital for mental health treatment and detained there until further order of the court rather than being committed to serve a custodial sentence in a prison setting. Other forms of disposal, e.g., community sentences, may have mental health treatment requirements attached to them. There is presently no (even approximate) analogue in Irish law for these treatment-focused sentencing disposals (at least absent a finding of not guilty by reason of insanity in a case where the statutory insanity defence provided for in s.5 of the Act of 2006 was relied upon).
89. It is important, however, to allude at this point, and in this context, to the judgment of the former Court of Criminal Appeal in this jurisdiction, in the *People (Director of Public Prosecutions) v. McMahon* [2011] 3 I.R. 774. This was an undue leniency appeal involving a mentally ill offender, with a previous conviction for manslaughter, who had pleaded guilty to offences contrary to s.3 and s.4 of the Act of 1997, having stabbed his psychiatrist during an acute psychotic episode. The central issue in the case concerned whether it would have been open to, and indeed more appropriate for, the sentencing court at first instance, which had imposed sentences of 3 years imprisonment (on the s.3 count) and 10 years imprisonment (on the s.4 count), to have imposed a life sentence on the accused on the s.4 count, in circumstances where the accused, by reason of his mental illness, posed a serious risk of immediate harm to others. The prosecutor had not



sought to argue that the sentences actually imposed were outside the permissible range of sentences for (in the words of O'Donnell J. who gave judgment for the court) "*what might be described, however inaccurately, as an ordinary offender who committed an offence contrary to s.4 of the Act of 1997 shortly after serving a prison sentence for manslaughter.*" Rather, the case was made that a life sentence could have been, and ought to have been, imposed, essentially for public protection purposes, a contention rejected by the Court of Criminal Appeal. We will be returning later in this judgment to this central issue in the McMahon case. What is of interest at this point, however, relates to the discussion in the judgment of O'Donnell J. of the absence of any provision in Irish sentencing law to allow a sentencing judge in this jurisdiction to directly address the possible mental treatment needs of a person being sentenced. O'Donnell J. observed:

"[24] In this case, it should be pointed out that there is a mechanism in place for the involuntary detention of those persons who pose a risk to themselves or others by reason of mental illness. That is provided for explicitly by the provisions of the Act of 2001. That Act permits involuntary detention of such persons for a defined period subject to review of the decision, and if necessary to scrutiny by a court. It was expressly submitted on behalf of the accused that the appropriate manner in which the future treatment of the accused should be dealt with, was under the mechanism of the Act of 2001. If it was considered that at the expiry of his sentence the accused continued to represent a danger to the public then, it was submitted, it was open to any competent person, including someone from the prison psychiatric service, the prison governor or members of An Garda Síochána, to make an application under the Act of 2001 in respect of the accused.

[25] It is certainly to be hoped that the accused will receive appropriate treatment for his illness, during the period of his imprisonment. It is also to be hoped that before the time for release from imprisonment arises, that his position will be reviewed and that if necessary an application under the Act of 2001 will be made. However, a sentencing court can only sentence the offender in respect of the offence. It cannot direct either of these results (treatment or an application under the Act of 2001), however desirable they might appear, or seek to ensure that the regimes being created by the imposition of a sentence on the one hand, and the Act of 2001 on the other, intersect without difficulty."

90. The second very significant difference is that the law in our neighbouring jurisdictions not only allows for, but indeed requires, a sentencing court to consider the need for public protection and where appropriate to take steps to ensure that the public is protected. In that regard a hospital order may be made with or without "a restriction order". A restriction order amounts in substance to indefinite detention for public protection purposes. Where a restriction order is made (and it has no existence independent of a hospital order) it lasts indefinitely and only the Secretary of State (or, where applicable, a relevant mental health tribunal) can permit the offender to leave, transfer to another hospital or be discharged from hospital. While it is not true to say that public protection is an irrelevant consideration in Irish sentencing law, it is the position that any sentence for

a criminal offence that would seek to deprive the person being sentenced of their liberty for the sole, or predominant purpose, of public protection would not be lawful in this jurisdiction. In the *McMahon* case, previously cited, O'Donnell J. said:

“Whether sentencing courts should be given additional powers in respect of persons who for whatever reason are deemed to pose a real and serious threat to the public, is a matter which would require the most careful review and sophisticated analysis by all the organs of government as to the mechanism by which such a result might be achieved, the prudence of adopting such a course, and ultimately its legality. However it does not appear to this court, that the court's power to impose sentence for a criminal offence can by itself permit the court to impose open ended detention on the grounds of anticipated future risk of harm.”

91. He had earlier observed:

“[21] Some of the issues which arise in this type of case are usefully illustrated by the striking facts of the Australian cases of *Veen v. R* (No..1) (1979) 143 C.L.R. 458 and *Veen v. R* (No.2) (1988) 164 C.L.R. 465.

[22] In *Veen v. R* (No.1) (1979) 143 C.L.R. 458 the accused suffered from alcohol induced brain damage and experienced uncontrollable urges leading him to commit violent crimes. In 1975 he was charged with murder in New South Wales but was convicted of manslaughter having regard to the defence of diminished responsibility. The trial judge having explicit regard to the needs for community protection, sentenced the accused to life imprisonment. The accused successfully appealed to the High Court where a sentence of 12 years was substituted for the life term. The view taken by the majority was that while the protection of the community was a factor in determining sentence, it was not a consideration which would justify what was in substance a sentence of preventive detention. The matter did not however end there. Veen was released after serving eight years and tragically killed another person. Once again he was charged with murder, and found guilty of manslaughter on the same basis, and again sentenced to life imprisonment. Once again he appealed to the High Court against sentence (*Veen v. R* (No.2) (1988) 164 C.L.R. 465), but on this occasion his appeal failed. The court pointed out that the mitigating factors which were present in the first case such as youth and possible rehabilitation were no longer present and in this case, the fact that there was a previous conviction rendered the second offence much more serious. Accordingly, a sentence of life imprisonment was an appropriate sentence. In a joint judgment, Mason C.J., Brennan Dawson and Toohey JJ., expressed the principle in the following way:-

*“It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of*

*preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.”*

[23] This passage expresses the law as it appears to this court to stand in Ireland in the absence of legislation. The protection of the public is an appropriate factor in the exercise of the sentencing function, but it cannot be extracted from that function to create a self standing judicially created jurisdiction to impose a form of preventive detention. Whether sentencing courts should have the power to order the detention of individuals deemed to pose an immediate threat to the public, over and beyond any appropriate sentence for the crime committed, is a matter which should be addressed in the first place by detailed legislation by the Oireachtas after appropriate research and debate, and subject to constitutional and convention review if appropriate. Detention outside the context of the criminal justice system may be justified in certain circumstances: see *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360. Similarly orders made under the Act of 2001 are orders of detention. But in each of these cases, the jurisdiction is carefully defined by legislation.”

92. As counsel for the applicant in the present case has placed some reliance, inter alia, on the fact that the respondent has been assessed as being at high risk of committing a similar violent offence, and as counsel for the respondent has specifically sought to argue that the applicant, in seeking the imposition of a higher sentence on the respondent, is in effect asking the court to incarcerate him, for longer than would otherwise be merited, for what amounts to public protection purposes, we will of necessity be returning to this issue later in this judgment.
93. The third significant difference giving rise to a need for caution is that the way in which offence specific guidelines are structured by the Sentencing Council of England and Wales renders them in many respects not suitable for cross-application in this jurisdiction. (No such guidelines have yet been produced by the Scottish Sentencing Council). This arises not least because they are based upon a grid approach which we do not operate, because they use starting points which by and large we do not, and because the courts in that jurisdiction do not approach proportionality in sentencing in the same way that we do. Irish law imposes a dual proportionality requirement, requiring that a sentence should be proportionate not just to the gravity of the offence but also to the circumstances of the offender. The sentence to be passed is therefore not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by the accused in question - see *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356 at 359. In contrast, the approach in England and Wales is to merely require that the sentence be proportionate to the gravity of the offence and much less account is taken of the personal circumstances of the offender.
94. All of that having been said, and again acknowledging the need for caution due to these factors, we have nevertheless found much in the material to which we have alluded that

is potentially of general application to the exercise of sentencing in a case such as the present and we have found it to be of considerable assistance. In particular, we have found the guidance offered on "Assessing culpability" in section two of the Sentencing Council's overarching guideline on "*Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*" to be informative and helpful. The following points are amongst those made therein:

- The sentencer should make an initial assessment of culpability ... , and should then consider whether culpability was reduced by reason of the impairment or disorder.
- Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour.
- In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required.
- The sentencer, who will be in possession of all relevant information, is in the best position to make the assessment of culpability.
- Where relevant expert evidence is put forward, it must always be considered and will often be very valuable. However, it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside.
- The sentencer must state clearly their assessment of whether the offender's culpability was reduced and, if it was, the reasons for and extent of that reduction. The sentencer must also state, where appropriate, their reasons for not following an expert opinion.
- Courts may find the following questions a useful starting point. They are not exhaustive, and they are not a check list as the range of offenders, impairments and disorders is wide.
  - o *At the time of the offence, did the offender's impairment or disorder impair their ability:*
    - to exercise appropriate judgement?*
    - to make rational choices?*
    - to understand the nature and consequences of their actions?*
  - o *At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?*
  - o *Are there other factors related to the offender's impairment or disorder which reduce culpability?*

- o *Medication. Where an offender was failing to take medication prescribed to them at the time of the offence, the court will need to consider the extent to which that failure was wilful or arose as a result of the offender's lack of insight into their impairment or disorder,*
- o *"Self-medication". Where an offender made their impairment or disorder worse by "self-medicating" with alcohol or non-prescribed or illicit drugs at the time of the offence, the court will need to consider the extent to which the offender was aware that would be the effect,*
- o *Insight. Courts need to be cautious before concluding that just because an offender has some insight into their impairment or disorder and/or insight into the importance of taking their medication, that insight automatically increases the culpability for the offence. Any insight, and its effect on culpability, is a matter of degree for the court to assess."*

95. The Sentencing Council's overarching guidance also contains the following general advice with which it is difficult to quarrel with and of which we approve:

*"Sentencers should note the following:*

- *some mental disorders can fluctuate and an offender's state during proceedings may not be representative of their condition at the time the offence was committed;*
- *care should be taken to avoid making assumptions. Many mental disorders, neurological impairments or developmental disorders are not easily recognisable;*
- *no adverse inference should necessarily be drawn if an offender had not previously either been formally diagnosed or willing to disclose an impairment or disorder;*
- *offenders may be unaware or unwilling to accept they have an impairment or disorder and may fear stigmatisation if they disclose it,*
- *it is not uncommon for people to have a number of different impairments and disorders. This is known as 'co-morbidity';*
- *drug and/or alcohol dependence can be a factor, and may mask an underlying disorder;*
- *difficulties of definition and classification in this field are common. There may be differences of expert opinion and diagnosis in relation to the offender or it may be that no specific disorder can be identified;*
- *a formal diagnosis is not always required, and*
- *where a formal diagnosis is required, a report by a suitably qualified expert will be necessary."*

96. The Sentencing Council makes the further point, with some elaboration, that it is important that courts are aware of relevant cultural, ethnicity and gender considerations

of offenders within a mental health context. Again, we have no difficulty in accepting that as a general proposition.

97. We would commend as best practice that a judge in this jurisdiction in deciding on the appropriate sentencing disposal in a case involving an offender with significant cognitive difficulties or a mental health disorder, should adopt a multi-stage approach, as follows:

*Selection of a provisional Headline Sentence  
without regard to the mental condition in question*

- A. In the first instance a sentencing court should determine upon the headline sentence that would otherwise apply but for the existence of the mental condition in question. This should be done in the normal way by considering in the context of the range of penalties provided for by the legislature (i) the intrinsic culpability associated with the type of offending that was committed, (ii) the extent to which that intrinsic culpability may have been aggravated, or mitigated, by factors bearing on culpability (excluding the mental condition in question), and (iii) the harm done.

As in all cases a provisional decision needs to be taken at this point concerning whether the custody threshold has been passed, bearing in mind the parsimony principle, and following a consideration of which of the commonly recognised objectives of sentencing (retribution, deterrence, incapacitation (to the extent permitted by law), restitution, and reform/rehabilitation) ought to be prioritised in the structuring of the sentence in such a case. If the custody threshold has been passed, the case should be located at an appropriate point on the available range of custodial penalties based on the court's provisional assessment of culpability and harm done.

*Adjusting the provisionally selected Headline Sentence  
to take account of a cognitive or mental health issue*

- B. In this second stage, the sentencing judge must now take account of the offender's cognitive issue or mental health disorder; and consider to what extent, in light of that factor, there may need to be an adjustment to his/her culpability as provisionally assessed in stage A in order to arrive at the headline sentence in the particular case before him or her.

The fact that an offender would not have committed the offence but for his/her mental condition will not necessarily relieve them of all moral responsibility for their actions. However, it may do so. In other cases, moral responsibility may be diminished, but not wholly extinguished. The sentencing court will therefore be concerned here with determining the extent to which the offending may have been attributable to the condition in question; or whether the offender's responsibility for his/her offending conduct was "diminished" by the condition in question, but not wholly extinguished.

The conduct of this assessment may not be wholly straightforward, but it is important that it is conducted with rigour and care. The assessment may be complicated by the overlay of additional factors, such as concurrent self-induced intoxication (as in this case), or a failure to take prescribed medication.

The courts in Ireland have long recognised that where disinhibition, or aggression, has been influenced by self-induced intoxication leading to the commission of offending conduct, or which contributes to the commission of offending conduct, such intoxication cannot in general be relied upon as a mitigating factor and indeed it will frequently be regarded as an aggravating factor. However, this general approach may require a nuanced application where there is an underlying significant mental illness. How self-induced intoxication may influence a sentencing court's assessment on an offender's overall culpability may in such a case be dependent on the court being satisfied that that person had an awareness or an appreciation of the dangers associated with becoming intoxicated in his/her situation, and that he/she had an ability to act on that to avoid the dangers in question being realised but failed to do so. A sentencing court's assessment of the relevance to overall culpability of self-induced intoxication in such a case will therefore very much depend on the evidence before it.

Somewhat similarly, a failure to take prescribed medication will not necessarily be a culpable omission. It may be attributable in whole or in part to the offender's mental illness or condition.

To enable a sentencing court to conduct this vital secondary assessment it is very important that all relevant information, including expert opinions (either in the form of expert testimony given in court, or reports in writing) as is necessary to enable the court to do justice in the case is placed in evidence before it. That having been said, it is for the sentencing judge to make the assessment of culpability. We endorse and adopt the views of the Sentencing Council for England and Wales to the effect that where relevant expert evidence is put forward, while it must be considered and will often be valuable, it will be for the sentencing court to make its own decision as to the degree of the offender's culpability, and that court is not bound to follow an expert's opinion if there are cogent and compelling reasons not to do so.

The primary responsibility for adducing required evidence will always rest on the party asserting the proposition in controversy. Thus, it will be for the accused who seeks to establish either absence of culpability or diminished culpability to produce *prima facie* evidence, including expert opinion evidence, at his/her sentencing in support of that contention. Equally, where such *prima facie* evidence has been adduced, and the prosecution seeks to suggest that there was insufficient connection between the impairment or disorder being relied upon, and the offender's behaviour, to affect their culpability; alternatively, that the offender's culpability was not in fact diminished to the extent contended for, due to the

existence of concurrent or other factors, it will be incumbent on the prosecution to adduce relevant evidence, including such expert evidence as may be required, in support of their counter-contention. If necessary, the court should be prepared to adjourn sentencing to facilitate the provision of such evidence as it may require (including expert opinion or supplementary expert opinion) to enable it to arrive at a just and appropriate sentence.

If the sentencing court determines that by virtue of the mental impairment or disorder at issue the offender's culpability is diminished (or, in what we think is likely to be a rare case, perhaps even eliminated), then the court's provisional assessment as to what would have been the appropriate headline sentence, will require adjustment based on the now re-assessed gravity of the offending conduct, following the taking into account of the influence on the offender's culpability of that mental impairment or disorder.

In some instances, a case which met the custody threshold in the provisional assessment may no longer do so. Alternatively, even if the custody threshold is still met, a shorter period in custody than would otherwise have been imposed may be required. Depending on the degree, if any, to which culpability is diminished any initial view as to the objectives of sentencing to be prioritised in the structuring of the sentence may also require to be adjusted. As mentioned earlier in this judgment, a previously perceived requirement to promote general or specific deterrence may be less relevant, as indeed may be the need for censure and retribution. There may appear to be an increased need to structure a sentence in a way that may assist the offender in accessing treatment himself/herself, or through the assistance of others, even though the court itself cannot direct that the offender should receive treatment, or intervene directly to ensure that such treatment is provided.

There may also be a need to try to protect the offender and the public through incapacitating the offender from committing further crime or causing further harm, in a situation where he or she represents a danger to themselves or to the public, but this objective can only be pursued to the very limited extent permitted by law. In that regard, every custodial sentence imposed in pursuit of a legitimate sentencing objective such as censure, retribution, or deterrence, has an incidental incapacitatory effect, in as much as the deprivation of the person's liberty will, of necessity, curtail or inhibit to some extent, and possibly to a significant extent, that person's opportunity or ability to commit further crime or do harm for so long as they remain incarcerated. The fact that custody has an incidental incapacitatory effect might, in a case involving an accused who represents a potential danger, tip the scales in favour of recourse to custody, or as to more rather than less custody, but it can only do so to the extent permitted by the sentencer's legitimate margin of appreciation in terms of fixing a penalty that is proportionate to the offence as committed by that offender. Accordingly, the possibility of incidental incapacitatory effects may be taken into account by a sentencing court and that possibility may



legitimately influence the sentencer's decision, both as to the choice of sanction and/or as to the length of any custodial sentence to be imposed, provided always that preventative detention is not the primary purpose being pursued and provided that any period to be served in custody, imposed legitimately and justifiably in pursuit of a sentencing objective other than incapacitation, but with incidental incapacitatory effect, remains proportionate both to the gravity of the offending conduct, and the personal circumstances of the offender.

*Applying mitigating factors to arrive at the ultimate sentence*

- C. The third stage involves, as in all cases (whether there is a mental impairment or disorder or not), taking into account mitigating factors not bearing on culpability, and relevant personal circumstances of the offender, not already taken into account. In the case of a person with a mental impairment or disorder, on whom a custodial sentence may possibly be imposed, consideration must be given to the fact that it may be more onerous for such a person to have to spend time in custody because of their mental impairment or disorder and some allowance may need to be made for this. Further, if there is a possibility, supported by evidence, that a custodial sentence might actually worsen the person's mental condition, due account needs to be taken of that in assessing the proportionality of any proposed custodial sentence.

When all relevant mitigating factors and personal circumstances that were not previously taken account of in earlier stages have been identified and considered, there should be an appropriate discounting from the adjusted headline sentence leading to an ultimate post mitigation sentence.

- D. If a suspended, or part suspended sentence is being imposed as part of the ultimate post-mitigation sentence, it may be desirable to impose conditions as to engagement and co-operation with psychiatric services and/or the Probation Service, and requirements in that regard will be very much case specific and may in practice be guided by recommendations in reports by mental health professionals / the offender's probation officer.

**Was the sentence for the s.3 offence in this case unduly lenient?**

98. We think that if the offender had been in the whole of his mental health this would have been an appropriate case to have started at the maximum penalty of five years having regard to the egregious nature of the offending. The victims were vulnerable, and the attacks were vicious. Fortunately for the respondent, the harm ultimately caused to the various victims was not as serious as perhaps it might have been. If, for example, the respondent's boot had connected with a fragile part of the unfortunate Mr Coman's skull, there might have been fatal consequences. Although there was no fatality, it was regrettably the case that Mr Coman was left with an additional disability as a consequence of receiving a broken shoulder that prevented him from walking with sticks during what remained of his life.

99. We do not think that the sentencing judge committed any error in referring to Mr Coman having been kicked in the head. While there was some lack of clarity as to whether the kick launched by the respondent had connected with Mr Coman's head or with his upper torso, we think that that makes little difference in terms of the culpability of an assailant who kicks at the upper part of the body of a vulnerable and disabled man whom he has just felled to the ground with an earlier kick. It was a most reckless and dangerous thing to do.
100. However, the assailant in this case committed the offences in circumstances where he was seriously mentally ill with a psychosis at the time, and that would have significantly reduced his culpability. The position is of course complicated in the present case by the fact that the respondent's psychotic symptoms were worsened by his consumption of alcohol. It has been established that when mentally stable, the respondent has an appreciation and understanding that alcohol can adversely affect his state of mental health. What is not apparent on the evidence is whether such an appreciation can survive and endure following the onset of an acute psychotic episode. In that regard, the evidence is unclear as to whether the respondent's self-induced intoxication on the occasion giving rise to the offences the subject matter of the present review, was wilful or engaged in recklessly in a situation where he had the necessary awareness and an ability to act upon that, in which case his drinking would have been a culpable failure on his part sufficient to offset, if not wholly then at least in part, the reduction in culpability for his offending behaviour to which he would be otherwise entitled on account of his mental illness; or whether the respondent's recourse to drink, and his becoming self-intoxicated, was attributable to, or excusable in whole or in part by, the onset of an acute episode of his psychosis. If, by virtue of being in a deteriorating mental condition, he could not help himself from drinking, or was unable to act upon the appreciation that he had when mentally stable concerning how drink might affect him, there could be no question of any off-setting of his reduction in culpability.
101. It seems to us that absent expert evidence shedding light on these questions it would not have been appropriate for the court below to make assumptions in regard to the significance of the respondent's self-induced intoxication for his level of actual culpability in this case or to draw an adverse inference in that regard. We therefore think the sentencing judge was right to have treated the respondent simply as being a person whose culpability should be regarded as being reduced because of having been diagnosed with paranoid schizophrenia, antisocial personality disorder and alcohol dependence and who was at the time in the throes of a psychotic episode and who had been drinking.
102. The sentencing judge was best placed, having received the evidence first hand, to assess the extent to which the respondent's actual culpability was reduced because of his mental state. The sentencing judge took into account that the respondent represents a high risk in terms of possible re-offending, having regard to his previous record, his homelessness, substance misuse, mental health issues and lack of family supports, but also took into account that the assaults were unpremeditated and that at the time he was suffering from psychosis and had been drinking. On the basis that he would otherwise have been entitled

to start at 5 years' imprisonment, but in fact started at 3 ½ years' imprisonment, we may deduce that he regarded the respondent's culpability as being reduced by 30%. We think this was an appropriate reduction on the evidence that was before him and we do not accept the submission of the applicant that this represented an excessive level of discounting for culpability, given the severity of the respondent's mental illness. We therefore find no error of principle with respect to the assessment of culpability.

103. On the mitigation side the sentencing judge took account of mitigating factors not already taken into account, including the early admissions and the early plea, and the significant personal adversity that the respondent was labouring under in terms of having a long-standing serious psychiatric illness. In considering how best to take account of these mitigating circumstances the sentencing judge reflected appropriately on how to reconcile and accommodate the recognised sentencing objectives of punishment, deterrence, incapacitation (to the limited extent permitted by law), and rehabilitation. He acknowledged the submission made to him that deterrence "*isn't really of much relevance*" in the case before him. By that, we understand him to have meant that the case of a mentally ill offender provides a less suitable vehicle for the sending of a deterrent message than would be the case of a similar offender in the whole of their mental health, and we agree with him in that respect. He expressly acknowledged that there was a need to protect the public, but also exhibited an awareness that preventative detention was not an option open to him. The sentencing judge was clearly alive to the fact that his ability to facilitate incapacitation was severely limited, and that in effect his scope for action in that regard was confined to his margin of appreciation in terms of what might amount to a proportionate custodial sentence, having determined, correctly in our view, that the custody threshold was clearly met by the circumstances of the case. He also had regard to rehabilitation, in that having determined upon a custodial term he recommended that the respondent should receive psychiatric services while in custody, and he specifically referenced the possibility of the making of a referral to the Central Mental Hospital under s.15 of the Act of 2006 by visiting psychiatric services.
104. As regards the level of discounting for mitigation not bearing on culpability, the sentencing judge suspended 1½ years of the 3 ½ year headline sentence that he had determined upon. This amounted to a discount of just under 43% from the headline sentence. It was perhaps at the generous end of what he could have allowed, but we are satisfied that it was within his margin of appreciation in this exceptional case. Although, if he had been so minded, less discount might have been afforded than was afforded, he would not have been able to deprive the respondent of the minimum level of mitigation to which he was entitled. Any discretion in that regard would have been confined to what might legitimately have been withheld within his margin of appreciation. We are satisfied that such discounting for mitigation as was afforded was, albeit generous, within the range of the sentencing judge's discretion. The fact that he might equally have opted to be somewhat less generous was not an error of principle.

105. In conclusion, having considered the circumstances of this case in detail we are not persuaded that the sentence imposed by the Circuit Court judge at first instance was unduly lenient. The application is refused.