



THE COURT OF APPEAL

**Edwards J.
McCarthy J.
Kennedy J.**

Record No: 36CJA/22

**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

DANIEL MURRAY

RESPONDENT

**JUDGMENT of the Court delivered by Mr. Justice Edwards on the 9th of December,
2022.**

Introduction:

1. The subject of the present appeal is an application made by the Director of Public Prosecutions (i.e. "the applicant") pursuant to section 2 of the Criminal Justice Act 1993 to the effect that the sentence imposed by McDermott J. at the Central Criminal Court on the 25th of January 2022 on Daniel Murray (i.e. "the respondent"), he having pleaded guilty before the said sentencing court of the offences of (i) manslaughter contrary to the common law and (ii) arson contrary to s. 2 of the Criminal Damage Act 1991, was unduly lenient. McDermott J. in handing down sentence had ordered that the respondent be imprisoned for the period of nine years on each count, such sentences to run concurrently from the 3rd of August 2021, but with the final eighteen months of each sentence being suspended upon conditions.

Background facts as established in evidence:

2. On the 2nd of August 2018 a neighbour of the deceased alerted emergency services at 3.03am of a house fire at No.7 Derrylurgan in Ballyjamesduff, Co Cavan. Fire brigade units were dispatched from Ballyjamesduff, and from Virginia also in Co. Cavan, and upon arrival firefighters noted that the house-fire was at an advanced stage and that a body could be seen in the downstairs of the building. The body was later established to be that of Mr. Oliver Murray, an uncle of the respondent with whom the respondent frequently stayed.

3. Gardaí also attended at the scene and upon arrival became aware that the respondent also resided at the premises from time to time. However, following a search by the fire team it was established that he was not in the building.
4. Evidence was given that another neighbour of the deceased had called to the respondent's parents' home after the fire had been discovered. Upon arrival there he had heard shouting between the respondent and his father. When the door was answered by the respondent the neighbour asked him if he had heard about the fire at his uncle's home, to which he answered, *"I heard a little something about it."* Further, upon being informing by this neighbour that a body had been found in the burned out building the respondent asked, *"Is the dog okay?"* The sentencing court was told that the neighbour in question had later stated to gardaí that the respondent, having been told about the fire, *"didn't look too annoyed or shocked"*.
5. A post-mortem conducted by pathologist Dr. Linda Mulligan determined that the death of the victim was caused by inhalation of smoke and fire gases, on a background of dilated cardiomyopathy. Following forensic testing of a DNA sample voluntarily provided by the Liam Murray, a brother of the deceased, Dr. Sibeal Waldron of Forensic Science Ireland found very strong support for the proposition that the deceased, and the said Mr. Liam Murray, were brothers.
6. Following examination of the scene in the aftermath of the fire it was established that the fire did not originate from the stove or from any electrical items and that no accelerants had been found.
7. The sentencing court received further evidence that at 7.15am on the morning of the fire the respondent inquired from a garda at the scene whether the occupant was dead and then pointed to a group that had gathered, while saying, *"Look at Oliver's relatives staring. They are nothing but parasites, all talking and staring just because there was a murder."*
8. In a voluntary statement made at Bailieborough Garda Station shortly afterwards, the respondent admitted that he had been staying between the deceased's house and his parents' house following his discharge on the 23rd of July 2018 from a hospital where he had been an in-patient. He further stated that on the 1st of August 2018 both he and another man had been drinking and smoking, following which they went to the deceased's house for an hour. The respondent then stated that he went to his parent's house where he drank and watched television with his father, and that he had remained there for the rest of the evening. In the statement he said that he had been alerted to the fire by his mother and went over to his uncle's house at about 8 o'clock in the morning all whereupon he discovered that the deceased had died.
9. The respondent further referred in his voluntary statement to having made a 999 call a week previous. He stated that a named gentleman had come over and had been arguing with the deceased. The gentleman in question had a cut above his eye and a swollen lip and the respondent had called an ambulance for him and that the ambulance took the

gentleman away. The respondent further stated that yet another man had entered the house and attacked the first visitor while he, the respondent, was in the back garden.

10. However, evidence was given in court at the sentencing hearing to the effect that the respondent had been identified on CCTV footage from various locations in the town as having been other than at his parent's home on the afternoon and during the night before the fire. He had in fact attended at the Garda station during the afternoon on the 1st of August, and CCTV further showed him walking in the direction of the deceased's house, which was also the direction of his parents' house, about 15 minutes before the fire was reported in the early hours of the 2nd of August. Neighbours of the respondent's parents gave statements to gardaí in which they recalled the respondent trying to enter his parents' house at around 3.10am, while flames were visible from the deceased's home. Further, in a statement given by the respondent's father, the father recalls making a cup of coffee for his son after he had arrived home between 2am and 3am "*half drunk*". He also recalled his son telling him that the deceased's house was on fire.
11. The sentencing court further heard that in a statement given to gardai by the deceased's next-door neighbour, the neighbour recalled that following the deceased's funeral he had heard the respondent shouting "*Technicality, technicality...Why didn't the fire alarm go off? ... if they get me, it's a technicality.*"
12. The sentencing court further heard that the Book of Evidence contained another statement made by the respondent's father. He had told gardaí that two weeks after the fire his son admitted to him that he had started the fire. The respondent's father also noted that his son did not appear to be upset when making his admission.
13. Following the identification of the respondent as being a person of interest to the gardaí in connection with the case, and in circumstances where the respondent was by that stage serving a sentence in Castlereagh prison in respect of an unrelated matter, gardaí sought a warrant under s. 42 of the Criminal Justice Act 1999, so that he might be arrested and detained in connection with their ongoing investigation into suspected offences involving the homicide of Oliver Murray and criminal damage to Mr. Murray's dwelling house. A s. 42 warrant was issued on the 11th of January and executed on the 15th of January 2019 following which the respondent was brought to Bailieborough Garda Station where he was detained. The respondent was interviewed on six occasions while being so detained, and admitted to starting the fire in interviews 3, 5, and 6. He stated that he had been sleeping in his room in an extension to the rear of the building when he had set fire to a sheet which was hanging from a line in his bedroom using a "*Bic*" lighter. He then put this fire out. However, approximately five minutes later, he again set fire to the sheet, but on this occasion, he said "*[t]he house just went up*".
14. During the interviews he stated that he did not intend for his uncle to die and that he had started the fire to scare his uncle and to get back at him for "*hitting granny, all the bad things he did to me and anybody. I just wanted to take it out on the house, but it went the wrong way.*" He stated that he was not on good terms with his uncle at that time and that although he didn't assault him on that day, he had hit his uncle on previous

occasions. He stated that he hated the house which he believed had a "dark energy in it." The respondent claimed he did not recall how he got out of the house but presumed that it must have been through a window as the front and back door were locked and that the key to the doors would have been in his uncle's pocket. In the interviews the respondent further stated, *"I just wanted to scare him. I thought he'd get out the window or door. Have I got regrets? I don't know. I do and I don't. He's better off dead. His head was fucked. I had to do everything for him. None of them wanted anything to do with him."* He stated that he was just hoping his uncle would have got out. He later maintained that he thought that the *"bathroom would have stopped it, concrete floors and walls. It wasn't premeditated."*

15. During interview no. 5 the respondent stated that on the day prior to the fire he had been drinking and that he went to the Garda Station to make a statement, following which he went to the deceased's house where he continued to drink and then fell asleep. At approximately 2am he had awoken, and thoughts came into his head that *"he was sick to me back teeth (sic) with the room itself, which was overrun with mice"* and that he *"wanted to smoke the room out of it."* He stated that he didn't think the fire would flare up the way it did or that it would get to the main part of the building. He reiterated that, *"I thought the bathroom would have stopped it and it wouldn't have got into the main part of the house. I thought Oliver would have gotten out long before it would have gotten any worse in the house."* He asserted yet again that his intention was to only frighten his uncle and not to kill him. When he saw the flashing blue lights of the fire brigade from his parent's home on the night of the fire, he *"figured that everything was okay"* and that *"Oliver was being looked after"*.
16. The sentencing court also heard further evidence concerning the 999 call to which the respondent had referred when making his earlier voluntary statement. The call had been made on the 25th of July 2018 and gardaí had obtained a transcript of the call in which the respondent was heard to say, *"Hello this is Daniel Murray here. I'm from [address provided] I was to go back again to hospital, so I did and he wouldn't let me go"*. The respondent is asked by the operator, *"Who is he?"*, and the respondent replies *"His name is Oliver Murray and if I go and I do anything to him, then I'm going to end up killing him."*
17. The respondent was originally charged on indictment with a count of murder contrary to common law and as provided for by s. 4 of the Criminal Justice Act 1964, in which it was alleged that he had killed his uncle, one Patrick Oliver Murray, on the 2nd of August 2018 in Ballyjamesduff, Count Cavan, intending to kill him or to cause him serious injury.
18. He was also charged with a count of arson contrary to s. 2 of the Criminal Damage Act 1991, in which it was alleged that on the same date he had damaged a dwelling house by fire without lawful excuse and intending by the arson to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.
19. At an early stage, the respondent intimated a willingness to plead not guilty to murder but guilty to manslaughter. However, this was not acceptable initially to the Director of

Public Prosecutions ("the DPP"). The respondent subsequently intimated that he would also plead guilty to the arson charge, and that being so the DPP then agreed to accept both pleas on the understanding that evidence at sentencing would be led on a full-facts basis.

The Respondent's Personal Circumstances:

20. The respondent was not a first-time offender, having a history of forty-eight previous convictions, including convictions for criminal damage, public order offences, assaults, and arson.
21. Almost all of the respondent's previous instances of offending were dealt with by the District Court in a summary manner. However, his most recent conviction, which was for an assault causing harm, had been dealt with in the Circuit Court which in December 2019 had imposed a three-year sentence on the respondent, nine months of which were suspended.
22. One of the criminal damage offences, which occurred on the 31st of May 2017, and for which the respondent had received a five-month sentence of imprisonment in February 2019, had involved him breaking into a mechanically propelled motor vehicle, dousing a seat in petrol, and placing the petrol can inside the car. A cigarette lighter (not belonging to the owner) had been found on the seat of the car. When the respondent was arrested by Gardaí shortly afterwards as the suspected perpetrator, they observed him to be intoxicated, and that there was a strong smell of petrol from his clothing.
23. Further, when outlining the respondent's criminal history, the prosecuting Garda also referred to earlier arson offences committed by the respondent dating as far back as April 2002, when the respondent was twenty-years old. There had been two incidents during that month giving rise to charges of arson of which the respondent was subsequently convicted. The first had involved an incident in which the respondent had set fire to hedging and trees in the garden of a neighbour's dwelling house. The second had involved setting fire to a mechanically-propelled motor vehicle in the driveway of another neighbour's dwelling house, and to bags of clothes, shoes and other items in the back garden of the same dwelling house. The evidence was that it had taken the Fire Brigade a couple of days to extinguish the fires that had been started by the respondent.
24. The sentencing court was provided with the respondent's date of birth and was told that he was thirty-six years on the day of the offences and was forty years on the date of sentencing.
25. It was put to the State's witness, Detective Sgt. O'Connor, in cross examination that the respondent had been drinking heavily for a number of months before the incident and that he had a long-standing history of alcohol and, to some extent, drugs misuse. This was accepted. It was further accepted that the respondent when sober is a very different man to when he is drunk and heavily intoxicated. It was suggested to the witness that the respondent's primary residence was in his parents' home but that he would go to his uncle's house when his drinking got out of control. Detective Sgt. O'Connor responded to

this by saying, "I know he spent a lot of time in his uncle's house". The witness had earlier stated that he had known both the deceased and the respondent for approximately five years and that they had had "an up-and-down relationship".

26. Some further details concerning the respondent's personal circumstances were available to be gleaned from a number of reports placed before the sentencing court. It is proposed to review these individually.

Psychiatric Report

27. The sentencing court was provided with a report from consultant psychiatrist. The primary purpose which the psychiatrist had been consulted was to consider whether the respondent might have been suffering from a mental disorder within the meaning of the Criminal Law (Insanity) Act 2006 and the Mental Health Act 2001, and whether the respondent was mentally fit to stand trial. The psychiatrist concluded that the respondent had not been suffering from any form of major mental disorder such as would cause him not to know what he was doing, to know that it was wrong or to be unable to refrain from his actions. The indications were that he was intoxicated by the effects of alcohol, a consequence of its use with which he was very familiar. He did not therefore consider that it was open to the respondent to seek to avail of an insanity defence. He was also satisfied that the respondent was fit to plead and to stand trial.
28. The psychiatrist's report is, however, extremely detailed in considering the respondent's family history, personal and educational history, medical history, psychiatric history and forensic history. It is not necessary to rehearse all of the detail provided for the purpose of this judgment, apart from some highlights which will be referred to, save to say that the court has nevertheless taken full account of the history provided. It is appropriate to highlight that the report indicates that the respondent was an only child, living at home on the family farm with his elderly parents both of whom were still alive. It records him as having been educated to Junior Certificate standard, and as having then had a succession of menial jobs followed by a brief stint as a mechanic's apprentice (which he did not complete). Thereafter he had a number of factory jobs, and had participated in a community work scheme in the course of which he had done a number of training courses in subjects such as computers and welding. Overall, although his educational and training achievements were relatively modest, the history was of a good work record with a number of employers up until he developed his serious alcohol dependency. He had begun drinking alcohol from the age of 12 or 13 and was experiencing memory blackouts from the age of 20. The respondent also admitted taking unprescribed drugs including sleeping tablets, Xanax, Diazepam, and benzodiazepines while consuming large amounts of alcohol. He said that he had also smoked hash and weed, and had consumed a lot of ecstasy. The psychiatrist felt that the history as provided to him suggested that such was the level of the respondent's drinking and substance abuse that he might have been suffering from episodes of early *delirium tremens* (severe alcohol withdrawal symptoms with hallucinations). The respondent also gave a history of trying to cut down on his use of alcohol for the five years before his arrest, but of not having entered any formal treatment program. There was evidence that the respondent suffers from depression and

had been prescribed antidepressant medication for this by his GP. He had not been hospitalised as a psychiatric inpatient.

29. A review of the respondent's medical records indicated a number of hospitalisations for physical injuries, many of which were said to have been sustained in the course of assaults. One was an admission to Cavan General Hospital on the 26th of April 2003 with injuries to his head, which he attributed to being struck on the head with a hatchet by his uncle. The records also disclosed admission to Cavan General Hospital on the 3rd of December 2012 for *"extensive burns of face from petrol ignition."*
30. When discussing his offending behaviour with the psychiatrist, he stated that he had done it because he *"wanted to get Oliver a bit rattled"*, and because Oliver had removed a boat from inside the door which had been useful in preventing unwanted visitors from entering the room. In this context he specifically mentioned the named individual in respect of whom he had made the 999 call that he had spoken about in his voluntary statement. He stated because the fire was catching hold more quickly than he had expected, he went out through the window of the room. He said that he thought that Oliver was possibly outside the house with his dog. He went outside the back gate of the house and made his way through neighbours' gardens to the front of a neighbour's house, thereby avoiding meeting Oliver if he was in the grounds. The psychiatrist asked him why he had wanted to avoid him, and he said that he wanted him to discover the smoke for himself. He said that he then made his way to town, pausing for 45 minutes on a wall near the Cavan Road. By that stage it had begun to rain, and he then made his way to his father's house. He reiterated to the psychiatrist that he had had no intention of harming or killing his uncle, stating *"we were on good terms"* particularly when his uncle was not drinking. When asked by the psychiatrist how he felt about his uncle's death he said, *"real sad, it's sad. The poor man didn't deserve to go in flames. I feel like there's a pit in my stomach"*.

Psychologist's Report

31. The social and forensic history provided in the psychologist's report substantially mirrors that in the consultant psychiatrist's report. Moreover, the psychologist had the benefit of the consultant psychiatrist's report when conducting his assessment of the respondent. The psychologist agreed with the psychiatrist assessment with respect to the absence of evidence of an underlying mental illness. He commented:

"Regarding Responsibility

In my opinion Mr Murray's behaviour is not related to or motivated by an underlying mental illness. He is responsible for his behaviour and acknowledges the role of alcohol in his actions, for which he is genuinely remorseful. He was (highly) intoxicated at the time of the offences. He entered a plea of guilty to the charges.

Regarding Risk

While past history of violence is a recognised risk factor in predicting future risk of violence, Mr Murray's future risk of violence, as already stated, is not related to any

*underlying mental illness. **Lifelong abstinence from alcohol and illicit substances** would mitigate Mr Murray's risk of future violence. Without this, given Mr Murray's previous history of Arsenal assaults, is likely to pose a serious risk to others should he use intoxicants in the future. It is noteworthy that when he used alcohol fabricated within the prison, on 12 September 2020, he was noted to be threatening and assaultive and required restraint."*

32. The psychologist made a number of recommendations regarding disposal options both in the event of a custodial disposal and in the event of a non-custodial disposal and should it be necessary for this court to proceed to a resentencing we will have regard to these, as did the judge in the court below.

The Probation Report

33. The sentencing court was also provided with a probation report. Again, this contained a social and forensic history, and once again this was broadly consistent with that contained in the reports of both the consultant psychiatrist and the psychologist.
34. Importantly, however, the report deals in some detail with the respondent's alcohol addiction and substance misuse. In doing so the probation officer comments:

"Mr Murray has not opted for counselling support as a treatment option until his latest incarceration to Castlereagh Prison. Mr Murray has linked in with addiction services in prison and has been engaging in the group work programme for a significant period of time. Mr Murray is open to the prospect of residential or community support upon his release. However he believes if his time is occupied with employment he would be able to continue his sobriety from prison into the community.

I am advised that Mr Murray is prescribed an antidepressant; Lexapro for a number of years. Mr Murray spoke of his history of depression that he attributes to his years of alcoholism. Mr Murray described the extreme emotional lows he felt during every hangover. He felt that his addiction came to the point where he could not manage being sober.

He believes that his incarceration has provided him with a period of stability and sobriety that he has not had in his life for over a decade. This is something that Mr Murray appears to be genuinely positive about. He has expressed a desire to continue to engage with addiction support upon his release from prison in an attempt not to fall back into his lifestyle before incarceration. Mr Murray believes that he would benefit from engaging with the Probation Service in this regard. He finds the medication as having the desired positive effect he requires in conjunction with his sobriety. Mr Murray acknowledged a direct link between his mental health struggles and his addiction.

Risk Assessment

A risk assessment applied to this case indicates a high risk of further re-offending within a twelve month period for Mr Murray. The risk issues for Mr Murray primarily revolve around his addiction, chaotic lifestyle and the lack of self-control that inevitably comes from his alcohol and occasional drug use. His alcoholism has resulted in him coming to the attention of the Gardaí for Public order and Assault related Offences consistently in the past. While incarcerated, Mr Murray has evidenced the potential to achieve and thrive when sober and drug free. This has been portrayed by Mr Murray's positive work ethic and engagement with addiction services since he was incarcerated."

35. Later in the same report the probation officer further states:

"... The period of sobriety and stability that prison has provided Mr Murray over the past three years is a positive starting point for his reintegration back into the community. He appears to have generally managed his time in prison productively and is adamant that this will continue for the remainder of his time in prison and post-release"

And that:

"Mr Murray will face an ultimate test in his sobriety and desistance from criminal activity upon his release. Therefore it is my assessment and recommendation that he will require significant support during this transition."

36. The probation report then concludes by setting out a number of recommendations in the event of the court opting to incorporate some element of community-based sanction in its sentence. Once again, should it be necessary for this court to proceed to a resentencing we will have regard to these, as did the judge in the court below.

Victim Impact Evidence

37. The sentencing court heard poignant evidence from the deceased's brother, Mr. Liam Murray. He told the court of his great memories of growing up with his brother Oliver, that Oliver was always quiet but good-humoured, and that he would always share whatever he had as a child. The witness said "[h]e didn't have much, but he'd give you half of it." He described how the deceased had stayed in the family home after all of his brothers and sisters had moved out. He had looked after both parents initially and then after his mother once his father had died. Eventually, their mother had moved in with one of their sisters and Oliver was alone. He conceded that his brother had had issues with drink but stated that when he wasn't drinking he was an absolute gentleman and he described how helpful he was to neighbours and those around him in his community. He stated that when the respondent needed somewhere to stay or a bed for the night he'd always go to Oliver. He described his devastation following the death of his brother. It has affected his sleep and he is constantly thinking about what occurred. The incident has affected his family very badly. They don't like passing the house any more now that it is burned out and a shell. If they are going into Ballyjamesduff, or would need to pass through it on the way to Cavan, they would take a route that bypassed Oliver's house so

as not to see it. He expressed particular regret at not being able to see his brother in the coffin because of the condition he was in after the fire. He concluded by saying that he misses him very much.

Submissions to the Court Below

38. Counsel for the applicant referred the sentencing judge to the Supreme Court's decision in *The People (DPP) v. Mahon* [2019] IESC 24 which provides appellate sentencing guidance in relation to manslaughter cases. It was submitted that the respondent's offending fell within the worst category of cases described at para. 54 thereof. The court's attention was also drawn to the reference at para. 57 of Charleton J.'s judgment in *Mahon* to the case of *The People (DPP) v. Griffin* [2018] IECA 257 in which the accused was sentenced at first instance to fifteen years' imprisonment, after mitigation, in the context of offending said by counsel for the applicant to be similar in terms of its gravity to that in the present case. This sentence was upheld on appeal.
39. Counsel for the respondent drew attention to the respondent's history of intoxicant abuse, in particular his alcohol addiction, which it was argued was to blame for the position the respondent found himself in. Counsel stressed that the tragedy at the heart of the case was the consequence of unintentional but reckless actions by the respondent. Counsel argued that the issue in relation to his addiction and substance misuse was "*instructive*" and submitted that while in prison the respondent had engaged with addiction services "*for a significant period of time*". Counsel argued that the risk assessment in relation to the respondent had to be viewed in the context of his difficulties with alcohol. He urged that it "*has to be seen in the context of some hope for optimism if he is a person who can deal with these demons [...]*". Counsel also invited the court to have regard to the Probation Report which outlined in detail the remorse he had expressed. Counsel submitted that in his interviews, in the psychological report and in the probation report, the respondent had indicated that there is nothing more that he would wish, but that he could turn back the clock.
40. In relation to the psychological report, counsel submitted the following:
- "MR. MCGRATH: [...] You'll see remorse on the part of the accused, you'll see no attempt by the accused to distance himself from what occurred on the night in question. You'll see no attempt on the part of the accused to minimise the effect of what occurred, and his direct responsibility for that, Judge. You'll see, as I said, reference to him repeatedly saying if he could turn back the clock he would, Judge. And you'll also see there, Judge, repeated references to this relationship, this toxic -- this tragic relationship, I suppose, between the accused man and alcohol and drugs, and the catastrophic effect it has had on his life, Judge."*
41. Counsel further submitted that the final part of the psychological report indicated that the respondent "*does have mental health issues, in the sense that he has addiction issues, obviously, and he is a man who certainly suffers from ongoing depression*" and that the report mirrored the acceptance on the part of the Garda Sergeant that the offending was largely related to the substance misuse. As such, counsel submitted that abstinence from

alcohol consumption and illicit substances would *"obviously [have] a dramatic effect on the future risk that he poses to society"*.

42. The defence also put before McDermott J. two letters in which the respondent expressed his remorse: one addressed to members of his family and the other addressed to those who attended the scene of the tragedy on the night of the offending.
43. Counsel submitted that if the case was to be put in the most serious band of offending under *Mahon* that it should be put towards the lower end of this serious band: First, the case involved recklessness not premeditation, and; secondly, the case was distinguishable from *Griffin* on the basis that the victim in that case was a twelve-year boy, age of the victim being an aggravating factor not applicable in the present case, and also on the basis that *Griffin* was a contested case whereas the present case was not contested owing to the early guilty pleas – the fact that it was not contested being demonstrative of the respondent's remorse.

Sentencing Remarks:

44. McDermott J. considered that the respondent's offending was of *"a very serious and reckless kind"* and that the situation the victim faced was *"appalling"*. While the sentencing judge accepted the respondent's remorse at the time of sentencing as being sincere, he remarked that in the early aftermath of the fire, *"Mr Murray went to another house nearby and seemed to indicate a level of almost indifference to what had happened and what he'd done."* The sentencing judge observed that the circumstances in which this offending was committed were

"made all the more serious by the fact that Mr. Murray has a history of both violence and setting fire to other people's property, and has served sentences in the past for serious offending and was indeed interviewed while severing (sic) a sentence for serious offending in relation to this matter."

45. In setting the headline sentence, McDermott J. had regard to the *"very high degree of recklessness involved in what he did that night"* and considered same against the respondent's history of arson offending. Further to this, the learned sentencing judge considered the actual damage and devastation caused by the respondent's offending. Relevant in that regard was the damage the respondent inflicted upon his family in killing his uncle. The sentencing judge referred to the *"very moving testimony"* received by way of victim impact statement from Mr. Liam Murray in relation to his uncle, noting that the deceased was described as *"a quiet, good-humoured man and always a bit of a smile"*, that he would share what he had as a child, and that *"he didn't have much but he'd give you half of it"*. McDermott J. noted that the respondent himself had benefitted from the deceased's generosity and that on the night of the offending the respondent was present at the deceased's dwelling house because the deceased had allowed him to stay, notwithstanding a history of differences and difficulties between the two men. He recalled that Liam Murray had said: *"there was always a bed at Oliver's for Daniel"* and commented that *"that was apparently the type of man that Oliver fundamentally was"*.

46. On the basis of the aggravating factors outlined and having regard to Mahon and the respondent's high culpability, McDermott J. set the headline sentence at twelve years. He was not satisfied that the case fell into the category that would attract a penalty in excess of fifteen years and up to life imprisonment, notwithstanding *"the awful nature of this case"*. He considered that *"there are other cases that are more heinous and more awful and more horrendous that come before the courts deserving of even more serious penalties"*.
47. McDermott J. discounted three years for mitigation. In doing so, he afforded the respondent credit for his guilty pleas (acknowledging that a plea to manslaughter was available at a very early stage), his remorse for killing his uncle and destroying his uncle's property, and his efforts to deal with his substance misuse while in custody by availing of addiction services and a group work programme for a significant period. The judge acknowledged the respondent's willingness to engage with residential and community support upon his release from custody and to continue with addiction support post-release. McDermott J. also noted the respondent's belief that engagement with the probation service would be advantageous in establishing a stable lifestyle and that he would hope to find employment after release from prison. He noted that the reports submitted to the court *"appear to accept that he's able to achieve and thrive when sober and drug free and it's thought that he's genuinely positive about these issues and addressing his, what are virtually, lifelong addiction problems."*
48. McDermott J. further observed that the respondent had had significant employment in the earlier part of his adult life and that he had attended training schemes to better his prospects. He also took account of the fact that at the time of sentencing the respondent was almost forty years of age.
49. While he was satisfied that the appropriate post mitigation sentence for each offence was one of nine years' imprisonment, he went on to state that he would suspend the final part of both sentences for a period of eighteen months, *"in accordance with the suggestion of the Probation Service to encourage the positive features of his development that have been referenced in the reports"*. The conditions attaching to the part suspensions, as reflected in the Rule of Court, were as follows:

"[...] [T]hat he will place himself under the supervision of the Probation Service for the said period of eighteen months from the date of his release and comply with all lawful directions, instructions and recommendations of his Probation Officer; that he will keep abstain (sic) from alcohol and unprescribed medication; that he will avail of addiction counselling for the remainder of his sentence and continue this support as required in a community or residential setting following release; that he will refrain from any further offending behaviour or contact with persons with whom he was involved with criminal and substance abuse in the past; that he inform the Probation Service of any change of address or circumstances immediately AND further that he will come up if called on to do so to serve the balance of the

sentences imposed, being eighteen months imprisonment, but suspended on his entering his bond. [...]"

The Section 2 Application - Grounds:

44. The applicant, by way of an application made pursuant to s. 2 of the Criminal Justice Act 1993 dated the 15th of February 2022, contends that the sentences imposed were unduly lenient. He therefore seeks a review of the said sentences upon the following grounds:

- "1. *The sentencing judge erred in nominating a headline sentence of 12 years in relation to both offences having regard to the circumstances of the offences committed.*
2. *The sentencing judge erred in holding that, in relation to the manslaughter offence, the offence did not lie in the category of 'worst cases' as described by the Supreme Court in *The People (DPP) v Mahon [2019] 3 I.R. 151.**
3. *In reducing each sentence from a 12-year headline to a sentence of nine years' imprisonment and further suspending the final 18 months, the sentencing judge had excessive regard to the mitigating factors in the case."*

The Court's Analysis and Decision

45. The law with respect to the conduct of undue leniency appeals is well-settled at this stage. The jurisdiction to review a sentence on the grounds that it was unduly lenient derives from s. 2 of the Criminal Justice Act of 1993, as amended, which (to the extent relevant) provides:

- "2.(1) *If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Appeal to review the sentence.*
- (2) *An application under this section shall be made, on notice given to the convicted person, within 28 days, or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine, from the day on which the sentence was imposed.*
- (3) *On such an application, the Court may either—*
 - (a) *quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
 - (b) *refuse the application."*

46. In terms of the general principles governing such reviews, the leading authority is *The People (Director of Public Prosecutions) v. Byrne [1995] 1 I.L.R.M. 279*. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2

of the Act of 1993, and in it, O'Flaherty J., giving judgment for the court, sets out a number of principles and considerations relevant to the conduct of such reviews. He said:

"In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.

*Secondly, the Court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to Court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Mr. Justice Flood has termed the 'constitutional principle of proportionality' [see *People (DPP) v. W.C.* [1994] 1 ILRM 321], his decision should not be disturbed.*

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr Grogan S.C., the test to be applied under the section is not the converse of the inquiry the Court makes where there is an appeal by an appellant. The inquiry the Court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

47. Since then, the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356. In that case Barron J. stated:

"[...] In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error of principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of potential penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered. [...]"

46. More recently in *The People (Director of Public Prosecutions) v Stronge*, [2011] IECCA 79, McKechnie J. distilled the case law on s. 2 applications into the following propositions:

- "(i) *the onus of proving undue leniency is on the D.P.P.;*
- (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;*
- (iv) *this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;*
- (v) *the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;*
- (vi) *it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally*
- (vii) *due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."*

47. The Court has received written submissions from both sides, for which it is grateful. The submissions on behalf of the applicant reflect and amplify the arguments made on her behalf in the court below.

48. It was submitted that the sentencing judge erred in nominating a headline sentence of 12 years having regard to the circumstances of the offences committed. Further, it was submitted that the sentencing judge erred in holding that the manslaughter offence did not lie in the category of "worst cases" as described by the Supreme Court in *The People (DPP) v. Mahon* [2019] 3 I.R. 151.

49. In *Mahon* the Supreme Court gave guidance in relation to sentencing in manslaughter cases. The Court divided the cases into four categories of cases for the purpose of sentencing. As on no view of this case could it fall within either of the bottom two categories which the court labelled as offences of "*medium culpability*" and offences of

"lower culpability", we need only concern ourselves with the top two categories which were those labelled cases of "high culpability" and those labelled as the "worst cases".

50. At para. 51 of the judgment of the Supreme Court, Charleton J. stated, with reference to 'the worst cases', that:

"Some unlawful killings are close to indistinguishable in culpability from murder. Cases involving the highest level of culpability attract an appropriate sentence of between 15 to 20 years and a life sentence is also possible. Relevant to the level of culpability are matters such as the circumstances in which the victim died, and the conduct of the accused."

51. At para. 62, the court then described cases of 'high culpability'. Charleton J. observed that:

"Cases of high culpability tend to attract a punishment of between 10 and 15 years as a headline sentence and tend to involve aggravating factors, which may include previous convictions of the accused for assault or other relevant convictions, history of violence between the accused and the victim, callousness towards the victim, confrontation involving a potential lethally weapon, and death resulting from an unlawful act carrying a high risk of serious injury of which the accused was aware or ought to have been aware."

52. In both instances, the judgment provides indicative examples drawn from existing case law for the assistance of judges at first instance. We have had regard to all of the examples cited, including the case of *The People (DPP) v. Griffin* [2018] IECA 257 which is placed by the Supreme Court in the category of worst cases. However, having had regard to the circumstances of that case, and to the other examples given in *Mahon* of cases considered to fall into one or other category, we are not convinced that the circumstances of the present case, egregious though they be, require it to be located amongst the category of worst cases.

53. The circumstances here, although very bad, were not as aggravated as in *Griffin*. In both cases it was accepted that there was no specific intention to kill or cause serious harm such as would have been required for a conviction for murder, but the action leading to the killing was premeditated. Moreover, it was carried out in circumstances where there was a high degree of recklessness as to the possibility of a person or persons being injured or killed. That having been said the premeditation was greater in *Griffin*. The accused in that case had made not one but two visits to the hut or shed in question. He knew that it was a place that children used as a den. He had left home twice that evening saying that he was going to burn the hut, and visited the hut twice setting fire to it on the second occasion. Both visits were after dark and on his first visit, which it may be inferred was to reconnoitre the place, he had felt a person's foot. Despite this, he returned and set fire to the hut. The fact that it was a hut greatly differentiated the premises from those in the present case. It was a single space unlike the house in the present case which had a number of rooms and where at least there was some possibility of an occupant who was

in a different room to that in which the fire was started escaping and avoiding being caught up in the conflagration. Moreover, the house in the present case was built of brick and concrete and of other materials that could have been anticipated to somewhat slow the progress of the fire. Indeed, as we have seen in the review of the facts earlier in this judgment, the respondent asserted repeatedly in his interviews that that was his belief, saying at one point that, *"I regret what happened. I didn't think it was all going to burn. I didn't think the rest of the house would go. I thought the bathroom would have stopped it, concrete floors and walls"*, and at another point that *"I didn't think the fire would flare up in the way it did. I thought the bathroom would have stopped it and it wouldn't have got into the main part of the house. I thought Oliver would have gotten out long before it would have gotten any worse in the house. It wasn't my intention to do anything bad to him, just to frighten him."*

54. A further significant differentiating factor between the two cases is that the lives of two persons were placed at risk in the *Griffin* case, whereas in this case it was only one. In the *Griffin* case there were two boys in the hut, one of whom escaped and one of whom tragically died in the fire.
55. While we are satisfied that this case, although very bad, was not so bad as to require it to be automatically placed in the category of very worst cases, we do think that it is a somewhat borderline case. We would recall the words of Birmingham J., as he then was, at para. 49 of his judgment in *The People (DPP) v. Casey and Casey* [2018] IECA 121 to the effect that:
- "[...] the Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."*
56. We think that this is one of those cases. In our assessment the headline sentence required to be located towards the top end of the category of cases of high culpability. If it had been located at the lower end of the category of worst cases it would not necessarily have been an error as, for the reason stated by Birmingham P., a sentencing judge has a margin of discretion. In our view an appropriate starting point would have been 14 or 15 years. However, the sentencing judge's starting point in this case was 12 years which is in the middle of the range appropriate to cases of high culpability and not at the upper end where we believe it belonged. Accordingly, we think that the headline sentence nominated was too low and that was an error of principle.
57. The applicant also complains about the level of allowance afforded for the mitigation in this case. The level of straight discount afforded was three years or 25%. There was then a suspension of a further 18 months of the post mitigation sentence to incentivise continuation of the work which the respondent had begun while in prison to address his

serious alcohol addiction and substance abuse issues. In circumstances where there was a valuable plea, which the trial judge had been content to accept as having been an early plea, and other mitigation including remorse which was accepted as being sincere and a significant employment history, it is hard to see how a discount of 25% could be criticised. Insofar as the suspended element was concerned the sentencing judge had considerable discretion with respect to that. He set forth cogent reasons for doing so, anchored in the sentencing objectives of reform and rehabilitation. Moreover, the contents of the reports before him, and particularly the Probation Report, provided him with an evidential basis to justify suspending an additional portion of the sentence in the interests of incentivising continued progress towards addressing his addiction issues. We are required by the jurisprudence on undue leniency appeals to afford significant weight to the reasons given by the trial judge for steps taken by him at sentencing.

58. Taking an overall view of the case, we consider that the headline sentence was too low, and significantly too low, but that there was no error with respect to the level of mitigation afforded. The question for us is, whether, having found an error with respect to the setting of the headline sentence, that error led to an ultimate sentence which represented a substantial departure from what would have been the appropriate sentence in this case? We are persuaded that that is so. Accordingly, we find the sentence imposed by the court below to have been unduly lenient, and we must therefore quash it and resentence the respondent in those circumstances.

Re-sentencing

59. Taking into account the culpability of the respondent, which was very significant, and the harm done by him which was egregious, we have no hesitation in placing this case at the high end of the category of cases identified in the *Mahon* jurisprudence as falling within the category of cases of high culpability. In doing so we have taken into account that the respondent was highly intoxicated at the time that the offence was committed, and this was self-induced intoxication which provides him with no mitigation in terms of his culpability. That having been said we recognise that this was not once-off intoxication, but that the appellant suffers from a serious addiction to alcohol. While addiction can sometimes mitigate culpability, the reports in this case indicated that the respondent had a significant level of self-awareness of the risks posed by his addiction and in the circumstances we do not think that the addiction factor serves to mitigate his culpability by much. The respondent's culpability was also significantly aggravated by the fact that he had previous convictions for relevant offences, being three previous convictions for arson type criminal damage. We also consider that even in his intoxicated state, he must still have appreciated the vulnerability of his uncle who had also consumed alcohol and was asleep in the premises, albeit in another room.
60. In the circumstances of the case we assess the gravity of the respondent's offending as meriting a headline sentence of 15 years imprisonment. We will discount from that by four years to take account of the mitigating factors in the case which were correctly identified by the sentencing judge in the court below. We were impressed by the rationale offered by the sentencing judge in the court below for offering an additional incentive to

the respondent to continue the work he has begun in addressing his alcohol addiction and substance abuse issues, which we are convinced, based on the reports, provided to us were a significant factor in precipitating his offending in this instance. The sentence we have imposed contains a significant retributive element, and appropriately marks the censure and deprecation of society with respect to his conduct. That having been said, however, reform and rehabilitation are also important objectives in sentencing. We agree with the sentencing judge at first instance that this was an appropriate case in which to offer some incentive to the respondent to continue addressing his underlying issues. There is evidence of significant progress to date and the incentivisation of continued progress is appropriate. To that end we will again suspend the final 18 months of the sentence.

61. Accordingly, the net sentence is one of 11 years imprisonment with the final 18 months thereof suspended for a period of 18 months on the same conditions as attached to the suspended portion of the sentence in the court below.