



THE COURT OF APPEAL

Record No: 5/2023

**Birmingham P.
Edwards J.
McCarthy J.**

Between/

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

Respondent

V

JOHN DELANEY

Appellant

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 16th of October 2023.

Introduction

1. Before this Court is an appeal brought by Mr. John Delaney (i.e. “the appellant”) against the severity of the sentence imposed on him by the Southern Eastern Circuit Criminal Court sitting in Waterford on the 21st of December 2022. The appellant had pleaded not guilty to one count (count no. 1) of burglary contrary to s. 12(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act 2001 (i.e. “the Act of 2001”), and to one count (count no. 2) of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991 (i.e. “the Act of 1991”). He was found guilty of those counts by a unanimous jury verdict on the 3rd of February 2022, following a three-day trial. On the 21st of December 2022, the Circuit Criminal Court passed sentence, and imposed on the appellant an effective custodial disposal of 3 years. This sentence comprised:

- Custodial term of 4 years and 6 months, the final 18 months thereof suspended on certain terms for a period of 2 years post-release, in respect of the burglary count.
- A concurrent custodial term of 1 year in respect of the criminal damage count.
- Both sentences were to date from the 28th of December 2022.

2. Mr. Delaney appeals against the severity of his sentence on the following grounds which are reproduced with reference to the written submissions as filed on behalf of the appellant:

- a) That the learned sentencing judge erred in fact or in law in imposing a sentence which was excessive in all of the circumstances.*
- b) That the Learned Sentencing Judge failed to give sufficient credit for the mitigation or the personal circumstances of the Appellant.*

- c) *That the Learned Sentencing Judge failed to have adequate regard to the sentencing aim of rehabilitation.*
- d) *That the Learned Sentencing Judge failed to recognise, support or encourage rehabilitation in the determination and structuring of his sentence."*

3. However, at the opening of the oral appeal hearing the court was advised that the only point that the appellant would be pursuing was the failure of the sentencing judge to suspend a greater portion of the sentence to incentivise continued rehabilitation (essentially grounds c.) and d.), respectively).

Evidence of Garda Robert Flynn

4. At the sentencing hearing in the Circuit Criminal Court on the 21st of December 2022, a Garda Robert Flynn (otherwise "Garda Flynn") gave evidence in relation to the factual background of the appellant's offending.

The incident

5. Garda Flynn described how in the early hours of the 26th of September 2022, a Ms. "A" and her two children, aged 12 and 13 years respectively, were asleep in a dwelling-house in Waterford City. Ms. "A" was awoken at approximately 5:40am by the sound of people talking outside the property. She looked out of her bedroom window and observed at the rear of her property two men comprising the appellant (who she knew as "Scooby Delaney") and a second individual. Ms. "A" in her evidence at trial indicated that the two men were not permitted to be there. Ms. "A" described how she had heard the appellant starting to kick her house's back window and back door. Distressed by this, Ms. "A" woke her children up, rang 999, and left the property. She recalled hearing the two men kicking the door as she left. Gardaí, enroute to the property in response to the emergency call, observed Ms. "A" and her two children in their pyjamas going to the Garda station. One Garda attended to Ms. "A" and her children, while another Garda encountered the defendant and the second individual as they came out of the property. The appellant was observed by gardaí putting something in his back pocket, which object transpired to be the keys to Ms. "A"'s back door. Garda Flynn described how when the appellant was stopped by gardaí, the appellant informed gardaí that the keys in question were his own, but they were subsequently identified by Ms. "A" as being the keys to the back door of her property. Garda Flynn confirmed that the position was that the appellant was intoxicated at the time, and indeed the member's evidence at trial on the 2nd of February 2022 was that the appellant "*appeared quite intoxicated at the time, you could smell a strong smell of alcohol from him, he was unsteady on his feet, and he seemed to be slurring his words*".

The Garda investigation

6. The appellant was arrested, detained, and was later interviewed by gardaí. During the course of the Garda interview, the appellant gave an account that he attended at Ms. "A"'s property in circumstances where she was known to him and that they were romantically involved. Garda Flynn referred to the evidence of a Mr. Charlie Power who gave evidence at the appellant's trial and had testified that there was a romantic connection between the appellant and Ms. "A". Garda Flynn described how this suggestion of romantic involvement with the appellant was

"*emphatically denied*" by Ms. "A" in her evidence at trial. Ultimately, the suggestion of a romantic involvement between the appellant and Ms. "A" was rejected by the jury.

7. Garda Flynn averred that in the course of the interview, the appellant's responses comprised a mix of "*no comment*" replies and a limited account by which he claimed that he had an entitlement or other basis for being in Ms. "A"'s property.

8. At the sentencing hearing, Garda Flynn stated that the criminal damage count on which the appellant was found guilty by the jury related to a window at the rear of the property. The sentencing court was furnished with photographs of the damage done to the rear of the property. It should be noted that the sentencing judge was the same judge who had presided over the trial of the appellant in February 2022. The trial court had also been furnished with photographs of the damaged window. Garda Flynn in his evidence of the 2nd of February 2022 described the photographs in question as depicting a rear window which had been "*almost ripped out from the hinges*".

Appellant's role in saving a woman from entering a river

9. In cross-examination, reference was made to an incident which occurred in the months preceding the sentencing hearing in which the appellant had saved a young woman from drowning in a river. The appellant purportedly obtained a letter from the rescued lady in which she thanked him for efforts, however his legal team had mislaid this letter in advance of the sentencing hearing and were thus unable to furnish the court below with it. Garda Flynn confirmed that he had attended this incident and that the circumstances were that the young woman in question was threatening to enter the water but was stopped from doing so by the appellant and his family.

Victim Impact Statement

10. Ms. "A" was present at the sentencing hearing on the 21st of December 2022 but elected not to give a victim impact statement.

Appellant's Previous Conviction History

11. Garda Flynn described the appellant's previous conviction history. It was stated that the appellant had 145 previous convictions, dating as far back as 2004 with the most recent at the time of sentencing dating as recently as November 2021. The majority of the appellant's previous conviction record related to road traffic matters: twenty-five previous convictions for driving without insurance; nineteen previous convictions for driving without a driving license; twelve previous convictions for driving when disqualified, and; six previous convictions for drink driving. Garda Flynn stated that the appellant had previously received a 5-year prison sentence in respect of an endangerment conviction. The appellant had a previous burglary conviction dating back to 2008 and concerning offending which took place in 2006. He had sixteen public order-related convictions to his name. There were also three assault causing harm convictions on his record and one conviction for assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997.

12. Garda Flynn confirmed that at the time of the appellant's commission of the relevant offences (i.e. the offences for which he was sentenced on the 21st of December 2022) he was on bail for road traffic matters, namely driving without insurance and failing to provide a sample of

breath at a Garda station. He was convicted of these road traffic matters on the 10th of December 2020.

13. Noting that the date of offending here was the 26th of September 2019, Garda Flynn outlined that the appellant had approximately thirteen convictions for offences committed after this date. Eleven of these related to road traffic offences, and two were for simple possession of drugs.

14. In cross-examination, Garda Flynn stated that the relevant date of offending relating to the November 2021 conviction was August 2020. When asked by counsel on behalf of the defence whether he was aware that the appellant was released from his most recent period of incarceration on the 27th of November 2021, Garda Flynn replied "*I do know he received a five-month prison sentence in March 2020 so they would align*". Since his release in November 2021 the appellant had not come to adverse Garda attention.

Probation Report

15. The court below was furnished with a Probation Report signed on the 23rd of November 2022. Copy of same has been made available to this Court. The report is comprehensive in its detail, and effort is now made to summarise it.

Acceptance of responsibility?

16. In the first place, it should be said that it is clear from the Report that while the appellant accepts some responsibility for his conduct, it is limited acceptance:

"Mr. Delaney informs he entered the victims' home (sic) without her expressed permission and, in doing so, accepts that he is guilty of burglary. He asserts he does not recall damaging any of the victims property (sic), advising that he was able to access the back door keys from the kitchen window and it was these he used to enter the house".

Appellant's alcohol consumption

17. The Report goes on to describe the personal circumstances of the appellant. Notably, it details heavy alcohol consumption in the months preceding the commission of the offences, and that this consumption had culminated in "*a considerable degree of upheaval in his personal life, especially in his relationship with his wife and child*", particularly inasmuch as the appellant's drinking behaviour had caused him to resort to asking his wife for money to spend on alcohol after he had expended his own money and that such requests would "*regularly*" result in the couple arguing. The Report states: "*Mr. Delaney informs that he was spending much of his time with other heavy drinkers, his priorities being focused upon his maintaining a lifestyle fueled (sic) by substance use, with little thought for those closest to him*".

18. The appellant, in his account to the probation officer, situated his recollection of the events of the 26th of September 2019 in the context of his addictive behaviour. It should be observed that his recollection was not congruous with the evidence at trial which was accepted by the jury, and which was described by Garda Flynn at the sentencing hearing. The appellant stated that he and his cousin had contacted Ms. "A" while enroute to a licensed premises in search of whiskey. He advised that Ms. "A" had agreed to assist them in procuring whiskey, and that Ms. "A" was having a "*get together*" at her house close to the licensed premises on the night in question. The appellant described seeing, from where he was seated in his cousin's car, silhouettes through the

closed window blinds of Ms. "A"'s house. From this he determined that there were people partying in Ms. "A"'s house who he wished to join. There then followed efforts by the appellant to access the property. He advised the probation officer that he had knocked on the door to no avail, and that peering through the front door's letterbox he saw people walking into a kitchen area at the rear of the property. He made his way to the rear of the property and there observed an open window close to the back door. He advised that he was able to reach through this open window to grab the keys to the back door that were hanging nearby. Using these keys, he claimed he was able to open the lock of the back door, and that he then proceeded to enter the property walking through the kitchen into the hall area. Believing that people were in the property, the appellant said that he had called out to them and surmised that they had moved upstairs. It is at this point, the appellant stated, that he then saw that the property's front door was open, and that Ms. "A" was standing outside the house. Gardaí arrived on the scene, and the appellant concealed the back door keys in his trousers pocket.

19. When asked by the probation officer to explain in further detail why he wanted to enter Ms. "A"'s home, the appellant described how he would regularly attend at her home for parties and that he would have sexual relations with Ms. "A" on some of these occasions. He said that he would regularly seek such intimacy during heavy periods of alcohol and substance use.

20. The appellant's alcohol and substance abuse is described in greater detail later on in the Report. It is observed that the appellant attributed much of his problems to his alcohol use. He had noted that his wife and daughter endured hardship with respect to his alcohol abuse, which had necessitated relocation from time to time such as to distance themselves from the adverse effects of the appellant's alcohol abuse. Reference is also made to alcohol-fuelled physical altercations between the appellant and his brother, and further reference is made to the appellant's use of alcohol whilst on Circuit Court bail including a Garda encounter in Waterford city centre whilst intoxicated when he should have been at home.

21. The Probation Service invited the appellant to consider partaking in the Alcohol Use Disorder Identification Test (AUDIT) and the Drug Use Disorder Identification Test, both questionnaires being tailored to help assess alcohol and drug consumption, substance abuse related behaviours and associated problems. The Report indicates that the appellant agreed to go through these questionnaires. The appellant reports that his drug consumption is confined to cannabis which he smokes two to three times per week on a limited basis. The Report advises that the appellant did not present as someone at increased risk of drug abuse related problems. As per the application of the AUDIT tool, the Report notes that the appellant's alcohol use places him at increased risk of alcohol associated health difficulties, and the Report recommends one-to-one professional support to help reduce this risk. The appellant explained that his alcohol consumption was connected to feelings of anger, and he advised the Probation Service that he had taken steps to manage his urges to drink by walking his dogs, attending AA meetings, and considering the needs of his wife and daughter.

Appellant's lack of remorse

22. The appellant did not express remorse for the impact of his actions upon Ms. "A"; in fact, he did not acknowledge his actions as having had any impact on her at all. The Report states:

"Mr. Delaney pled not guilty to the matter before the Court. He was asked about how he now considers his decision to enter the victims home (sic) without her consent. Mr. Delaney describes his overall behaviour as stupid and foolish, he asserting that he should not have been seeking out drink, drugs and casual sex. **He reports that, whilst he believes he was wrong to enter her home without her expressed permission, he cannot see how the victim would have been adversely impacted in any way by his choice to do so. Mr. Delaney says he feels she is not afraid of him and he states she would have informed the Court of this.** When asked who would have been impacted by what happened, he reports that his wife and child would have suffered most as a result of his substance abuse fueled (sic) behaviours, they having to leave home for 2 to 3 months at a time, due to the adverse consequences for them of his drinking".

[Emphasis added]

23. In a section headed "Offence analysis", the Probation Report observes that the appellant has sought to minimise the seriousness of his offending and that he was completely dismissive of Ms. "A"'s experience. It notes that the appellant did not acknowledge Ms. "A"'s concerns for her and her children's safety, and that he did not demonstrate any empathy towards her and had no insight whatsoever into the adverse effects his unlawful entry into her home would have had upon her and her children who were present at the time.

*Appellant's previous conviction record
and history with the Probation Service*

24. The Probation Report goes on to describe the appellant's previous conviction record, which has already been outlined in this judgment at paras. 9 to 12. It is observed that over the course of his 20-plus-years' history of offending, the appellant had been penalised in several different ways ranging from custodial disposal, fines, disqualification orders, suspended sentences, and periods of Court-ordered supervision by the Probation Service. The Report states that the appellant has admitted that his conviction record reflects "a history of risk-taking and disregard for rules/ laws of the land" which dates as far back as his youth; the Report notes that the appellant acknowledged that as his substance use grew in his adolescence so too did his risk taking, and the nature of the convictions he began to accrue become more serious. Reference was made to a "traveler feud (sic)" lasting some 15 years out of which some of the appellant's more serious historic offending was said to have arisen. The probation officer remarks in the Report:

"His involvement in this feud led to an escalation in the level of violence he was prepared to use and it is evident from his criminal record that his time spent in prison did little to help him desist from re-offending post-custody. A perusal of this criminal record makes it clear that prolonged periods of desistance from re-offending are largely attributable to Mr. Delaney being incarcerated during these times. His persistence in offending despite punishments highlight that Mr. Delaney did not consider the consequences of his law breaking as being enough to deter him from re-offending."

25. The Report then details a history of involvement with the Probation Service dating back to 2002 when the appellant was approximately 15 years old. We do not propose to rehearse in detail this history of involvement except to acknowledge that it involved the appellant engaging with

inter alia U-Casadh, an ex-prisoner scheme aiding rehabilitation and reintegration into the local community in Waterford.

Risk assessment

26. Under the sub-heading "*LSI-R Risk assessment*", the Probation Report assessed the appellant as falling within the high-risk range of re-offending. It identified as risk factors the appellant's long history of offending and substance misuse, as well as his mental health challenges and his need to make positive use of his day-time hours (and in this regard it is noted that the services of U-Casadh are no longer available). It is said that, attitudinally, the appellant is inclined to dissociate himself from the consequences of his offending behaviour, and this inclination is said to manifest itself in the appellant's tendency to not consider the impact his offending wreaks upon his victims or indeed the public at large. The Report observes that for the appellant to be able to motivate himself consistently towards avoiding re-offending behaviour "*he needs to be helped to see the consequences his anti-social behaviour is having and has had upon others- be it for crimes that arise in criminal prosecution or those that can result in road traffic violations*", and to this end the Report recommends engagement by the appellant with victim focused work which would be of assistance inasmuch as it would promote the development of empathy with victims of crime. It should also be stated that the Report notes that the appellant had made some efforts at rehabilitation, namely attending alcoholic-anonymous meetings and taking prescribed medication for his mental health issues. The Report observes that were the appellant to focus "*wholeheartedly on these key relationships, consistently attending to his mental health treatment and avoiding all alcohol abuse, [he] would be taking positive steps towards addressing his risk of re-offending over the next twelve months*".

Appellant's personal circumstances

27. The appellant was approximately 37 years of age at the time of sentencing and was approximately 34 years old at the time of offending. Of a traveller background, the appellant was born into a large family in the United Kingdom and moved to Ireland, where the family settled in Waterford, when he was approximately 5 years of age. The appellant complained of not liking school at all, and he described difficulties affecting his schooling ranging from his dyslexia diagnosis to unfair treatment on account of his traveller background. The Report states that the appellant left school at the approximate age of 12 years, following which he worked with his father looking after horses. He then started helping other relatives with grounds work at around the age of 15 years. The appellant had also done some "*cash in hand*" work in construction and rubbish collection. He has been in receipt of Job Seekers' allowance for much of his life. The appellant advised that he had been married for approximately 11 years at the time of the Report, and that he and his wife have a daughter together who was aged 8 years at the time of the appellant's sentencing.

28. As regards the appellant's mental health issues, the Report notes that he is currently prescribed medication by his GP for symptoms of depression. A review of his Probation file by the probation officer indicated that as an adolescent the appellant had previously been referred to the Department of Psychiatry at University Hospital Waterford. The Report recommends that in order

for the appellant to benefit from his mental health treatment, he ought to engage fully with his medication regime and regularly attend at his GP for reviews.

Report's conclusions

29. The Report concludes by essentially noting that the appellant's acceptance of responsibility is compromised by him maintaining a different account of events giving rise to the offending. It states that the appellant does not accept wilfully causing any criminal damage, nor does he exhibit remorse for the fear he caused to Ms. "A" and her children. The Probation Service regarded this as problematic, noting:

"Empathy for ones victims (sic) can be an indicator of an offenders willingness (sic) to desist from further such re-offending. Such empathy was lacking in this case and indeed with respect to Mr. Delaney offending history (sic) in general. This is of great concern to the Probation service".

30. The Report's conclusions repeat previous observations regarding the appellant's high risk of re-offending and cite the following risk factors: the appellant's long history of substance abuse and offending behaviours; lack of victim empathy, and; his need to positively manage his mental health and make positive use of his day-time hours. The Report suggests:

"Given his high risk of re-offending, were the Court to consider Probation supervision as an element of finalising matters today, perhaps it may choose to add strict conditions to such supervision, namely his engagement with all Probation referrals to the addiction services, his full participation with mental health treatment and his co-operation with the Probation service in a programme designed to promote victim empathy".

Evidence of Michael McGath

31. Mr. Michael McGath was involved with the U-Casadh charity which was wound up in October 2022. Giving evidence to the sentencing court, Mr. McGath averred he had first encountered the appellant in January 2019 when the appellant was referred to the charity after he had been released from a term of imprisonment.

32. Mr. McGath stated that during the first four days of the initial 18 months with the charity the appellant consumed alcohol, and on those four days he "amassed" criminal charges which resulted in his period of imprisonment which resulted in his release in November 2021. After the appellant was released from custody in November 2021, he attended voluntarily at the charity and Mr. McGath stated that during this time he seemed to be doing well. Mr. McGath was not aware that there were incidents where the appellant was not signing on, and Mr. McGath only became aware of these incidents when he attended court on the last occasion the appellant appeared before the court below. Mr. McGath stated that he had only encountered the appellant where he had consumed alcohol on one previous occasion in the course of the preceding year. The occasion in question was a birthday gathering for the appellant's family members where the appellant had gotten drunk and got into a row. The following day, the then sober appellant was unsure as to who he was and where he was. Mr. McGath surmised that when the appellant takes alcohol he loses "any kind of perception on reality (sic), and has no memory of it and [...], has no knowledge of what he is doing when he's deeply under the influence of alcohol". Mr. McGath described the

appellant as otherwise being honest, committed, and a good person particularly when working with others.

33. Mr. McGath described the appellant as attending AA meetings more frequently since his last appearance in court, stating that this increased engagement had benefited the appellant socially. Mr. McGath surmised that the appellant's alcoholism had led him to commit the harm he had done to society and to serve time in custody. The witness averred that he had seen the appellant exhibit empathy on a number of previous occasions, stating that he believed that the appellant was not incapable of empathy. However, Mr. McGath did state:

"[F]or some reason he [i.e. the appellant] has something in his head as regards this particular incident -- incidence that he had some right perceived or make -- made up, that he had some kind of entitlement to be there. And he doesn't seem to be getting the fact that he didn't have any entitlement and he was absolutely very drunk. So his awareness of the situation I think is very clouded and I may be, again I'm not trying to come up with my excuses, but maybe his lack of relating to the victim would be -- I'm not sure that he had realised that he had done the harm that he has done".

34. Mr. McGath stated that he believed that the appellant has something positive to contribute to society but that it is necessary that the appellant sorts out his alcoholism. Mr. McGath remarked that until the appellant's alcohol issues are resolved *"there is no point in giving him any other breaks"*, as his alcoholism is *"the main thing that has caused the trouble that he's got himself involved in [...] and the trouble that he has caused everybody else"*.

35.

Sentencing Judge's Remarks

36. The sentencing judge's ruling considered the factual background to the appellant's offending. He identified as aggravating factors: that the burglary occurred in a private dwelling-house; that it occurred at night; that there was a confrontation with the occupants who comprised a mother and children; that the occupants had to flee the building, and; that he was on bail at the time and had 145 previous convictions, including a previous burglary conviction which was of immediate relevance, and three s. 3 assaults. In assessing the appellant's culpability, the sentencing judge acknowledged the appellant's history of alcohol abuse particularly within the context of the appellant's background as a member of the travelling community. He concluded that the appropriate headline sentence fell in the beginning of the midrange, nominating 5 years' imprisonment in respect of the burglary count.

37. On the point of mitigation, the sentencing judge stated that *"[I]ittle can be said by way of mitigation"*. Acknowledging the contents of the Probation Report, the sentencing judge remarked that the document *"makes it quite clear that he has shown no remorse, no empathy for his victims, two of whom are children, no insight, and that he completely dismisses the experiences in the middle of the night of his victims"*. He further observed that the Report describes a disregard for rules and laws of the land, and refers to frequent breaches of curfew while on bail. The appellant's long history of alcohol and substance abuse was acknowledged. The sentencing judge also made reference to the appellant's involvement with the U-Casadh project, and to the appellant's attendance at AA meetings. The judge below noted that the appellant is a pleasant person but for

his alcoholism, however he stated that there was no acknowledgment of guilt by the appellant in the present case and that mitigation was thus “*very limited*”. To account for this limited mitigation, the sentencing judge discounted 6 months from the headline sentence, leaving a post-mitigation sentence of 4 years and 6 months’ imprisonment to be served.

38. The sentencing judge’s focus then turned to the question of whether to order a partial suspension of the post-mitigation sentence. In considering this, he had regard to the contents of the Probation Report and to Mr. McGath’s evidence. The sentencing judge remarked, in suspending the final 18 months of the appellant’s sentence:

“Nonetheless the probation officer states that as matters stand, Mr Delaney describes wanting to make good choices so as to help improve his quality of life. He informs me he is taking medication prescribed for his mental health and that he is attending Alcoholics Anonymous meetings. The officer points out that he would require one-to-one support with regard to addressing his alcohol and substance use history. On balance it is evident from his presentation and probation appointments that Mr Delaney is very proud of his young daughter and wife, and grateful that they continue to live together. And were he to focus wholeheartedly on his key relationships, and consistently attend to his mental health treatment, and avoid all alcohol, Mr Delaney would be taking positive steps towards addressing the risk of reoffending over the next 12 months, which unfortunately the probation officer assesses as being high risk. For the reasons I’m prepared to suspend the final 18 months of the sentence. I’m going to do so for a period of two years, which is longer than the period of suspension, but I’m doing that because of the risk factors, and as an encouragement that he will deal with his alcoholism. I’m making specific conditions that he adheres and engages with all probation referrals to the addiction services, that he fully participates with the mental health treatment, and if directed by the probation service, that he participates in a programme designed to promote victim empathy. [...]”

Parties’ Submissions to the Court of Appeal

Submissions on behalf of the appellant

39. While the written submissions filed in this case addressed all grounds of appeal initially relied upon, it is only proposed to review those relevant to the grounds actually being proceeded with, i.e., grounds c.) and d.), respectively.

40. It was submitted that counsel had outlined in the court below the constructive steps which the appellant had taken to address his addiction issues and to effect positive changes in his life so as to avoid further criminality. Counsel says that the appellant committed these offences at a point in his life “*where he was at a crossroads and in need of rehabilitation due to addiction issues*”. It is said that the appellant’s addiction issues had a “*significant bearing*” on the commission of the offences, and that the type of sentence imposed would likely and adversely impact the appellant’s ability to deal these issues and to eventually return to society as a law abiding and drug free citizen. It is on this point that counsel argues that the sentencing judge failed to recognise, support or encourage rehabilitation in the determination and structuring of his sentence. It is said that counsel for the appellant in the court below had introduced evidence on his behalf from external parties, most particularly Mr. McGath, confirming the appellant’s difficulties and the steps

he had taken to change his ways. Reference is made to *People (DPP) v. Maguire* [2018] IECA 310, in particular to the words of Edwards J. at para. 112 of his judgment:

“112 Although rehabilitation in the narrow sense of reformation of character, or addressing personal issues such as addiction, so as to break a cycle of criminal recidivism, may not have been required in the majority of these cases, it is also reasonable to infer that many of the judges concerned were anxious to incentivise rehabilitation in the broader sense, by the showing of a degree of leniency, particularly by generous use of the option of partially suspending a sentence, with the objective of getting the offender to resume making a positive contribution to society and his/her community.”

41. Counsel argues that the appellant’s efforts at rehabilitating himself, addressing his alcoholism and effecting positive lifestyle changes, all in an effort to break a cycle of recidivism, attracted greater merit than what was afforded by the sentencing judge at first instance, particularly to incentivise continued rehabilitative efforts. Counsel thus makes the case that the failure to incentivise rehabilitation in any respect has nullified any real prospect of the appellant returning to society as such a law abiding and alcohol/drug free citizen, and that the court below failed to engage in a balancing exercise between the conflicting sentencing principles of deterrence and rehabilitation. Counsel notes that this Court has previously intervened to facilitate rehabilitation, and he references *People (DPP) v. Coughlan* [2019] IECA 173 in this regard. It is submitted that the present case is an appropriate one justifying intervention by this Court.

Submissions on behalf of the Director

42. Counsel for the Director submits that the sentencing judge had very carefully considered the submissions made in respect of the prospect of rehabilitation and that, having done so, he suspended one third of the post-mitigation sentence. Counsel argues that an effective custodial sentence of 3 years is “*by any measure*” a very lenient sentence for a serious burglary which involved the deliberate breaking into an occupied home in the middle of the night, thereby forcing a mother and her two young children to flee in their pyjamas to the Garda Station. It is submitted that it is also a very lenient sentence for a serious burglary which resulted in a contested trial by an individual who expresses no remorse.

43. It is submitted by counsel for the Director that in circumstances where there was very little evidence of mitigation, no empathy, understanding or insight, and a high risk of reoffending, which in ordinary course would make it difficult for a sentencing court to justify rehabilitation, the sentencing court in the present case heavily incentivised rehabilitation by suspending one third of the post-mitigation sentence. This partial suspension is regarded by the Director as “*an extremely significant reduction in light of the circumstances*”. Counsel refers this Court to *Coughlan* and he observes that the dicta of Edwards J. was approved in *People (DPP) v. McDonagh* [2021] IECA 197 wherein this Court (McCarthy J.) held that a sentencing judge is entitled to *inter alia* critically assess a submission that a defendant is at a “*cross roads*”. Counsel reminds the Court that the appellant had been engaging with the Probation Service intermittently since 2002 and that he had amassed 145 convictions in his time. In such circumstances, and where there was effectively very little mitigation and a Probation Report raising very significant concerns, the suspension of one third of the post-mitigation sentence was nonetheless afforded. It is thus argued that the

sentencing judge had carefully considered the question of rehabilitation and had structured the resultant sentence to account for it.

The Court's Analysis and Decision

44. The first thing to be said is that the court applauds and commends the appellant's stated resolve to finally address his alcoholism and substance abuse issues. He is, as was stated by the court in the exchanges with counsel at the oral hearing of the appeal a chronic recidivist and his recidivism is all connected with these issues. We think the reality of the case was succinctly summarised by Mr McGath in his evidence to the court below when he said:

"He has to sort out his alcoholism and if he doesn't then there is no point in giving him any other breaks unless the alcoholism is sorted."

45. Coming back to the appellant's stated resolve to rehabilitate himself, there has to be follow-through on that and the evidence is at best thin with respect to any track record of achievement in his rehabilitation. The appellant engaged to a degree with Uí-Casadh, and with Alcoholics Anonymous, and that is commendable but the evidence, such as it is, is that while he may have reduced his drinking while doing so, and in the period running up to his sentencing, he had not stopped drinking. He was in trouble on a number of occasions after committing the offences the subject matter of this appeal and before the sentencing. He was drinking, and was observed by gardai out and about in breach of his curfew, and in an intoxicated state. That this was the position was hardly likely to inspire confidence in the sentencing judge that this was a man worthy of taking a chance on.

46. That having been said, the court acknowledges that recovery from alcoholism is difficult, and recognises that sometimes people do fail several times, despite having the best intentions, before they achieve abstinence and recovery to the point where they can live a pro-social life. He is fortunate in having the support of somebody as committed as Mr McGath, to aid him in his efforts at recovery and the court very much wishes him well in his continued efforts. Unquestionably there was a case here to incentivise the appellant to continue along the path that he had embarked on towards recovery and rehabilitation, but the difficulty for the court is that he was offered such an incentive and quite a substantial incentive. The sentencing judge suspended 18 months of the sentence to that end. Counsel for the appellant has sought to argue that it was not enough but we are not persuaded that the sentencing judge erred in principle in only suspending 18 months of the sentence.

47. In *People (DPP) v Coughlan* [2019] IECA 173 we said:

"We have stated in the past that rehabilitation is an important objective in the sentencing process to which the courts must have regard. However, it is important to emphasise that before an intervention, involving going the extra mile, would be justified on the grounds of rewarding progress towards rehabilitation to date and/or to incentivise future rehabilitation there has to be a sound evidential basis for so intervening. There has to be evidence of a real prospect of rehabilitation."

48. Our conclusion is that the sentencing judge in this case was fully justified in suspending the period of 18 months of the sentence in furtherance of the objective of incentivising rehabilitation. This appellant had expressed a resolve to rehabilitate and had taken some (modest) steps towards doing so. However, there simply was insufficient basis for going any further. There

was an insufficient evidential foundation for a greater level of suspension. There was no track record of achievement and the appellant's behaviour in the interval between committing the offences the subject matter of this appeal and his sentencing was not such as to inspire a great deal of confidence that he would fulfil his stated resolve.

49. Accordingly, we find no error of principle in the approach of the sentencing judge at first instance and must dismiss the appeal. All