THE COURT OF APPEAL

[2019] IECA 372

Record No: 193/2018

Edwards J.
McCarthy J
Kennedy J

BETWEEN/

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

LIAM WALSH

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 28th day of February 2019 by Mr Justice Edwards.

Introduction

1. The appellant was charged on a ten count indictment. On the 3rd of May 2018, he pleaded guilty to count 8, being a count of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud) Offences Act, 2001 (the "act of 2001") committed on the 25th August 2017. On the 31st of May the appellant entered further pleas to counts 3, 5, and 6, which again comprised offences contrary to s. 4 of the Act of 2001 committed on the 10th of September 2017, the 29th of September 2017 and the 1st of October 2017, respectively. On the same date he also pleaded guilty to count 9, which was in respect of an offence of escape from lawful custody on the 20th of October 2017.

2. The pleas to these counts were acceptable to the Director of Public Prosecutions in circumstances where it was agreed that although the appellant could only be sentenced on those counts to which he had pleaded guilty, evidence at the sentencing hearing would be presented on a 'full facts' basis; it being the prosecution's contention that the offences for which the court would be required to sentence the appellant had been committed as part of what was, in effect, a spree of similar crimes committed during the months of August, September and October of 2017, and that this was important contextual information of which the court should be aware when sentencing.

3. On the 31st of May 2018, Nolan J. imposed a sentence of 2 ½ years' imprisonment on count no 3, backdated to the 20th of October 2017, and took the other counts, in respect of which there had been pleas of guilty, into account.

Background Facts

4. Garda Cathal Feely gave evidence at the sentencing hearing, and he told the court that on the 25th of August 2017, Margaret Gallagher was the manager of the Whitefriar campus, including Whitefriar Church, on Aungier Street in Dublin 2. She was working that day when at approximately 4.15 pm, she noticed a male enter the church building, and make his way to the mass shop. The male picked up outgoing post from the window hatch, walked over to the small writing table, opened his rucksack and put the post into it. There was a CCTV system in operation at the location and Ms Gallagher downloaded footage of the incident which she then gave to gardaí. The accused man, Mr Walsh, was later identified from the CCTV recording as being the male in question. This incident had been the subject of count no. 1 on the indictment.

5. Garda Feely also testified that at 2.30 in the afternoon on the 10th of September 2017, a Ms Harte was in Supermac's restaurant on Lower O'Connell Street, with her husband and two children. She was seated upstairs and was heavily pregnant at the time. She said that there was somebody behind where she was sitting and that her handbag was on her right on the chair. Ms Harte had taken out her purse, given some money to her husband and he had gone up to the counter to pay for purchases that they had made. She left her purse on top of the bag beside her and left it open. She was then talking to her children and looking at a map on her phone. Out of the corner of her eye she observed a male take something out of her bag. She looked back, looked him in the eye, and noted that he was well-dressed. She then looked into her bag and noticed that her purse was gone. She looked back again and at this point the man in question had made a run for the stairs. Ms Harte ran after him, but was unable to pursue him very far because she had her children to mind. The Gardaí were notified and she gave a physical description of the man in terms of his build, clothing and so on. The purse which was stolen had contained €50 in cash, her driver's licence, some bank cards, and GP cards for the children. The accused man, Mr Walsh, was ultimately identified as being the person who had taken the wallet. This incident had been the subject of count no. 2 on the indictment.

6. Garda Feely also testified that on the same date, being the 10th of September 2017, a Ms Jesieva, who is Latvian, was in the city centre in Dublin 1 with her boyfriend and had gone to The Admiral bar and restaurant in Marlborough Street. Ms Jesieva had told Gardai that there were a few people in the restaurant, that she had sat down with her family and that on doing so she noticed there was a male sitting on his own. She was unable to describe what he was wearing. Ms Jesieva had put her bag on the back of the chair on sitting down. She said the bag was a white leather bag with blue flowers and that she had paid €60 for it in Latvia. The bag itself contained her Samsung Galaxy S 6 mobile phone, which was black, and which was worth €520. It also contained a Latvian identity card in her own name, various bank cards, medical cards, her Irish driver's licence, a small amount of English currency, 100 Danish Krone, some car keys, perfume, make-up and some jewellery

of modest value. Whilst Ms Jesieva was sitting there she turned to a waiter in order to place an order and at that point realised that her bag was gone. Once again, there was a CCTV system in operation at the location and the taking of the bag had been captured. When the CCTV was viewed by Gardaí, Mr Walsh was identified as the person who took the handbag. This incident was the subject matter of count no. 3, to which there was a plea of guilty.

7. Garda Feely also told the court that on the 24th of September 2017, a Ms Merriman was in Christchurch Cathedral attending an ordination ceremony. She placed her handbag under a seat within the church where she could keep an eye on it but was, at the same time, engaged in conversation with friends of hers, while intermittently checking on her bag. On one of these checks, she looked down and saw that the bag was in fact gone. She didn't see anyone taking it or leaving with it. The gardaí were notified of the theft and she described to them what the bag had looked like and its contents. Subsequent to that, it was established that shortly afterwards a bank card which had been in her handbag was used in the Fresh supermarket on Camden Street in Dublin 2. A person had used it to make two tap transactions.: one for €15 and the other for €11, and it was the prosecution's case that the person in question was the appellant. This incident had been the subject matter of count no. 4 on the indictment.

8. The sentencing court was further told that on the 29th of September 2017, a Ms Patricia Dias was in the Cappuccino Bar on Crow St which is in Temple Bar, Dublin 1. She sat down at the table near one of the walls and she placed her handbag to her right on the floor. At one point, she noticed that her handbag was in a different position to that in which she had initially left it. Ms Dias thought that it was a little further from her than she recalled having left it. She thought that this was weird and reached out and pulled the bag towards her. However, she thought nothing more of it until she went to pay. At that point she opened her handbag and noticed that her purse was gone. She described to gardaí her sadness and upset at that. Her handbag had contained various items but, particularly, the purse had contained important documents that she had obtained earlier that day from the Garda National Immigration Bureau. Once again there was an operational CCTV system at the location. Gardaí attended at the scene, downloaded and viewed the relevant CCTV footage and ultimately Mr Walsh was identified as being the person who had carried out the theft. This incident was the subject matter of count no 5, to which there was a plea of guilty.

9. The court further heard that on the 1st of October 2017, at The Riddler Restaurant in the La Rochelle Building in the Christchurch area of Dublin 8, a Mr Elroy Hook was present with a number of friends. There were five in the group in total and they sat at a six seater table with their jackets hanging over the spare chair. Mr Hook had his wallet inside his jacket which he had placed over the chair. Shortly after the group's arrival at the premises a man came in to the restaurant by himself. He didn't order anything, but told the waiter that he was waiting for someone. Mr Hook described him as being tall, over 190 centimetres, with long dark blond hair which was in a ponytail. The man also had a light blue backpack with him. According to Mr Hook, this man was present for maybe 15 or 20 minutes, during which time he moved around a bit but seemed really relaxed. At one point this man went out for a cigarette and then came back in. Mr Hook stated that the man then enquired if he could

"*take the spare chair with all our jackets on it.*" One of the group asked another group member to retrieve his wallet from his jacket before giving the chair to the man who had requested it. However, the group member who had been asked to retrieve the wallet reported that it wasn't to be found in the jacket. The group searched the floor, but the wallet wasn't recovered. Ultimately the gardaí attended, viewed CCTV footage covering the location, and it was established that Mr Walsh was the man who had requested the chair and that he had taken the wallet. This incident was the subject of count no. 6, to which there was a plea of guilty.

10. Garda Feely further told the sentencing court that on the 10th of October 2017, in the Shelbourne Hotel, a Ms Ursula Duggan was present with members of her family and they were planning a family occasion. She said that she had a small black leather handbag with her. The handbag contained some Ulster Bank cards, €250 cash in €50 notes, and some items of a personal nature. At a certain point in her dealings with her family, Ms Duggan realised that her bag had been taken but she had not seen it being taken. Gardaí came to the scene, and once again viewed CCTV footage leading to Mr Walsh being identified as a suspect. The injured party in this matter was 87 years old. This incident was the subject matter of count no. 7 on the indictment.

11. Garda Feely also testified that on the 14th of October 2017, at Dollard & Company in Dublin 2, which is a restaurant and supermarket premises, a Ms Laura Murphy was there with two of her friends. In the middle of the premises, there is a bar where you can buy food and Ms Murphy was sitting at the counter eating food with her friends. To the left of her there were a number of free stools and she had put her leather jacket over the stool to her immediate left. She had also then placed her handbag on top of her jacket on that stool. Her handbag was a green leather Rebecca Minkoff designer handbag valued at €500, and in it there were three bank cards, ie., one AIB visa debit card, one Huntington debit card and a Discover credit card. There was also €50 in cash. At approximately 15.35hrs that afternoon she noticed that the handbag was missing when she went to get something from it. Once again the gardaí were called, CCTV was downloaded and the accused man was identified as the suspect. This incident was the subject of count no. 8 to which there was a plea of guilty.

12. The sentencing court was told that gardaí investigating these matters formed the view that they were linked, and arising from the CCTV evidence obtained at various locations they were of the belief that the same man had carried out each theft. On the 20th of October 2017, a Garda Heafey was on foot patrol on Grafton Street, when he observed a male walking towards him, pushing a buggy with a small child in it, and Garda Heafey recognised him as being the person suspected of having committed the theft in the Shelbourne Hotel a little more than a week previously on the 10th of October 2017. Garda Heafey arrested this male, being the accused man Liam Walsh, cautioned him in the normal fashion and brought him back to Pearse Street Garda Station. On arrival in the garda station, Mr Walsh was searched in ordinary course and a wallet was retrieved from his person which contained a number of stolen bank cards and cash. These cards and cash were ultimately identified as being the property of one Ying Quan and were the subject of count no. 10 on the

indictment, being an offence of possession of stolen property contrary to s.18 of the Criminal Justice (Theft & Fraud) Act 2001.

13. The court further heard that shortly before 18.50hrs on the evening of Mr Walsh's arrest, Garda Niall McLoughlin accompanied him to the back yard of Pearse Street Garda Station so he could have a cigarette. About three minutes later, the back gate of the garda station opened up to allow an official garda vehicle to leave, and at this point Liam Walsh ran from the backyard in an attempt to abscond from garda custody. Garda McLoughlin gave chase on foot and at the junction of College Street and Westmoreland Street in Dublin 2, just a short distance away, he caught Liam Walsh, restrained him and conveyed him back to Pearse Street Garda Station. He had a conversation with Mr Walsh at that point who admitted that it had been his intention to escape from custody. The appellant did not resist when he was re-apprehended.

14. Garda Feeley confirmed that the persons from whom various items were stolen were advised of their right to attend court, or to make victim impact statements, but that they didn't wish to do either.

15. Under cross examination in relation to the theft offences, Garda Feeley agreed that each offence had been committed through stealth and that there was no element of confrontation or intimidation or interaction with any of the injured parties and that the items were taken while the injured parties were distracted.

16. Garda Feeley agreed that in relation to the attempted escape, it was an opportunistic act when a gate opened unexpectedly and, appeared to have been a moment of madness in that he came back without any difficulty and without any struggle whatsoever. He confirmed that the appellant had not been detained in relation to the matter but rather had simply been charged following arrest. In relation to the previous convictions, Garda Feeley confirmed that the most serious previous convictions related to offences committed in 2010/2011; that he had received sentences in respect of those offences resulting in a four-year sentence in 2012 and that after his release from that sentence, there had been a period during which he had not come to adverse garda attention until the present offences which occurred from August to October 2017. Garda Feeley agreed that during that period the appellant had been rehabilitated in relation to previous drug abuse, but that he had relapsed into taking cannabis and cocaine during the three-month period in which he committed the offences that the court was required to deal with.

17. Garda Feeley further agreed that following the appellant's arrest on the 20th of October, he was remanded in custody until the end of February 2018 at which point he was granted High Court bail on the basis that he would continue with rehabilitative treatment, previously commenced while in custody. He confirmed that the appellant then went back into custody quickly in relation to another matter that was subsequently withdrawn by the DPP; and that he had effectively been in custody for the previous seven months, i.e., since the 20th of October 2017, apart from a period of about two weeks.

The appellant's personal circumstances.

18. Evidence was given that the appellant has a total of sixty-six previous convictions. Of the previous convictions, there were twenty one for theft, seven for robbery, six for burglary, five for possession of or handling stolen property under section 17/18 of the Act of 2001; three for possession of drugs; four for s.2 assault; one for s.3 assault causing harm, one for threatening to kill or cause serious harm; two for possession of knives and other articles contrary to s.9(1) of the Firearms and Offensive Weapons Act 1990; one for production of an article contrary to s.11 of the Firearms and Offensive Weapons Act 1990; four convictions contrary to the Road Traffic Acts; two for criminal damage; and three for public order offences. Eleven of the previous convictions had been recorded on indictment in the Circuit Court. The previous convictions dated from between the 19th of December 2006 up until 21st of March 2013.

19. Under cross-examination, Garda Feeley confirmed that all of the thefts had been dealt with in one arrest and that it had not been the case that the appellant had been charged, released on bail, and had re-offended in the period since the last offence in time arose.

20. The sentencing court heard evidence that the appellant's offending had commenced when he was 15 years of age, that he had had an unstable upbringing, that his mother had left the family home and that his father, who had difficulties with alcohol, had brought him up thereafter. There was also evidence that the appellant got involved in taking drugs and alcohol himself at a young age and it was at that stage that his offending began.

21. During his time in custody, the appellant did engage in a meaningful way with the rehabilitation services available to him, such that he was afforded bail by the High Court following evidence from a prison counsellor which indicated his cooperation and the potential for him to attend an external rehabilitation centre upon his release. However, the appellant could not proceed with this programme as he again found himself in custody. At his sentencing it was suggested however, that those rehabilitative programmes would still be available to him, as well as an educational programme.

22. One major incentive for the appellant to rehabilitate was the birth of his daughter just a few days before he went into custody. His daughter required surgery due to complications during birth, and the appellant has effectively been in custody for her entire life thus far.

Sentencing Judge's Remarks

23. The sentencing remarks were quite succinct and can be reproduced here in full:

> "*The defendant in this case comes before the Court in relation to, I think, ten matters in all. Eight thefts, one escape from lawful custody and the other handling property. The thefts have, I suppose, similar characteristics in that he spotted an opportunity and stole. It seems he tried to escape from Pearse Street Garda Station with no great effect. It seems the guards chased him, apprehended him and he was brought back to the station. The last one it seems, when arrested, he had in his possession certain stolen items.*

Now, Mr Walsh has a long history of offending. There's some for minor offences, some for serious and some for modest enough type of offending. The mitigation is clear; he's pleaded guilty in the case, he did cooperate. It seems he's trying to reform himself. It's up to Mr Walsh to do that. It seems while in custody he did take advantage of the services available and it seems he has an ambition to reform himself. But that's for Mr Walsh. Up to now he has been somewhat of a menace to society and it seems to me it's up to Mr Walsh to make the best of what's available to him and to reform himself. If not, he'll spend long terms in custody I've no doubt. I think the appropriate sentence, taking all the factors into account, I'm going to impose on count No. 1, for convenience, is a term of imprisonment of two and a half years, backdated to the 20/10/17. And I'll take all remaining counts into account. Thank you"

24. The sentencing judge, upon being reminded that there had not been a plea in relation to count no. 1, changed his order and instead imposed the sentence in respect count no. 3, and took the other matters to which the appellant had pleaded into account.

Grounds of Appeal

25. The appellant seeks to rely on two grounds of appeal:

(i). That the sentencing judge erred in refusing an application by the appellant to adjourn the sentencing hearing in order that he could put mitigating documentation before the court.

(ii). That the sentencing judge erred in law in failing to structure a sentence balancing punitive, deterrent and rehabilitative elements, and in failing to structure a sentence proportionate to the gravity of the offence and the circumstances of the offender.

Appellant's Submissions

The Application to Adjourn

26. At the beginning of the sentence hearing on the 31st of May 2018, counsel for the appellant made an application to adjourn the hearing in such terms:

"*I am instructed to seek an adjournment in relation to this matter in circumstances where Mr Walsh is very anxious to put certain mitigation material before the Court that's not available today. And the reason for that is that Mr Walsh spent some time in custody in relation to this matter between October and February. He was granted High Court bail in February, in circumstances where he's engaged in drug rehabilitation in the prison system and on the basis that he would continue to attend at a day programme when he was released. Unfortunately, within a week, he was put back into custody in relation to another matter, and the DPP has withdrawn that charge as of the end of last week. And Mr Walsh was unexpectedly released at the end of last week in circumstances where he'd been in custody for three months in relation to a matter that was ultimately withdrawn. In those circumstances, he hadn't had an opportunity to continue with the day programme that he'd been released to engage with and also having continued to liaise with drug rehabilitation in the prison,*

he doesn't have a letter from that counsellor because that was to be made available to him today within custody. But he was unexpectedly released at the end of last week. So in those circumstances, where he is very anxious to put that before the Court, and he tells me he's also made contact with an education programme that he can commence shortly and that there are medical issues in relation to his newborn baby that he would like to put before the Court. I'd ask the Court for an adjournment, I have those materials to put before the Court."

27. This application was refused and the sentence hearing continued. The background was that on the 3rd of May 2018, the appellant entered a guilty plea, and sentencing was scheduled for the 31st of May 2018, four weeks after the arraignment. His plea was an early plea, which was acknowledged by the court, and the sentence date of the 31st of May 2018 was the first time the matter had been listed for sentence. The appellant here submits that at the sentencing, the appellant did not have the materials he wished to submit, and that this was not due to any error on his part. It was *prima facie* evident that that the appellant had engaged in a meaningful way with his rehabilitation programme and that he would continue on this journey. The appellant further submits that should it be found that the sentencing judge did not err in refusing to adjourn the application at the commencement of the hearing, he did err insofar as not adjourning matters in order to facilitate the court receiving such evidence as would confirm both the appellant's attempts at rehabilitation and the assistance available to him.

28. It was further complained that as the sentencing judge did not outline a headline sentence arising from the offending, and instead outlined giving credit for the appellant's co-operation, his early plea and attempts at rehabilitation, it is contended that the sentence arrived at of 2 ½ years would indicate a headline sentence of at least four years. Despite the distress caused to the victims, the appellant submits that the offences would more appropriately occupy the lower range of the theft offences, rather than the middle ground which a headline sentence of 4-7 years would. Thus, it was submitted that the sentencing judge erred in principle in nominating a headline sentence that was excessive in terms of the gravity of the offences.

29. The appellant further submitted that the sentencing judge placed too much weight on his previous convictions, failing to take into account the steps the appellant had made towards rehabilitation, and structuring his sentence in such a way as to not give any incentive for the appellant to continue with this rehabilitation through partial suspension.

30. The appellant directs our attention to the Court of Appeal judgment in *DPP v Morgan* [2018] IECA 169, in which a sentence of two years imposed for a robbery which included the victim receiving a "severe" and "savage" beating was appealed due its severity. In Morgan, the appellant had numerous previous convictions, totalling 101, but had availed of rehabilitative aid before his sentencing. Mahon J. stated:

> "*The dilemma facing the sentencing judge was the fact that this vicious and unprovoked assault had been committed by a person who had an appalling record and a large number of very relevant past convictions. Clearly, he saw little prospect*

for further rehabilitation occurring outside prison and saw no reason to structure a sentence accordingly.

However, and perhaps to a greater extent than would be the more usual experience of this court, there did exist and were made available to the sentencing court very strong and positive statements from different persons and institutions particularly experienced in dealing with and assessing offenders and more particularly repeat offenders. The overwhelming sense emerging from these sources is of a young man previously consumed with criminal and irresponsible behaviour having turned, or at least engaging in the process to a significant degree of turning, away from a criminal past and having commenced in a very real way, rehabilitation. The public interest in encouraging this reform is so obvious that it barely needs mention. Importantly in this case there exists substantial proof that the appellant has (and has done so by the sentencing date) successfully dealt with his previous serious addiction problems and was, and is, drug free. That fact alone marks out this case as, sadly, somewhat rare.

The court is satisfied that the learned sentencing erred in failing to structure the sentence to facilitate and encourage this rehabilitation. His decision to impose a custodial sentence was, however, correct because of the very serious nature of the crime.

The court will therefore allow the appeal. It will impose a sentence very much designed to provide the appellant with the strongest possible incentive to continue his admirable efforts to date to rehabilitate and leave his criminal past forever behind him, while at the same time, reflecting the very serious nature of the crime.

That sentence will be five years imprisonment with the final four years suspended for a period of three years post release on the appellant entering into a bond in the sum of €100 to keep the peace and be of good behaviour and comply with the requirement of the Probation Service during the said three years."

31. The appellant submits that he was deprived of the opportunity to offer evidence of his rehabilitation to the court, and that while the sentencing judge made reference to the appellant's "*ambition to reform*", he did not structure the sentence in any way which would facilitate this rehabilitation.

Respondent's Submissions

32. The respondent accepts that the offences of dishonesty charged do not fall on the higher end of spectrum but seeks to remind this court that many involved the theft of valuable and personal items which would cause significant inconvenience and emotional upset. The fact of this would not have been lost on the appellant, as he was careful in his methods and was aware of what he sought to steal.

33. As these offences could be collectively described as a spree, the respondent relies on this Court's previous judgment in *DPP v Michael Casey & David Casey* [2018] IECA 121:

> "*Where multiple offences have been committed in a spree there is nothing in principle wrong with a court taking account of the overall gravity of the offending conduct viewed globally, indeed it is desirable that it should do so. Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor. That it was part of a spree renders the gravity of each individual offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher offences for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing*".

34. Although the extent and nature of the spree differs between these cases, with the Caseys' spree taking place in one night and the appellant's occurring over a number of weeks, the respondent submits that a precise correlation is not required

The respondent submits that the offences in this case qualify to be treated as a spree – comprising as it does a pattern of proliferation warranting the imposition of consecutive sentences. The appellant's offences, it was submitted, cannot be accurately described as a single transaction.

35. It was submitted that if there was any benefit arising from the sentencing remarks, it was to the appellant, to the extent that the potential aggravating nature of this spree following a history of offending was not fully examined. If there was any weight to his claim that the unstated headline sentence was too high, the respondent submits this falls apart once the offences are considered as a whole under the *Casey* analysis.

36. The respondent submits that the sentence imposed in respect of count no. 3 was fair and proportionate, as it was intended to reflect the entirety of the offending. If anything, the respondent claims, the sentencing judge saved the appellant from either an increase in the individual tariff, or the possibility of sentences running consecutively. The respondent does not claim that the sentence is unduly lenient within the statutory definition, but that it was unduly lenient given the larger pattern of offending.

37. The respondent drew attention to the previous offences of the appellant, which included 21 counts of theft, 7 counts of robbery and 6 counts of burglary. Though 11 previous convictions were recorded on indictment, the respondent cites the fact that the appellant has a total of 66 previous convictions, and has 5 convictions for assault and one for issuing threats. The potential for relevant previous convictions to aggravate the sentencing was confirmed in *Casey* – although that case concerned burglary, the appellant in the current case presents a more relevant and more serious record of offending. Thus, it would follow that the sentencing court approached the appellant's sentence with as much leniency as

was available to it, and in no way imposed a sentence which could be described as excessive or severe.

38. Regarding the appellant's submission relating to a possible error on the part of the sentencing judge in refusing his application for an adjournment, in circumstances where the appellant had hoped to make available to the court evidence of his rehabilitation efforts, the respondent points to the court's acknowledgements of these efforts (for example: "*while in custody he did take advantage of the services available and it seems he has an ambition to reform himself*") to claim that the court already took account of these matters on trust, and the availability of the evidence itself would make no difference to the court's determination.

39. The respondent contended that the appeal should be dismissed as the sentence the appellant received was a fair and proportionate one.

Court's Analysis and Decision

40. During the oral hearing of this sentence appeal, matters were distilled down to two complaints which are said to amount to errors of principle on the part of the sentencing judge.

41. The first complaint which may be readily disposed of is that the sentencing judge did not adhere to the recommended best practice advocated by this Court and rather arrived at his decision by a process of instinctive syntheses.

42. We have emphasised time and again that while we encourage judges to adopt the methodology of semi structured reasoning in constructing a sentence, an approach which is considered to be best practice, the failure to do so will not *per se* amount to an error of principle.

43. This was a very experienced sentencing judge. Moreover, he was sentencing the appellant for commonplace offences. He was expressly told the range of applicable penalties by counsel for the prosecution. It could not tenably be contended that he was unaware of the need to assess gravity with reference to the spectrum of available penalties and by taking into account culpability and harm done. Equally, it could not be contended that he was unaware of his obligation to afford due mitigation.

44. While he did not explain his reasoning process in the recommended way, we find, looking at the sentences actually imposed, that there is no reason to believe that he over- assessed gravity or that he failed to take due account of mitigation.

45. Indeed, the sentences that were imposed appeared to us to have been very lenient given the circumstances of the case. It was not an error of principle *per se* to have constructed a sentence based upon an instinctive synthesis of the relevant facts.

46. We are therefore not disposed to uphold this ground of appeal. Had the sentence imposed looked to us to have been possibly excessive, and by reason of the employment of an

instinctively synthetic process of reasoning incapable of ready explanation, we might have been disposed to interfere with it as we have done in some other such cases.

47. However, no such concern arises here. The sentence imposed was by any yardstick very lenient indeed in the circumstances of the case.

48. The second complaint is that the sentencing judge erred in failing to suspend a portion of the sentence to incentivise rehabilitation. An ancillary aspect to this is that the judge had been asked to adjourn sentencing to enable the appellant to obtain a report from a drug rehabilitation counsellor that he had been attending. The judge had refused this application summarily and without giving any reasons for doing so. This was in circumstances where the court had been told that the appellant had, while in prison in the past engaged with drug rehabilitation services, that following a release from prison he had unfortunately relapsed leading to him committing these offences, that he had been re-committed to prison in consequence of another matter during which he had re-engaged with drug rehabilitation services, that he had then been released again unexpectedly and only a week approximately before coming before the court for sentencing for the matters, the subject matter of this appeal.

49. It was submitted that he had simply not had time to take up the report that he wished to put before the court.

50. Counsel for the appellant complains that the refusal to allow the appellant the opportunity to procure this report in the teeth of being told that (a) there had been positive engagement with the drug rehabilitation counsellor and (b) that there had been insufficient opportunity for the appellant to procure the required report providing evidence in support of that assertion was unfair and erroneous.

51. We must emphasise that whether or not a judge suspends any portion of a sentence to incentivise continuing rehabilitation is a matter for the judge’s discretion. A judge will always have a very wide discretion in that regard and in general an Appellate Court will be very slow to interfere with any such decision.

52. However, the discretion must be exercised judicially and fairly. Where a court is told that mitigating evidence, potentially relevant to whether or not a court might possibly exercise its discretion in favour of suspending all or part of a sentence, is not yet available and the court is provided with a reasonable explanation for why that is the case and is further told that such evidence could be made available if a short adjournment was granted, the court in question should, in the interests of justice, lean towards the granting of the adjournment sought, unless there are cogent reasons for not doing so, which reasons should be expressly stated if the court decides not to grant the adjournment.

53. Regrettably the sentencing judge in this case gave no reason for refusing the adjournment in circumstances where a short adjournment should arguably have been granted.

54. We consider that that was an error of principle.

55. In the plea of mitigation, the sentencing judge was told the appellant wished to attend a rehabilitation centre on release from custody and to have support from the drugs counsellor, a Mr. Dowling, with whom he had been engaging with while in custody.

56. In effect, the court was being asked to impose a sentence that would facilitate the appellant's structured release into the community in a way that would enable him to continue along the path of rehabilitation which he has latterly taken.

57. We accept that the sentencing judge did go on to deal with the matter on the basis that he was prepared to accept that the appellant had made efforts to address his substance abuse issues. The difficulty, however, was that he did not have precise details concerning the extent of the appellant's progress both before and since the appellant had relapsed and had committed the offences for which he was then about to be sentenced.

58. Nor did the sentencing judge have any independent assessment of the genuineness or otherwise, of the asserted commitment to resume and continue efforts at rehabilitation.

59. We feel that in justice the appellant, in this case, should have been afforded the opportunity to put such material before the court and that it was not sufficient for the sentencing judge to proceed on the basis of being prepared to accept in a non-specific way that there had been efforts at rehabilitation. The failure to afford the appellant that opportunity was an error.

60. In circumstances where we have identified an error of principle, we must quash the sentence imposed by the court below and proceed to a re-sentencing of the appellant.

61. As is our practice, we invited the parties to submit to us on a contingent basis any additional material that they would wish to be taken into account in the event of a re-sentencing.

62. We have received a number of documents from counsel for the appellant. These include a positive Prison Governor's report which confirms that he is employed in a food service role while serving his sentence, receiving daily temporary release to facilitate this.

63. A report from Mr. Noel Dowling, who is a drugs counsellor at Cloverhill Prison, confirming the appellant's engagement with the drugs rehabilitation programme at that prison. He confirms that the appellant has attended thirty-five counselling sessions, that he is motivated and focussed and that he is making a concerted effort to rehabilitate.

64. And we also have a report from the education centre in Cloverhill Prison confirming positive engagement by the appellant with educational services.

65. We will take all of this into account.

66. The appellant pleaded guilty to five offences on the indictment, being count numbers 3, 5,6 8 and 9. The appellant had also asked that five other counts, being count numbers 1, 2, 4, 7 and 10 to be taken into consideration. Count numbers 1-8 all involve s.4 Theft, count

no. 9 was a count of escaping from lawful custody and count no. 10 was a count of possession of stolen property.

67. The sentencing judge at first instance decided to deal with matters globally and to impose a single sentence on Count number 3 and take all other matters into consideration. That was an option that was certainly open to him.

68. However, we propose to structure the appellant's sentence differently.

69. We have carefully considered each of the offences to which there were actual pleas of guilty and have taken into account the culpability of the appellant and the harm done. In the case of the escape from lawful custody, there was no harm done to any individual but the offence is an affront to society. We have also considered the scale of penalties in each instance. We would assess the gravity of each theft offence as meriting a sentence of twelve months' imprisonment before application of mitigation. We take the same view in relation to the offence of escaping from lawful custody. Moreover, in circumstances where an additional five offences, that is four of theft and one of possession of stolen property, are to be taken into consideration, we would add a premium of two months in each instance, making the headline sentence in each case one of fourteen months.

70. The appellant did plead guilty and has had, and continues to have, various adversities in his life as disclosed in the evidence before the Circuit Court and of which we take account. We also note and take account of his substance abuse problem in particular and his efforts to date at rehabilitation. We are prepared to discount by six months in each case, to take account of mitigation, leaving five net sentences of eight months' imprisonment.

71. However, we feel that given the multiplicity of offences within the short timeframe involved and the multiplicity of victims, consecutive sentencing is called for.

72. We will therefore make the sentence on Count 5 consecutive to that on Count 3, the sentence on Count 6 consecutive to that on Count 5, the sentence on Count 8 consecutive to that on Count 6 and the sentence on Count 9 consecutive to that on Count 8, resulting in an overall aggregate sentence of forty months or three years and four months.

73. We will then reduce that forty months' sentence by five months or a month in the case of each individual case, to take account of the totality principle leaving a net sentence of thirty-five months.

74. Further, and to incentivise the appellant's continued efforts at rehabilitation, we will suspend the final five months of the sentence on Count 9 on terms to be discussed at the end of this judgment, leaving a sentence to be actually served of thirty months or two and a half years.

75. So, to summarise. The net effect of what we are doing is that we have increased the assessment and gravity of the offences in each case or at least the overall gravity of the offences to forty months or three years and four months after mitigation, we have taken five months off in application of the totality principle and we have, in addition, suspended

five months off to incentivise rehabilitation, bringing us back to the sentence that was, in fact, originally imposed but which was, in our view, erroneously constructed.

76. So, that is the position. The appellant will be required to enter into a bond. The proposed terms are that he would keep the peace and be of good behaviour, that during the period of suspension he would co-operate with the Probation and Welfare Service and further that he will continue to engage with drug rehabilitation services during the remainder of his sentence and following his release. The term of the suspension will be of two years.