THE COURT OF APPEAL

[179/17]

The President
Whelan J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

KEITH HEARNE

APPELLANT

JUDGMENT of the Court delivered on the 13th day of May 2019 by Ms. Justice Kennedy

Introduction
1. This is an appeal against severity of sentence. The sentence under appeal was imposed in the Central Criminal Court on the 19th June 2017, following a plea of guilty in respect of the counts on indictment.

2. The appellant was sentenced to 12 years' imprisonment in respect of the offences of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981; rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act, 1990; false imprisonment contrary to s. 15 of the Non-Fatal Offences against the Person Act, 1997; and sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990.

Background
3. The incident in question occurred on the 4th of July 2015 in the Crowne Plaza Hotel in Blanchardstown. The injured party was volunteering at a convention being held in the hotel. She was in the midst of setting up an audio-visual display in one of the hotel rooms when the appellant, who was an attendee of the convention, locked her into the room and proceeded to throw her on the ground. A scuffle ensued and the complainant was thrown into a row of chairs and tackled to the ground where the appellant sat astride her. He put his hand over her mouth to muffle her screams and licked her cheek, saying 'any girl would love this'. He told her he could break her neck there and then and asked her if she would prefer that. He asked her was she going to be a good girl and he then removed her clothing and used a neck tie to bind her hands. He then digitally penetrated her. The injured party described this as being extremely painful and that he was very rough. She screamed throughout and he then leant over her and threatened her, stating "I have a knife in my bag. If you don't shut up, I'll use it." He attempted to vaginally penetrate the complainant with his penis but could not maintain an erection. He masturbated and then, pulling the complainant's legs over her head, he vaginally penetrated her. She described this as incredibly painful. He grabbed her by the hair and pulled her to her knees. She managed to extract one hand from the binding, at which point he struck her and then grabbed her by the back of the head and put his penis into her mouth, gagging her due to the force he used.

4. The offending ended when a third party heard the commotion and managed to enter the room and tackle the appellant, leading to the appellant's arrest. The appellant's bag was seized and was found to contain a prop knife purchased at the convention, handcuffs, condoms and sadomasochistic items including a studded collar, leather gloves and a leather mask.

5. During the course of interviews with the Gardaí, the appellant made admissions as to the offences in question, stating that he had a mental disorder and had not been taking his medication in the weeks leading up to the offence.

Personal circumstances
6. The appellant was born on the 12th of July, 1988, and is from Tallaght, Co. Dublin. The appellant has no previous convictions. Evidence was given by the appellant's mother detailing the appellant's psychiatric history which include diagnoses of ADHD, autism spectrum disorder, bipolar disorder and schizoaffective disorder. The appellant received treatment as an in-patient in St Patricks Institution when he was 15 years old. A number of reports were compiled for sentencing purposes and these provide details of the appellant's variable use of psychiatric medications and place the appellant at a moderate to high risk of reoffending. Specifically, the judge received a psychiatric report from Dr. Monks, Consultant Forensic Psychiatrist, dated the 27th January 2017. The judge requested a pre-sentence psychiatric report, which report was also prepared by Dr Monks and is dated the 12th June 2017.

The sentence
7. The trial judge identified a headline sentence of 15 years' imprisonment in respect of the two counts of rape and allowed a discount of 3 years for the mitigating factor, being that of the plea of guilty. Concurrent sentences of twelve years and six years were imposed in respect of the counts of false imprisonment and sexual assault. In his sentencing remarks, the judge acknowledged the need to permit of the potential for rehabilitation. A period of five years' post-release supervision was imposed.

8. In the course of sentencing, the trial judge referred to the victim impact report and the devastating impact suffered by the complainant as a result of the appellant's offending. The trial judge also referred to the reports prepared in respect of the appellant, noting that the reports make clear that the appellant was of sound mind at the time of offending. The reports also indicated that there was a moderate to high risk of sexual reoffending and the trial judge indicated that the mitigating factor of a low risk of recidivism was not present in this case.

9. Following a careful consideration of the offences, the trial judge outlined the headline sentence as follows: -

> "Having regard -- I must look of course at the individual offender for these crimes. It is not a question of looking at some notional or theoretical person. I must look at the accused who is before me and I must have regard to the totality of the evidence pertaining to this offence and this accused which extends and includes of course to the adverse effects on the victim. The Sex Offenders Act provides that the adverse effects on a victim should be taken into account in sentencing. To my mind, that Act did not consolidate the common law but made provision explicitly for the imposition of a higher sentence, commensurate with the risk or at least with the adverse effects on an accused -- or a victim of crime. So, in all of the circumstances before applying any mitigating factor it seems to me that the appropriate sentence in respect of those are the offences which carry the most serious penalties, that is imprisonment for life, in particular the rape contrary to common law and the offence of rape contrary to section 4, the sexual offences which carry that penalty, it seems to me that the appropriate penalty is one of 15 years' imprisonment."

In terms of mitigation, the judge stated as follows: -

> "Now, I must take into account the mitigating factors. There is only one mitigating factor as far as I'm concerned and that mitigating factor is the plea of guilty, which I accept was at an early stage and which I accept was preceded by written communication with the Director of Public Prosecutions or his or her solicitors. However, since the accused was found in flagrante in respect of this matter, the mitigation to be afforded in respect of the plea of guilty must be modest and accordingly I will reduce the penalty, or impose a sentence of 12 years affording a relatively modest period of three years approximately by way of reduction to recognise the fact of the plea."

Grounds of appeal

10. The appellant puts forth the following grounds of appeal, as outlined in written submissions: -

> (i) Having identified where on the spectrum of the offending behaviour the incident offence lay and having articulated it as falling at the top bracket of the offending and warranting a term of imprisonment of 15 years' imprisonment, the learned sentencing Judge specifically stated that the only sole mitigating factor present was the plea of guilty as offered by the defendant and suspended a period of three years to reflect same;
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> (ii) The learned sentencing judge erred in so identifying a single mitigating factor as being present in circumstances where the defendant was a person of previous good character who had further struggled and laboured under a number of particular difficulties to include learning difficulties from a young age;
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> (iii) The learned sentencing judge erred in failing to take into account the fact that the appellant had a number of pro-social factors present in his life such as would assist in providing security and stability in his post release environment;
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> (iv) The learned sentencing judge erred in viewing as an aggravating factor the presence of certain items within a rucksack brought to the scene by the appellant and the Court specifically referred to handcuffs or hand restraints being present therein. However, none of the items contained within the bag played any part in the offending behaviour, and whilst reference was made to a knife at the scene by the learned sentencing Judge, it was confirmed in evidence that that implement was a prop or toy instrument purchased at the comic convention by the appellant on the day in question and formed no part of the offending behaviour;
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> (v) The learned trial judge erred in fact and in law in imposing a sentence which was excessive in all of the circumstances and failed to take into account the particular rehabilitative capacities of the appellant before this Court; the Court appeared to take the view that there was no prospect of the appellant gaining any insight into his own behavioural difficulties over the duration of the custodial period imposed;
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> (vi) The learned sentencing judge imposed a sentence which was excessive having regard to all the circumstances of the case.

Submissions of the appellant

11. The appellant submits that the trial judge erred in failing to attach any weight to the numerous mitigating factors put forward. In recognizing only, the guilty plea as the sole mitigation present, the appellant submits that the sentence imposed was disproportionate and overly emphasised the principles of deterrence and punishment.

12. In particular, it is submitted that the Court erred in not considering the appellant's previous good character and lack of convictions. The appellant submits that the absence of previous convictions is one of the strongest mitigating factors in a case and the importance of such as a mitigating factor was expressed in *The People (DPP) v. Perry* [2009] IECCA 161 and similarly, in *The People (DPP) v. Kelly* [2005] 2 IR 321, the Court of Criminal Appeal treated the absence of previous convictions as a mitigating factor in favour of the appellant who was convicted of manslaughter. The appellant refers to the decision of the Court of Criminal Appeal in *The People (DPP) v. Loving* [2006] 3 IR 355 where it was accepted that previous good character is a factor to be considered when imposing sentence. The appellant submits the following comments of Mr. O'Malley in *Sentencing Law and Practice*, are applicable to sentencing in Ireland: "There is no logical basis for denying mitigation to first time offenders solely on account of the nature of the offence."

13. The appellant argues that the trial judge erred in failing to afford adequate regard to the extensive mental health difficulties suffered by the appellant. The appellant refers to *The People (DPP) v. Power* [2014] IECA 37 where this Court held that the failure of the sentencing judge to refer to the information regarding the accused's mental health, represented an error in principle.

14. The appellant says that the Court failed to recognise the pro-social factors present that would offer stability and incentivise rehabilitation, namely the involvement of the appellant's mother who has a history of providing support to the appellant with in-depth knowledge of the appellant's psychiatric difficulties. The appellant refers to *The People (DPP) v. Hall* [2016] IECA 11 where the importance of the sentencing judge to afford due regard to all mitigating factors, including those that could assist rehabilitation was made clear.

15. The appellant submits that the presence of certain items in the appellant's bag including the prop knife played no role in the

offending behaviour. The appellant submits that the trial judge's reference to the knife did not make clear that it was a prop knife and moreover, in giving express consideration to the possession of a knife, for which the appellant was not charged, this was inconsistent with the fundamental principle that an offender can only be sentenced for offences to which they have been convicted or pleaded guilty, a principle adopted by the Irish Courts through the reasoning in the English case of *R v. Canavan* [1998] 1 ALL ER 42.

16. The appellant submits that the principle of rehabilitation was not upheld by the trial judge in imposing sentence. It is submitted that the trial judge erred in disregarding certain factors including the previous good character of the appellant as a basis for indicating that rehabilitation would be possible.

17. It is argued that the judge erred in identifying a pre mitigation figure of 15 years and further failed in not identifying the range of gravity in which the offences fell. In all the circumstances of the case, the appellant submits that a starting point of 15 years was too high and offers a number of comparator cases including *The People (DPP) v. SP* [2009] IECCA 1 where the Court varied a life sentence to one of 15 years. This case involved the repeated abuse of young boys and the accused had previous convictions and a history of prior sexual offending. The appellant also refers to *The People (DPP) v. GF* [2014] IECA 42 where the Court of Appeal imposed a sentence of 14 years' imprisonment where the appellant pleaded guilty to the repeated rape and abuse of his neighbour's child accompanied by circumstances of extreme depravity and sexual perversion. *The People (DPP) v. Griffin* [2011] IECCA 62 concerned an accused being convicted of rape and sexual assault following a trial. The offending behaviour was perpetrated against the victim between the ages of 8-16, with the appellant starting the abuse when he was aged 24. The Court of Criminal Appeal reduced the appellant's imprisonment from life with a substituted sentence of 15 years, stating the case lacked aggravating violence to warrant a higher sentence. The Court in *The People (DPP) v. PP* [2015] IECA 316 reduced and substituted a sentence of imprisonment from 12 years to 7 years in respect of a conviction on 17 counts of sexual assault and rape, the victim being the appellant's 7-year-old daughter.

Submissions of the respondent

18. In response, the respondent submits that the Court was correct in identifying the plea of guilty as the sole mitigating factor. Moreover, that in coming to that conclusion the trial judge considered all salient factors. The judge referred to the psychiatric reports which detailed the appellant's unwillingness to address his psychiatric health difficulties and the reports concluded that he was of sound mind at the time of offending, as such, it is submitted that his psychiatric illnesses could not be relied on as a mitigating factor. The respondent submits that there was no cogent evidence of remorse such that it gave any comfort to the victim. Therefore, it is submitted that the trial judge was left only with the plea of guilty as the mitigating factor.

19. The respondent submits that the trial judge's reference to the knife in the appellant's bag was not in error as the appellant made specific reference to it when threatening the complainant and it formed a clear part of the aggravating circumstances. Furthermore, it is submitted that the judge specifically noted that the Court must take into account the concept of rehabilitation but the reports submitted on behalf of the appellant indicated that the appellant was at a risk of reoffending. The appellant submits that the Court, bearing in mind the requirement to factor any potential for rehabilitation, specifically indicated the requirement of a 5-year post release supervision order to encourage and assist with community rehabilitation the concept of rehabilitation was further acknowledged in the reduction of the headline line sentence from 15 years to 12 years.

20. The respondent rejects the assertion that the sentence imposed is excessive. The respondent submits that it is consistent with the range of offences identified in *The People (DPP) v. Drought* [2007] IEHC 310 and subsequent cases. The respondent accepts the importance of the plea of guilty, especially in sexual offences and it is submitted that the sentencing judge expressly acknowledged the plea as the primary mitigating factor and gave it due credit. However, the offence of rape is one of the gravest offences and it is submitted that proper regard was had to the very serious nature extent and duration of these offences on the victim.

Discussion

21. Counsel for the appellant criticises the pre-mitigation sentence of 15 years' imprisonment. Moreover, it is submitted that the judge failed to consider any mitigating factor other than that of the plea of guilty and did not take into account the rehabilitative capabilities of the appellant.

22. We will address, firstly, the specific complaint set out in the written submissions regarding the assessment of gravity by the sentencing judge namely; that the judge erred in viewing as an aggravating factor, the presence of items in the appellant's rucksack. Those items were described as "sadomasochistic gear" and included a studded collar, handcuffs and a 'prop' knife. The complaint expressed is that the judge considered the items found to be an aggravating factor notwithstanding the fact that they were not produced in the course of the attack by the appellant. It is properly conceded in the written submissions that reference was made to the use of a knife by the appellant in the course of attack, specifically that he would use the knife if the injured party did not shut up.

23. In the circumstances of the present case, where the appellant remained uninvited in the hotel room, where he locked the hotel door and unlawfully detained the injured party and where he immediately proceeded to violently attack her, we can see no basis for the complaint. The appellant readily threatened the injured party that he would use a knife; the fact that he did not in fact produce a knife, does not in any manner, lessen the impact or the effect of the threat made to her. That a "prop" knife was then discovered in his rucksack along with other material with possible sexual connotations, is a relevant aggravating factor and one which the judge was entitled to take into account.

24. In identifying the pre-mitigation sentence of 15 years, the judge classified the offences as being at an extremely serious level. When we scrutinise the offending conduct, we find ourselves in agreement. This conduct featured many aggravating factors, we have already identified the contents of the rucksack as being an aggravating factor but there are many aggravating factors in the present case. This was a violent, premeditated and prolonged attack on a young woman who was subjected to appalling and varied sexual acts. She was stripped naked, humiliated, threatened with a weapon, slapped, struck, her legs were forced over her head causing extreme pain while the appellant penetrated her, she was pulled to her knees by her hair, she suffered pain and injury, including genital trauma, she was placed in terror by the actions and words of the appellant. This dreadful ordeal only ended when somebody forced their way into the room and caught the appellant in the act of violating the injured party. The ordeal has had a profound and devastating effect on the victim which is readily understandable given the facts of this case. In light of the aggravating features, we are in no doubt that the classification by the judge of this as being a most serious matter was not in error.

25. It is submitted on behalf of the appellant that the judge did not properly consider the appellant's mental disorder when imposing sentence. The question at this stage of the analysis is whether his mental difficulties impacted on his culpability such as to operate as an extenuating factor. In circumstances where an offence comes about as a result of a mental disorder, it may be the situation that the moral culpability of the offender may be less depending upon the particular circumstances. The circumstances however are all-important. The judge imposing sentence, must take into account those particular circumstances which will include the offender's

mental condition at the time of the incident. The appellant has diagnoses of schizoaffective disorder and autism spectrum disorder. In the present circumstances, it is apparent from both of Dr Monks' reports of the 27th January 2017 and the 12th June 2017, that while the appellant has a complex mental disorder, he did not have any active symptom of mental illness at the relevant time, nor did the particulars of his ASD account for his sexually violent conduct. Moreover, it is the position that the evidence before the sentencing judge revealed that the appellant was not compliant with his medication for a considerable period prior to the offending conduct. The fact that he was not compliant with his medication in circumstances where he was aware of his illness is a relevant factor as stated by Fennelly J. in *The People (DPP) v. C* [2013] IECCA 91:-

> "Where the act has been significantly the result of a psychiatric condition, the moral guilt of the accused may be less, depending on the circumstances. That qualification is important. The sentencing court will have to take account of all the circumstances, which will include the extent to which the accused is aware of or responsible for his condition or careless in regard to its treatment."

26. However, in the circumstances of the present case, the fact of the appellant's non-compliance with his medication is not of significance where, notwithstanding his failure to take his medication, he did not have active symptoms of mental illness at the relevant time. Therefore, his condition did not have relevance to his moral culpability and did not affect his level of responsibility for his offending conduct.

27. Arising from that, it can be said that the judge was entitled to take the view that the appellant was of sound mind at the time of the commission of the offences and, therefore, his mental disorder did not operate to extenuate his moral culpability and so did not serve to reduce the pre-mitigation sentence of 15 years' imprisonment. We are satisfied that the sentencing judge did not err in this regard.

The Mitigating Factors
28. The argument is advanced that the judge, in effect, disregarded all mitigating factors with the exception of the pleas of guilty. Reliance is placed on the absence of previous convictions, the appellant's family support and his mental disorder as mitigating factors, of which it is said, the trial judge took no account.

The Timing of the Guilty Plea.
29. We will address firstly the pleas of guilty. In the first instance it is important to set out the timeline in respect of the determination of these matters.

30. The offences were committed on 4th July 2015, the appellant was charged with the offence of rape on 5th July 2015, the matter was, in the ordinary way, returned for trial before the Central Criminal Court and a trial date was fixed.

31. On the 9th February 2017, a letter was sent to the DPP indicating that the trial date was taken on the basis that the only defence being contemplated was that of a psychiatric nature and that the facts would not be in issue. On the 16th February 2017, a further letter was sent by the appellant's solicitor to the DPP notifying the DPP that the appellant would be entering a guilty plea. The fact of this plea was communicated to the injured party on the 22nd February 2017, and the pleas of guilty to certain charges, specifically, the offences of rape and false imprisonment were entered on the 6th March 2017. The trial date had been fixed for the 27th March 2017.

32. In the course of the appeal, there was some debate as to the date when the injured party became aware that the matter would not be proceeding to trial. There was an issue as to whether a letter had been furnished to the DPP advising that insofar as a trial date had been taken, this was to facilitate a psychiatric assessment of the appellant to explore the possibility of a special verdict. It was clarified that the letter which was furnished was dated the 9th February 2017, advising that the trial date of 27th March 2017 was taken on the basis that the only defence being contemplated was of a psychiatric nature and that the facts would not be in issue. Whilst it was indicated to the sentencing judge that the DPP had been so notified, no date was placed on this notification in the course of the sentencing hearing. In any event, the relevant date of notification that pleas of guilty would be entered was the 22nd February 2017.

33. It is undoubtedly so, that the injured party was aware of that situation from the 22nd February 2017, a little over a month before the trial date of 27th March 2017. A guilty plea may merit a significant discount but this depends upon the circumstances of the plea of guilty and in particular, the time when the plea of guilty is entered. Furthermore, a sentencing judge is entitled to take into account circumstances where an offender is caught red-handed, which may serve to reduce the discount to be afforded. It is trite to say that a guilty plea saves victims of crime from having to give evidence and from having to undergo the rigours of cross-examination. There is no doubt therefore, that a plea of guilty will spare a victim from having to testify about events which caused a devastating psychological impact. Obviously the earlier the plea of guilty the greater the credit in most circumstances to be afforded to the offender, as this means that the victim does not have to face the prospect of having to give evidence. In the instant case, the injured party did not become aware of the fact that the appellant intended to enter pleas of guilty until approximately one month prior to the trial date and whilst credit was, and indeed should be, given for the plea, the level of discount must be less as a result of the timing of the plea of guilty and the fact that the appellant was caught in the course of sexually assaulting the injured party. These were circumstances which the sentencing judge was entitled to take into account as reducing the discount to be afforded for the plea.

34. We are satisfied that the sentencing judge afforded a considerable reduction for the mitigating factor which he identified as being pleas of guilty, thus reducing the pre-mitigation sentence by three years. We are of the view, that whilst this Court, if sentencing in the first instance, may not have given such a level of reduction for the pleas of guilty given the tardiness of those pleas; nonetheless that is not the issue, but it is of relevance to our consideration of the submissions on behalf of the appellant that the trial judge erred in failing to take account of other mitigating factors specifically, the absence of previous convictions, the appellant's family support and his mental disorder.

Additional Mitigating Factors.
35. We now move to address those particular factors. The consideration of the appellant's mental condition at this stage of the analysis, is whether his underlying psychiatric condition and mental difficulties would have the effect of rendering incarceration more onerous for him with his particular difficulties than it might be for an individual without his condition.

36. When the sentencing judge addressed the issue of the appellant's mental disorder he stated as follows: -

> "How then does one approach this matter? Sentencing is not an exercise in vengeance. He is of sound mind. One must hold open some potential for rehabilitation, one must allow some light at the end of the tunnel, so to speak. One must

> have regard to the both the principle of general deterrence in respect of offences of this type, but also specific deterrence so far as this accused is concerned and that is here a relevant factor, because he is a person, albeit with psychiatric difficulties, who has failed to properly submit to treatment. One must not also have regard to the punitive element in sentencing."

37. At a later stage in the sentence proceedings, the judge clearly indicated that he was satisfied that there was only one mitigating factor in the case and that was the plea of guilty. He did not consider or have regard to the appellant's mental disorder as potentially relevant to mitigation. Moreover, he did not consider the absence of previous convictions or the appellant's family support as mitigating factors.

38. In this regard, it is the view of the Court that the judge fell into error. Firstly, whilst the judge acknowledged the appellant's mental disorder, he did so in the context of assessing the gravity of the offending behaviour and he therefore only considered his mental difficulties in the context of considering whether such had the capacity to extenuate his moral culpability. He did not consider whether the appellant's mental disorder had the capacity to mitigate his sentence, in the context of having the potential to impact adversely upon his capacity to serve a sentence of imprisonment.

39. Secondly, the absence of previous convictions is ordinarily a mitigating factor. There are circumstances where the absence of convictions may not be treated as such, for example, where an accused has been engaged in sexual offending over a prolonged period but has not been brought to justice. However, this is not one of those cases and we are therefore satisfied that the sentencing judge fell into error in failing to consider the absence of previous convictions as a mitigating factor.

40. Finally, in this analysis, the appellant's family support was relevant to the prospect of rehabilitation, however, in this respect, we are satisfied that the judge had regard to rehabilitation in the imposition of sentence.

Conclusion.

41. The issue therefore is that whilst the sentencing judge fell into error in the manner we have identified, whether this amounts to an error of substance. In this respect we must look at the sentence actually imposed. The sentence imposed was one of 12 years' imprisonment. We have already found that the gravity of the offending conduct merited a pre-mitigation sentence of 15 years' imprisonment. We are satisfied that the sentencing judge gave a significant reduction for the pleas of guilty, in fact when one looks at the circumstances of the pleas, such reduction may have been excessive. When we examine Dr Monks' report, it is clear that the appellant will require ongoing psychiatric supervision, which should be afforded to him whilst incarcerated. Moreover, Dr Monks opines that the appellant is likely to encounter long-term difficulties managing stress. This, it appears to us, applies whether in a setting of incarceration or in the community. Therefore, whilst it appears that the appellant will continue to experience difficulties associated with his illnesses, there is no specific reference in the reports to such difficulties being exacerbated in a custodial setting. However, one might assume this to be so, but in the circumstances, we are not satisfied that such difficulties as may be envisaged serve to reduce the pre-mitigation sentence to any significant degree.

42. In the circumstances, we are satisfied that in reducing the sentence downwards to one of 12 years' imprisonment, albeit having determined that the only mitigating factor was that of the pleas of guilty, the sentence imposed was one which was appropriate. Even if the sentencing judge had considered the absence of previous convictions and the appellant's mental disorder with the consequential impact of the latter on his capacity to serve a sentence of imprisonment as mitigating factors, we are satisfied that the downward reduction of three years was sufficient to incorporate those mitigating factors.

43. In the final analysis, we are satisfied that whilst the judge fell into error, this did not result in an error of substance. The offending conduct on the part of the appellant was of a most serious character and even taking the mitigating elements into account, we are satisfied that the conduct merited a sentence of 12 years' imprisonment.

44. Accordingly, the appeal is dismissed