UNAPPROVED REDACTED JUDGMENT
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THE COURT OF APPEAL

Record No: 284/2018

Neutral Citation: [2021] IECA 168

Birmingham P.
Edwards J.
Collins J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

v.

X.

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 10th of June 2021.

Introduction

1. In this judgment the name of the appellant, and of the injured party, have both been redacted in the interests of affording appropriate anonymity to the injured party.

2. On the 8th of October, 2018, the appellant came before the Central Criminal Court and pleaded guilty to count 2, on an indictment containing 75 counts. Count 2 was a count of rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act, 1990.

3. On the 15th of October, 2018 the appellant pleaded guilty to a further 23 counts on the same indictment, representing 11 further counts of rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act, 1990; 6 counts of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990; 2 counts of attempted rape contrary to common law; 1 count of rape contrary to s.2 of the Criminal Law (Rape) Act, 1981 as amended by s.21 of the Criminal Law (Rape) (Amendment) Act 1990 and s.34 of the Sex Offenders Act, 2001; and 3 counts of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997.

4. Following the arraignment on the 15th of October, 2018 the sentencing judge heard initial evidence concerning the circumstances of the case. He heard further evidence on the following day, i.e., the 16th of October, 2018 and pronounced sentence on the 2nd of November, 2018.

5. The appellant received the following sentences: 18 years' imprisonment with the final 3 years suspended in respect of each of the s. 4 rape offences, the s. 2 rape offences and the attempted rape offences; 2 years' imprisonment in respect of each of the sexual assault offences; and 1 years' imprisonment in respect of each of the counts of assault causing harm. All sentences were to run concurrently. A *nolle prosequi* was entered in respect of each of the remaining counts on the indictment.

6. The appellant now appeals against the severity of his sentences.

Factual Background

7. The court heard evidence from Garda Ray Dermody, who was a member of the Child Protection Unit at the Garda station at which he was then based. Garda Dermody told the

court that on the 9th of December 2017 he received a referral in the course of his duties concerning the injured party "A". The referral indicated that "A" had presented at the Garda Station with her mother on that date, and had complained of sexual abuse perpetrated by her father, the appellant. The services of specialist garda interviewers were sought, and an appointment was arranged for the 17th of December 2017. In the interim, an investigation was commenced based on the initial allegation. On the 13th of December, the appellant presented at the Garda Station in question and made a voluntary cautioned statement.

8. It later emerged that prior to making her formal complaint "A" had previously indicated some of what had happened to schoolfriends, stating that she had been raped, but not by whom. However, after further offending by the appellant "A" had finally disclosed to her mother that she had been repeatedly raped and sexually abused by her father. She had initially attempted to write down what had happened, which prompted her mother to bring her out of the house discreetly under the pretext of picking up prescription medicine, as the appellant could be controlling in regard to their leaving the house. Both mother and daughter then proceeded to the Garda Station where "A" then made her complaint.

9. The injured party was born in 2001. The relevant offences took place between the 20th of January 2006, and the 8th of December, 2017. In her initial complaint, "A" did not tell gardaí about the most recent offences of the appellant due to fear but provided details in respect of those on a subsequent date later the same month. "A" estimated that the abuse began when she was four years old and recalled her address at that time. She remembered the offending behaviour began with the appellant touching her in an intimate and sexual way while she was in his bedroom in their first house in a Dublin suburb (we will call it "address no 1"), when she would have been between four and seven years old, between 2005 and 2008. She was unclear about much but remembered that she knew at the time that what he was doing was inappropriate, and that it felt wrong.

10. The family subsequently moved for a short period to another address in another Dublin suburb (we will call it "address no 2"), and resided there from March through August, 2008, when "A" was seven years old. "A" recalled being the victim of further sexual abuse by her father during this period, and described him using his hand or penis on her body, but was an unclear historian as to more specific details or dates.

11. In August, 2008, while "A" was still seven years old, the family moved yet again, to an address in County Dublin (we will call it "address no 3"), and remained there until January, 2014, when she was 13 years old. At this property, the appellant repeatedly touched "A" both outside and inside her clothing in a sexual manner. This occurred in various rooms in the house, but most commonly in the sitting room, and in the appellant's bedroom. The appellant also touched "A's" vagina with his penis and fingers in her own bedroom, but did not engage in sexual intercourse. "A" recollects being naked or partially clothed on many of these occasions, and feeling humiliated at having to remove her clothing for the appellant's sexual pleasure.

12. "A" recalled a specific incident at the age of 11 in a field near to address no 3, during which she was forcefully put to the ground by her father, before he removed her underwear and attempted to insert his penis into her vagina, but gave up due to her crying. "A" vividly remembers running away from him afterwards. This incident was the basis for one of the attempted rape counts.

13. A similar attempt was made and abandoned in the bedroom of the appellant at address no 3. Again, this incident was the basis for one of the attempted rape counts.

14. In January, 2014, the family moved to yet another property (we will call it "address no 4") not far from where they were then living, and they remained there until June, 2016. During this period, the appellant began perpetrating s. 4 rapes upon the injured party. These were of both an oral and anal nature. "A" recounted that these events were preceded by

physical coercion; and she described the appellant talking through what he was going to do and reassuring her that it would not interfere with her virginity, before engaging in anal intercourse which proved exceedingly painful. The injured party has difficulty isolating these events individually, as they became mind-numbingly repetitious. She stated that these anal rapes occurred at least once a week, predominantly at weekends and increasing during her holidays from school.

15. "A" recounted that the appellant would also force her to perform oral sex on him on these occasions. Moreover, during his interviews with gardaí the appellant told the interviewers that he also administered oral sex to "A", a fact which she found repellent to have to recall.

16. Also, during this period, the appellant induced the injured party to drink alcohol, beginning with white wine. This was done, it is believed by gardaí, to facilitate his offending behaviour. He also forced the complainant to watch inappropriate pornographic type material on the television.

17. The injured party was 15 when the family moved once again, to yet another address in County Dublin (which we will call "address no 5"). The appellant continued to subject her to s.4 rapes but in addition began after a time to subject her to s.2 vaginal rapes, which distressed "A" profoundly both due to her religious beliefs, and due to assurances she had received from the appellant. The appellant had previously emphasised repeatedly to "A" that her virginity was to be prized, that this was a very important thing and that the one thing he would not do was take away her virginity. Despite these earlier assurances the appellant escalated his abuses to include raping "A" vaginally at address no 5.

18. The injured party further recalled receiving physical beating from the appellant, in circumstances where he suspected that she had been accessing material he disapproved of online on her mobile phone, or where he regarded her as having dressed inappropriately.

These beatings caused her significant pain, and the complainant sustained black eyes on two occasions.

19. In December 2016, the family moved to yet another address (which we will call "address no 6"). The oral and anal rapes continued at this property with the same frequency as before. While at address no 6 "A" received a particularly violent beating from the appellant which caused her to miss the end of that school year. There was a refusal by the appellant to call a doctor, or to allow a doctor to be called, for her or to invite attention in any way which might have uncovered the abuse.

20. During the summer of 2017, the appellant was hospitalised for a period. She believed and led the appellant to believe (because she believed it herself), that she had become pregnant. This led to a temporary respite from the abuse, which lasted for about a month. It transpired that the complainant was not pregnant, and the abuse resumed.

21. Garda Dermody confirmed that it had emerged from "A's detailed account (provided subsequently to specialist interviewers following the initial complaint at the garda station) that she had been completely conditioned by the appellant from an early age to come downstairs and be available to her father to be sexually abused and raped; and indeed, that he could have access to her for such purposes by just simply requesting her presence.

22. As time went on "A" hinted to some of her school friends that she was being raped but could not bring herself to disclose the details of it until the 8th / 9th of December 2017 on which occasion the final anal rape was perpetrated upon her. It was following this violation that she found the courage to confide in her mother and was taken to a garda station on the 9th of December as previously outlined.

23. The appellant, when initially approached by gardaí later that day, made certain admissions and having done so then left the family home voluntarily at the request of the gardaí and in ease of his family. Upon leaving, he resorted to living on the streets until he was

taken into custody eleven days later by which time a full and detailed account of his abusive conduct had been obtained from the complainant.

Interviews with the appellant

24. On the 20th of December 2017, the appellant presented at the relevant garda station by arrangement and submitted to being arrested there and then detained. A series of interviews followed, and his period of detention was extended to facilitate the interviewing process. Initially, the appellant accepted that he had transgressed, but stated that he had done so on no more than 30 occasions. However, he ultimately conceded that there could have been daily sexual contact with his daughter after 2014. The appellant indicated that he had difficulties in his marriage from as early as 2005 and stated that he and his wife had not been intimate since 2013, which he felt may have contributed to his actions. He further stated that the death of his father in 2014 led him to abandon all control, and that oral and anal sex between himself and his daughter became a fixture from then on. He conceded that the abuse occurred most frequently at weekends and during holidays. He accepted that there had been some penetrative sex per vagina but suggested that it was confined to only a few occasions. He conceded that he had ejaculated on nearly every occasion that he engaged in what was described as *"full sexual contact"* (which is assumed to mean penetrative sexual contact) with the complainant. He also indicated that bar one episode he never used any condom, or other contraceptive or barrier safety mechanism in respect of the risks of pregnancy or transmission of disease.

25. The appellant sought to downplay allegations that he had hit and had beaten the complainant but accepted that he had done so on three occasions. He stated that he viewed his relationship with his daughter as *"by day father and daughter, by night partner*". The appellant also stated that some of the activity was sought out by the injured party. He had great difficulty accepting the term 'rape'. He accepted that he had given the complainant

alcohol to intoxicate her to facilitate the abuse, and further conceded that he may have offered her cannabis at times. Whilst the appellant could not recall some of the earliest instances of abuse alleged, he stated that the complainant would not lie and that anything she said was likely to be utterly accurate. He stated during interview: "*I'm very tired, my brain is not functioning properly, I'm here to help, I just want to get what I deserve*". He indicated that he smoked a lot of cannabis himself and that his memory of events may have been negatively impacted by drug abuse.

26. Garda Dermody accepted that the appellant seemed to possess a lack of insight into what he had done, and that he had professed a consistent fondness for his daughter despite what he had done to her, and saw his marital problems as excusing his actions. The appellant stated that "A" was the only person who understood him.

27. Following the appellant's release from detention on the 21st of December 2017 he was charged with rape and remanded in custody. The appellant did not seek bail.

28. It was accepted by Garda Dermody that the appellant had entered guilty pleas at an early stage, and that he had indicated from the outset that he would do so. The appellant had been sent forward for trial on the 26th of April 2018 with a trial date of the 1st of April 2019. The sentencing court heard that the Chief Prosecution Solicitor had received a letter dated the 11th of September 2018 formally confirming that the accused would be pleading guilty to all relevant charges, and that the trial date was then vacated and the matter was listed for sentencing in October 2018. The appellant was co-operative in the setting of a sentencing date that accommodated the complainant in sitting exams. No disclosure was sought on behalf of the appellant at any stage.

29. It was accepted by Garda Dermody that the appellant had co-operated fully with the garda investigation and during court proceedings. During the garda investigation certain manuscripts written by the appellant, which were somewhat difficult to decipher, and which

were characterised as possibly draft letters, were found at one of the relevant addresses. These manuscripts referenced the appellant's religious beliefs as a Muslim and expressed what was described in evidence by Garda Dermody as *"an attempt at remorse or religious based apology"* for his abuse of his daughter.

Circumstances of the appellant

30. The appellant was 52 years old at the date of his sentencing. He had been raised in a small agricultural town in North Africa. He was the second youngest of eight children. His father was unemployed, and the family struggled financially. There was marital disharmony between his parents and he was largely reared by older brothers. Although he had much freedom as a child, he was sometimes hungry and he claims to have been subjected to frequent physical beatings by his mother, and by his brothers, for minor misdemeanours. He is said to have received little affection in the family home. He had a difficult childhood and was bullied in school, ultimately leaving at the age of 16 without any formal qualifications. He joined the army in his country of birth at the age of 21, but deserted in 1988, and was required to return, which led to bullying and humiliation until he completed his service in 1989. He then worked for an oil company and travelled to Asia before entering Europe through Holland. He then journeyed to Ireland in 1999 and applied for refugee status.

31. The appellant worked sporadically in a number of establishments as a kitchen porter before meeting the mother of the complainant, then aged 18. Their daughter was born shortly thereafter in 2001. They have two sons and another daughter together, the last of whom was born in 2013. It appears that the abuse was confined to the complainant, and the appellant presented as being disgusted at the mere thought of interfering with his other children. He had a history of inadequate employment and was somewhat reliant on his in-laws.

32. A psychologist's report was furnished to the court at the sentencing hearing. It details that as a child, the appellant was the victim of defilement by older teenagers in positions of

trust on numerous occasions, which caused him much shame and confusion in his own sexuality. He did not become involved with a woman until he was in his 30s.

33. The appellant suffers from mental health issues, which have gone largely untreated, except for his own cannabis and alcohol use to self-medicate. He was put on anti-depressants upon going into custody but discontinued these after a period. The appellant also suffers from a gambling addiction.

34. The psychological report describes the appellant as candid and open. He is prone to high levels of psychological distress, anxiety and depression, feelings of social ostracization, resentment and inferiority. He lacks emotional awareness and has a highly impoverished sense of self and makes hasty and ill-considered decisions. He was assessed as representing an average risk of re-offending, with the following noted as matters of concern: his age, his poor capacity for relationships, his attitude towards women, his degree of social isolation, his difficulty appreciating the impact of his behaviour on others, issues related to anger, deviant sexual preference and using sex as a coping mechanism.

35. The report further states that the appellant is a psychologically vulnerable man with a significant background of childhood sexual abuse, violence, ostracism and economic deprivation; that he failed to develop the skills necessary to express his emotional needs and was left lacking in confidence and self-worth. He resorts to gambling, alcohol and drugs as a distraction from his negative emotions. The report suggests that the appellant attempted to regain a sense of power and authority by exerting his dominance within the family.

36. The psychologist's assessment included views that:

> *"Despite Mr. ["X's"] best efforts to live up to his own moral obligations, his efforts have fallen short of his perceived ideals. In this regard Mr. ["X"] tends to be unrealistic in his perceived sense of morals and as such also applies these ideals to the behaviours of others. Additionally Mr. ["X"] has a strongly traditional outlook*

regarding gender roles and perceives men as the dominant figures in society, with women as submissive. Mr. ["X's"] perceived sense of self and identity is closely tied to this traditional view of the world.

It is therefore likely that the more Mr. ["X's"] behaviours failed to live up to his expectations and masculine ideals, insofar as he was living in poor accommodation, experiencing financial deprivation and ongoing marital problems, along with having to rely on [another] *to house his family, the angrier and more resentful he became. It is also likely that this was further compounded by* [specified marital difficulties].

These events are likely to have left Mr. ["X"] feeling powerless, inept and redundant in his role as a husband, father and man.

Unable to cope with his perceived failure and lack of control over his life circumstances, he attempted to regain a sense of power and authority by exerting his dominance within the family via his sexual abuse of ["A"] and other acts of aggression.

In order to manage his inner sense of conflict regarding the abuse of his daughter, Mr. ["X"] developed the erroneous cognition that ["A"] willingly engaged in their sexual relations. In doing so Mr. ["X".] attributed a maturity to ["A"] that was well beyond her years began to see ["A"] as a substitute for his life partner. Mr. ["X's"] thinking this regard remains significantly skewed as he continues to have difficulty appreciating the abusive nature of his actions and the impact that they have had on his daughter."

37. The report suggests specialised therapy, involving consistent and long term psychotherapeutic intervention.

38. The court was also furnished with a Governor's report from the Midlands Prison indicating that the appellant had been well-behaved since his incarceration. He had no

previous convictions. The appellant wrote a letter from prison, a copy of which was furnished to the sentencing court, expressing apologies to "A" for his actions. Counsel for the appellant informed the court that this letter, which had initially been handed by the appellant to his legal team, had not been sent directly to "A", due to the recognised sensitivity of such a communication, and that instead it was furnished to the prosecution's legal team so that "A" could be apprised of its existence and canvassed as to whether she would be willing to receive it. The sentencing judge's remarks indicate that "A" had not received it as of the date of sentencing.

Impact on the victim

39. "A" prepared a victim impact statement which she read to the court and which was later characterised by the sentencing judge as *"searing and articulate"* and as *"one of the most moving impact statements"* that the court had heard *"reflecting on the importance of filial love, she loved her father deeply but hated what he was doing to her"*, to the point where "A" now *"questions if he ever loved her to any degree at all"*.

40. "A" stated that her father had torn her soul apart. Remembering that her world once revolved around her father, she described the trauma his breach of trust and sexual abuse caused to her. She told the court that her father murdered her self-value, took away her dignity, and burnt through her virtue as though she meant nothing, and that it hits her like a bullet every morning and occupies her mind at night. She finds the memories suffocating and suffers flashbacks. She also recalled the physical abuse she would be subjected to on the basis of small acts her father found morally objectionable, which has caused her a great deal of lasting self-doubt. She often has difficulty breathing upon remembering the abuse, and has difficulty imagining the future. She feels guilt at bringing the appellant to justice at the cost of her siblings losing a father. The appellant conditioned the complainant to believe her only worth as a woman was her virtue, which he then took. She feels there is no escape, and no

cure for having been the victim of the appellant's abuse. She still feels weak and trapped and does not hold out much hope for potential medicinal or therapeutic solutions due to the gravity of the abuse.

Remarks of the sentencing judge

41. After accurately summarising the evidence, the sentencing judge characterized the appellant's offending behaviour as being *"at the very apex of the serious offences of rape"*. He noted that the aggravating circumstances included the nature of the crimes themselves, by which we understand him to have meant the egregiousness of the particular offending conduct in this case, the profound breach of trust involved and the appellant's abuse of filial love *"to an unbelievable degree to isolate her and cruelly abuse her"*; his encouragement of the victim to consume alcohol contrary to her religious beliefs; his encouragement of her to watch pornography with him and the gross hypocrisy involved in subjecting her to physical beatings for minor transgressions on her part.

42. It was acknowledged that there were substantial mitigating circumstances, namely: a clear expression of remorse immediately upon being confronted; the appellant's agreement to voluntarily absent himself from the family home; voluntary admissions made by him to the gardaí at a time before a detailed statement had been taken from the complainant; further admissions made after his arrest and when the complainant's detailed statement was available and put to him; the early indication of a guilty plea; the further evidence of early and genuine remorse from the letters furnished to the court. The sentencing judge indicated that the appellant had had time to reflect and was deeply ashamed of his actions. The Court took note of the fact that he had no previous convictions. It was further noted that the appellant was now isolated from his immediate family and had lost their support. Further, he was a foreign national with no contact with his more extended family of origin.

43. The sentencing judge stated that due to the lengthy period of offending, the court had a duty to sentence consecutively, and the nature of the counts clearly indicated that the cumulative sentence would be substantial.

44. The sentencing judge then referenced the psychological report detailing the appellant's difficult background. The sentencing judge accepted that the appellant suffered deep rooted psychological distress throughout his life and behaved the way he did for complex reasons to do with powerlessness, control and dominance, but the reality remained that he was personally responsible for his actions, and account had to be taken of the gravity of the breach of trust involved where a father abuses his young daughter.

45. The sentencing judge stated that a realistic headline sentence would clearly be life imprisonment. Although there was *"very, very substantial mitigation"*, the sentencing judge believed that the court still had to impose *"a very significant sentence"*. The sentencing judge recognised the tragedy of a 52-year old man with no previous convictions being imprisoned for a long time but held that *"that's the reality in terms of the proportioned* (sic) *sentence which the court has to impose"*. It was stated that there was a prospect of rehabilitation on the evidence, and the court would reflect that in the sentence imposed *"to an extent"*. It was noted that the appellant was an appropriate candidate for the "Better Lives" treatment program for sexual offenders in prison, which his counsel had indicated he would seek to avail of.

46. The sentencing judge then determined that the appropriate sentences should be concurrent sentences of 18 years' imprisonment with the final 3 years suspended, on each of the s. 4 rapes, on each of the s.2 vaginal rape offences and in respect of each of the two attempted rapes. He further determined that sentences of two years imprisonment should also be imposed on each of the six counts of sexual assault, and a sentence of one year's imprisonment on each of the three counts of assault causing harm, all such the sentences to

run concurrently *inter se*, and also concurrently with the longer sentences imposed for the rape/attempted rape offences. The sentencing judge said the length of the sentences, albeit that they were being imposed concurrently, was intended to reflect the jurisprudence that the Court would have been entitled to sentence consecutively. The suspension of the last 3 years was made conditional, *inter alia*, on the appellant undergoing the "Better Lives" treatment program in prison.

Grounds of appeal

47. The appellant appeals on the basis that in arriving at the headline sentence of life imprisonment, the sentencing judge erred in describing the offences as "*at the very apex of the serious offence of rape".* It is further submitted that the sentencing judge gave insufficient weight to the mitigating factors present and undue weight to the following aggravating factors:

(i) The profound breach of trust;

(ii) The encouragement to consume alcohol and watch pornography;

(iii) The gross hypocrisy of physically punishing the complainant for minor transgressions;

(iv) The extended period of offending over 12 years in the family homes.

Submissions

48. Both sides in this appeal have placed reliance on aspects of the Supreme Court's guideline judgment in *The People (Director of Public Prosecutions) -v- F.E. (No 1)* [2020] ILRM 517, where that court considered sentencing in rape cases.

49. The context within which the Supreme Court came to consider that case was that the Court of Appeal had reduced a sentence of 12 years' imprisonment, with the final two years thereof suspended, imposed by the Central Criminal Court on a count of marital rape (with lesser sentences having been imposed on two related charges, where the appellant's wife was

also the victim, of threatening to cause serious harm, and of threatening to kill, respectively) to one of ten years' imprisonment with 18 months suspended. The further appeal to the Supreme Court in that case was brought by the Director of Public Prosecutions on a point of law which asked the Court to consider sentencing in rape cases in general, and in cases where a court might be required to consider the inter-relationship of several offences occurring as part of a single criminal event, such as had occurred in the *F.E.* case. The Supreme Court found that the Court of Appeal had fallen into error in not adequately taking account of the inter-relationship between the rape and the other offences of violence perpetrated by the accused against the victim. It had been acknowledged by the Court of Appeal in its judgment that it would have been open to the trial judge to impose consecutive sentences, which she had elected not to do, and for which she was not criticised before the Court of Appeal. In circumstances where no undue leniency review had been sought by the DPP, the Court of Appeal proceeded to consider in isolation each individual sentence that was being criticised as having been too severe. The Court of Appeal had felt it appropriate to do so in circumstances where separate (albeit concurrent) sentences had been imposed for each offence, believing that if it did otherwise it might appear to a reasonable observer that the appellant was being punished more than once for separately charged offending conduct. The Supreme Court disagreed with this approach and considered that in a case where multiple offences had been committed as part of a single criminal event those offences should not be considered in isolation. Charleton J stated (at para 22):

> *"As the case law demonstrates, just because what might ordinarily be called a criminal event is split into two charges, that does not mean that the penalty for each offence should not influence the other. When crimes are proximate to each other, then just like events, it is appropriate to have regard to the overall event in sentencing. That was not done by the Court of Appeal."*

50. The effect of the Supreme Court's judgment on this aspect of the matter is, as we understand it, that if, in a case where multiple offences have been committed as part of a single criminal event, a sentencing court elects not to avail of consecutive sentencing, and concurrent sentences are to be imposed, the sentence to be imposed for the most serious offences or offences (in *F.E.'s* case the rape) must adequately take account of the inter-relationship between that offence and the offences attracting lesser sentences and to be served concurrently, and in that way reflect the totality of the offending behaviour.

51. The Supreme Court's consideration of whether the Court of Appeal's approach had been correct, and the guidance it had to offer with respect to sentencing for rape in general, was the subject of a first judgment delivered on the 6th of December 2019, see [2019] IESC 85; and consideration of the appropriate sentence was then the subject of a second set of judgments delivered on the 26th of February 2020, see [2020] IESC 5. In the Supreme Court's view, the trial judge had got the balance right and they restored the original sentence.

52. In coming to that conclusion, the Supreme Court reviewed jurisprudence, both generated domestically and from other jurisdictions, concerning sentencing for rape and surrounding circumstances of violence. In their first judgment in the *F.E.* case the Supreme Court considered sentencing in rape cases ranging from the imposition of suspended sentences to the imposition of a life sentence.

53. The appellant draws our particular attention to paragraph 69 of that judgement, where Charleton J on behalf of the Court, considered "admission as mitigation" in the category of "cases requiring up to life imprisonment". He stated:-

> *"These cases illustrate that despite a plea of guilty at an early stage, the normal mitigating effects of relieving the victim of being part of a trial may not be enough to reduce the sentence from life imprisonment. These cases are exceptional. A common factor in mitigating offences of rape and serious sexual assault is an early admission*

of guilt but this depends on the circumstances. An early admission of guilt may be evidence of a contrite approach to wrongdoing. The later that admission comes, on arraignment, on the day of the trial, or during the trial and after the cross examination of the victim of the offence, the less effect it ought to have on sentence."

The Court stated further:-

"Although the Law Reform Commission have usefully set out mitigating factors, what has been seen as relevant in rape cases includes voluntary attempts to alleviate the effects of the crime, where an offender is very young or very old or where the offender has reduced mental capacity. Finally of course the offender's background and previous convictions have to be taken into account as well as the foregoing factors in aggravation of sentence or mitigation of guilt."

54. We are asked to have regard in the present case to the fact that the offender surrendered himself to Gardaí within days of the complaint being made concerning his serial sexual abuse and rape of his daughter over a period of 12 years being made. He indicated an intention to plead guilty from the outset and followed through by pleading to 24 counts on the indictment covering the entire period of his criminal offending. It was submitted that how he approached the case from the outset was evidence of sincere remorse and contrition of the type identified in *FE* as relevant to the value of a guilty plea.

55. In the Supreme Court's re-sentencing decision in the *F.E. (No 2)* case ([2020] IESC 5), the principles upon which the Courts must approach any sentencing, as set out in *The People (DPP) -v- M* [1994] 3 IR 306**,** were reiterated**.** In paragraph 22 of his judgment on that occasion, Charleton J, adopting internally quotations from the judgment of Denham J in *M*, observed:-

"What is before a sentencing Court is 'the nature of the crime, and the personal circumstances of the appellant' since these are 'the kernel issues to be considered and

> *applied in accordance with the principles of sentencing.' While sentencing is often described as discretionary, the analysis of a sentencing judge is squarely based on these principles as 'the essence of the discretionary nature of sentencing'."*

At paragraph 25 he emphasised that:-

> *"While sentencing is often misunderstood outside the legal sphere, it is an exercise in the application of appropriate principle and the fitting of offenders into the scheme of what has emerged through precedent, analysis and research as being a just exercise of discretion."*

56. Counsel for the appellant says that in the instance case, while there was no doubt but that the offences fall within the most serious range of offending, the identification of a headline sentence of life imprisonment, which was reduced post mitigation to a sentence of 18 years with 3 years suspended, implying a net custodial sentence of 15 years assuming the conditions attaching to the partial suspension are adhered to, does not fully credit what was characterised by his counsel as *"the exceptional nature of the appellant's behaviour"* following disclosure of the crimes by "A", whereby he left the family home, surrendered to Gardaí, went into custody, indicated an intention to plead guilty, and followed up with guilty pleas to numerous offences. It was submitted that the sentencing court, by setting a headline sentence of life imprisonment, limited its options in terms of an appropriate post mitigation sentence, and fettered its ability to take adequate account of the personal circumstances of the appellant as it was also obliged to do.

57. It was further submitted by counsel for the appellant that in considering the nature and circumstance of the offences, including the aggravating factors and the mitigating factors, the sentencing judge failed to give adequate weight to the appellant's personal circumstances and background in imposing an overall sentence of 18 years imprisonment with three years

suspended. While it was accepted that this represented some discount on a life sentence, it was said that the sentencing judge did not adequately consider the impact of a sentence of that duration having regard to the appellant's background and circumstances. It was further complained that the sentencing judge paid insufficient regard to the constitutional requirement that the ultimate sentence should be proportionate not merely to the gravity of the offending conduct as viewed one dimensionally, but rather two dimensionally involving a consideration of the gravity of the offending conduct as committed by the particular offender in his circumstances. Accordingly, it was submitted that the overall sentence that was imposed fails this two-dimensional proportionality test, as being disproportionate to the gravity of the offending by this appellant when due account is taken of his background, circumstances, co-operation and remorse. In support of this submission we were reminded of the following remarks of the Supreme Court, per Denham J, in *DPP -v- M* [1994] 3 IR 306 (at p.317):

> *"Thus, having assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered."*

58. In the context of the complaint just described much emphasis was placed on the content of the psychological assessment of the appellant as contained in the report of Dr Patrick Randall, Consultant Clinical and Forensic Psychologist, previously alluded to and which had been before the sentencing judge.

59. We have also been provided with a recently prepared update to that report but will only have regard to it should we be disposed to quash the sentence imposed by the court below and find it necessary to proceed to a re-sentencing.

60. Counsel for the respondent, in replying to the submissions on behalf of the appellant, submitted to us that when the circumstances of this case are assessed against legitimate

comparators, the sentencing judge's nomination of life imprisonment as the appropriate headline sentence did not represent an error in principle.

61. Counsel for the respondent also referenced the judgment of Charleton, J. in the *F.E.* case, and pointed to his review of the sentencing parameters for rape cases. We were referred in particular to paragraphs 63 to 68, under the heading "*Cases requiring up to life imprisonment*."

62. Charleton J began this portion of his review by quoting from paragraph 49 of his earlier judgment, delivered while he was a High Court judge and while sitting in the Central Criminal Court, in *The People (Director of Public Prosecutions) v. W.D.,* [2008] 1. I.R. 308:

> *"49. Reading the reports of these cases indicates that a number of factors are regarded by the courts as aggravating the offence of rape. The courts have placed particular emphasis on the harm that rape does to the victim and where there is a special violence, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions, these will have a serious effect on the eventual sentence. Abusing a position of trust, as with a person in authority, misusing a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrator or victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape. Coldly engaging in a campaign of rape, shows a particularly remorseless attitude which is not necessarily mitigated by later claims of repentance. Participating in a gang rape involves a terrifying experience for the victim and using death threats and implements of violence for the purpose of wielding authority or sexual perversion are also serious aggravating factors. Attacking the very young or the very old also emerges as an important aggravating factor from these cases."*

63. The Supreme Court judge remarked at paragraph 64 in the *F.E.* case that *"[r]egrettably there continue to be very serious examples"*, which he then went on to review and discuss. We were referred to his commentary at paragraph 68 concerning instances where series of offences committed over a protracted period had attracted very heavy sentences of up to life imprisonment. He had remarked:

> *"Many such sentences in the uppermost band were for a series of offences. In The People (DPP) v McCarton [2010] IECCA 50 the accused pleaded guilty to two attacks on different women in their own homes. He received 20 years with 2 suspended. Clearly, a planned series of offences aggravates the circumstances. As in the WD case, many sentences for a series of offences involve the exploitation of children over time. One such was The People (DPP) v EC [2016] IECA 150 where there were dozens of guilty findings for rape, oral rape and sexual assault over a five-year timescale. The victims were the accused's three daughters and a life sentence was upheld. A sentence of 20 years was upheld in The People (DPP) v Farrell [2010] IECAA 68 which consisted of more than thirty offences against three young victims. Another life sentence was The People (DPP) v R McC [2008] IR 92 upheld for a series of offences against the accused's daughters and nieces. Use of the victims for child pornography aggravates a sentence; as in The People (DPP) v Anon (Central Criminal Court, 12 December 2016) where the sentence was 20 years and the victim was the accused's son, who was disabled, but was used for thousands of obscene photographs. In The People (DPP) v Anon (Central Criminal Court, 8 December 2011) the accused's four daughters were raped and otherwise abused over a span of 18 years. The plea of guilty was entered on the empanelment of the jury. A life sentence was imposed."*

64. It was submitted that, adopting Charleton J's words, the present case also involves "*the exploitation of ["A"] over time*"; and included many of the factors identified as aggravating when it comes to sentence. It was submitted that the facts of the present case could properly sit amongst those cases identified by Charleton, J. as having attracted sentences of life imprisonment, or where very high sentences were imposed after mitigation had been taken into consideration. The aggravating factors in the present case were said to be manifold and grave.

65. It was submitted by counsel for the respondent that taking the bare facts of the case in the round, the nomination of a headline sentence of life imprisonment was appropriate and certainly was not such as to constitute an error of principle.

66. On the issue of whether adequate account was taken of mitigating factors, counsel for the respondent asks us to note that the sentencing court expressly acknowledged and detailed the "*substantial mitigation circumstances*" present. That court also had the benefit of a detailed psychological report which set out and recounted the appellant's admittedly difficult and tragic personal circumstances, although the sentencing judge appeared to have taken the view that there were limits to the extent to which such factors could mitigate the appellant's culpability, stating that *"the reality still is that Mr "X" is responsible, personally responsible for his actions*."

67. The appellant contends that not seeking bail and going into custody on 20th December 2017 was also mitigating factor for which he ought to have received additional credit. This proposition is not accepted by the respondent. The appellant got full credit for this in the backdating of the sentence imposed to that date.

68. It was submitted on behalf of the respondent that the sentencing court made appropriate allowance for mitigation, in effect doing so in two phases: (i) the reduction of a sentence of life imprisonment to 18 years imprisonment; and (ii) the suspension of the final 3

years of that 18 year sentence on the conditions indicated. On that basis, the appellant (subject to compliance with conditions of suspension) serves a sentence of 15 years' imprisonment.

69. It was submitted that that sentence when juxtaposed with sentences imposed in many other cases of comparable severity is broadly consistent with them, is not excessive, and by reference to some comparators might even be considered somewhat lenient.

70. In *The People (DPP) v. Jimmy O'Neill* [2015] IECA 327, the appellant pleaded guilty to counts of s.4 rape and s.2 rape on two girls, aged 9 and 6 respectively, whom he lured to a flat and detained for approximately 20 minutes. He was arrested shortly thereafter and after initial reluctance made full admissions. He had "*a considerable number*" of District court convictions (public order etc.). He pleaded guilty in the District Court before being sent forward for sentence. A sentence of life imprisonment imposed at first instance was upheld by the Court of Appeal.

71. In *The People (DPP) v. RMcG and C.D.* [2008] 2 IR 92 the Supreme Court reviewed two separate cases in which sentences of life imprisonment were imposed, in the context of the provisions of s.29 of the Criminal Justice Act 1999. The life sentences imposed were upheld and the respondent submits that they represent reasonable comparators to have regard to in the present case. RMcG pleaded guilty to 8 counts of rape, 1 count of attempted rape, 4 counts of sexual assault and 7 counts of indecent assault perpetrated upon his two daughters and four nieces over an 11-year period. The accused had no previous convictions, made full admissions, indicated an intention to plead guilty and did so, and had vacated the family home. CD had pleaded guilty to 10 sample counts of rape, and 2 sample counts of sexual assault, perpetrated upon four of his daughters over a period of 20 years. After initial denials, he voluntarily re-attended at the Garda station and made full inculpatory statements,

expressed remorse and apologised. Thereafter, he was completely ostracised and had significant health problems.

72. In summary, the respondent says appropriate mitigation and no more was extended to the appellant.

73. The respondent has submitted that sentences of this magnitude are far from exceptional in cases of this nature and gravity. She accepts that the sentences imposed in this case are significant sentences, but they have been imposed for very serious and significant offences that merit severe punishment even allowing for mitigation. It was submitted that had the sentencing Court measured sentence in this case according to some lower scale than that applied, that would itself have been a significant error of principle.

Our Decision

The Headline Sentence of Life Imprisonment

74. We do not agree with counsel for the appellant that it was inappropriate for the sentencing judge to have determined upon a headline sentence of life imprisonment given the seriousness of the offending conduct in this case. As stated by Finlay C.J in *The People (Director of Public Prosecutions) v Tiernan* [1988] I.R. 250 (at p.253):

> *"The crime of rape must always be viewed as one of the most serious offences contained in our criminal law even when committed without violence beyond that constituting the act of rape itself. … The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration. … Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions."*

75. In this case there were a multiplicity of seriously aggravating factors of which due account had to be taken.

76. The offending involved a high number of individual incidents perpetrated with regularity over nearly eleven years. Almost the entirety of "A's" childhood had been blighted by being subjected to the abuses for which the appellant faced sentencing and, as is evident from her poignant and moving victim impact statement, those abuses had a profoundly damaging effect on her. As the sentencing judge recalled, in the opening sentence of her victim impact statement "A" said, *"[h]e tore my soul apart; my 'dad'"*

77. The rape offences perpetrated by the appellant involved every type of rape i.e., oral, anal and vaginal, and constituted *"coldly engaging in a campaign of rape"*, to adopt the words of Charleton J at para 49 of his judgment in the *W.D.* case, cited and quoted above at para 59 of this judgment. In her victim impact statement "A" said,

> *"Of all the destruction, torture, heartbreak and anxiety, the worst thing he did to me, was he made me love him - unconditionally, in the most poisonous form"*

78. She added moments later,

> *"Not only did he strip me from hope in life and people, he made me feel as though the only worth I had as a woman was my virtue, and then he took that too."*

79. The offending involved the highest and most culpable degree of breach of trust, that between a parent and child, and as a corollary of this he had grossly misused his dominant position within the family.

80. If yet further evidence were needed of his abuse of his dominant position, the appellant had been controlling of his wife and children, evidenced by physical beatings of "A" for minor infractions, and the need for "A's" mother to create a false pretext, i.e., the need to go to get a prescription filled, in order to be able to bring "A" to the Garda station

once she had finally felt able to disclose to her mother that her father had been raping and sexually abusing her.

81. The appellant had also pressured the victim into consuming alcohol and watching pornography, notwithstanding that she was still a child, as part of his modus operandi in sexually abusing her.

82. We are satisfied that the cumulative effect of these aggravating factors and the harm done, coupled with the intrinsic depravity of the offending conduct at issue, uplifted the overall culpability of the appellant's conduct and brought it within the sentencing judge's scope for action to nominate a headline sentence of life imprisonment. This was particularly so in circumstances where he was considering imposing concurrent sentences, rather than consecutive sentences, and was seeking to ensure that the sentences that he would impose for the most serious of the offences, i.e., the numerous rapes of different types, would reflect the totality of the offending behaviour.

83. The setting of a headline sentence is all about assessing the gravity of the offending conduct, and determining within the available range of penalties what sentence is distributively proportionate to reflect offending conduct at the level of gravity assessed. Gravity is assessed by reference to culpability and harm done. Each type of offending has an intrinsic culpability level to be assessed in the first instance according to the basic circumstances in which the offence was committed, and the harm that typically ensues. This is a matter for judgment by the sentencing judge, who may be assisted in that regard by experience, relevant comparators (which must be used correctly), and sometimes by guideline judgments both formal and informal. In the future, sentencing judges are also likely to have the benefit of sentencing guidelines promulgated by the Judicial Council as provided for in s. 7(2)(h) of the Judicial Council Act 2019, but to date there are no such guidelines. In the area of rape and serious sexual offences, however, there is the significant guidance provided by

the Supreme Court in *The People (Director of Public Prosecutions) v F.E. (No 1)* [2020] ILRM 85. Any provisional positioning of a case on the range of penalties based on intrinsic culpability and harm typically done then requires to be fine-tuned to take account of aggravating factors, mitigating factors bearing on culpability, and any atypical aspects to the harm done.

84. In this case, there were numerous aggravating factors, there were no mitigating factors bearing specifically on culpability, and the harm done although serious was not atypical for the type of offending involved.

85. The observation that there were no mitigating factors bearing on culpability is important because the appellant complains that in characterising the offending as being *"at the very apex of the serious offence of rape"*, therefore meriting the nomination of life imprisonment as the headline sentence, *"the sentencing judge gave insufficient weight to the mitigating factors present"*, and undue weight to certain aggravating factors. It requires to be appreciated that the only mitigating factors relevant to the assessment of gravity, and the setting of a headline sentence, are those bearing on culpability. Most of what are routinely characterised or labelled as "mitigating factors" do not fall into the category of mitigating culpability, e.g, a guilty plea, previous good character, co-operation, a good work history, previous and indeed present adversities in one's life, contributions to society and to one's community, remorse, apology and other such matters. These are taken into account at sentencing in the second stage, where there is a discounting from the headline sentence to take account of the appellant's personal circumstances so that he is sentenced not simply for the crime, but for the crime as committed by him in his particular situation and circumstances, but such factors have no bearing on what is the appropriate headline sentence.

86. Much was made in this case of the fact that the detailed psychological report concerning the appellant concluded that he was a psychologically vulnerable man with a

significant background of childhood sexual abuse, violence, ostracism and economic deprivation. He was certainly entitled to have these factors taken into consideration as part of his personal make-up and personal circumstances, in the second stage of the sentencing process, and we will return to this. However, we think it important to observe that a case was not advanced on behalf of the appellant that these circumstances served to mitigate his actual culpability for the offences perpetrated on his daughter thereby reducing the gravity of his offending, and suggesting that accordingly they ought to have influenced the setting of the headline sentence. No such case was made.

87. We feel it necessary to acknowledge that there is a large body of literature in peer reviewed journals in the fields of sentencing, behavioural psychology and criminology, that suggests that experiencing abuse during childhood, including physical abuse, sexual abuse, neglect, and witnessing trauma, may increase the likelihood that an individual will commit criminal acts in adulthood, and many sentencing experts have argued that childhood abuse should be a key mitigating factor (bearing on culpability) in criminal sentencing. This literature is reviewed in a recent article entitled *"The potential influence of criminological rationales in considering childhood abuse as mitigating to sentencing"* by Dr C Berryessa of Rutgers University, New Jersey (2021) Vol 111, Child Abuse and Neglect, 104818. The Irish courts have to date expressed no considered view on the idea that having an abusive background could mitigate culpability (and thereby influence assessment of gravity) and have done no more than show a willingness to take account of an abusive background as part of an accused's personal circumstances in the second stage of sentencing. As we are satisfied that the issue of whether this appellant's background of having been abused in childhood might have implications for his culpability does not arise for consideration in this case, it is sufficient to suggest that, were such an issue to be raised in a future case, at the very least a nexus would require to be established through appropriate expert evidence between the fact

of having experienced abuse and propensity and predilection towards committing offending of the type for which the offender is to be sentenced, before a sentencing court would be justified in engaging with it. Although there was detailed psychological evidence placed before the sentencing judge in the present case, it is not suggested anywhere in the psychologist's report that the appellant's culpability may be reduced on account of having been a victim of abuse himself. It goes no further than showing that he himself is a damaged individual, who has faced many adversities.

88. We do not consider that the guidance provided in *F.E.* in any way constrained the sentencing judge from nominating a life sentence as the being the appropriate headline sentence in this case. The cumulative circumstances of this case qualifies it on any fair assessment for inclusion in the category of cases spoken of in *F.E.* as *"requiring up to life imprisonment"*, and of cases requiring *"condign"* punishment spoken about in the earlier case of *W.D.* (cited above). We are completely satisfied that the already significant intrinsic culpability associated with the commission of rape was greatly increased by the aggravating factors present in this case which the trial judge identified and with which we agree, and we reject the criticism by the appellant that the sentencing judge attached undue weight to the aggravating factors.

89. Counsel for the appellant has pointed to individual cases cited during the reviews and analysis in *F.E.* (and *W.D.*) as supporting her contention that this case belongs amongst those categorised in that case as *"more serious cases"* rather than amongst those said to require *"up to life imprisonment"*. We have on several occasions sought to emphasise that the correct use of comparators is not to directly compare the circumstances of one case with another. No two cases are the same and such comparisons are of little value. The correct use of comparators involves surveying a meaningful sample of cases to discern a trend or trends in sentencing (which is what the Supreme Court did in *F.E.*), understanding and accepting that

this will yield no single correct sentence for a particular instance of offending but that it may suggest the range within which a potentially appropriate sentence may be found, and assist the sentencing judge in the case at hand by indicating to him/her the scope for action within which he/she may operate. It is also the case that there will rarely be clear blue water between ranges, a point made by Birmingham J in this court's guideline judgement in *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121, so that sometimes a case might fall to be assessed as belonging at the high end of one range, alternatively the low end of the next range up, such that a judge in the exercise of his/her discretion, and depending on the sentencing objectives being prioritised, might legitimately locate it in either. As Charleton J said in *F.E. (No 2)* [2020] IESC 5, it is a matter of analysis into which sentencing band culpability for a particular crime properly fits.

90. All of that having been said we are completely satisfied that in the circumstances of this case it was legitimately within the discretion of the sentencing judge to take the view that the offending in this case was *"at the very apex of the serious offence of rape"*, and to have nominated a life sentence as the headline sentence. We find no error of principle on that account.

Discounting for mitigation in the second stage of sentencing

91. In the second stage of sentencing, there was discounting in two respects. In the first instance there was discounting from the headline sentence of life imprisonment to a determinate sentence of eighteen years imprisonment. There was then the suspension of the final three years of that eighteen-year term, leading to a net custodial sentence to be served of fifteen years imprisonment (assuming the conditions upon which the three year portion which was being suspended would be adhered to).

92. It is not possible to say what the precise discount represented in percentage terms because of the nature of a life sentence. Although as a matter of legal principle a life sentence

imposed upon a person lasts for the whole of that person's life, most persons who receive a life sentence in this country are eventually released on licence by the executive after having been incarcerated for a substantial period of time, but the period to be served pending release on licence is not fixed. It has varied generally over the years and it also may vary in individual cases for good reasons.

93. We had reason to allude to this previously in our judgment in *The People (Director of Public Prosecutions v Wanden* [2019] IECA 221, a case in which we had to consider a determinate sentence of 30 years imprisonment for the importation of 1,554 Kg of Cocaine, where we quoted the following passage from the judgment of Charleton J in *The People (Director of Public Prosecutions v Mahon* [2019] IESC 24, where, speaking of the mandatory life sentence for murder, he said:

> *"The term of such a sentence is indeterminate from the outset. Hence, prisoners commencing such a term do not have their presumed release date, taking account of remission, calculated. Such an exercise is impossible since release on a life sentence is at the discretion of the Executive, perhaps with input from the Parole Board. While it is possible to find a mean length of sentence before conditional release on a life sentence, no prisoner can predict that result. Furthermore, both the longest term served, and the mean length of time before release, have increased over the last two decades. An analysis of existing and past statistics is instructive in that regard."*

94. We then went on in *Wanden* to say:

> *"71. The Supreme Court's judgment goes on to consider statistics from various sources, including certain material published in Charleton, McDermott and Bolger - Criminal Law (Dublin, Butterworths, 1999), and somewhat more up to date material published in January 2019 by the Irish Prison Service. The latter provided figures covering 2001 to 2016 inclusive and a table reproduced in the judgment suggests (a)*

a mostly rising graph in terms of length of time spent in custody, and (b) that during the five most recent years surveyed, i.e., between 2012 and 2016, the average time that had been spent in custody by prisoners released in those years from life imprisonment varied between 17½ years and 22 years. The average was 22 years in 2012, 17½ years in 2013, 20 years in 2014, 17½ years in 2015 and 22 years in 2016. The judgment then comments:

> *"44. There has been an increase in the time served, on average, by those sentenced to life imprisonment over the two decades. According to Diarmaid Griffin - The Release and Recall of Life Sentence Prisoners: Policy, Practice and Politics, (2015) 53(1) Irish Jurist 1 at page 2, the average time served on a life sentence before release had been 7.5 years between 1975 and 1984; 12 years between 1985 and 1994; 14 years between 1995 and 2004; 17 years between 2004 and 2009; and 19.5 years between 2010 and 2013. The Irish Parole Board's 2017 annual report stated that of the 14 prisoners serving a life sentence who had subsequently received parole that year, the average sentence served was 18 years. Such figures for release are sentences without any remission. Thus, release after 15 years would be equivalent in normal circumstances to a determinate sentence of 20 year's imprisonment."*

95. The most recent Report of the Parole Board, of which we take judicial notice, is that published on the 2nd of October 2020 for 2019, indicating that by that stage the average time served on a life sentence was 20 years, compared with 17.5 years in 2018.

96. Accordingly a life sentence currently implies that, in most cases, an actual custodial term equivalent to a determinate sentence of at least 20 years would be served, and possibly significantly more than that. Standard remission on determinate sentences is 25%, and accordingly it possible to do as Charleton J did in *Mahon,* and by application of a process of

reverse engineering arrive at an indication of likely equivalent determinate sentences for periods served on a life sentence before release on licence. As Charleton J pointed out, release on licence from a life sentence after 15 years would be equivalent in normal circumstances (save for the possibility of recall, which always hangs over a prisoner released on licence) to a determinate sentence of 20 year's imprisonment. By application of the same process we can say that release after 17.5 years is equivalent to a determinate sentence of almost 22 years, while release after 20 years similarly equates to a determinate sentence of 25 years.

97. While it is not possible to ascertain with precision the amount of discount afforded by the trial judge in this case by opting for a determinate sentence of eighteen years in the first instance instead of a life sentence, there is little doubt that it represented a substantial amelioration of the appellant's position. Taking the most recent figures which suggest that the average time currently to be served on a life sentence before release on parole is 20 years, a discount of the order of seven years might be inferred as having been afforded in this case, on the basis that the equivalent determinate sentence would be in the order of 25 years. If that were so, the further period of three years to be then suspended would mean that he received an effective overall discount of 10 years or 40% in terms of the carceral aspect of his punishment.

98. The appellant seeks to make the case that the sentencing judge failed to take adequate account of the mitigating circumstances in the case. We are not persuaded that that is so. Although the exact position on discounting remains somewhat uncertain, whatever the actual discounting from a headline sentence of life imprisonment to a term of eighteen years might equate to, it was by any yardstick both a meaningful and substantial discount. Moreover, there is complete certainty about the further discounting involved in the suspension of the final three years of the eighteen-year term.

99. The sentencing judge gave a careful and considered judgment, in which he referenced all of the mitigating factors in respect of which the appellant was entitled to credit. These included his pleas of guilty, his substantial co-operation, his expressions of remorse, his lack of previous convictions, his age, his ethnicity and foreign identity, his ostracization by his family, his mental health and psychological issues, and the adversities he had experienced in his life as disclosed in the psychological report. His willingness to seek treatment and undergo the "Better Lives program" was also referenced.

100. Notwithstanding the existence of what the trial judge accepted was *"very very substantial"* mitigation in this case, the judge was of the view that the appellant would still have to go to jail *"for a very long time"*. In our view, for the reasons already expressed, he was right in so concluding. We have stated previously in other cases, and we re-iterate, that there are normative limits in egregious cases to the extent to which mitigating circumstances can relieve an offender of carceral consequences. This appellant was entitled to an appropriate discount for the substantial mitigating circumstances in his case. However, he was still going to have to serve a substantial prison term. We are satisfied that this appellant did in fact receive an appropriate level of discounting for the mitigating circumstances in his case, and we find no error in that respect.

101. With regard to the prospect of reform and rehabilitation, the sentencing judge said that he would cater for this *"to an extent"* in the sentence he intended imposing. We are satisfied that the suspension of the final three years may be attributed at least in part to that objective. Although the appellant had been very co-operative once the victim had made her disclosures, had presented as remorseful, and had indicated a willingness to undergo the Better Lives program, there was no evidence any actual work towards rehabilitation before the sentencing judge. Accordingly, while the judge could be satisfied as to the appellant's determination to seek treatment and reform, there was no track record of actual achievement in that regard. A

stronger evidential foundation would have been required to justify him in going further than he did in the interests of promoting this offender's rehabilitation. We find no error in the sentencing judge's approach to the rehabilitation objective.

102. Overall, we find no error of principle in respect of how the sentencing judge dealt with the second stage of sentencing.

Conclusion

103. The appeal against the severity of the appellant's sentences must therefore be dismissed.

Adjustment to the Order

104. Notwithstanding our dismissal of the appeal against the severity of the appellant's sentences, we propose of our own motion to make a technical adjustment to the conditions attaching to the part suspension of the sentences for the rape offences.

105. The present wording of the conditions on which those sentences were part suspended reads as follows:

> " … with the final 3 years of said sentences of 18 years to be suspended for 3 years conditional upon the Accused entering a bond in the sum of €100.00 that he will keep the peace and be of good behaviour towards all the people of Ireland during his periods of imprisonment and for the said period of 3 years from the date of his release, that he undergo the Better Lives Treatment Program while in custody and further that he will come up if called upon to do so at any time during the said period of 3 years to serve the portion of the sentence of the Court this day imposed but suspended on his entering into this recognizance."

106. We hereby amend it so that it now reads:

> " … with the final 3 years of said sentences of 18 years to be suspended for 3 years conditional upon the Accused entering a bond in the sum of €100.00 that he will keep

the peace and be of good behaviour towards all the people of Ireland during his periods of imprisonment and for the said period of 3 years from the date of his release, that he undergo a sexual offender rehabilitation programme while in custody and further that he will come up if called upon to do so at any time during the said period of 3 years to serve the portion of the sentence of the Court this day imposed but suspended on his entering into this recognizance."

107. The appellant may enter in to a new bond to reflect the amended conditions before the Governor of any prison in which he is for the time being serving his said sentences, or a part thereof.