THE COURT OF APPEAL

Record No: 153CJA/2022

Edwards J.
McCarthy J.
Kennedy J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

Between/

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

Applicant

V

N.B.

Respondent

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 22nd of June 2023.

Introduction

1. Before this Court is an application brought by the Director (i.e. "the applicant") pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of the sentence imposed on N.B. (i.e. "the respondent") on the basis that it was unduly lenient.

2. On the 15th of July 2022, and following a guilty plea entered by the respondent on the 18th of May 2022 (which was entered on an agreed basis that the full facts of all four counts on the indictment would be provided to the sentencing court), the Eastern Circuit Criminal Court sitting in Bray, Co. Wicklow sentenced the respondent to 2 years' imprisonment, suspended in its entirety, in respect of one count (count no. 3 on the indictment Bill No. WWDP0039/2019) of sexual assault contrary to Common Law and as provided for by s. 37 of Sex Offenders Act 2001. It should be stated that three further charges (count nos. 1, 2, and 4) of sexual assault were preferred against the respondent, but that in respect of each one a *nolle prosequi* was entered into in accordance with s. 12 of the Criminal Justice (Administration) Act 1924.

3. The terms of the respondent's suspended sentence were set out in the Rule of Court:

"[...] *the conditions being that he will keep the peace and be of good behaviour towards all the people of Ireland for a period of 3 years from this date and with conditions as set out*

in the Probation Report of 12th of July 2022, said conditions being he be placed under Probation Supervision, he attends all appointments with his supervising Probation Officer, he attends for assessment and treatment in any Sex Offender Treatment Programme as deemed suitable by the Probation Service and that he follows all lawful directions by his Probation Office, particularly in relation to risk management in the community. Further conditions that he stay away from the victim and her family and there be no contact in any way shape or form with the victim, in person or electronically AND FURTHER that he will come up if called on to do so to serve the sentence imposed, but suspended on him entering into this Recognisance."

Factual Background

4. The factual background to the respondent's offending is set out herein with reference to the evidence tendered to the sentencing court by a Garda Leanne Kirwan (otherwise "Garda Kirwan") as detailed in a transcript of those proceedings provided to this Court. As a preliminary observation, it should be stated at this juncture that there was a single complainant in this case. To preserve her anonymity, she shall be simply referred to as "the complainant".

5. As indicated in the respective particulars of the various counts on the indictment, the offending complained of occurred over a period stretching from late spring 2016 to early autumn 2017. During this period, the complainant was aged approximately between 12 and 14 years. She made the complaint when she was aged 13 years and was interviewed by specialist child interviews on account of her age. It would appear from a reading of the transcript of 15th of July 2022 that the respondent was in a relationship with the complainant's mother at the time of offending, and that he was father to one of the complainant's younger siblings. In cross-examination, it was revealed that this relationship had been ongoing since 2014 but the date of the relationship's end was unclear – the Probation Report stating it ended in March 2018 but Garda Kirwan stating in evidence that it ended around the time of the complaint. Most of the offending complained of occurred within the confines of the complainant's family home, situated in a village in Leinster.

6. Garda Kirwan described the various incidents complained of. In total there numbered four incidents, which are now summarised below:

Incident No. 1

7. The first incident described by Garda Kirwan occurred in the family home of the complainant. The complainant was about to go for a shower in the ensuite of her mother's bedroom. The respondent pulled her onto the bed and there put his hands up her top. Garda Kirwan averred that the respondent did not let the complainant go until he heard the sound of a stairgate open at the bottom of the stairs and, believing that someone was coming, he released her from his grasp.

Incident No. 2

8. The second incident described by Garda Kirwan also occurred in the family home of the complainant, specifically in the sitting room thereof. The complainant was seated on a couch when the respondent came into the room. He put his arms around her and proceeded to sit on her, placing his two legs on top of her, and there kissed her.

Incident No. 3

9. The third incident described by Garda Kirwan occurred at an unknown location but took place within the confines of the driver's cabin of the respondent's articulated lorry. The respondent was seated in the driver's seat, the complainant seated behind him in the rear compartment of the vehicle where she was told by him to go to sleep. The respondent continued to drive, but with his left arm he reached behind and rubbed the complainant on her legs, up and down inside her legs, up to her knee and onto her private parts. The touching occurred on the exterior of the complainant's clothing.

Incident No. 4

10. The fourth and final incident described by Garda Kirwan occurred at the complainant's family home and in the context of a family barbeque. It was said that the respondent gave the complainant alcohol, and that after she had complained of being sunburnt, he rubbed after-sun lotion onto her back and then proceeded to rub it underneath her top and on her breast area.

Garda Investigation

11. The complainant reported the appellant's misconduct to her mother not long after the offending occurred. From the transcript, it would appear that this disclosure occurred in the context of a conversation between the complainant's mother and the complainant regarding an explicit photograph her mother had found on her phone which was sent by the respondent along with an accompanying caption "*national no panties day*". The respondent had claimed that he had sent it to the complainant in mistake, and that it was actually intended for the complainant's mother.

12. On the 21st of July 2017, the complainant's mother contacted gardaí in relation to the complainant's disclosures and following the making of the complaint an investigation commenced. The respondent was arrested on the 5th of February 2018 and was interviewed in relation to the allegations made against him. At the sentencing hearing, Garda Kirwan stated that nothing of probative value emerged from this questioning. The Probation Report tendered to the sentencing court stated that gardaí interviewed the respondent on two occasions. It was said that he was co-operative inasmuch as he had attended these interviews, but that on both occasions he made no admissions in relation to the allegations made against him.

13. The respondent was returned for trial on the 18th of September 2019, and the matter was adjourned on several occasions before finally being listed for trial on the 18th of May 2022, on which date the respondent entered a guilty plea in respect of count no. 3 on the indictment on a full-facts basis. The matter was subsequently sent forward for sentencing on the 15th of July 2022 on which date the Circuit Criminal Court heard evidence in relation to the offending and ultimately imposed sentence on the respondent.

Victim Impact Statement

14. The complainant tendered a poignant victim impact statement to the sentencing court which was read into evidence by counsel on behalf of the prosecution. On account of its length, we do not intend to reproduce it in full here. Instead a summary is now provided.

15. The complainant spoke of how once the respondent entered her family's life, she did not feel comfortable in her body or home. She described how during this time her relationship with her mother "*suffered badly*", and that both her and her mother lived in fear of the respondent. The

complainant explained that the respondent was a "*father figure*" but that he had abused this trust. The trauma the complainant experienced as a consequence of the respondent's misconduct adversely affected her schooling; gave rise to anxiety and fear in her, such as to necessitate the prescribing of medication, and; prevented her from leaving her home and communicating with others, to the detriment of her friendships that she had hitherto maintained. She averred that her biggest fear arising from the respondent's misconduct is that her younger brother, the respondent's biological son, might someday discover who is father truly is and what he had perpetrated against her, his older sister. She further stated that "*never in a million years*" would she have thought that she would have had to deal with "*something so serious*", and that she had made the disclosures for the purposes of saving herself and her family.

Personal Circumstances of the Respondent

16. The respondent was aged approximately 25 to 26 years at the time of the offences the subject matter of the indictment. At sentencing, he was approximately 29 years of age.

17. The respondent's conviction history was described by Garda Kirwan in evidence. He had two previous convictions recorded, both in relation to the same type of offence, breach of safety orders. The recipients of these safety orders were two different women, including the complainant's mother. The first conviction was dated the 17th of December 2014 and he received a six months' suspended sentence. The second offence occurred on the 27th of July 2017. He was subsequently convicted of it in October 2017 following which received a six months' suspended sentence. This second conviction related to a breach of a safety order imposed in the interests of the complainant's mother.

18. The Probation Report tendered to the sentencing court set out some general background history of the respondent. It was said that the respondent is the second youngest of eight children and at the time of sentencing he resided with his parents in the family home. He had been in full-time employment as a truck driver for over 14 years. The Report further detailed that he had children from a previous marriage which broke down as a result of "*acrimonious differences*". It was said that he was not in contact with his children from this marriage. It was further said that he no longer had access to his biological son with the complainant's mother. The Probation Report described that the respondent had an intimate relationship with a third partner from 2018 to 2021, and that she had secured a safety order against him which expired in April 2022. The Report further detailed that the respondent had attended twelve counselling sessions with a psychotherapist to address his difficulties with anger management and intimate partner relationships.

Probation Assessment

19. In the Probation Report dated the 7th of July 2022, the respondent's offending was assessed. It stated that the respondent struggled to accept that his conduct was sexually criminal and that he believed he was offering the complainant "*emotional comfort*" at a time when she was undergoing medical treatment and hospital appointments. He stated that when the disclosures were initially made by the complainant, he did not deny to the complainant's mother that he had kissed and hugged her but maintained that his actions were not sexually motivated or criminal in any way.

20. In victim awareness-focused discussions, it was observed by the probation officer that the respondent, while acknowledging that the complainant had been impacted adversely by his offending, continued to "*minimise*" his misconduct, maintained that his actions were not sexually criminal, and he expressed "*limited amounts of remorse for the victim and her family*".

21. The respondent expressed a motivation to engage with the Probation Service and acknowledged that he had struggled to control his temper for many years (he had described to the probation officer compiling the Report that in the immediate aftermath of the complainant's disclosures both sets of the couple's parents had attended at the house as he was known to have "*temper problems*"). He advised that these temper problems had negatively affected his relationships with intimate partners in the past. He admitted to his previous convictions for breaching safety orders.

22. The Probation Service has various risk assessment tools at its disposal for assessing the likelihood of recidivism. In respect of the herein respondent, the Service applied the 'Risk Matrix 2000' tool. When applied in the respondent's case, it assessed him as falling in the medium risk category for sexual or non-sexual violence reoffending. It identified as static risk factors, the respondent's age and previous convictions.

23. The senior probation officer who compiled the Probation Report expressed the following concern in her conclusions:

> "*The Probation Service remains concerned that* [the respondent] *has minimised the sexual nature of his offending behaviour, demonstrates limited remorse for his actions and will require extensive offence-focused work and treatment in order to reduce his risks of future offending in the community*."

Sentencing Judge's Remarks

24. The sentencing judge acknowledged the background to the respondent's offending and noted the various materials tendered to him in evidence. He noted that the range penalties available to the court below in sentencing for an offence such as this included fines, community service orders, and custodial sentences of up to a statutory maximum of 14 years. He emphasised that the sentence imposed in any particular case must be proportionate. In this regard, he set out his approach:

> "*It must reflect the gravity of the offending conduct and secondly, it must have regard to the personal circumstances of you, the guilty person viewed from your own perspective, and also viewed from that which would best serve the interest of society at large. In assessing the gravity of your crime, I have to consider the harm done to* [the complainant] *by your offending, but I also have to assess your level of moral culpability. So, I have to consider your personal circumstances together with any aggravating or mitigating factors that arise. I have to assess whether you've shown any genuine remorse or displayed any appreciation of your wrongdoing. And I also have to take into account your past record* [...]. *I have to consider the effect of the consequences of the crime on society in general, but in particular, the loss and impact on* [the complainant] *and whether any restitution has been attempted by you. I have to consider your level of co-operation with the guards, and I have to give you credit for your plea of guilty.* [...]
>
> [...]

Any sentencing must include an element of deterrence specific to you, but also to society at large. [...]"

25. The sentencing judge outlined the factors serving to aggravate the respondent's offending. He identified in particular: the "*enormous*", "*almost irreparable*" breach of trust by the respondent as a person essentially *in loco parentis* to the complainant; the negative impact his offending wrought upon the complainant and her mother, having regard to the victim impact statement, and; his conviction history, particularly noting that he had a conviction for breaching a safety order imposed for the benefit of the complainant's mother with whom he had an intimate relationship at the time. Having regard to the foregoing, the sentencing judge nominated a headline sentence of 2 years and 6 months, which headline fell on the low to medium end of the relevant scale of offending.

26. As regards mitigation, the following factors were identified as enuring to the respondent's benefit in sentencing: his guilty plea, described as "*a plea of value*" notwithstanding that it was not early, which, it was said, spared the State "*a considerable amount of expense*" and further saved the complainant from having to attend a trial to give evidence; his co-operation "*to a degree*" with gardaí, and; his record of employment indicative of "*a tax paying and continuously working member of society*". The sentencing judge deducted 6 months to account for mitigation, leaving a net total of 2 years' imprisonment to be served. This was then suspended in its entirety, expressly on account of the respondent's work history. This suspension was made on certain conditions which are set out at para. 3 of this judgment.

Notice of Application for Review of Sentence

27. In a Notice of Application for Review of Sentence dated the 2nd of August 2022, the applicant advances the following grounds:

"*The learned sentencing judge: -*

a) Failed to fully appreciate the gravity of the offences as committed by the offender, the Respondent.

b) In nominating a headline sentence of 2 years, the learned sentencing Judge erred in law and in fact in failing to have sufficient regard to the aggravating features of the case and in particular, the seriousness of the breach of trust as the complainant was the 13-year-old daughter of his girlfriend and with which family the respondent was then residing.

c) The learned sentencing Judge erred in law and in fact in failing to place the offences appropriately on a range of seriousness for the offences of this nature, in failing to have appropriate regard to the maximum sentences available and in nominating a headline sentence which was too lenient in all the circumstances.

d) The learned sentencing judge erred in principle in failing to attach any, or any sufficient, weight to the principle of general deterrence both in respect of the respondent and of other offenders in the future.

e) The learned sentencing judge placed disproportionate weight upon and gave an excessive discount for the mitigating features and to the guilty plea, having regard to the circumstances of the respondent's arrest.

f) The learned sentencing Judge erred in principle in suspending the whole of the sentence.

g) In all the circumstances the sentence imposed was unduly lenient."

Applicant's Submissions

28. The starting point of the applicant submissions is that the headline sentence nominated was an error inasmuch as while the respondent's offending may have fallen at the lower end of the scale of offending "*it was by no means trivial and had included a series of escalating events, in a fashion that would normally come under the description of grooming*". Moreover, it is submitted that the respondent's offending in the present case had both direct and indirect effects, in that it both impacted negatively upon the complainant, the target of his misconduct, and it consequently precipitated the complete fracturing of a family unit. The applicant stresses that this indirect effect on the wider family unit merited greater weight in assessing the gravity of the respondent's offending.

29. As regards what factors were to be weighed in the balance when imposing sentence, the applicant directs this Court to the commentary of Prof. Tom O'Malley S.C. in his treatise on sentencing, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) wherein at paras. 13-40 to 13-41 O'Malley identifies factors, mitigating and aggravating, applicable to sentencing in sexual offences cases.

30. Turning first to the gravity of the respondent's offending, the applicant emphasises that a significant number of the aggravating factors identified by O'Malley are at play in the present case, and, in this regard, she highlights in particular the respondent's membership of the complainant's family unit (giving rise to "*an even greater breach of trust*"); that the offending took place over an extended period, and; the age disparity between the parties. Further with respect to gravity, the applicant submits that the impact of the offender's misconduct upon the victim is one of the principal factors to be weighed. In this regard, reliance is placed upon the decision of this Court (Edwards J.) in *The People (DPP) v. D.C.* [2015] IECA 256 wherein it was held that at para. 18 of the judgment that "*seriousness is to be weighed with reference to both culpability and harm done with due regard to the range of available penalties.*" The applicant stresses with respect to this point that the respondent's misconduct in the present case had a "*severe effect*" on the complainant and that this was evidenced by her victim impact statement. While the applicant concedes that the sentencing judge in the court below correctly identified the aggravating factors to be weighed when determining gravity for the purposes of nominating a headline sentence, he did not afford those aggravating factors sufficient weight and in this regard the headline sentence of 2 years and 6 months actually nominated was erroneous.

31. The applicant submits that the present case does not feature mitigation of the kind described by O'Malley in his work, with exception to the respondent's history of employment. The applicant observes that there was no evidence of self-rehabilitation, voluntary attendance at counselling, or an absence of previous convictions, and; the applicant further observes that O'Malley opines that such factors, if present, may only be applicable in cases concerning an isolated incident of sexual offending. While it is conceded that credit in mitigation was due to the respondent for his guilty plea, it is nevertheless submitted that the strength of mitigation was, in

effect, overstated by the sentencing judge and that the discount afforded to account for these factors was excessive.

32. The applicant further takes issue with the total suspension of the post-mitigation sentence imposed, counsel concluding their written submissions by contending that the effect of the suspension was to render any already too low sentence unduly lenient.

Respondent's Submissions

33. Replying first to the applicant's submissions with respect to the gravity of the offending, counsel for the respondent submits that the sentencing judge in the course of his ruling was very specific in his reference to the impact of the offence upon the complainant and that due regard was given by him to the victim impact statement. The respondent emphasises that the court at first instance had considered in full the evidence of Garda Kirwan in relation to the factual background of the offending, and that the sentencing judge appreciated the gravity of the offending. The respondent later observes in his written submissions that the applicant does not dispute the finding of the court below that the respondent's offending fell on the lower end of the scale, and it is accepted by the applicant that the sentencing judge had summarised "*thoroughly*" the facts of the present case and made specific reference to the aggravating factor that the respondent had previous convictions. As such, the respondent refutes the suggestion by the applicant that the headline sentence nominated was erroneous as it is evident from reading the transcript of the sentencing hearing that the judge at first instance had considered the full facts and range of factors when making his ruling.

34. The respondent submits that the applicant's ground in relation to a purported failure on the part of the sentencing judge to afford sufficient weight to the general sentencing principle of deterrence is unfounded. Counsel directs this Court to the wording of the sentencing judge's ruling, in particular:

> "*Any penalty must be proportionate. It must reflect the gravity of the offending conduct and secondly, it must have regard to the personal circumstances of you, the guilty person viewed from your own perspective, and also viewed from that which would best serve the interest of society at large*."

Further, it is emphasised that the sentencing judge also considered the effect of the consequences of the respondent's criminal behaviour on society, and that he noted that any sentence imposed must include an element of deterrence specific to the individual defendant (i.e. the herein respondent) but also to society at large.

35. The respondent further disagrees with the applicant's submission to the effect that disproportionate/excessive weight was afforded to mitigation in the present case. In particular, counsel notes that the sentencing judge had properly considered the value of the respondent's guilty plea in the light of the circumstances in which it was made and its timing, and further having regard to its impact on the victim, and in this respect counsel draws this Court's attention to the following excerpt of the sentencing judge's ruling as set out in the transcript:

> "[...] *and I have to give you credit for your plea of guilty. Whilst the plea cannot be described as an early plea, it is nevertheless a plea of value. It doesn't -- you haven't saved the State a considerable amount of expense, but importantly, you have saved your*

victim having to attend to give evidence and then be subjected to cross-examination, rigorous or otherwise. That ensures that your plea is of value."

36. In reply to the applicant's submission that the total suspension of the 2-year custodial sentence imposed on the respondent represented an error in principle, counsel on behalf of the respondent observes that the suspension was made in the light of mitigation, in particular the respondent's employment history as a haulier, and that it was imposed on certain express conditions requiring engagement with the Probation Service.

37. It is submitted that the sentencing judge acted within jurisdiction and in contemplation of all of the facts of the present case, and that the sentence imposed was reasonable and reflected the justice of the case. It is emphasised with reference to the principles set out by the Court of Criminal Appeal in *The People (DPP) v. Stronge* [2011] IECCA 79 as being applicable in undue leniency applications that it is necessary for the applicant to demonstrate that the divergence between the sentence imposed and that which ought to have been imposed amounted to an error of principle before this Court would be justified in intervening. The respondent submits that the applicant has not been successful in meeting this threshold and that accordingly the Director's applicant should be dismissed.

Court's Analysis & Decision

38. There is no dispute in this case as to the legal principles to be applied in determining an undue leniency application brought under s. 2 of the Criminal Justice Act 1993. The jurisprudence in that respect is well settled. The case of *Stronge*, cited previously, is authority for the principle that interference in applications of this type is warranted only where a "*substantial or gross departure from what would be the appropriate sentence in the circumstances*" is demonstrated by the applicant.

39. To succeed, the applicant must establish that the sentence imposed by the court below represented a substantial departure from the norm. Such a departure will usually have been caused by a clear error of principle. It is immaterial whether an appellate court would have imposed, if it had been sentencing at first instance, a different sentence to the one that was actually imposed. That is not the test. For the court to interfere the sentence must have been shown to have been not just lenient but unduly lenient in the sense just spoken about. Moreover, in determining whether that is the case, an appellate court is obliged to consider and give significant weight to the reasons stated by the sentencing judge at first instance for imposing the sentence that he or she imposed, although this will not necessarily be determinative.

40. In seeking a review in this case the applicant contends that the sentence imposed by the court below was unduly lenient for two main reasons. Firstly it is said that the headline sentence nominated by the sentencing judge was simply too low and failed to properly reflect the gravity of the respondent's offending and the harm done to the complainant. It is complained, *inter alia*, that in his sentencing remarks the sentencing judge referenced only three of the four incidents of sexual assault that it had been agreed would be given in evidence, and the applicant regards this as being a significant indicator of a failure on the sentencing judge's part to fully appreciate the gravity of the offender's conduct. Secondly, it is suggested that the overall level of discounting from the headline sentence, being the combination of a straight discount of six months (or 20%) from the headline sentence of two years and six months nominated, and then the suspension of

the entirety of the residual sentence, was excessive in light of the available mitigation in the case and that it implied the affording of disproportionate weight to the mitigating factors in the case.

41. With respect to the headline sentence, we agree with the submission made by the applicant. Counsel for the respondent characterised the nature of the offending as being low level in terms of its gravity, and had asked the court below to deal with the case on the basis of imposing a suspended sentence in circumstances where his client had no previous convictions for offending of the same type and had a good work record. While we accept that the courts encounter a great many sexual assaults of a more serious variety, we do not consider the offending in this case to have been at such a low level that the custody threshold was not reached, and indeed well exceeded. While any one of the individual incidents of sexual assault described in evidence in this case might not, if it were considered in isolation, have caused the custody threshold to be exceeded, what is of great importance is that the offending for which the respondent was being sentenced was not an isolated incident. There were four incidents described in evidence, and they involved various types of assault including touching of the complainant's breasts and of her private parts and, while the word grooming was not used by Garda Kirwan in giving her evidence, we are satisfied that it did involve an element of grooming. Moreover, it is of significance that the child here was very young, between 12 and 14 years, and it is clear from her victim impact statement that she has been greatly affected and traumatised by the abuse was perpetrated on her.

42. Further, the offences were committed in gross breach of trust. The respondent was *in loco parentis* to the child in question and he abused his position in that respect, not once but serially.

43. It was suggested by counsel for the respondent that the headline sentence nominated at first instance, and indeed the ultimate sentence imposed, was not out of kilter with sentences routinely imposed for similar offences. We beg to differ. Certainly, since the establishment of the Court of Appeal there has been a discernible recalibration by this Court as to how the seriousness of serial sexual offending, particularly of young children, is to be regarded. This is consistent with the decision of Oireachtas to provide for an increased maximum penalty for the sexual assault of a child under 17 years of age i.e., from 10 years imprisonment in the case of the sexual assault of a person over the age of 17 years to 14 years imprisonment in the case of a child under 17 years of age. In our view, the appropriate headline or pre-mitigation sentence to have been applied in this case was one of 4 years' imprisonment.

44. Moving then to the mitigating circumstances in the case, the main circumstance that the appellant could rely upon in that regard was the fact that he had pleaded guilty. However, it was not a particularly early plea. Nevertheless, every plea is valuable and he was certainly entitled to an appropriate discount for his guilty plea.

45. Regrettably, from his perspective, he was not a person of previous good character. He had two previous convictions for breaches of safety orders. Further, he had not been significantly cooperative, had demonstrated only a limited amount of remorse, and was inclined to minimise the nature of his offending behaviour. There was a clear continuing problem of lack of insight on his part as to the damaging nature of the violatory assaults that he had perpetrated, and concerning the harm that he had done. He was assessed as being at moderate risk of reoffending.

46. The main point that was, and which could be, made in his favour was that he had a good employment record which, if he were to go to prison, might be jeopardised. The case was made that if he were to be granted a suspended sentence it would incentivise him to live a pro-social life going forward, so that potentially he might be a positive contributor to his community.

47. We again agree with counsel for the applicant that the overall level of discounting for mitigation was excessive. We have no difficulty with the initial discounting from 2 ½ years to 2 years, which represented a 20% straight discount for mitigation. This would appear to us to have been an appropriate level of discounting. Indeed, the judge would have had some margin of appreciation in that respect and might indeed have gone slightly higher, but his decision to afford 20% discount was within that margin of appreciation. Moreover, we accept that the sentencing judge had a discretion to go somewhat further and to suspend a portion of the residual post mitigation sentence in the interests of incentivising rehabilitation. However, we would seriously quarrel with the extent to which he did so and we are of the belief that he exceeded his margin of appreciation in that respect. We have said many times that where the judge opts to suspend the sentence in whole or in part that has to be an adequate evidential basis for doing so. We have no difficulty with the idea that there was an evidential basis for some level of suspension in this case but to have wholly suspended the sentence was simply unjustified having regard to its seriousness and the lack of a sound evidential basis for doing so.

48. Against a background where we have found the judge to have been an error both with respect to the selection of a headline sentence and also with respect to the extent to which he discounted for mitigation, we have no hesitation in further finding that the ultimate sentence was substantially outside the norm and was unduly lenient. In the circumstances we must quash the sentence imposed by the court below and proceed to resentence the respondent.

49. Consistent with what we have indicated already, we will nominate a headline sentence of 4 years' imprisonment. From that we are prepared to discount by 25% to reflect the mitigating circumstances in the case, and so we will reduce the headline sentence to a post mitigation sentence of 3 years' imprisonment.

50. The question then arises as to whether we should part suspend any portion of the post mitigation sentence in furtherance of the objective of incentivising the respondent's rehabilitation and to encourage him to live a prosocial life when he is released from prison. The scope for this is really quite limited in circumstances where he is not undertaken to date any meaningful work to gain insight into the true nature of his offending behaviour, and further given the level of risk that he represents as assessed. However, taking into account his good employment record and the hopes that the sentencing judge at first instance had for him, and reflecting the fact that it will be more difficult for him to go into prison now having avoided a custodial sentence at first instance, we are prepared to suspend a period of 6 months of the post mitigation sentence.

51. In conclusion, the respondent is sentenced to 3 years' imprisonment with the final 6 months thereof suspended.

52. We also considered appropriate to impose a post release supervision order in this case. We will discuss with counsel on both sides the appropriate conditions to be attached to this supervision order.