



THE COURT OF APPEAL

Record No: 32/2022

**Edwards J.
McCarthy J.
Kennedy J.**

Between/

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

RESPONDENT

V

J.U.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 21st of February 2023.

Introduction

1. The present appeal has been brought by J.U. (i.e. "the appellant") against the severity of the sentence imposed on the 7th of February 2022 by Creedon J. in the Central Criminal Court. The appellant had been convicted of one count of rape contrary to Common Law and s. 48 of the Offences Against the Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. In respect of this count on which the appellant was convicted, the sentencing court ordered that the appellant serve a custodial sentence of 8 years with the final 1 year thereof to be suspended subject to his adherence to certain probation conditions which will be outlined later in this judgment.

Factual background

2. At the sentencing hearing on the 13th of December 2021, a Garda Aidan Moran gave evidence in relation to the circumstances of the appellant's offending.
3. On the 8th of May 2017, both the appellant (then aged 21 years) and the complainant (also then aged 21 years) attended at a party held at a residential address in Dundalk, County Louth. The complainant, originally from Dundalk, was a student at a third level institution in the City of Dublin. The complainant had been invited to the party which was being hosted by a friend of the complainant's sister. The complainant arrived at around

21:45pm with her sister and another female friend. The appellant had been socialising elsewhere at that time and arrived at the party sometime after midnight. Both parties were known to one another.

4. The complainant had consumed a significant quantity of alcohol. She had given evidence that she had drunk red wine and vodka and she had felt unwell at one point and went to the bathroom to vomit. Following this, she laid down in one of the bedrooms in the house. By the time the appellant had arrived at the party, he was also inebriated. There was a number of people coming to and going from the address throughout the evening. By the end of the night, the last people remaining at the house were the complainant, her sister, her sister's friend who resided at the address, and the appellant.
5. The appellant entered the room where the complainant was sleeping and initially laid down on the bed. The appellant then removed his clothes and proceeded to climb into the bed and laid beside the complainant. At a certain point the complainant awoke from her slumber and became conscious of the appellant's presence. The complainant gave evidence that the appellant spoke to her but that she did not respond. She maintained that she was frozen in shock and fear. She further described how the appellant had pulled her underwear to one side and proceeded to penetrate her vagina with his penis. The appellant then asked the complainant to turn over, using her name. The complainant described that she could not and did not respond to this request. The complainant recalled the appellant pulling her onto her side, whereupon he continued to penetrate her, and then he rolled the complainant onto her back. The complainant at this point managed to rise from the bed and promptly left the bedroom. The complainant described feeling "very upset" and that she was crying. The complainant then left the premises, along with her sister, and the pair went home.
6. The complainant made a complaint to An Garda Síochána on the 9th of May 2017. She was then taken to a sexual assault treatment unit at a hospital in the City of Dublin whereupon a genital examination was conducted and revealed two superficial linear abrasions, which abrasions were described by the doctor attending to the complainant as being consistent with recent vaginal penetration.
7. At trial, there was evidence of telephone and social media exchanges between the complainant and the appellant the following day. In these exchanges, the appellant did not deny his actions to the complainant, apologising to her and saying that he was drunk. In cross-examination, Garda Moran confirmed the tenor of these messages: that the appellant was "extremely sorry for what happened"; that he was "disgusted at himself"; that he was "scared"; that he "was on the verge of vomiting", and; that he was concerned for the complainant's welfare. At trial, the appellant gave evidence to the effect that he could not remember much about the night of the offence, nor could he remember much about penetrating the complainant. He averred that he had "little memory" in general of the events that took place on the evening of the 7th of May 2017. He further averred that it was not in his nature to have behaved in such a manner, and it is for this reason that he had pleaded not guilty.

8. The appellant was interviewed by gardaí on the 23rd of May 2017, and he was generally cooperative but did not admit to rape.

Personal circumstances of the appellant

9. The appellant was 25 at the time of sentencing and was living at home with his parents and his younger sister, then aged between 12 and 13 years. The family were not originally from Ireland and had moved to the jurisdiction when the appellant was approximately 8 years of age. The appellant had previously worked as a barman in Dundalk, and more recently was working with his father. The appellant was not known to the gardaí, he had never come to the gardaí's attention prior to or since the incident and he had no previous convictions.

Victim impact statement

10. At the sentencing hearing, the complainant read aloud in court a lengthy and detailed victim impact statement to which we have had full regard and which we will attempt to summarise. Overall, she described herself before the incident as being *"a generally happy person who always saw the best in people and tried to look at the bright side"* but that now she feels like a part of her *"will never be the same"*. She reported that she had *"struggled making friends in college after the incident and had to take a year out"*, and that she has had her *"guard up"* with every person that she has met since the incident, saying *"I couldn't let them know what I was going through"*. The complainant stated, *"who I am now is a question I struggle to answer every day."*
11. The complainant described the incident of the 7th of May 2017 as having changed her life *"forever"* and that it ruined her early 20s. She further stated that she was now entering her late 20s *"as a completely new person"* whom she was unsure whether she liked.
12. The complainant stated that the rape perpetrated by the appellant against her had *"torn [her] to pieces emotionally"*, stating that

"[N]ever in my whole life have I felt so isolated. It has made me feel things I never thought I would ever feel. Times when I was sad before this happened don't come close to what I've been going through since. Initially I was in a state of shock, a surreal numbness that I've never felt before. This lasted months and can resurface from time to time. I was so disconnected from my emotions and body. I like to think of myself as a strong person and tried to develop coping mechanisms, but the impact of this trauma was larger than I could have ever imagined. The world became a dark and scary place where I felt there was no one I could trust. I felt so helpless, surrounded by darkness and felt like I was drowning in it. I knew in my head that there'd be light at the end of the tunnel and this couldn't last forever, so I felt so frustrated I couldn't just shake it off and be okay."

13. The complainant described her inability to *"find joy in life any more"*, saying that *"nothing could distract me from what had happened"*. Whereas before the incident she could find solace in listening to music, after the incident this only served to make her feel *"more agitated and upset because it didn't work anymore"*. The complainant further described oscillating between feeling *"too much emotions (sic)"* to *"feeling absolutely nothing"* since

the incident, and that feeling nothing at all was “worse” than feeling “*pain, regret, sadness, [and] anger*”. She described the “*surreal experience*” of feeling nothing as “*eerie*” and that she feels like she is “*freefalling with nothing solid to hold onto to [...] [an] out-of-body experience where you’ve finally given in and died and now you’re just an onlooker on your life while not being able to live.*”

14. The complainant further described the impact of the incident upon her relationship with food and her body, stating that she “*hated [herself] and [her] body for a long while*”, and that she had put on weight in the years since the incident.
15. The complainant then described the guilt she felt for having brought her family “*through all this trauma and darkness*” and that she felt like she had let them down for having been raped. She said that she had developed suicidal thoughts and she stated, “*all I wanted to do was stop fighting and give in to depression*” and that “*the only thing that would soothe me was the image me (sic) ending it all and killing myself because this is what made sense to me*”. The complainant described how she could finally sleep only after having “*picture[d] all the different ways I could do it*”. She described how after waking up, “*[t]he reality of my circumstances always hit me like a tonne of bricks.*”
16. The complainant has described the period since the incident as “*the loneliest experience of my life*”. She had hoped each year that “*this would be the end of it*” and that the passage of time made it hard for her “*to see the bright side and hold out for hope for it to be over*”. The complainant stated that she had turned to counselling and medication to alleviate her pain but that she never felt quite at ease with counselling as she does not like to talk about herself:

“I wasn’t ready to deal with the trauma, I need to bury it deep inside and act like [...] everything was okay [and] then maybe I’d start to believe it. Every time you tell the story it took me back to that place of despair. I would feel powerless all over again. The feeling of pure panic and paralysing fear without being able to move would take over and all I’d want to do is run. I’m unable to think about that night without these feelings taking over every time.”

17. The complainant described how the incident had affected her relationship with alcohol in that every time she drank she hated herself and that while drink was used to “*numb*” the pain, “*all it did was resurface thoughts and feelings of what happened*” to her. She described her discomfort at having visitors to her house, describing her home as a “*safe place*”. She had had to take a year out from her studies to “*process*” it. During this time she had “*learned how to bury it all down and almost pretend [the incident] didn’t happen for the most part.*” Notwithstanding the milestones and successes she had achieved in life since the incident – the completion of her degree, obtaining a driving license, purchasing a car, and finding employment – she still feels “*stuck, frozen in place emotionally*”.
18. Further, the incident has affected her view on marriage, having children, and men generally:

"I used to imagine marriage and children and a husband one day in my future. But since this has happened I don't feel like it'll ever happen. Why would I want to bring a child into a world like this? How could I protect them if I couldn't even protect myself? I can't image (sic) letting myself get close (sic) to a man, both emotionally and physically, the very thought of it panics me, even a man brushing past me stresses me. I know not all men would do what was done to me, but how do you tell the difference?"

19. The complainant further expressed concern as to how the incident may impact her standing in her community.
20. She had believed that once the matter had gone to court and there was an outcome she would feel as though a *"weight would be lifted off my shoulders, I could finally move on and be happy."* However, this did not come to fruition, rather she realised that she had been *"frozen"* in the period since the incident and now *"had to deal with it"*. The complainant feared that she was *"not strong enough"* to survive dealing with it.
21. The complainant concluded by resolving to *"embrace"* who she is and what has survived and that in the wake of the appellant's conviction and sentencing she will *"recreate, rebuilt and live the rest of [her] life"*, stating that she refuses to be a *"victim"* anymore. The complainant concluded by stating *"I will learn to forgive my body, but I will never forgive [the appellant]. What he put me through will not define me anymore"*.

DPP's submission to the court below

22. Counsel on behalf of the prosecution submitted to the sentencing court that the appellant's offending fell within the category of cases meriting an *"ordinary headline sentence"* as discussed in Charleton J.'s judgment in the Supreme Court case of *DPP v. F.E.* [2019] IESC 85. The respondent therefore submitted that the appellant's offending warranted a headline sentence of between 7 and 10 years.

Probation Report

23. In the Probation Report the appellant's Probation Officer, outlines that while the appellant does not recall the events comprising the offence of which he was found guilty, he understands the offence and is taking responsibility for his behaviour. The appellant advised that he was made aware of his behaviour by the complainant's sister the morning after the offence took place. The appellant stated that he was *"horrified"* to hear what he had perpetrated and that he tried to apologise.
24. The Probation Report notes that despite the appellant's claim of not remembering his offending behaviour, he nevertheless stated at interview that he views himself as a *"disgrace"*. The Probation Report observes that the appellant *"was appropriately able to perspective take from the victim's point of view"* and that he *"clearly"* acknowledged the impact his offending behaviour has wrought upon the complainant. Further to this, the appellant had also *"clearly"* understood that *"indirect victims"* have been affected by his behaviour. The appellant advised that his offending behaviour have been a source of deep upset for his parents and that many of his friends were *"shocked"* by his behaviour and

had distanced themselves from him. The Probation Report observes that the appellant has stated at interview that he is "*deeply remorseful for his actions.*"

25. As to the appellant's personal circumstances, the Probation Report notes that the appellant moved to Ireland with his parents when he was about 8 years old. It describes a "*close & supportive relationship*" between the appellant and his parents with whom the appellant will be residing upon release from custody. The appellant had embarked on a nursing course following completion of a post leaving certificate course, but did not complete it, and took up employment in the bar/restaurant trade instead. The appellant then took up employment as a general labourer in the construction industry. The Probation Report notes that the appellant has been "*continuously gainfully employed*" since completing his secondary level education. A friend of his has offered employment in construction following his release from custody, and the appellant hopes to continue to be in full time employment upon release.
26. The Probation Report notes that the appellant has never been in a long-term relationship. From the age of 18 to 21 years, the appellant had spent much of his time socialising with friends. He considers himself an easy-going person who easily followed the crowd, which often included drinking to excess.
27. The appellant has been socially isolated since the incident owing to the upset and anger that many of his friends feel towards him. Because of this, the appellant's social life has declined to such an extent that he does not attend parties or nightclubs anymore. He has not stopped drinking entirely, but he nevertheless claims to have substantially cut down on his consumption. The Probation Report observes that it is "*evident*" that appellant's alcohol consumption played a "*key role*" in the appellant committing the offence. The Probation Report notes that while the appellant may not view himself as having a problem with alcohol, his excessive drinking on the night of the offence led him to exploit a situation to his own advantage. The Probation Report observes that it would be beneficial for him to explore this further in a therapeutic setting.
28. The appellant has been assessed as falling in the moderate risk category on both the sexual and non-sexual violent scales, when assessed using the RM2000 static risk assessment instrument. The report cites the appellant's age as a "*significant factor*" resulting in his placement in the moderate risk category. On application of the Stable 2007 dynamic risk/needs assessment instrument he falls to be located on the low/moderate end of the scale for the stable risk assessment. The Probation Report notes that the primary areas of risk identified included intimacy deficits, specifically with regard to his absence of relationship stability, which intimacy deficits are tied in with the appellant's young age. Also identified as a primary concern area was the appellant's general self-regulation which arose as the appellant self-reported poor problem-solving skills and making poor choices. The appellant expressed that he would be happy to get assistance and guidance in this regard.
29. The Probation Report notes a number of protective factors in the appellant's favour: a supportive family who will enable him to reintegrate in the community with stable

accommodation and emotional support; the support of a few friendships who have also verbally given offers of support in terms of access to employment, and; an “appropriate” attitude on the part of the appellant. The appellant understands that he will find reintegration following release to be challenging, given his behaviour, and is willing to engage meaningfully with professional services to avail of any assistance offered to him.

30. The Probation Report concluded by recommending that should the appellant be placed under the supervision of the Probation Services; the following conditions are recommended:

- “1) That he attend all appointments as directed by the Probation Service.
- 2) That he undertake offence focused work with his Probation Officer in relation to alcohol use and cognitive distortions.
- 3) Engage with addiction services, if deemed appropriate.
- 4) That he engage with a referral to [the Irish Association for the Social Integration of Offenders], work & training to gain safe pass certs for future employment opportunities.
- 5) That he advise the Probation Service of any change of contact details relating to address or phone number.”

Sentencing remarks of Creedon J.

31. The matter was adjourned until the 7th of February 2022, on which date Creedon J. imposed sentence upon the appellant and set out her reasoning.

32. In relation to setting of the headline sentence, the sentencing judge noted that a maximum sentence of life imprisonment was open to the sentencing court. The sentencing judge further noted that the respondent had indicated that it was her view that the offending fell into the “ordinary category” of offending as termed in *F.E.* and therefore warranted a headline sentence of between 7 to 10 years. The sentencing judge also noted the appellant had submitted that the facts of the case bring it into “below the norm” as also termed in *F.E.*

33. The sentencing judge then described the factors at play in setting the headline sentence. With respect to the nature of the offending, the sentencing judge had regard to the dicta of Charleton J. in paras. 43 to 44 of *F.E.* that:

“it has been unequivocally stated by the courts that rape is a violation in the most serious way of the constitutionally protection rights of women to their bodily integrity and to their physical and mental independence [...] A non-custodial sentence should be “wholly exceptional” on the [DPP v. Tiernan [1988] 1 I.R. 250] principles.”

34. The sentencing judge had regard to the facts of the case. She noted that the complainant, in circumstances where she had withdrawn from the party on account of feeling unwell

and had gone to bed, was “*entitled to feel safe in that environment*” but that the appellant took advantage of the complainant’s vulnerability when the complainant was clearly asleep and raped her. The sentencing judge noted that the complainant had gone to a sexual assault treatment unit whereupon, following a genital examination, two superficial linear abrasions consistent with having been raped were discovered. The sentencing judge acknowledged the content of the victim impact statement as demonstrative of the clear detrimental impact that the appellant’s offending had and continues to have upon the complainant in terms of her mental health, her emotional and physical wellbeing, and her education.

35. The sentencing judge looked to the appellant’s level of current understanding of the impact of the offence and the need to have regard to his rehabilitation. The sentencing judge noted that at the time of offending the appellant was 21 years of age. The sentencing judge further noted that despite his conviction, the appellant continued to maintain memory gaps in relation to the night of the offence but that he has a good understanding of the impact of his offending on both direct and indirect victims and is deeply remorseful, as per the Probation Report. The sentencing judge further acknowledged that the Probation Service had conducted a risk assessment in relation to the likelihood of the appellant reoffending and had placed the appellant in the moderate risk category for both sexual and nonsexual violent scales of reoffending and he was placed in the low to moderate risk category on the stable risk assessment. The sentencing judge acknowledged that the appellant comes from stable, supportive and comfortable family circumstances and stated that “[*t*]he Court has regard to the fact that he will be re-entering society as a young man.”
36. Having regard to the foregoing, and to submissions made by counsel in the sentencing hearing of the 13th of December 2021, and to the categories outlined in *F.E.*, the sentencing judge considered the facts of the case to properly lie in the “*ordinary category*” of offending and nominated a headline sentence of 9 years’ imprisonment.
37. With regard to mitigation, the sentencing judge acknowledged that the appellant was found guilty following a jury trial, which verdict he accepts. The sentencing judge acknowledged that the appellant had apologised to the complainant and that he expresses remorse which provides the complainant with some acknowledgement of the hurt he caused her. The sentencing judge further acknowledged that the appellant is apologetic for having put the complainant through the trial process and that he is dealing with his alcohol issues. However, the sentencing judge stressed that the significant credit which could have been afforded in mitigation had the appellant entered a guilty plea could not be afforded to him in this case. The sentencing judge noted that the appellant had no previous convictions and had never otherwise come to garda attention. Lastly, the sentencing judge identified the appellant’s stable and supportive family background as a mitigating factor.
38. Having regard specifically to the appellant’s apology, his lack of previous convictions, his age and the fact that he will have to reintegrate into society, the sentencing judge

deducted 1 year from the headline sentence leaving a net custodial sentence of 8 years. The sentencing judge then suspended the final 1 year of that custodial sentence, adopting the conditions recommended in the Probation Report (as described in para. 30 of this judgment).

Notice of Appeal

39. In Notice of Appeal lodged on the 16th of February 2022, the appellant now appeals to this Court against the severity of sentence imposed on him by Creedon J. on the 7th of February 2022. The grounds of appeal are as follows:

- "1. *The sentence imposed by the learned sentencing judge was excessive in all the circumstances;*
2. *The learned sentencing judge erred by placing the offence in the ordinary category of offending as set out in DPP v FE, [2020] 1 ILRM 517;*
3. *The learned sentencing judge erred by setting a headline sentence of nine years;*
4. *The learned sentencing judge erred in referring to the fact that the Appellant continued to insist that he could not remember the incident in a manner which appeared to cast doubt on the Appellant's position;*
5. *The learned sentencing judge erred in law and in fact in placing excessive weight on the aggravating factors as outlined during the sentencing hearing;*
6. *The learned trial judge failed to give sufficient weight to the mitigating factors as outlined in the sentence hearing."*

Parties' submissions to the Court of Appeal

Appellant's submissions

40. In the appellant's submissions to this Court, counsel first centre their analysis on relevant aggravating factors for offences falling in the "ordinary category" as noted in *F.E.* and distil the following inexhaustive list:

- "(i) *Prior convictions;*
- (ii) *Duration of the abuse;*
- (iii) *Attacking a victim in their own home;*
- (iv) *Physical domination;*
- (v) *Systematic grooming;*
- (vi) *Plying a victim with alcohol;*
- (vii) *Being a family member"*

41. It was submitted that none of the above aggravating factors are a feature in the present case.
42. In relation to offending lying “*below the norm*”, in which category it was argued at sentencing that the appellant’s offending properly belonged, the appellant submits that while offending captured by this category for the most part relates to juvenile offenders, this is not a mandatory feature of such cases. The appellant draws this Court’s attention to *DPP v. McLaughlin* [2015] 3 I.R. 198 and *The People (DPP) v. Counihan* [2015] IECA 59, and contrasts them with the present case. In *McLaughlin*, the defendant had pleaded guilty to raping the complainant in her bedroom after having been earlier expressly told that she had no interest in sexual contact with him. The defendant had given the complainant a sexually transmitted disease as a result of the rape, and he had three previous convictions albeit non-sexual in nature. After paying a sum of €10,000 in compensation to the complainant, the defendant received a fully suspended sentence of 3 years and following an appeal by the Director this Court imposed a custodial sentence of 4 years and suspended the final 3 years thereof. In *Counihan*, the defendant had been convicted of 2 counts of rape and 2 counts of indecent assault following a trial. These offences were perpetrated by the adult defendant on a 13-year-old complainant. Certain aggravating factors were at play, specifically the position of power that the defendant enjoyed; that the complainant was the sister of the defendant’s wife; that the abuse had a very severe impact on the complainant, and; that there was a lack of remorse and acceptance of guilt on the part of the defendant. On appeal, this Court substituted a 10-year sentence and suspended the final 7 years thereof. The appellant herein submits that the offending behaviour in *Counihan* and the defendant’s attitude to same were far more egregious than that in the present case.
43. Reference is also made by the appellant to *The People (DPP) v. Lukaszewicz* [2019] IECA 65, which case the appellant submits is, to some extent, of a similar factual matrix to the present case. Therein, the defendant had been convicted of rape following a trial. At the time of offending, both parties were of similar age, the defendant was 16 years of age and the complainant 15 years of age. In *Lukaszewicz*, however, it is submitted by the appellant that more aggravating factors were at play. Specifically, the involvement of planning, a refusal to stop when asked, and a lack of remorse and acceptance of guilt. On appeal, this Court upheld the sentence imposed at first instance which comprised of a 5-year custodial sentence, 2 years thereof being suspended.
44. The appellant submits that the sentencing judge erred in placing the case in the “*ordinary category*” of offending in *F.E.*, which category was described by Charleton J. in *F.E.* as relating to offending where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence. The appellant directs this Court’s attention to the judgment of Charleton J. in *DPP v. W.D.* [2008] 1 I.R. 308, p. 320 in which Charleton J. notes that cases involving a custodial sentence of 8 years are characterised “*by either a more than usual degree of violence on the part of the perpetrator, by a particularly unfortunate effect on the victim or by instances of the conviction being recorded on a number of difference counts.*” The appellant also quotes

from p. 324 of *W.D.* in which Charleton J. suggested that a perpetrator of rape may expect to receive a custodial sentence of 8 years or more if the circumstances are sufficiently bad, involving “*a worse than usual effect on the victim, where particular violence has been used or where there are relevant previous convictions, such as convictions for violence of some kind.*” We must interject at this point to say that the comparisons being made by counsel lack validity, and that in effect apples are being compared with oranges, in a situation where the figures spoken of in the *W.D.* jurisprudence were post mitigation figures whereas the figures relied upon in the *F.E.* jurisprudence are headline or pre-mitigation figures.

45. The appellant further contrasts the facts of the present case with those decisions cited in the *F.E.* decision as being representative of cases falling within the ordinary category in support of his overall submission that the sentence imposed by Creedon J. was excessive in the circumstances. We are asked to consider the circumstances in *The People (DPP) v. T.E.* [2015] IECA 218; *The People (DPP) v. T.V.* [2016] IECA 370 ; *DPP v. P.G.* [2017] IECA 42; *DPP v. Power* [2014] IECA 37 and *DPP v. K.K.* [2022] IECA 92, and we have done so.
46. The appellant submits that being convicted after a trial does not automatically attract a more severe custodial sentence when none of the accepted aggravating factors feature. The appellant relies on the dicta of Charleton J. in *W.D.*, *supra* at p. 315, in this regard. The appellant draws the attention of the Court to this Court’s decision in *DPP v. C.* [2015] IECA 76 in which it was held that a failure to plead guilty should not be treated as an aggravating factor in sentencing.
47. Moreover, the appellant submits that a person convicted following a trial should be entitled to a certain amount of credit for having conducted his defence in a manner showing sensitivity to a vulnerable witness as per *DPP v. D.O’D. (No. 2)* [2015] IECA 306. The appellant submits that the defence was not bolstered by a claim of consent or by suggesting that the complainant was lying. In this regard, the appellant submits that D.O’D is equally applicable to the immediate case. As such, the appellant submits that the sentencing judge’s reservation regarding the appellant’s consistent claim of suffering from memory gaps is misplaced and should be treated as a mitigating as opposed to an aggravating factor.
48. Finally, the appellant submits that *DPP v. A.U.* (Bill No. CCDP 113/19) is a useful comparator inasmuch as it involves a similar factual matrix. In that case, in spite of the fact that the accused had slapped the complainant and had forced her to engage in oral sex, a custodial sentence of 6 years was imposed, with the final 6 months thereof suspended. The appellant submits that this sentence was far more appropriate compared to the sentence imposed at first instance in the present case.

Respondent’s submissions

49. In reply to the appellant’s submission that the sentencing judge erred in nominating a headline sentence of 8 years because of the absence of certain “*accepted*” aggravating

factors, the respondent submits that the present case is replete with different but nonetheless aggravating factors and they identify: the forceful attack on a sleeping vulnerable person in a safe space; the psychological and physical harm, and; the impact on her education which was delayed as a result of emotional trauma sustained from the attack. The headline sentence was correct, the respondent submits, on account of the gravity of the offending and the harm rendered to the complainant which was reflected in her victim impact statement. In any event, the respondent submits that the sentencing court gave careful consideration to the categories set out in *F.E.* and that appropriate mitigation was afforded. Accordingly, the respondent submits that the sentencing judge had proper regard to all matters canvassed in sentencing including the very serious nature, extent and duration of the offence on a young woman and the profound and lasting effect that the offence has had on her. The respondent therefore submits that the sentencing judge did not err in principle by nominating a headline sentence of 8 years.

50. While the respondent accepts that there was no force or violence beyond the inherent violation of the victim that rape involves, it is contended that even for ordinary offences the sentence must reflect the inherently violatory nature of the act. There may be circumstances such as minority and immaturity in consequence of that, or mental or cognitive deficiency, to give just two examples which might cause some cases to be placed in the category of offences attracting sentences below the norm, but this was not one of them. While there had not been an invasion of the victim's dwelling, there was an invasion of her bed and of her personal space in which she was entitled to feel safe. She was also particularly vulnerable on the occasion by virtue of having consumed drink and having had to retire to bed due to illness associated with her intoxication.
51. Lastly, the respondent submits that the absence of additional gratuitous violence is not a matter of mitigation but rather is merely the absence of a further aggravating factor to an already serious offence. The respondent relies on the dicta of Finlay CJ. in *Tiernan* in this regard.

The Court's analysis and decision

52. We are satisfied that the appellant has not established an error in principle such as would warrant this court to interfere with the sentence imposed at first instance. We consider without a moment's hesitation that this was a case that properly belonged within the category of ordinary headline sentences as identified in the *F.E.* jurisprudence. We do not consider the circumstances of this case as being exceptional or very unusual as counsel for the appellant contended. What is perhaps unusual, in circumstances where the appellant has not at any stage sought to dispute what the complainant says occurred, is that the appellant did not plead guilty. He was of course under no obligation to plead guilty, and he cannot be penalised on account of not doing so. However, the wisdom of his strategic decision was highly questionable, to put it at the slowest. The effect of that decision was to deprive him of the single most significant piece of mitigation of which he could have availed. The sentencing judge specifically alluded to this. We accept that he contends that he couldn't accept that which he was being accused of, because it was generally out of character for him, and that that was the reason why he did not plead

guilty. However, that does not reduce his culpability. Nor does it provide him with mitigation. It is simply an explanation for why he did not plead guilty. However, neither the court below nor this Court is in a position to make any allowance for the fact that he made a bad strategic decision in terms of how he approached the trial, and afford him mitigation to which he is not entitled. There was no facing up to the matter in advance of the trial. Neither was the victim spared the trauma and distress of having to testify. It is accepted that she was not robustly cross-examined, and it was not suggested to her that she was anything other than truthful. However, in a situation where she had to go into the witness box, the appellant is not entitled to claim partial mitigation on the basis that she could have been treated worse.

53. We reiterate that this case properly belonged, for the purpose of setting a headline sentence, in the category of cases attracting ordinary headline sentences as discussed in *F.E.*
54. Counsel for the appellant submitted that the oral hearing that even if we were to reject his contention that it belonged in the lower category that the sentencing judge ought not to have selected nine years' imprisonment as a starting point. In response to this, counsel for the respondent contends that there were aggravating circumstances. It was not a wholly un-aggravated instance of rape. The victim had been vulnerable. She had been violated in a situation where she was entitled to feel safe. Most significantly, very significant harm had been done as was evident from the poignant and eloquent victim impact statement received by the court below. We agree with this submission. While another court might not necessarily have started at the same point, and one might view the headline sentence as having been at the severe end of the sentencing judge's range of legitimate discretion, it cannot be said that it was outside of her margin of appreciation. We find no error of principle in the setting of the headline sentence.
55. We are satisfied that the appropriate discount was made for mitigation and in those circumstances we have no hesitation in upholding the sentence imposed by the court below.
56. The appeal is therefore dismissed.