THE COURT OF APPEAL

Neutral Citation: [2025] IECA 44

Record No: 203/2024

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

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

RESPONDENT

V

J.K.

APPLICANT/INTENDED APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 16th of January, 2025.

Introduction

1. This is an intended appeal brought by Mr. J.K. (hereinafter, "the appellant" for convenience), subject to the Court agreeing to enlarge the time for an appeal, against the severity of the sentence imposed on him by the Central Criminal Court on the 27th of July 2018. On the 8th of June 2018 the appellant was found guilty in a retrial, by way of a majority verdict of 10 members of the jury, of counts 1 to 5 inclusive on the Indictment, which comprised of offences of attempted rape (count 1) and rape (counts 2 to 5) on his cousin. The appellant had stood trial in June 2017, at the conclusion of which the jury was unable to reach a verdict.

2. On the 27th of July 2018 the Central Criminal Court passed sentence ordering that the appellant serves six years imprisonment in respect of count 1 and in respect of counts 2 to 5 inclusive he was sentenced to nine years imprisonment, all terms to operate concurrently with the final twelve months thereof suspended. A condition of the suspended sentence was that he undergo the Better Lives Programme.

3. Also before this Court is an application filed by the appellant on the 22nd of July 2024 seeking an enlargement of time to appeal. He was 6 years and I month and two days late in seeking to appeal against his sentence, and his reasons for that are set out in an affidavit filed on his behalf by his solicitor, Edward King, and received in the Court of Appeal office on the 1st of November 2024. It requires to be noted that the appellants lodged within time an appeal against his conviction, although that was ultimately unsuccessful. Further, it has been communicated to the Court of Appeal office by the solicitor for the respondent that the respondent will not be opposing the application and that her attitude is that it is a matter for the Court, and the Court alone, whether the extension of time being sought should be granted. The Court will address the extension of time issue later in this judgment.

Factual Background

4. At the sentencing hearing of the 23rd of July 2018, the Court heard evidence from Garda Dan Whelan in respect of the attempted rape and rape offences.

5. On the 30th of October 2014, Garda Whelan became aware of the incident through the husband of a M (i.e. "the victim"). Garda Whelan visited M that day at her home and after a brief conversation made arrangements for M to call to the Garda Station on the 3rd of November 2014 to make a detailed statement in relation to it. The statement proceeded on this date.

6. M was born of the 11th of February 1976 and lived with her father, mother, and brother. The appellant was born of the 23rd of May 1966 and was her cousin.

7. Count 1 of which the appellant was found guilty relates to an incident which occurred in January 1984. M recalled going to her grandmother's house on the occasion of a 21st birthday of her cousin. She recalled that on that date "*the majority or all of the family*" apart from her and the appellant left the house to travel to a 21st birthday party at a location in Wexford. She recalled that on that evening the appellant was "*minding her and babysitting her*".

8. M gave evidence that the appellant indicated that he had something to show her and that he carried her upstairs to his room. She stated that he then attempted to rape her in a bed upstairs in that particular house, in a room which he shared with his brother and some of his cousins. M gave evidence of distress and also of feeling sore for a period of time after that particular incident. She also gave evidence that he "*was aggressive and threatened her and told her not to tell anybody or there'd be trouble and this would be their secret*". After initially leaving M in the bedroom crying, the appellant returned some time later to the bedroom where he made those threats.

9. Counts 2 to 5 relate to a time between roughly mid 1985 and mid 1986 when the appellant was living in his uncle's (M's father) household. Sometime after January 1985, the appellant moved into M's family home and shared a room with her brother, for the period in question.

10. M recalled that of a Friday evening her parents would go out to traditional music sessions, and her cousin, the appellant, would babysit. On those evenings her brother would be allowed out to play, leaving M on her own with the appellant. There was a set pattern in that he would empty his pockets and place "*his money or whatever*", the contents of his pockets on a mantlepiece and he would lock a back door and then would go into the sitting room. M's evidence was that this took place every Friday night. She recalled the appellant giving her sweets at different times and being given money at different times but there was always some gift. On these occasions, sexually inappropriate contact occurred which eventually led to rape. M gave evidence that she "*told nobody*".

11. On the 21st of December 2014, the appellant was arrested and interviewed under caution. The appellant denied the allegations put to him.

Victim Impact Statement

12. A victim impact statement of M was read out in Court by Garda Whelan as follows:

> *"In January 1984 I was sexually assaulted by* [the appellant] *for the first time. For most of 1985 and 1986 I was raped on a weekly basis by* [the appellant]*. Although I did not receive medical attention I did suffer physically. I remember being very sore, was so uncomfortable that I found it difficult to walk. I do remember roaring with pain the first time he tried to rape me. For the best part of 1985 and 1986 I suffered pain and discomfort that no nine year old should experience. My childhood was taken away from me as I suffered in silence. I will never get that time back. As an adult the pain and trauma continued in the form of suicidal thoughts, anxiety and depression. For the past 15 or more years, after having my own children the anxiety and depression really took over my life. I was over protective of my children and constantly worried that something like my abuse would happen to them. I felt as if I had no control, that I could not protect myself and would not be able to protect them. For the past 15 years I have been prescribed the antidepressant tablet Cipramil and more recently Myra. Sleeping has been a problem all my life and I have often lay awake all night remembering the rapes and suffering them over and over in my head. My confidence was shattered. The older I got the less confident I became to the stage where I stopped going to town on my own and would always need someone with me. After encountering* [the appellant] *in a pub in Enniscorthy in late 2014 my confidence took a battering. After that I was afraid in my own home when I was alone. I would not stay in the house unless every door and window was locked. I dreaded anyone, particularly a man, calling to the house even if I knew them. My trust was gone. Since* [the appellant] *was convicted my health has improved. I no longer take Cipramil tablets and find my emotional well being is improving. I hope that the trauma I have suffered is behind me now as I try to rebuild my life and my family life.* [name redacted]*.".*

Personal Circumstances of the Appellant

13. The appellant was born on the 23rd of May 1966. He is a separated man and has four children, all in their early 20s, two girls and two boys. He comes from a large well-known family in the area.

14. In 1988 or thereabouts, the appellant went to the UK. He retuned in 1995 having worked in the mechanical trade industry in an entity called Hanlon's in Norwich in the UK. Upon his return to Ireland, he attended an electronic course. He worked in a foreign entity called Comvitra but ultimately in 2007 he was forced to leave that employment on account of his separation. Testimonials adduced referred to the fact that the appellant himself, from that point in time, reared his four children on his own effectively.

15. The appellant has no previous convictions.

Sentencing Judge's Remarks

16. On the 27th of July 2018, the judge in the Court below passed sentence on the appellant. The sentencing judge noted the factual background of the case as described in evidence by Garda Dan Whelan. He then noted the age difference between the appellant and the victim.

17. The sentencing judge then acknowledged that he had to impose a proportionate sentence and whether the sentences imposed should be concurrent or consecutive. He further acknowledged the contents of the victim impact statement and the number of references provided on behalf of the appellant.

18. The sentencing judge then identified the relevant aggravating factors at play in this case as follows:

> *"Now, the first matter is to set out the aggravating circumstances. Now, these are very serious offences indeed because they actually involved on the first offence, an attempted rape which was accompanied by a serious threat when* [M] *as she then was was still crying as a result of the pain inflicted on her, as* [the appellant] *attempted to rape her. He went back up the stairs to her and aggressively and told her it was a secret and warned her not to tell anybody. She -- I mean, I think it's self-evident the attempted rape of a seven year old is a harrowing offence.*
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> *The I think -- another aggravating factor is in fact there was a gap when* [the appellant] *matured and one thought of this as a once off issue where he was only 17 years of age and Mr Sheahan has quite rightly pointed out that when one is dealing with a juvenile, one has to take other matters into consideration in which the Court will do in relation to that offence. But there was a gap of a year and* [the appellant] *having been invited through the goodness of* [M's] *parents and into their family, committed what I could call a grave breach of trust again. And again the nature of the offences were quite violent.*
>
> [M] *in her evidence indicated this involved quite gross activity on the part of* [the appellant]. *So the Court isn't dealing, as is obvious by the convictions with a touching or inappropriate touching type of case. The type of sexual assault perpetrated on* [M] *was of the most serious kind, generally regarded as the second most serious offence known to law after murder. So the Court is therefore dealing with particularly serious offences.*
>
> *Now, the second aggravating factor is the impact on* [M] *in relation to the victim impact statement read on her behalf to the Court by Mr Owens. And not surprisingly, when you think of what happened to her, she feels that her childhood*

was taken away from her, that she suffered in silence, she never told anyone about it until much later. She actually suffered physical pain as well as psychological and mental pain at the time of these offences. It influenced her adulthood hugely. She has suffered from anxiety and depression and became over protective of her children.

She has had problems right throughout her life as a result of these very serious offences at a very young age and that was very clear from the victim impact statement. And I describe it generally in relation to these type of offences which the Court unfortunately has experience of, and has to deal with quite a lot as a victim in these kind of circumstances when they are abused so horrifically as a child, it's like a broken mirror and the pieces can never really be put together again fully. So [M] *has had to live with the consequences of those offences all over that period of 32 to 34 years."*

19. When considering whether to impose concurrent or consecutive sentences on the appellant, the sentencing judge took into account the principle of totality, and therefore to avoid an over lengthy sentence, he chose to impose a concurrent sentence in this instance.

20. In relation to mitigation, the sentencing judge made the following remarks:

"The Court then looks at the mitigating circumstances and the very important mitigation, it's not an aggravating factor. But the very important mitigation of plea of guilty is not available to [the appellant] *in relation to these offences. He has maintained his innocence which he is quite entitled to do so.*

….

And the second very important aspect of mitigation and a very very important one on sexual matters, particularly historical child sexual abuse is an acknowledgement by the perpetrator that he has wronged the victim and that's obviously not available in this case.

But there are two important mitigating factors which the Court is obliged to take into consideration. And even though there was a gap and certainly clear intent and knowledge on [the appellant's] *part by telling* [M] *or threatening her at the attempted rape stage and also bribing her with sweets and money during the second incidents over a period of time, there is no doubt that* [the appellant] *was a very young man when this was happening. And he obviously had difficulties in his life at that time and though obviously the fact that* [the appellant] *maintains his innocence, it's not open really to the Court to go into those. But certainly the Court has taken into consideration his youth at the time.*

The second important factor that the Court takes into consideration is that it's clear from the references that I've seen that [the appellant] *has led a blameless life from this period on, the Court has to respect that. He has reared four children on his own as a single parent and he seems to have been throughout his more mature years a man of compassion and care and highly regarded and those are the very difficult issues which the Court has to consider in relation to these issues. And I have no doubt that that is the case, that there are many fine qualities to* [the appellant]*, the Court is not punishing the person, the Court is punishing the serious nature of the offence which is very serious indeed. So those are the two mitigating factors that the Court has taken into consideration.".*

21. The sentencing judge identified the appropriate headline sentence for the rape offences, i.e., counts 2 to 5 inclusive, as being 13 years imprisonment, and then deducted 4 years to reflect the two important mitigating factors that he had identified leaving a post mitigation sentence of 9 years imprisonment. However, the trial judge then went further a suspended a further year to incentivise rehabilitation, in circumstances which are now controversial in the context of this appeal. We will return to this. All sentences were to run concurrently.

22. Returning to the suspension of the final year of the rape sentences, this was made conditional on the appellant entering into his own bond in the sum of €100 to keep the peace and be of good behaviour to all citizens for a period of one ear from the date of his release, and the further condition that he undergo the 'Better Lives Programme' while in custody.

23. We think it is important to set out verbatim what the sentencing judge said with regard to his proposal to suspend the final year:

"The purpose of the one year suspension is for a very specific purpose and I think I need to explain it, it's for the purpose that the Court -- that sentence will be suspended if Mr K undergoes the Better Lives Protection Programme which is a tailored programme prepared by the Probation Service in accordance with -- in consultation with the Irish Prison Service for sexual offenders. I want to make clear in acknowledging the bond, the Court notes that Mr K has pleaded not guilty to the offences and he [maintains he] *is an innocent man. But that is available to him in due course if he wishes to avail of it and it doesn't reflect on the position that he has taken, the fact that he has to enter a bond in relation to that at this point in time."*

[addition in square brackets by the Court of Appeal to reflect its understanding]

Evidence in support of the motion for an enlargement of time

24. The motion was grounded upon an affidavit of a Mr. Edward King, sworn on the 22nd of July 2024. In paragraphs 4 to 12 inclusive Mr. King makes the following averments (with appropriate anonymising redactions by this Court):

> 4. The transcript from the sentencing hearing was furnished by the Courts Service to this Deponent and I beg to refer to same, marked with the letters EK1 upon which I have signed my name prior to the swearing hereof.
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> [The passage of the transcript dealing with the suspension of the final year of the sentence, set out earlier in this judgment, is then quoted]
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> 5. The Court further noted:
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> *"Now,* [the appellant]*, you'll just be asked to acknowledge that at this point in time. As I say, it's without prejudice whatsoever to your maintenance of your innocence and your not guilty pleas."*
>
> 6. The appellant duly entered into the bond.
>
> 7. The appellant has served his sentence in the Midlands Prison and remains in custody. The appellant applied for the Building Better Lives Programme in compliance with the conditions of his bond.
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> 8. During the Covid 19 pandemic, on a date not known to this Deponent, the appellant met with a probation officer who spoke to the appellant about the Better Lives Programme. The appellant was asked if he continued to maintain his innocence and he confirmed that he did and still does. The probation officer then informed him that she would need to speak to her supervisor and in the course of a second meeting with the appellant she advised him that "*he didn't meet their criteria*".
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> 9. The appellant received an undated letter from Mr P Kelleher, Assistant Governor in the Training Unit, which refers to a meeting on the 8th May 2024. The letter notes that the appellant had not completed the Building Better Lives Programme and states that the DPP had advised the Irish Prison Service that the appellant had not met the condition of his bond, the final year of his sentence does not stand suspended and therefore his new release date is therefore the 21st April 2025. I beg to refer to the said letter marked with the letters "EK2" upon which I have signed my name prior to the swearing hereof.
>
> 10. The appellant was due to be released on the 20th July, and normal procedure is that he would be released 2 days earlier, the 18th July 2024.
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> 11. The appellant is being detained contrary to the Order of the 27th July 2018 in circumstances where the appellant's entitlement to maintain his innocence and enter in to the bond was expressly acknowledged by the Court on the 27th July [2018] and the appellant applied for the Building Better Lives Programme in an effort to comply with the condition of his bond, The appellant has done all that he

can to comply with the conditions of his bond, in the context of the Court's acknowledgement of his entitlement to maintain his innocence.

12. The appellant was unable to file an appeal within the time provided for in Order 86C Rule 4(1) by reason of the following:

a. The facts averred to above did not within the said period.
b. Within the said period the appellant was not aware of the criteria that would be imposed by the Probation Services for entry by him into the Better Lives Programme.
c. It was not known that the appellant was continue to maintain his innocence throughout his incarceration.
d. The appellant was informed that he had not met the condition of the suspension until he was notified in the correspondence exhibited herein and marked EK1.

Appellant's Submissions on Enlargement of Time Application

25. The appellant submits that "*in no way can the within application be seen as late or stale*". The appellant states that had he appealed within the time provided for by Order 86C Rule 4(1) (the grounds of which appeal he would not have known about because the criteria for the Better Lives Programme were not publicly available at the time of the sentencing hearing nor were the criteria made known to the appellant) it is highly likely that the Court would have dismissed the appeal on the basis that it was pre-judging the outcome of an application for inclusion in the Better Lives Programme. The appellant refers the Court to the case of *People (DPP) v. Kelly* [1982] IR 90 in support of this application.

Decision on the Enlargement of Time Application

26. The Court considers that in the unusual circumstances of this case, having regard to the nature of the central issue to be agitated in the intended appeal, and in circumstances where the application to extend time is not being actively opposed by the respondent, it is appropriate for it to enlarge time for the appellant to appeal against the severity of his sentence, and for the Court to engage with the substantive issue being raised.

Grounds of Appeal

27. The grounds of appeal upon which the appellant relies are as follows:

1. The condition of the suspended sentence that the Appellant undergo the Better Lives Programme, was an unlawful condition by reason of it being a condition that requires an admission of guilt.

2. The condition of the suspended sentence that the Appellant undergo the Better Lives Programme, was unlawful by reason of it being a condition that would require an admission of guilt in circumstances where the trial judge knew that the Appellant maintained his innocence.

3. The condition of the suspended sentence that the Appellant undergo the Better Lives Programme requires the Appellant to admit his guilt and is therefore wholly unfair to the Appellant.

4. The condition of the suspended sentence that the Appellant undergo the Better Lives Programme was a condition that the Appellant was highly unlikely to be complied with by the Appellant in light of him having maintained his innocence throughout the trial and the sentencing hearing.

5. The trial judge imposed a suspended sentence which was tantamount to a further period of imprisonment with a deferred commencement date.

6. The trial judge imposed a partially suspended sentence which was unreasonable in all of the circumstances.

7. The trial judge induced the Appellant to enter into a bond which the Court knew or ought to have known the Appellant could or would not fulfil in circumstances where the Appellant had maintained his innocence throughout the trial.

8. The trial judge failed to have any or due regard to the Appellant's position on guilt in imposing the condition that the Appellant undergo the Better Lives Programme.

9. The trial judge failed to have due regard to good sentencing principles in imposing the condition that the Appellant undergo the Better Lives Programme, *inter alia* because the said condition served no rehabilitative or deterrent purpose in the conditions that prevailed in the case.

Submissions on the Substantive Issues.

Appellant's Submissions

28. Grounds 1 – 3 put forward by the appellant may be considered together: the condition was unlawful and/or unfair because compliance required an admission of guilt. The appellant submits that the condition was unreasonable as it was highly unlikely to be complied with by the appellant in light of him having maintained his innocence throughout two trials and the sentencing hearing. The appellant maintains that this was tantamount to a further period of imprisonment with a deferred commencement date and contrary to good sentencing practice. The appellant places reliance on the cases of *People (DPP) v. Alexiou* [2003] IR 513 and *People (DPP) v. Jerzy Broszczack* [2016] IECA 121.

29. The appellant maintains that the insistence of his innocence should not have barred him from an educational or rehabilitative programme and assuming that the trial judge's intention in imposing the condition was to try to rehabilitate the appellant, it is submitted that it would have been reasonable to require the appellant to undertake a programme for which the appellant had a reasonable prospect of being eligible. The appellant refers the Court to *The People (DPP) v. Jerzy Broszczack* [2016] IECA 121 and distinguishes it from the instant case as the appellant maintains that he could not have anticipated in entering into the bond that the Better Lives Programme required him to acknowledge guilt. It was submitted that the condition of the suspended sentence that the appellant should undergo the Better Lives Programme, was therefore an unlawful condition by reason of it being a precondition to acceptance on to that programme that a participant should admit his guilt.

30. At the oral hearing of the appeal, we were further referred by counsel for the appellant to *People (DPP) v Gierlowski* [2022] IECA 128 as supporting the appellant's contentions; and the Court itself drew both side's attention to *The People (DPP) v S.A.* [2020 IECA 311 which seemed to the bench to be potentially relevant, following which counsel for the appellant indicated that he wished to further rely on that decision as also supporting his contentions.

31. The appellant submitted that that the trial judge, knowing that the appellant had maintained his innocence throughout two trials and the sentencing hearing, imposed an unreasonable and/or irrational condition of the suspended portion of the sentence which was therefore unfair and unlawful. The appellant did not refuse to engage in the programme, he applied and was refused. As such, the appellant submitted that he did all he could, short of acknowledging guilt, to comply with the condition of the suspension. In addition, it was submitted that as a consequence of the Better Lives Programme requiring an acknowledgement of guilt, imposing a partially suspended sentence which required participation in that programme as a pre-condition, was in the circumstances of the appellant's case tantamount to a imposing further period of imprisonment with a deferred commencement date and was therefore unlawful and/or unfair and/or contrary to good sentencing practice.

32. Ultimately, the appellant submits that the trial judge erred in principle and practice in imposing the condition that the appellant undergo the Better Lives Programme and that the sentence should be varied to remove that condition.

33. Much was made of the fact that the respondent had initially indicated likely opposition to any application for an extension of time, when the matter was mentioned to Birmingham P in a Court of Appeal Case Management list in July of 2024, only for her to later decide not to oppose it, and to apprise the appellant of her change in attitude just days in advance of the hearing of the appellant's motion, and with only four months approximately to run before the expiry of the full 9 year sentence (ignoring any suspended portion). In that regard, as things stand the appellant is due to be released on 21 April 2025. The DPP's approach was said to have compounded the unfairness to which it is claimed the appellant has been subjected by virtue of how his sentence was structured at first instance, i.e., by the suspension of the final year thereof conditional upon compliance with the said allegedly unlawful pre-condition.

34. At the oral hearing of the appeal the Court was apprised that, per the Irish Prison Service (IPS)'s Website, the Better Lives Programme is to be replaced by a new programme entitled "New Chapters". In that regard the website states:

> *"Following the emergence of updated research evidence, practise-based evidence, discussions with field experts, new Council of Europe recommendations, and the new National Strategy on Domestic, Sexual and Gender-based Violence, the Irish Prison Service has developed a new model of intervention for people convicted of sexual offences. This model, called 'New Chapters', will now offer a broad range of evidence-based treatment programmes to people in custody who are convicted of*

sexual offences. This model will be delivered by a team of psychologists who have specific clinical expertise in the assessment and treatment of men convicted of a sexual offence, and will offer a broad range of programmes targeting the needs, risks and strengths of a much larger number of people in custody.

Each programme in 'New Chapters' has been designed to help people to make positive changes in their lives, to address the known risk factors relevant to sexual offending, to prevent re-offending and/or to prepare people for release. 'New Chapters' will be rolled out initially in the Midlands and Arbour Hill Prisons, where programmes will be introduced on a phased basis in accordance with staffing levels."

35. Beyond it being stated by prosecuting counsel that his understanding was that the commencement date for the roll-out of the new programme on a phased basis was to have been the 1st November 2024, neither side was in the position to provide any further details beyond what is stated on the IPS website.

36. The appellant is currently in Mountjoy prison, and the prison officers accompanying the appellant to court, and to whom the Court directed an enquiry, were of the belief that the new programme has not yet been rolled out in Mountjoy.

Respondent's Submissions

37. The respondent submitted that the sentencing judge was entitled to impose a custodial sentence and to make an order suspending a portion of that sentence conditionally. It was further submitted that the sentencing judge was entitled to impose such conditions as he considered appropriate having regard to (i) the nature of the offences, and (ii) with a view to reducing the likelihood of re-offending, i.e., promoting personal desistance, including a condition that the appellant attend a course of education, training or therapy as might be approved by the Court.

38. The respondent submitted that in taking the approach which he did, the sentencing judge was doing no more than imposing a condition which was appropriate having regard to the nature of the offences and which, if complied with, was likely to reduce such prospect as there might have been re-offending.

39. The respondent does not accept that the imposition of a condition that the appellant should complete the Better Lives Programme for sex offenders was unreasonable for being highly unlikely to be complied with. No submission was made that the appellant did not accept the jury's verdict on all or any of the counts charged. The respondent maintains that the sentencing judge was clear in his explanation that by entering a bond to complete the programme, he was ensuring that the appellant could avail of the suspended period of the sentence should he wish to complete the programme at some point during the course of serving that sentence. The respondent submits that submission to, or at least completion of a programme of education, training or therapy such as the

Building Better Lives Programme for sex offenders is "*part and parcel*" of a rehabilitative process that was likely to require that the appellant accept culpability for his actions, however belatedly. The respondent maintains that the basis upon which the appellant now asserts that he "*could not have anticipated*" this is unclear.

40. In addition, the respondent submitted that criteria for inclusion in the Building Better Lives Programme were, ultimately, a matter for the Irish Prison Service rather than one for the courts.

41. The respondent submitted that it was reasonably clear from the sentencing judge's remarks that the appellant's ability to avail of part suspension of the sentence depended upon him completing the Better Lives Programme. The respondent accepts that the sentencing judge's remarks gave the impression that entering the bond did not require an acknowledgement of guilt. Rather, the sentencing judge emphasised that entering the bond would ensure that the Building Better Lives Programme would be available to the appellant "*in due course if he wishes to avail of it and it doesn't reflect on the position that he has taken, the fact that he has to enter a bond in relation to that at this point in time*".

42. The respondent submitted that as the appellant's conviction was upheld just two months into the pandemic, it is reasonable to infer that he was aware of this by the time he had an opportunity to apply for entry to the Better Lives Programme. Notwithstanding this, he continued to maintain his innocence.

43. Ultimately, the respondent submitted that suspension of the final twelve months of the appellant's sentence should be revoked in circumstances where the appellant chose not to avail of the Building Better Lives Programme to the extent that he continued to maintain his innocence notwithstanding conviction by jury trial. The respondent maintains that while this was his right and remains his entitlement, he ought not to then reap the benefit of a part-suspended sentence.

44. Finally, it should be recorded that the respondent strongly rejects any suggestion that her actions in initially indicating likely opposition to an application for enlargement of time, and then later not ultimately opposing it, was the cause of any unfairness. The respondent contends that she was entitled when the matter was first mentioned in a management list in July 2024, and against a delay of in excess of six years on the appellant's part in filing any appeal against sentence, to insist on a formal application for an enlargement of time being made, and for same to be grounded fully on affidavit. The appellant only filed his formal Notice of Application seeking an enlargement of time and grounding affidavit in support of the application on the 1st of November 2024. Thereafter she was entitled to a reasonable time to consider the information contained therein and a decision was rendered in early January 2025, in advance of the listing and hearing of this matter on the 13th of January, 2025, that date being the opening day of the Michaelmas law term.

Court's Analysis & Decision

45. Having given careful consideration to the arguments on both sides, we are disposed to allow this appeal. We do so because we are not persuaded that it was lawful and appropriate for the sentencing judge to have structured his sentence in the way that he did, in particular by imposing a sentence which contained a suspended element that could not be availed of unless a precondition was satisfied; which precondition , having regard to the appellant's mindset and disposition at the time of sentencing, which was known and clearly appreciated by the sentencing judge, was very unlikely to be complied with. In saying that, we readily acknowledge that the sentencing judge was motivated solely by a desire to incentivise the appellant's rehabilitation, and believed that he was erecting a sentence structure that could, and hopefully would, enure to the appellant's benefit. However, our concern is that by making it a precondition that the appellant should have completed the Better Lives programme order to avail of the suspension of the final year of his sentence, in circumstances where he would not be admitted to that programme unless he was prepared to acknowledge his guilt, a circumstance that was, we are prepared to infer, known to the sentencing judge, the operative effect of it could be potentially have been coercive of the appellant's will, rather than merely incentivising work towards rehabilitation in the event of an uncoerced and entirely voluntary change of mind concerning, and of his attitude towards, his conviction. If, as we fear, the precondition was potentially coercive of the appellant's will, then it was unfair to subject him to it.

46. We are also concerned that the imposition of the controversial condition was not permissible within the terms of what was envisaged by section 99 of the Criminal Justice Act 2006. The relevant portion of section 99 provides:

> *"(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.*
>
> *(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during —*
>
> > *(a) the period of suspension of the sentence concerned, or*
> >
> > *(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned, and that condition shall be specified in the order concerned.*
>
> *(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers —*
>
> > *(a) appropriate having regard to the nature of the offence, and*

(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence, and any condition imposed in accordance with this subsection shall be specified in that order.

(4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any 1 or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:

(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;

(b) that the person undergo such —

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment, as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service.

(5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.

(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order."

47. As we interpret s.99(3), read in the context of the section as a whole, including the regime for supervision of suspended sentences, and for possible re-entry of a matter for non-compliance with the terms of a suspension, what the subsection seems to envisage in terms of permissible additional conditions to be attached in pursuance of the specified objectives, are that they will be conditions to be complied by the offender during the operative period of the suspension, and not pre-conditions to being able to avail of the suspension in the first place.

48. Moreover, and as stated by this Court in *The People (DPP) v DW* [2020] IECA 145, at para 78, the conditions of any suspension, or part suspension, form part of the punishment. In that regard, and as the Law Reform Commission observes in its report on suspended sentences [LRC 123 – 2020, at para 4.70], the conditions of suspension ought to be reasonable and proportionate. There is considerable case law on this, including the *DW* decision just referred to; the *Broszczack, Gierlowski* and *SA* decisions relied upon by the appellant; and the decisions in *The People (DPP) v Alexiou* [2003] 3 IR 513; and in *The People (DPP) v Lee* [2017] IECA 152.

49. In *DW* the controversial condition had required the offender to avoid contact with the injured party (a former intimate partner with whom he shared four children) for a period of 30 years, and the effect of which would have been to deprive him in large measure of society with, and an opportunity to be involved in, his children's lives as they were growing up. The court found that the condition was "*disproportionate and arbitrary and ultimately excessive in the distributive sense having regard to its operative duration and the strictness and lack of flexibility in its terms.*"

50. In *Broszczack* the appellant had been sentenced to a seven-year custodial sentence, with the final three years suspended on the condition that he leave the State on his release and remain outside the country for a period of seven years. While noting that conditions of suspension must always be reasonable and proportionate, the Court in that case held that the impugned condition was not so onerous as to undermine the exercise that the sentencing judge had been engaged in, i.e. seeking to adequately reflect the mitigating circumstances in the case by the suspension of the final three years of the headline sentence. Notwithstanding that the complaint of disproportionality was not upheld, the case represents a further iteration of the principal the conditions of suspension must be reasonable and proportionate.

51. In *Gierlowski*, the controversial condition was cast in terms that:

> *"the accused be screened for, attend, actively participate in and complete the sex offender program run by the prison, probation and psychology services, or such equivalent programme to the satisfaction of the Probation Service and treatment provider and [sic] be completed as and when directed by the Probation Service."*

This Court said with respect to it:

> *"We do not think that this condition can have any purpose more be policed or legitimately imposed in the present case since the accused maintains his denial of guilt. Accordingly, we discharge it as a condition of suspension."*

52. In the *SA* case, which concerned the rape and sexual abuse of two children, the appellant again continued to maintain his innocence and not to accept the verdict of the jury. The appellant had received a sentence of 14 years imprisonment with the final two years suspended upon conditions. The controversial condition at issue provided that the suspended portion of the sentence should not come into effect unless the appellant

participated in the Better Lives programme for sexual offenders while in prison. The Court of Appeal was satisfied that the judge sought to change the appellant's conduct through attendance on the programme. The Court said, at paragraph 93 of its judgment:

> *"whilst the undoubted aim of the sentencing judge in providing the option for the appellant undergo the programme was to seek to reduce the likelihood of Mr A committing any other offence, without his cooperation, it is not possible to insist on his attendance on the programme"*

It further commented and directed:

> *95. It seems to this Court that as the appellant does not wish to avail of the programme, in terms of the order of the Court, the final two years of the sentence will not, in reality be suspended. It is indeed unfortunate that he is unwilling to do so, however that does not remove the concern (albeit because of the appellant's refusal to engage), that the objective of the sentencing judge in suspending the final two years of the sentence to take account of mitigation cannot be fulfilled.*
>
> *96. Moreover, s.99 of the Act does not permit of a precondition being fulfilled prior to the operation period of the suspended sentence coming into force. In the circumstances we find an error in the structure of the sentence and consequently, we will intervene but, to a limited extent, and that is to amend the order by removing the requirement that the appellant engage with the Better Lives Programme.*
>
> *97. In lieu of that condition we will suspend the final two years of the sentence on the mandatory condition, that is the appellant enter into a bond before the Governor or Assistant Governor of the prison in the sum of €100.00 to keep the peace and be of good behaviour for the period of his imprisonment and for 2 years following his release from the sentences imposed.*
>
> *98. We will also impose the following additional conditions: –*
>
> *1. That the appellant remains under the supervision of the probation services for a period of two years and that he complies with the directions from the probation services to include the attendance on any programme as directed by the probation services;*
>
> *2. That the appellant keep away from and have no contact with the complainants in perpetuity."*

53. The *Alexiou* case was again concerned with a condition attaching to the suspension of a sentence imposed on a convicted drug dealer requiring him to leave the state immediately and remain outside indefinitely. The court of criminal appeal held that, in principle, a condition to leave the state indefinitely was not good practice and that the better approach was to impose such a condition for a defined period of time that was proportionate to the overall gravity of the offense as committed by the offender. Otherwise, there was a risk that such condition could have a disproportionate of punitive impact on the offender in circumstances where he or she might have legitimate reasons for needing to return to the State several years after the imposition of the condition of suspension.

54. The *Lee* case was concerned with a condition attaching to the suspension of a sentence requiring the appellant not to enter the towns of Laytown and Bettystown and their environs without the written consent of the Chief Superintendent for the relevant Garda district for a period of five years from the date of sentence. The Court of Appeal held that, given the fact that the appellant's mother lived in the area, this condition was disproportionate. The condition was varied to require the appellant to adhere to a curfew from 1900 each evening until 0700 the following morning.

55. The Law Reform Commission Report on Suspended Sentences, at para 4.73 *et seq*, (citing in turn O'Malley on Sentencing 3rd edn at para 22.09, and this Court's decision in *The People (DPP) v Broe*, [2020] IECA 140) indicates that it is well established that the conditions of suspension should afford an offender with a realistic prospect of compliance so that the offender is not set up to fail, and so that a suspended sentence, or the suspended portion of a sentence, does not, in essence, amount to a sentence of immediate imprisonment with a deferred commencement date. In *Broe* we said:

> *"a sentencing judge should satisfy himself or herself that there is a least a reasonable prospect that the accused will take the chance provided to him by the proposed suspended sentence"*

And that:

> *"a sentencing judge ought to, when structuring a sentence, use his/her judgment as to whether the risk associated with using a suspended sentence is justifiable in the circumstances of the case. However, this will be a judgment call in every case and it is not something to be measured with a micrometre."*

56. In the *Broe* case a suspended sentence had been used for the dual purposes of reflecting mitigation and incentivising rehabilitation. The Court of Appeal was primarily concerned, not with any specific condition in the circumstances of the case, but with whether, in principle, it could ever be appropriate to use the suspension of a sentence, in whole or in part, to reflect mitigation. The comments quoted above were made in the context of the Court deciding that, in appropriate circumstances a suspended sentence could be so used, and that in Mr Broe's particular case, the sentencing judge at first instance had not erred. The judgment postulated however a hypothetical scenario wherein use of a suspended

sentence to reflect mitigation would not be appropriate, involving a situation where due to the individual's circumstances there could be no confidence that the conditions of the suspension would be complied with. If a suspended sentence was used in such a situation the accused could be said to have been, in effect, set up to fail and might lose the benefit of genuine mitigation to which he was entitled.

57. While structuring a sentence to include a partially suspended component (the possibility of availing of which is made subject to a pre-condition, which the sentencer could not be confident would be satisfied) for the purposes of incentivising rehabilitation, as opposed to reflecting mitigation, would not *per se* generate a risk of the benefit of mitigation being lost; a concern must nevertheless arise, if there is no reasonable basis for confidence that the precondition to availing of the suspension could, or would, be satisfied in the circumstances of the case, that the effect of so structuring the sentence would be that the suspended portion would de facto represent a sentence of immediate imprisonment with a deferred commencement date.

58. We are quite certain that that was not the sentencing judge's intention in the present case. Indeed, quite the opposite. Nevertheless, given the trenchant nature of the appellant's persistence, notwithstanding the jury's verdict in continuing to assert his innocence, and his adamant refusal to accept the verdict of the jury, which we are satisfied must have been known to the trial judge having regard to the manner in which he addressed the suspended sentence issue in his sentencing remarks, we are left with a concern that the precondition which he imposed did, in the circumstances of this case, result in the suspended portion amounting in reality to a sentence of immediate imprisonment with a deferred commencement date.

59. For all of these reasons we believe that the impugned precondition was unlawful and unfair, and in those circumstances the sentence cannot stand. We do not consider it to have been reasonable and proportionate, notwithstanding the good intentions of the sentencing judge, to have suspended a portion of the sentence subject to such a pre-condition.

60. For completeness, we should say that we do not consider that a case has been made out that any unfairness suffered by the appellant on account of the way in which the sentence was structured at first instance was in any way compounded by how the DPP approached the belated attempt by the appellant to appeal against the severity of his sentence, and by insisting, as was her entitlement, that a formal application to extend time should be brought so that she might give it necessary and appropriate consideration. We are satisfied that the DPP acted properly and appropriately, having regard to the public interest, and that any criticism of her approach is unwarranted and unmerited. Further, in circumstances where a formal application to enlarge time was only filed on the 1st November 2024, and the DPP, having given it due consideration, indicated in early January 2025 that she would not be opposing it, there was no unreasonable delay on her part. She was entitled to a reasonable time to consider what her attitude would be, and she communicated her decision in that regard within approximately ten weeks (which

period straddled the Christmas legal vacation period), and in our assessment the time taken was entirely reasonable.

61. Accordingly, in circumstances where we have for the reasons stated found that the pre-condition attaching to the suspended portion of the sentence imposed at first instance was unfair, unlawful and disproportionate, we must quash the sentence imposed by the court below and proceed to a re-sentencing of the appellant.

Re-Sentencing.

62. No complaint is made, we think correctly, concerning the headline sentences nominated by the court below, or concerning the discount afforded for mitigation. The error, such as it was related to structuring, and in particular the part suspension of a portion of it to incentivise rehabilitation, namely the final year.

63. We are satisfied that there was a basis for a modest level of suspension to incentivise rehabilitation, in circumstances where the crimes of which the appellant was convicted dated back a considerable period of time, and there was no evidence of any further offending in the meantime.

64. Accordingly, having considered the matter de novo we are content to nominate the same headline sentences as did the court below, and to discount from these for mitigation to the same extent as did the court below. We will therefore impose sentences of six years imprisonment on count no 1 (the attempted rape offence) and nine year's imprisonment on each of counts 2 to 5 inclusive (the rape offences), backdated to commence on the same date as the sentences imposed by the court below. However, we will suspend the unserved balance of the nine year sentences with effect from today's date, for a period of one year from the date of his release, subject to the conditions that the appellant enters into a bond in the sum of €100 to keep the peace and be of good behaviour during the operative period of the suspension, and further should submit to the supervision of the Probation Service, co-operate with and comply with all directions given to him (including directions to undergo any course, or training, or programme) by any officer of the Probation Service, during the said operative period of the suspension. All sentences are to run concurrently.