



THE COURT OF APPEAL

Record Number: 220/18

Edwards J.
Kennedy J.
Donnelly J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

S. C.

APPELLANT

JUDGMENT of the Court delivered on the 19th day of December 2019 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. The appellant was convicted of two counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, one count of rape contrary to s.4 of the Criminal Law (Rape) Amendment Act, 1990 and three counts of attempted oral rape contrary to Common Law in respect of victim B. The appellant pleaded guilty to four sample counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) Amendment Act, 1990 as amended, in respect of two further victims; A and C. The appellant received a total sentence of 15 years' imprisonment.

Background

2. The sexual abuse in this case took place within a family unit. The appellant acted as a stepfather towards two of the complainants, who we will call A and B to preserve their anonymity, and is the biological father of the third complainant; C. The abuse came to light in April 2015 when C indicated to a family member that something inappropriate was happening between her and the appellant. This began a chain of events that led to disclosures being made by all three complainants. During this time, the appellant denied any wrongdoing and the matter proceeded to trial. The indictment, which originally contained counts relating to all three girls, was severed and the trial proceeded in February 2018 in respect of B only. The appellant was found guilty of those counts and when the matter came before the Court for sentence on the 19th April 2018, the appellant pleaded guilty to two counts in respect of A and C on a representative basis, with full facts to be given in evidence.
3. In relation to A, the period of offending was not continuous in her instance and by additional submissions on behalf of the appellant, it was clarified that the periods of offending were from the 1st April 2001 to the 31st October 2003, and from January 2007 until April 2010. She was born in 1992 and was therefore aged between 8 and 11 years and 14 and 18 years during the relevant periods of the offending conduct. The nature of the abuse in her case involved the appellant trying to hug her and kiss her on the lips, trying to put his tongue in her mouth and rubbing his hand over her vagina outside her clothing. On one occasion, when she was ten years old, he pulled down her top in order to

look at her developing breasts. When she was 15, she described times when she would bring him up coffee or breakfast in bed at his request, she would lie on the bed beside him, sometimes under and sometimes over the covers and he would hug her and rub his erect penis against her side or back. From the age of 18 she ensured she was never alone with the appellant.

4. In relation to B, the appellant was found guilty of two counts of rape, one count of oral rape and three counts of attempted oral rape. She was born in 1998. The first incident of rape occurred when B was 13 years old. She accompanied the appellant to their old house to collect some items and they were to stay overnight. On the way, the appellant bought alcohol for himself and for B. She had never had alcohol previously. They were sharing a mattress as the furniture had been taken out of the house. As they were both lying in bed, the appellant began touching her breasts underneath her night clothes, B tried to avoid this contact, but he separated her legs, hurting the muscles at the top of her thighs and forced his head between her legs and tried to lick her vagina. She tried to stop him, but he continued and was able to keep forcing open her legs. He then forced himself upon her and put his penis inside her vagina. She tried to move, and she told him to stop, and that he was hurting her, but he continued, saying "it's fine, it's fine." Eventually, when she managed to push him away, he became angry and turned over on to his side of the bed. B cried all night and felt sick and disgusted.
5. The next instance of rape took place when B was in secondary school. The appellant had allowed her to take time off school and they were at home alone. He suggested they watch a film in his room, and he started touching her under her clothing. He retrieved oil from his bedside locker which he put on her and raped her by inserting his penis in her vagina. Afterwards, she was very upset and went into her bedroom crying. She lay on her bed and tried to go to sleep. Due to a breathing issue, she was lying with her mouth open and she opened her eyes to see the appellant standing in front of her wearing only his boxer shorts. He tried to force his penis into her mouth, he appeared to think this was funny and was laughing as he did so. He continued his attempts, pushing harder and hurting her as she turned her head away. The appellant attempted to orally rape B in this fashion on other occasions and on one occasion he succeeded in orally raping her. These events took place when B was 13/14 years old. The period of offending was from 1st December 2011 until the 31st August 2013.
6. In relation to C, she is the youngest of the three victims, born in 2002, and the appellant's biological daughter. The appellant pleaded guilty to two sample counts of sexual assault on a full-facts basis. She was aged 9 to 11 years old at the time of the offending conduct. She described various instances, recalling one incident in particular; the date when the family had moved house. She recalled eating breakfast and watching TV, she was wearing her pyjamas when the appellant felt her breasts and vagina under her clothing. There were subsequently various incidents when he touched her on the breast area under her clothing while rubbing her leg. She recalled one incident, when he asked her to touch him and he pulled her hands into his boxer shorts and made her touch his penis. She tried to pull away, but she was unable to do so as he was trying to rub her

hands on his penis. She described how the incidents became more frequent as time passed. The period of the offending conduct was from 1st August 2011 until the 30th November 2013.

7. Thus, the offending relating to A extended initially for a period of 2 years and 6 months, then for a period of 3 years and 3 months, concerning B for 2 years and 7 months, and concerning C for 2 years and 3 months. There was a period when the appellant was abusing both B and C for a period of 1 year and 8 months.

The Sentence

8. In sentencing, the sentencing judge identified headline sentences in respect of each victim: on the sexual assault counts relating to A, where the maximum sentence on one count was 5 years and on the other; 10 years; the judge nominated a pre-mitigation sentence of three years' imprisonment. On the two rape counts and on the count of s.4 oral rape concerning B, she nominated a heading sentence of 12 years, while on the attempted rape counts, she nominated a sentence of 11 years. On those counts, the maximum sentence is life imprisonment. On the sexual assault counts concerning C, where the maximum sentence was 14 years, she nominated a headline sentence of 4 years. The judge identified the aggravating factors, namely; the nature of the offending, the age of the victims, the time span of the offending, and the grave breach of trust involved. She also carefully considered the profound effect the offending had on each victim. In this regard the judge made certain observations regarding the particular impact the abuse by a parent can have on a child in saying: -

"I want to just say a few words about the effects on all three and also the selection of the headline sentence in respect of 'B' because it is a striking feature of this case that this was a person in a parental authority engaging in the abuse. Sometimes, and particularly looking at the authorities on rape over the years, sometimes it might be said or thought that the upper end of the scale for rape is reserved for cases of violence but in my view where you have a child - father dynamic there is a different set of equally aggravating factors at play, and this can be seen very clearly from the victim impact reports in this case. First of all, in the case of a father - child abuse scenario you have the age of the child and, as we have seen in this case, ranging from eight and in some cases up to 18, but eight onwards. Because of the age of a child, the impact of sexual abuse can have a dramatic effect on the development of the child through the teenage years and into adulthood. This can affect, as was described in the victim impact reports here, many matters and many aspects of the child's development...So, the fact that the abuse is inflicted on a child is very significant because of the time in the child's life that it is carried out because it is a time of development."

She then proceeded to consider the fact that the offending took place in the family home and properly, in our view, considered this an aggravating factor. The judge observed: -

"The second aspect that is in my view very important in making this type of offending very serious is that it takes place within the family home. This is

supposed to be the child's sanctuary from the world and, instead, it becomes the place to fear and the child, in effect, has nowhere to hide because the family home, the supposed to be place of safety, becomes the location of the abuse."

Finally, the judge had regard, in assessing the gravity of the offending, to the moral culpability of the appellant as the father and stepfather of the victims, noting: -

"A third factor that in my view is relevant is the culpability of the accused when the accused is a father. As callous as stranger rape may be, it seems to me that there is equal if not greater callousness when a father engages in the abuse of a child... He knows them intimately and, in that context, then, to abuse them, he must know at least to some degree the impact that this abuse will have on the child. I say all of that because it seems to me that a lot of emphasis has been placed in the authorities on the use of violence accompanying rape in particular, whereas it seems to me that this particular configuration presents aggravating features that are as serious, to say the least."

9. The sentencing judge then applied a reduction of 25% in respect of the offending concerning A and C in order to give credit for the pleas of guilty. Such allowance did not apply regarding the contested matter, that is concerning B. The judge stated that in order to mark the three separate victims the sentences would run consecutively, giving a total sentence of 17 years and three months. She then proceeded to consider the mitigating factors, apart from the pleas of guilty: -

"I take into account Mr C's work history and the fact that he appears to have had an exemplary record working for a considerable period of time in the State's national defence forces and engaged in bus driving and coach driving and was engaging in productive and useful work in society to that degree. I place a very small amount of weight on the fact that he now belatedly recognises the fairness of the verdict and, in so far as there is any remorse, it seems to me that that process must only be beginning in very recent times and, based on my experience, the frame of mind that would enable someone to engage in this type of behaviour over such a period of time in respect of three victims takes some time for a person to fully understand what they have done and is not an overnight conversion and so I place very limited and minimal weight on his belated acceptance of the verdict. He has already been given credit in the way I have structured the sentence for his guilty pleas."

The judge then adjusted the notional sentence downwards to allow for the identified mitigation and also to take account of the totality principle, imposing a final sentence of 15 years' imprisonment, thus allowing a further reduction of 27 months for those factors.

Personal circumstances of the appellant

10. The appellant has a date of birth of 20th September 1967. He has two previous convictions, assault and assault causing harm, dating from the 1990's. He has a long history of work, having served in the defence forces from 1985 to 1999 and documentary

evidence details that his military conduct was exemplary. Several testimonials were furnished to the sentencing court on the appellant's behalf, including letters from the appellant's former neighbour and his niece.

Grounds of appeal

11. The appellant relies on the following grounds of appeal: -

- (1) The Learned Trial Judge erred in law and in principle in failing to take appropriate account of the Appellant's remorse, his sentiments of apology and his acceptance of his wrongdoing and its effects and consequences on the injured parties.
- (2) The Learned Trial Judge erred in law and in principle in failing to apply and observe the principle of rehabilitation and to take account of the Appellant's continuing application to work and productivity in prison in the structure and length of the sentences imposed.
- (3) The Learned Trial Judge erred in law and in principle in imposing consecutive sentences in the absence of a clear and well-grounded basis for doing so and, in so doing, breached the principle of proportionality and totality.
- (4) The Learned Trial Judge erred in law and in principle in failing to take appropriate account of the Appellant's personal history and positive characteristics, including his work history, exemplary military service and letters of reference.
- (5) The Learned Trial Judge erred in law and in principle in measuring sentence against precedent in failing to take account of the absence of physical violence as a feature of the offending of the Appellant.
- (6) The Learned Trial Judge erred in law and in principle in failing to take account, in the exercise of the appellant's entitlement to go to trial on Bill Number CC007/2017, of the manner in which the trial was conducted, being one in which the character and conduct of the injured party was not the subject of criticism or attack and in fact resulted in a substantial number of counts being withdrawn from the Jury.

12. In the hearing before this Court, Mr Gageby SC for the appellant emphasised the contention that the judge failed to properly apply the principle of totality. As regards the portion of the ground which takes issue with the consecutive element of the sentence, this was not pursued on appeal. He also relies on ground 1 as a discrete ground.

Submissions of the appellant

13. Mr Gageby does not take issue with the imposition of consecutive sentences but contends that the resultant sentence was unjust and in breach of the principle of totality.
14. Secondly, it is submitted that the judge did not take proper account of the remorse shown by the appellant and the act of contrition in pleading guilty to the offences against C and A in the aftermath of the trial concerning B.

15. The appellant says that the trial judge should have built in a rehabilitative element to the appellant's sentence, especially when the appellant expressed through his counsel the desire to rehabilitate himself, contending that a portion of the sentence ought to have been suspended.
16. Moreover, in written submissions it is contended that the judge failed to give sufficient weight to the mitigating factors including the appellant's personal history, his positive characteristics and the reference letters furnished to the Court.
17. Whilst Mr Gageby did not advance the argument in oral submissions, it is contended in written submissions that the judge erred in constructing a new scale of aggravating circumstance which places breach of trust on the same level as the use of violence. The appellant submits that the use of violence has long been recognised as a serious aggravating factor. The appellant refers to *The People (DPP) v. Murray* [2012] 2 IR 477 where Finnegan J. considered serious offences against the person to be in a separate category of offending due to the unlawful use of violence.
18. Finally, it is said that the trial judge did not adequately consider the manner in which the trial concerning B was approached by the appellant.

Submissions of the respondent

19. The respondent submits that the sentencing judge was best placed to assess the remorse shown by the appellant and as such, great deference ought to be shown to her finding of fact and say that the guilty pleas in respect of C and A earned a mitigation of 25% which is generous given the lateness of the pleas. Mr O'Leary SC for the respondent submits that the trial judge dealt with the appellant's acceptance of the verdict in her consideration of the mitigation which resulted in a further discount of two years and three months. The respondent submits that the sentencing judge was entirely correct to question the depth of the appellant's remorse and attach little weight to his acceptance of the verdict.
20. The respondent accepts that rehabilitation should be encouraged but its importance varies from case to case and in the instant case there was little evidence of efforts made by the appellant to further his rehabilitation and say that the judge carefully considered the prospect of rehabilitation.
21. On the issue of the principle of totality, it is submitted that the effective sentence imposed of 15 years' imprisonment was clearly warranted given the circumstances of the case and there can be no argument that the sentencing judge failed to have regard to the principle of totality.
22. It is contended that the mitigating factors were adequately reflected in the discount of two years and three months from the headline sentence, which had already been mitigated to reflect the guilty pleas. That the appellant had materially provided for his victims during the period over which the offences occurred is not a mitigating factor having regard to the offences committed.

23. The respondent says that the trial judge did not conflate breach of trust with violence but rather sought to emphasise the devastation wrought by the breach of trust in the instant case.
24. Finally, it is submitted that it cannot be accepted that the trial did not involve the impugning of the complainant's character as the trial was contested on the basis that the complainant was lying and the suggestion that one is making a false allegation of rape against one's father involved a grave assault on the complainant's character.

The acceptance of wrongdoing and expression of remorse.

25. Following his conviction for his offending conduct concerning B, the appellant entered pleas of guilty concerning the sexual assaults of A and C. He now argues that the sentencing judge failed to give sufficient credit to him for his acceptance of wrongdoing and expression of remorse. He points to his acceptance of the verdict recorded concerning his offending conduct regarding B and his public apology as indicative of genuine remorse. The apology offered sought to emphasise that the girls were entirely blameless, and that the appellant hoped they could recover from the consequences of his actions.

Mr Gageby submits that greater weight should have been afforded by the judge to these factors, arguing that such acceptance of blame is particularly important in the context of sexual abuse. He says that the judge erred in placing very limited and minimal weight on this aspect of mitigation.

Discussion

26. In the present case, the appellant was sent forward for trial to the Central Criminal Court in January 2017, the matter was first listed for trial on 22nd May 2017 which date was vacated due to outstanding disclosure. The trial was listed for the 28th February 2018, we understand that an application was made to sever the indictment which application resulted in the counts concerning B proceeding to trial in the first instance. It was only following his conviction on these counts that the appellant entered pleas of guilty to the counts concerning the remaining victims (April 2018). Therefore, from the time the matter was sent forward to trial until the acceptance of wrongdoing on the part of the appellant, some 15 months had passed.
27. It is accepted on behalf of the appellant that the guilty pleas entered are properly classified as late pleas of guilty with the consequential diminution in value. The appellant does not seek to argue that the sentencing judge failed to give adequate credit for the pleas of guilty, rather that the sentencing judge did not give sufficient credit for his acceptance of wrongdoing and remorse. Genuine remorse is treated by our courts as a mitigating factor, but the remorse expressed in the present case is tempered by the passage of time. The appellant did not enter pleas of guilty and accept his wrongdoing until some 15 months after he was returned for trial before the Central Criminal Court.

Conclusion on this ground

28. It is true that a public apology in court and an acceptance of blame are relevant mitigating factors and can go some way towards assisting a victim in moving forward. However, the timing of the acceptance of wrongdoing and the apology must be

considered in deciding the appropriate weight to be given. The later the acknowledgement of wrongdoing, the less the credit to be afforded to an offender. We are satisfied that the judge did not err in giving very limited weight to these factors.

Consecutive sentences

29. Consecutive sentences are appropriate in any given case where to impose concurrent sentences would not meet the extent of the offending conduct with due regard to the personal circumstances of the offender. Such a situation may well occur where there is more than one victim but quite obviously, the circumstances where the imposition of a consecutive sentence is appropriate is not limited. There may be situations where, for particular reasons, it is not appropriate to impose a consecutive sentence, even where there is more than one victim.

30. The overarching objective is that the sentence imposed must meet the extent of the offending conduct. This may be achieved by the imposition of carefully constructed concurrent sentences, but it seems to us that it is best achieved by the imposition of consecutive sentences where there is more than one victim. This is particularly so, where the offences are of a sexual character such as where there has been prolonged sexual abuse of more than one victim, then the interests of justice may require carefully structured consecutive sentences in order to ensure a proportionate sentence. As observed by Edwards J. in *The People (DPP) v. KC* [2019] IECA 126:

“A judge has a very wide discretion as to how he/she decides to structure a sentence to effect the punishment that he/she believes to be appropriate, and it is not the law that recourse can only be had to consecutive sentencing in limited and defined circumstances. The key consideration, however, in terms of whatever sentence is selected, and however it is structured, is that it should be proportionate in the distributive or ordinal sense both to the gravity of the offending conduct and to the circumstances of the offender. The reason that it is stated judicial policy that a judge's discretion to have recourse to consecutive sentencing should be exercised sparingly, is that it is much easier to end up with a sentence that is disproportionate where recourse is had to consecutive sentencing.”

31. And so, it can be seen that there are no hard and fast rules as to the particular circumstances where it will be appropriate to impose consecutive sentences or indeed the manner of the structure of those sentences. In this judgment we seek to give some guidance as to the circumstances where it may be appropriate to impose a consecutive sentence.

32. However, it is not desirable to set down rigid principles concerning when consecutive sentences should be engaged, and this is simply because a court has considerable discretion as to the structure of a sentence and the manner in which that sentence is to run.

33. We nonetheless observe that it appears to us in instances of long-term sexual offending involving more than one victim, that the imposition of a consecutive sentence or sentences may well be appropriate.

Consecutive sentences where there is more than one complainant

34. As Professor O'Malley correctly observes, the imposition of consecutive sentences where there is more than one complainant has developed through recent practice. However, historically, there are instances where consecutive sentences were imposed where the offender was sentenced for the sexual abuse of more than one complainant. An example being the case in *The People (DPP) v. Farrell* [2010] IECCA 68, where consecutive sentences were imposed concerning four complainants, resulting in an overall sentence of 20 years' imprisonment. Twenty-four years ago, the Court of Criminal Appeal in *The People (DPP) v. Z* (Unreported 14th March 1995), acknowledged that consecutive sentences may be appropriate where there is more than one victim of a sexual offender.
35. More recently in *The People (DPP) v. WM* [2018] IECA 281, consecutive sentences were imposed concerning the abuse of four complainants, resulting in a sentence of 13 years' imprisonment. This Court considered that the facts in that case manifestly called for consecutive sentences having regard to the multiplicity of victims and the overall incidence of offending. The sentences imposed for each victim were made concurrent inter se, but consecutive in respect of each victim. In considering the totality principle, the sentencing judge reduced the indicative sentence of nine years for the offences of rape to one of seven years and therefore correctly applied the principles regarding the application of the totality principle in order to achieve a proportionate sentence.
36. In *The People (DPP) v. PP* [2019] IECA 246 Donnelly J. in giving the judgment of the Court stated :-

"In the view of the Court, having regard to the principles referred to above, the point has been reached where it is generally an error in principle to fail to consider whether it is appropriate to impose a consecutive sentence where there has been more than one victim of sexual assaults. This applies with even greater force where the victims are children. On the other hand, as has been acknowledged, the final sentence imposed by a court must reflect the overall gravity of an offender's conduct while making due allowance for personal circumstances. Imposing the correct sentence may not always require the sentences to be stated to run concurrently. Where the same sentence is being imposed upon each count and is to run concurrently, the just and appropriate sentence may nonetheless be imposed if the sentence on each count reflects the particular gravity of all the circumstances of the offending. Thus, where the same sentences have been imposed on a number of counts to run concurrently with each other, but the trial judge has acknowledged that the sentence is greater than that which might otherwise have been imposed in the absence of the repetition of the behaviour and the fact that it was committed against more than one victim, no error in principle may necessarily have occurred."

The risk of double counting

37. It is submitted on behalf of the appellant that there is a very real danger that the exercise of imposing consecutive sentences may be in fact an exercise in double counting of egregious aggravating factors.
38. In ordering sentences to run consecutively, a court must obviously take considerable care to ensure that consecutive sentences are not being imposed for conduct which has already been taken into account as an aggravating factor.
39. Naturally, this does not mean that consecutive sentences cannot be imposed for a series of offending conduct but as Professor O'Malley in *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016) succinctly points out at para 5-29:-

“This does not preclude the imposition of consecutive sentences for offences arising from the same course of conduct provided no factor common to 2 or more of the offences is doubly punished. It would be inappropriate therefore to treat the possession of a firearm as an aggravating factor in a robbery if a consecutive sentence were being imposed for possession of the firearm.”
40. Thus, it can be clearly seen what a court must guard against. This does not of course preclude a court deciding in the circumstances where the offending conduct involves more than one complainant, whether the offences are similar in nature or not, that it is appropriate to make the sentences consecutive, so long as there is no question of double counting of an aggravating factor.

The totality principle

41. This Court received very helpful submissions on behalf of the appellant following the hearing of the appellant's appeal to assist this Court in giving guidance in sentencing for cases such as the present one.
42. The analysis engaged in by counsel for the appellant concerned sentencing in rape cases, some of which involved sexual assault and other offences, and some which were concerned with the offence of rape alone. Previous analyses of sentencing of rape and sexual offences were also considered and furnished to this Court.
43. The submissions address the general principles relating to consecutive sentencing and includes recent decisions of this Court, including *The People (DPP) v. KC* [2019] IECA 126; *The People (DPP) v. Casey and Casey* [2018] IECA 121 and *The People (DPP) v. PC* [2016] IECA 334. Many of the cases considered in the submission concerned a single complainant and were naturally of limited assistance in considering the issue of consecutive sentences, however, such cases were nonetheless relevant in terms of the sentences imposed for sexual offences. Whilst the respondent was given an opportunity to file additional submissions, the respondent did not do so.
44. While this Court endeavours to provide guidance regarding the approach to sentencing in different classes of cases, it is important to note that cases vary significantly and there are many variables within each case. Cases offered as comparators may also provide

limited assistance because of this. As Edwards J. observed in *The People (DPP) v KC* [2019] IECA 126: -

“Moreover, while a representative series of comparators can legitimately be presented as indicating a trend in sentencing to rely in that regard on just two or three cases will in many cases be insufficiently representative for that to be a meaningful exercise. There has to be a representative sample.”

45. In *KC* the Court considered submissions incorporating the following observations by Professor O'Malley relating to concurrent and consecutive sentences: -

“Insofar as there is any guiding common-law principle, it is that concurrent [sentences] should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents. But this, it should be stressed, is no more than a broad guiding principle. A court's fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct whilst making due allowance for personal mitigation and other relevant factors.”

46. He went on to say: -

“Where there are several victims....courts are now inclined to impose a set of concurrent sentences in respect of the offences against each victim but to order those sets of sentences to run consecutively to each other. Otherwise an individual victim may feel that harm inflicted on him or has gone unpunished. However, this is just a general principle that has developed through recent practice.”

47. The essence of the totality principle is that when imposing consecutive sentences, a court should review the aggregate sentence to be imposed in order to ensure that it fairly reflects the totality of the offending. The principle is a widely accepted principle in sentencing.

48. The primary rationale for the principle arises from the concept of proportionality. The totality principle ensures that the cumulative sentence imposed is proportionate to the gravity of the offending and the circumstances of the individual offender. In *Gilligan v. Ireland and ors*, [2014] 1 ILRM 153, MacMenamin J. delivering judgment, observed that totality is an aspect of the principle of proportionality: -

“The totality concept is a form of check to ensure that, where proportionate sentences are chosen for each offence, the court may, when appropriate, adjust that overall sentence, or the last sentence imposed, in order to achieve proportionality and overall fairness.”

49. The totality principle has been suggested to promote the avoidance of a crushing sentence. This is a well-recognised rationale in other jurisdictions. A judge has a very wide discretion regarding the structure of a sentence. Whether a sentence is consecutive or concurrent, the judge must have regard to the desideratum of sentencing; that is, to

achieve a proportionate sentence. It is in this respect that it is important to ensure that the sentence ultimately imposed is not a crushing one. The Supreme Court of Victoria described a sentence as crushing in *Friday v The Queen* [2014] VS CA 271, as one where:

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“....it is such a length that it would provoke a feeling of helplessness in the applicant if and when he or she is released, or which would result in the destruction of any reasonable expectation of useful life after release.”

50. It logically follows therefore that having decided upon sentences in respect of any given offence, and where a judge decides that such sentences should be imposed on a consecutive basis, it is essential that the judge step back and look at the overall sentence to be imposed to ensure that it accords with the totality principle.
51. The imposition of consecutive sentences is, with certain exceptions, discretionary. Section 11 of the Criminal Justice Act 1984, as substituted by s.22 of the Criminal Justice Act 2007, mandates a consecutive sentence for an offence committed on bail. This does not apply where a sentence is one of life imprisonment, however, a residual discretion remains with a sentencing judge in this respect. It can be seen therefore, that in leaving the question of making an indeterminate sentence consecutive to the discretion of the sentencing judge, this ensures the avoidance of a ‘crushing’ sentence. This of course, is dependent on the circumstances of the case, as in some instances a consecutive sentence of life imprisonment may be appropriate.

The Approach to Sentencing

52. In *The People (DPP) v. Casey and Casey* [2018] IECA 121, Birmingham J. (as he then was), outlined two approaches which the court may take in applying the totality principle. The first of these is the most commonly used approach and involves the following: –

“....First determining in the normal way the appropriate post mitigation sentence for each individual offence, and whether and to what extent those sentences should be consecutive or concurrent inter se, without reference to any consideration of what cumulative figure it may result in. The Court is then required to step back and give consideration to the resultant cumulative figure and if necessary adjusted downwards, with appropriate pro-rata adjustments to the individual components sentences, so as to avoid the imposition of a ‘crushing’ sentence on the offender.

The main criticism of this approach is that it may result in artificially inadequate sentences having to be imposed for individual offences in order to give effect to the principle.”

53. The second approach outlined by Birmingham J. involves the following: –

“It is open to a sentencing court, where it is sentencing for multiple offences, before considering what actual sentences should be imposed in respect of individual offences, and whether and to what extent individual sentences should be concurrent or consecutive inter se, to determine in the first instance a global pre-

mitigation sentence reflective of the overall gravity of the offending conduct. Clearly, in making such a determination, any global figure selected by the sentencing court is required to be proportionate to the gravity of the totality of the offending conduct, but no more than that.

Then, with the selected global headline sentence as a reference point, the court must proceed to assess gravity in the case of each individual offence and by resort to a combination of concurrent consecutive sentences to ensure that the cumulative total aligns with the global headline figure selected, by making adjustments up or down as required. (This may not prove to be as easy as it might appear at first glance because, as pointed out earlier, no one sentence should be disproportionately severe to the offence for which it is being imposed.) Appropriate discounts should then be applied to each individual component sentence to reflect mitigation.

If the discounting for mitigation has been appropriate and proportionate to the offender's personal circumstances, as it should be, the accumulated post mitigation individual sentences, structured as previously determined with respect to whether they should be concurrent or consecutive inter se, will yield a final figure that meets the overall proportionality requirements.

However, if a sentencing judge is in any doubt as to whether his/her presumptive final figure is in fact proportionate, then, once again, in application of the totality principle, he/she should step back and consider whether the presumptive final figure requires further adjustment in the interests of achieving overall proportionality.

The advantage of the global headline sentence approach is that it is arguably the approach to sentencing multiple offenders that may be most effective in achieving a degree of general deterrence."

The Optimum Approach

54. Whilst a judge has a wide discretion as to how to approach sentence, it seems to this Court that best practice would favour the first approach as stated by Birmingham J. in *The People (DPP) v. Casey and Casey* [2018] IECA 121. This Court has iterated the optimum method of sentence; that being the, by now well-known, two stage sentencing process. In circumstances involving the use of consecutive sentences, the requirement for a third stage may arise. This ensures that a sentencing judge properly applies the concept of totality by stepping back from the indicative sentence and adjusting the sentence, if that adjustment is necessary. Such an adjustment is not always necessary, but a judge must step back and assess the sentence in order to determine whether an adjustment is required. In applying the first approach as considered by Birmingham J., the reasoning of a sentencing judge is readily apparent. Whilst this is important in the context of concurrent sentences, it is all the more important when imposing a consecutive sentence.

55. However, a judge, when imposing sentence, will without doubt have good and logical reasons for making a sentence consecutive, and while it is preferable that a judge state those reasons, it is not the law that he/she is required to do so in every circumstance. The rationale being that of the considerable discretion vested in a judge in the imposition of sentence. Within the exercise of this discretion may be a consideration of the imposition of consecutive sentences. It is not the position that a judge may only apply consecutive sentences in certain limited circumstances. The primary consideration is the imposition of a proportionate sentence both to the gravity of the offending and the personal circumstances of the offender.
56. Ultimately, the overarching principle is that of proportionality and when imposing consecutive sentences, the principle of totality must be engaged in order to give effect to this objective.
57. While this Court favours the first approach, that does not mean *ipso facto*, that the global approach is necessarily wrong, but the three-stage process ensures that the approach of a sentencing judge is readily discernible, thus, the methodology adopted by the judge in sentencing is clear.

The range of sentences where consecutive sentences are imposed.

58. Whilst broad guidance may be provided by this Court as to the range of sentences which may be appropriate for certain offences, nothing more than broad guidance may be provided as there is no question of a standard tariff for any given offence given the broad range of aggravating and mitigating factors which may be present. While the courts attempt to maintain consistency in sentencing, it is generally impossible to directly compare cases.
59. A court may only provide guidance where the court has sufficient materials to enable it to properly do so. Counsel in providing material to this Court properly stated that the material was necessarily limited by the fact that the material contained an analysis of sentencing in rape convictions only with or without associated sexual assault and other offences. Moreover, only 7 of the 30 cases with which we have been provided involved more than one victim. Of those 7 cases, 2 resulted in consecutive sentences. Those cases are *The People (DPP) v. WM* [2018] IECA 281 and *The People (DPP) v. PC* [2016] IECA 334. Therefore, while a representative series of comparators may be indicative of a trend, we do not believe that we have a sufficient representation in the materials furnished to determine such a trend and so we limit ourselves to more general observations of settled principles.
60. Sentencing is not an exercise in retribution or revenge and must be tailored to meet the particular circumstances of the case in order to achieve a sentence which is proportionate to the offence and the offender. The sentence ultimately imposed must not be a crushing one, as that term is understood, but must be proportionate in the distributive sense.
61. There is no requirement that a custodial sentence must be imposed where an offender is being sentenced for a rape offence, however it is well-settled that rape is an extremely

serious offence and a suspended sentence for the offence is wholly exceptional. This is well established in the jurisprudence and we note cases such as *The People (DPP) v. YN*. [2002] 4 IR 309 and *The People (DPP) v. GD* [2004] IECCA 17 which confirmed this position.

62. Charleton J. undertook an extensive review of relevant precedents in *People (DPP) v. W.D.* [2007] IEHC 310 where he classified cases as lenient, ordinary, severe and condign.

63. Charleton J. also observed, following his analysis of lenient sentences, that a suspended sentence could only be contemplated where: –

“... The circumstances of the offence are such as to be so completely exceptional as to allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by the case law.”

64. Having reviewed relevant cases, Charleton J. classified lenient sentences as those attracting a post-mitigation sentence of less than 3 – 4 years’ imprisonment, as regards ordinary sentences, those where sentences of between 3 and 8 years’ imprisonment were imposed, as severe those where 9 – 14 years was imposed and as condign, those where 15 years to life imprisonment was imposed.

65. While this Court has indicated that it may take the opportunity in an appropriate case to revisit the appropriate range of sentence in rape, aggravated sexual assault and sexual assault, we are of the view that the factual matrix of this case does not lend itself to the provision of such guidance. Furthermore, as stated the samples of cases provided are very limited and do not lend themselves to a meaningful analysis.

66. Cases cannot be considered as useful comparators unless those cases provide an indication of a trend. The limited sample cannot be said to be indicative of a trend, but nonetheless we are confirmed in our view that where there is more than one victim of a sexual crime, concurrent sentences inter se but consecutive to each other may be appropriate. It is a legitimate exercise of sentencing which ensures that the individual victim is aware that the crimes against him/her have not gone unpunished.

67. Since this judgment was drafted and circulated, the decision of the Supreme Court (Charleton J.) in *The People (DPP) v. FE* [2019] IESC 85 has been handed down. The judgment in *FE* extensively considers sentencing in rape case and other sexual offences and the principles concerning concurrent and consecutive sentences. The Court emphasises that a final sentence must be appropriate for the offence or offences and this can be achieved by the imposition of consecutive sentences with due regard to the totality principle or by concurrent sentences reflecting the overall gravity of the offences. Charleton J. states insofar as more than one victim is concerned at para. 35:-

“While there is no obligation to impose consecutive sentences, it may be appropriate to do so by reason of a gap in offending, there being more than one victim, or where the facts are not related. All of this is a matter of good sense and

it would not reflect good sense to consider a series of offences over years against the same victim of the same seriousness to each carry a sentence as if that crime were isolated from what came before or after. This might result in a series of offences against the same victim receiving an inappropriate sentence where the human reality was that each offence made recovery from the others increasingly difficult. The totality principle means that the judge should objectively consider the overall impact of the offence on the victim or victims and also the rehabilitative effect of the overall result in light of the final total, and the justice of retribution and the need to mark the harm to the victim or victims.”

Consecutive sentences

68. The following can usefully be stated concerning consecutive sentences: –

- (i) Consecutive sentences should be used sparingly but should by no means be considered to be exceptional.
- (ii) The optimum approach to sentencing is that of the three-stage process. This ensures transparency so that the reasoning of the sentencing judge is readily apparent.
- (iii) The principle of totality requires a sentencing judge to look at the cumulative sentence imposed in order to determine if the overall sentence is proportionate to the gravity of the offending and the circumstances of the offender.
- (iv) The principle underpinning totality is proportionality. In this regard, totality may be seen as a subset of proportionality.
- (v) Totality is most frequently considered at the end of the sentencing process. However, a downward adjustment should only be made if the sentence is disproportionate.

This appeal

Insufficient adjustment downwards having regard to the totality principle.

69. The trial judge ordered that the sentences were to be imposed on a consecutive basis giving a total sentence of 19 years' imprisonment and reducing that figure to 17 years and three months to take account of the pleas of guilty. In that particular assessment, the sentencing judge reduced each of the headline sentences in the instance of A and C by 25% in order to give credit for the pleas of guilty. To take account of the mitigating factors, apart from the pleas of guilty and to take account of the principle of totality she further reduced the sentence to a total sentence of 15 years' imprisonment.

70. It is submitted on behalf of the appellant that the overall sentence was not or was not sufficiently 'adjusted downwards' having regard to the principle and that while the judge expressly mentioned it, she did not correctly apply the principle. The end result is according to the appellant an unjust punishment and a breach of the principle.

71. The principle of totality and the manner in which the judge considered it, is the primary focus of this appeal and so we set out the comments of the judge in considering and applying the principle.
72. At the very outset of her sentencing remarks, the judge indicated that she intended to impose a sentence of 15 years and she would explain how she arrived at that figure. She then said:-

“The highest sentence that will be imposed at the end of all my remarks, there will be individual sentences imposed, but the highest sentence will be a sentence of 15 years. I want to explain in detail how I've arrived at that and I should say in general terms that the principles of sentencing in this area while helpful are difficult to apply in cases where there are multiple complainants and multiple counts and sexual abuse of this nature. It's absolutely clear from previous decisions of the Court that I must take into account two quite separate matters in deciding on a proportionate sentence. I need to consider what is proportionate to the offence itself and also what is proportionate to the offender himself. At the end of that process I also have to regard the overall sentence and consider whether it's fair in a global sense in all the circumstances. This is referred to by lawyers as the totality principle. And sometimes and it will happen in this case the sentence needs to be adjusted downwards to take account of that overall totality principle which requires me to make sure that the total sentence is not unjust and out of line with previous decisions of this court. I should also say that the way sentences are required to be structured is for me to select in the first instance what's called a headline sentence which is essentially the sentence applying to the first part of the exercise which is the gravity of the offence or of offences in this case. And then to adjust that downwards in the light of mitigating factors which have been put before me.”

73. In imposing final sentence, the judge said:

“So, reducing the -- taking the sentences in respect of all three and making them consecutive, bringing the headline sentences to 19 years total, that reduces to 17 years and three months because of the guilty pleas. It reduces further in view of the mitigation and what I consider the principle of totality to an overall period of 15 years. “

Discussion

74. When imposing a consecutive sentence or sentences as in this instance, it is well established that a court must have regard to the principle of totality. It is readily apparent from the transcript that the sentencing judge in the instant case was very much alive to this. The judge determined the appropriate sentence for each of the offences with regard to the maximum penalty available and she then reduced the sentence to take account of the guilty pleas and again adjusted the sentence downward to take account of the other mitigating factors **and** in light of the principle of totality.

75. Quite clearly, the judge adopted the first approach as referred to *The People (DPP) v. Casey and Casey* [2018] IECA 121. Her reasoning is therefore readily apparent and open to scrutiny. On conducting such an exercise, it is clear that the judge assessed the gravity of the offending conduct very carefully indeed by reference to the culpability of the offender and the harm done and with reference to the penalty available in each instance of offending. The impact on the victims was of a severe order. The judge properly assessed gravity with reference to the maximum penalty available to her and measured the indicative sentence accordingly. Having reduced the sentence by 25% in the instance of the offending concerning victims A and C in light of the pleas of guilty, she then proceeded to adjust the sentence downwards in light of other mitigation and to give effect to the totality principle to ensure that the ultimate sentence was a proportionate one.

The sentences

76. The sentencing judge identified a notional sentence of 3 years' imprisonment on each of the sexual assault counts concerning victim A, she identified a notional sentence of 12 years in respect of the rape counts and 11 years in respect of the attempted rapes concerning victim B and 4 years' imprisonment on each of the counts concerning victim C. She then, as stated, adjusted the notional sentence for the offending concerning victims A and C by virtue of the pleas of guilty by 25% giving a total sentence of 17 years and 3 months.
77. The judge then considered mitigation other than that of the pleas of guilty and to give effect to the totality principle, reduced the sentences to a total sentence of 15 years' imprisonment.

Conclusion

78. Despite the sentencing judge's careful consideration of the case before her and her clear knowledge of the sentencing principles, we have come to the conclusion that while the sentence she imposed was within the margin of appreciation, she erred in the manner in which she structured the sentences.
79. Firstly, while the judge adjusted the sentences downwards as a result of the pleas of guilty, she failed to adjust the notional sentences concerning the offending relating to each victim separately in light of the general mitigating factors. It was, of course, open to her to adjust the headline sentence in the cases of victims A and C in light of all the mitigating factors to include the pleas of guilty. But in order to properly adjust the notional sentence in the case of the offending conduct relating to each victim, it is necessary to reduce each notional sentence separately by reference to the mitigating factors present, thus identifying the indicative sentence in each case.
80. Moreover, we are satisfied that the judge erred in conflating her determination of the appropriate allowance for the general mitigation, with the application of the totality principle. In the view of this Court, the appropriate course is to identify the notional sentences in each instance, reduce the sentences by virtue of the mitigation present and

then, consider the sentences and adjust downwards, if necessary, on application of the totality principle. In other words, apply the three-stage sentencing process.

Rehabilitation

81. It is contended that the sentencing judge failed to properly consider the prospect of rehabilitation and failed in particular to take account of the appellant's application to work and productivity whilst incarcerated. Rehabilitation is one of the fundamental principles of sentencing, however, rehabilitation may or may not have an impact on a particular sentence depending on the circumstances. Even where a person does not plead guilty to an offence, the prospect of rehabilitation should not be discounted but, understandably in those circumstances, the influence on sentence would be exceedingly modest, if it were to have any influence at all. Rehabilitation cannot be based on speculation, there must be an air of reality to the prospect of rehabilitation.

82. In the instant case, the judge acknowledged the efforts which the appellant was making whilst incarcerated and specifically referred to the fact that he was studying, that he works full-time in the mess and that he was gaining insight into the effects of his behaviour. As we have already observed, while we believe that the sentence imposed by the judge was within the margin of appreciation, she did not structure the sentence so as to incentivise his rehabilitation on his release from custody.

83. We will now address the balance of the issues raised.

Failed to take into account the manner in which the trial was conducted regarding B

84. It is submitted that the complainant's character was not attacked in the pursuit of the appellant's defence. The complainant was not subject to any verbal offensive and this should have been interpreted by the sentencing judge as a weighty mitigating factor.

85. This is not a ground with which we find any merit. The appellant did not plead guilty to the counts concerning B, as was his right. However, having contested the matter, he was then deprived of the mitigating factor of a plea of guilty. To argue that the complainant's character was not put in issue should act as a strong mitigating factor is wholly without merit and we have no hesitation in rejecting this ground.

Double counting

86. The appellant advances the arguments that in identifying the reason for making these sentences consecutive as being that of there being three separate injured parties, gave rise to the risk of double counting of that factor. It is argued that the trial judge had already taken into account the aggravating factors in applying broader sentencing principles. These factors included the breach of trust, the prolonged nature of the activity, the vulnerable injured parties and the young age of the injured parties. The concern expressed is that in stepping back to consider the overall sentence so as to determine whether that sentence was proportionate, this in fact resulted in an exercise in double counting of the aggravating factors.

Conclusion

87. We are not persuaded by this argument; a judge may decide in any given case that concurrent sentences will not meet the offending conduct and this conclusion might be reached on a single or on a number of bases. The fact of more than one complainant is a factor which a court may take into consideration in deciding whether or not to order the sentences to run consecutively. This does not give rise to the risk of double counting. If a court follows the optimal method of sentencing, that is, by adopting the two-stage process and in the instance of the imposition of consecutive sentences proceeding to the third stage, it is difficult to see how any such risk can arise.
88. Even if a court adopts the second approach as stated in *The People (DPP) v. Casey and Casey* [2018] IECA 121; that is the global approach with a downward reduction if necessary of the indicative sentence, it is difficult to see how that approach would give rise to the danger of double counting.

Violence conflated with breach of trust.

89. The gravity of an offence is measured through an assessment of the moral culpability of an offender concerning the offence and the consequential harm done. In the present case, we agree with the sentencing judge in her assessment that one of the factors bearing on moral culpability was the father/daughter relationship. In this position, the appellant, with his knowledge of the characters of the children must have been aware of the impact the offending would cause to them, thereby increasing his moral culpability. Whilst the appellant contends that the judge conflated violence with breach of trust, we reject this suggestion. The judge simply considered the breach of trust as an aggravating factor when assessing the appellant's moral culpability. She observed that such a factor is as much an aggravating factor as the use of additional violence in a rape. Whilst the distinction must be made between the physical use of violence and the psychological impact caused through sexual abuse, nonetheless, each are aggravating factors which affect the assessment of culpability. We reject this submission.
90. In view of the structural errors identified in the judgement, we will, in due course proceed to re-sentence the appellant. The matter will be adjourned in the meantime to enable the appellant to gather material for that purpose.