UNAPPROVED

FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 31

Edwards J.

McCarthy J.

Donnelly J.

Record No: 224/2019

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

J.McD.

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 8th of February, 2021.

Introduction

1. On the 21st of June, 2019, the appellant came before the Central Criminal Court and pleaded guilty to counts 4 and 5 on the indictment, which were both counts of defilement of a child under 15 years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act, 2006 ("the Act of 2006"). Other counts on the indictment had charged rape contrary to s. 4 of

the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990), but the pleas offered to the defilement counts, which had been added at a late stage, were acceptable to the Director of Public Prosecutions. A *nolle prosequi* was then entered in respect of the other charges on the indictment.

2. On the 17th of October, 2019, the appellant was sentenced to 4 years' imprisonment in respect of each count, to run concurrently from the 1st of April, 2019 to reflect time spent in custody. An order was also made providing for two years post-release supervision.

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

Background Facts

4. The two relevant counts relate to two incidents which occurred on the 21st and 25th of August, 2015, respectively, when the appellant, then a teenage boy, was 16 and a half years old and the victim, then a pre-teenage girl, was 12 and a half years old. For completeness, it should be mentioned that there was a second teenage boy, then aged 14 years, co-accused with the appellant in respect of the second incident, i.e, the incident on the 25th of August, 2015.

5. The victim had engaged the appellant over Facebook, falsely portraying herself as 14 years old, and told him that she wished to go out. The pair agreed to meet up on the 21st of August, 2015 near a Lidl supermarket, which was not far from a park.

6. The victim turned up as arranged and was accompanied by a friend, and met up with the appellant who was accompanied by several of his friends. The group proceeded in the direction of the park, and when they got there the appellant took the victim to a location, described in evidence as *"a field with a ditch and trees all around"*, some distance away from the others. The victim told gardai that she was effectively dragged and pushed over to this particular area. She had felt unsafe but stated that she didn't go with her gut feeling. The appellant then put his hands on her, feeling her all over her body including around her legs.

He then made her kneel on the ground and take his penis in her mouth. She described having to lick his penis like a lollipop as he manipulated her head to make her suck it.

7. According to the victim the appellant's penis was in her mouth for about 10 seconds on this occasion. However, while this was taking place the appellant produced his mobile phone and videoed what was occurring on his mobile phone. Some of his associates, who by this stage had caught up with the appellant and the victim, also took still photographs of what was occurring on their mobile phones. After the appellant had desisted, the victim was shown some of these photographs. The photographs showed her, in her words, *"giving him a blow job"*. Seeing these photographs caused her great distress. She had tried to grab the phone on which the photographs were recorded but she was not able to. She later told Gardai that she felt "*really dirty"* and that she ran away at that point. She expressed concern that if somebody saw the photographs she would *"get a name for having done this"* and said they had made her feel horrible.

8. Over subsequent Facebook messages, the victim asked the appellant to meet up with her again on the 25th of August. The appellant initially told her that he did not wish to do so but eventually agreed. They met close to a shopping centre and on this occasion the appellant was accompanied by the aforementioned co-accused. Also present were other friends of the appellant, and the victim's friend who had accompanied her previously. They proceeded to a nearby estate where the appellant made attempts to isolate the victim, which was interfered with by the efforts of her friend. He eventually succeeded however, and once he had separated the victim from the group, he pushed her down to the ground and again put his penis in her mouth. The victim estimated that this lasted for about 2 minutes. Subsequently, the appellant told her that she must engage in oral sex with his friend, the co-accused, or the appellant would show photographs taken on the previous occasion to other members of the boxing club in which she was actively involved. The victim told Gardai that she could not

stop shaking as this was happening, but that she did what she was instructed to do and took the co-accused's penis in her mouth, before running away.

9. The incidents came to Garda attention when, on the 26th of February 2016, an off-duty Garda encountered an incident in a shopping centre where a teenager was being pursued through the shopping centre by an adult man, and the Garda had intervened. It had transpired that the victim had been in a library in a shopping centre complex with her parents when she unexpectedly encountered the appellant. Distressed at encountering the appellant, the victim told her parents what he had done to her. The victim's father had then sought to apprehend the appellant leading to a running pursuit through the shopping centre. Following the off-duty Garda's intervention a formal complaint was made by the victim to Gardaí and a Garda investigation was commenced.

10. In the course of their investigation Gardaí examined the Facebook material and the video taken by the appellant of the victim performing oral sex on him. The video had been sent to a third party. When shown the footage by the gardaí, the victim was able to identify herself.

11. There were also exchanges between the victim and her friend following the 25th of August, in which she stated that she would end her life because the appellant was using her, and because she had given him "*things".*

12. Interviews with child specialist interviewers were arranged for March and August, 2016, which led to the emergence of further details, including that subsequent sightings of the appellant had caused her a great degree of fear and discomfort, and that a threat had been made to the victim by a relative of the appellant to pressurise her not take the matter further.

13. Following the commencement of the investigation Gardai had difficulty initially in locating the appellant and they did not succeed in interviewing him until August 2017, when the victim's allegations were put to him. However, this interview yielded nothing of

evidential value. The co-accused was subsequently arrested and made statements which Gardai felt it necessary to put to the appellant. This led to his re-arrest and a further interview with him in September 2017, which again yielded nothing of evidential value. In April 2018, directions were received from the respondent that the appellant should be charged with rape, contrary to s. 4 of the Act of 1990. Arrest warrants, including a European Arrest Warrant in circumstances where the appellant was understood to be in the United Kingdom at that stage, were applied for. The appellant was eventually arrested and charged a year later on the 1st of April 2019, following his voluntary return to the jurisdiction.

Impact on the Victim

14. The victim in this case went into the witness box and read her victim impact statement to the court without objection. She was not required to take the oath as defence counsel indicated that they did not consider it necessary. There had previously been considerable controversy as to certain matters contained in a written copy of her proposed impact statement that had been circulated in advance to the parties but, following a ventilation of the difficulties before the sentencing court on the 29th of July, 2019, and a ruling by the sentencing judge as to how he would deal with the controversy if it could not be resolved by agreement, these difficulties were ultimately resolved in discussions between counsel for the prosecution and counsel for the defence.

15. In the victim impact statement read into the record at the sentencing hearing the victim stated that the incident had "*totally changed her outlook on life",* and that whilst she had previously been confident and involved in many sporting activities, she had since become introverted and anxious, and had quit sports, including boxing, out of fear of seeing the appellant. She lost her sense of independence and security, and had difficulty sleeping, experiencing nightmares and flashbacks. She informed the court that she had stopped seeing her friends and was forced to move schools due to bullying arising from discovery of the

incident. Her statement indicated that she suffers from Post-Traumatic Stress Disorder and anxiety, for which she receives medication and counselling. She stated that she was ashamed of herself and her body and had attempted suicide. She still self-harms as a result of the incident and has issues with food and binge eating. She ran away from home on one occasion, and her parents have since become very protective of her. She no longer feels able to pursue her ambition to become a mid-wife. While she did complete a week-long transition year work-placement with the army under pressure to do so from her father, she felt unable to do further work placements that would have involved her dealing with people. Her school attendance deteriorated following her transition year and eventually she dropped out of school altogether. She was attributing precipitation of all of these difficulties to her defilement by the appellant and the co-accused. She stated (inter alia):

> *"I have no life with my friends, as I don't like going outside. I'm afraid to be seen, even on my own street. I live in constant fear. I can't enjoy my life, so basically I'm stuck in hiding. They have taken away my teen years as I'm a prisoner in my own home and I know I'll carry this burden for the rest of my life, although I am working hard to overcome (sic) back from this, I'm still terrified."*

Personal Circumstances of the appellant

16. The evidence was that the appellant comes from a disadvantaged background. The appellant was aged 20 and a half years at the date of his sentencing. He was therefore sentenced as an adult and fell to be sentenced as an adult, notwithstanding that his offences had been committed while he was a minor.

17. At the time of the offence was living at home with his mother and five younger siblings. He had also had a sixth sibling, a sister, who had died when she was eighteen months old. In a letter to the court the appellant himself asserted that he had grown up in a rough area, had poor education and had become involved with bad company. In a further

letter to the court from his mother, who was said to be pregnant again, the court was told that the appellant's father was never there for him when he was growing up, and that the appellant had assisted her in raising his five surviving siblings.

18. The court was also presented with a letter from a community school in the appellant's locality confirming his attendance there when he was between the ages of 13 years and 17 years. Accordingly, he was still attending school at the time of the offence.

19. There was evidence that at the time of his sentencing the appellant was in a two-year relationship with a girlfriend, and that he had asked her to marry him in March 2019. The court also received a letter from the fiancé of the appellant, which pleaded for leniency. At the oral hearing of this appeal we were told that the engagement has not survived the appellant's imprisonment for these offences.

20. The appellant did apply successfully for bail after he was charged. The bail terms had involved, inter alia, the lodgement of a substantial cash sum. Whether it was for this, or some other reason, bail was never taken up. The appellant has been in custody since he was charged on the 1st of April 2019. He benefited from the fact that a trial date had already been fixed in relation to his co-accused as this enabled him in turn to obtain an early trial date.

21. There was evidence that the appellant had seven previous convictions, all dealt with summarily, and all of which had been recorded in the interval between the offending the subject matter of the sentences now under appeal and the date of sentencing. These were for driving while uninsured; driving without a licence; two instances of failing to appear in answer to bail contrary to s. 13 of the Criminal Justice Act, 1984; burglary; s. 2 assault; and unlawful interference with a vehicle contrary to s. 113 of the Road Traffic Act, 1961. He had mostly received fines and other non-custodial penalties. However, he had received sentences of three months imprisonment for the s. 2 assault and a sentence of four months imprisonment for one of the instances of failing to appear.

22. In his letter to the court the appellant further stated that he deeply regrets what happened and attributes his actions to his age and immaturity at the time.

23. The sentencing court was told that the appellant is on the enhanced prison regime and was attending several courses. We understand that that remains the position.

How the co-accused was dealt with.

24. We are told there was a non-custodial disposal in the co-accused's case. He had been dealt with some months previously and was still a minor at the time of sentencing. Accordingly, he was dealt with under the statutory regime provided for in the Children Act, 2001.

Probation Report

25. The sentencing court was in receipt of and took account of several probation reports concerning the appellant. There was a contentious history associated with the probation assessment of the appellant. He was initially assessed in custody by his probation officer for the purposes of a report, subsequently issued to the court on the 18th of July, 2019. It transpired that amongst the briefing papers that had been furnished to the probation officer in advance of his interview with the appellant for the purpose of preparing this report was the original Book of Evidence, which was addressed to the then subsisting charges, namely charges of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990.

26. The appellant had not been cooperative when initially interviewed by the Probation Officer.

27. When the report dated the 18th of July 2019 was presented to the sentencing court, objection was raised to it on the basis that it had been prepared on the basis of briefing material in respect of charges not proceeded with. At the request of defence counsel, the court had directed preparation of a further probation report, on the basis that whatever probation officer tasked with assessing the appellant would be correctly briefed this time as to the

charges in respect of which the appellant faced sentencing and the evidence that would have supported those charges had the matter gone to trial.

28. The appellant was interviewed for the purposes of this further report on the 24th of July, 2019, by the same probation officer as had first interviewed him. He was again uncooperative. It had been proposed to conduct two interviews with him on that day, but he declined to participate in the second of those planned interviews. It therefore only possible for the Probation Officer to conduct a partial risk assessment. The report stated (inter alia):

> *"**Presentation at Interviews***
>
> *[The appellant] was uncooperative during interviews. His presentation during the interview on 24/7/19 was markedly more aggressive and volatile than the previous interview. He expressed his anger at being in custody for an offence that he does not take responsibility for. He outlined how he is finding it difficult to cope with being in custody, how difficult it is for him to accept the conviction and how stressful it is attending court. I am of the opinion that due to his heightened emotional state he could not focus on the interview and he failed to understand the purpose and role of preparing a report for court.*
>
> *In a brief discussion regarding his offending behaviour [the appellant] minimized his behaviour and he failed to accept that he had engaged in any harmful sexual behaviour. He stated that the victim consented to the sexual activity. He did not demonstrate any understanding of sexual consent. He showed no understanding of the possible harm caused the victim and he affirmed a victim blaming narrative. He refused to engage further in conversation regarding his offending against the victim.*
>
> *In relation to future plans [the appellant] stated it is his intention to return to live with his parents upon release from custody, however, he refused to inform me where his parents are residing.*

Risk assessment

I applied an actuarial classification instrument (RM 2000) that measures static risk factors associated with sexual and violent offending. On the sexual scale, [the appellant] was placed into the high risk category in terms of sexual re-conviction. … On the violence scale, [the appellant] was placed in the very high risk category in terms of reconviction for violent offenses over the following 5, 10, and 15 years respectively. …

This risk assessment tool is somewhat rudimentary as it only measures static factors. It is my opinion that due to the serious nature of the offence before the court, it is important to undertake an assessment of the more dynamic and acute risk factors associated with [the appellant]'s offending behaviour. This will highlight the most appropriate areas for intervention and the risks and needs which will need to be addressed and managed prior to and after his release from custody. This assessment could be conducted before his release from custody.

During the brief assessment, a number of risk factors were identified that would need to be addressed in the course of any further intervention or supervision with [the appellant] in order for him to lead a prosocial life. They are as follows:

- *[the appellant]'s limited insight into his offending behavior*
- *his lack of understanding of the hurt caused to the victim*
- *his lack of cooperation with this assessment"*

29. The report went on in a section entitled "Conclusion and Proposal" to opine that it was imperative that the probation service should be involved in the management of this case in order to address risk factors and provide a structured release planned for the appellant. It proposed that any possible disposal should include a period of three years post-release supervision and a number of conditions that might be attached to that were suggested.

30. Before the appellant was sentenced, the sentencing judge was furnished with a short updating report dated the 2nd of October, 2019. This confirmed that the appellant had again been interviewed and that again he had been uncooperative, and the position was largely as previously stated. However, the appellant did state to the probation officer that it was his intention to live in a hostel upon release and to have little contact with his family, thus leaving him with no identified support network. The probation officer believed he had stated this as a way of avoiding talking about his family. Other than that, the position remained the same as had been previously reported.

The sentencing judge's remarks

31. In sentencing the appellant, the sentencing judge emphasised that he would focus and concentrate on undisputed, essentially uncontroverted and objective evidence relating to the seriousness of the offences and would then impose what he considered to be a proportionate sentence in relation to the offending. He reviewed the facts of the case, noting the substitution of defilement charges for the rape charges originally preferred. He acknowledged the circumstances giving rise to controversy about the reports from the Probation Service and placed on the record that he had afforded the appellant an opportunity to obtain a further probation report after an objection had been made on his behalf to the first one.

32. The sentencing judge specifically noted the appellant's age at the time of the offences, and the fact that he was a minor at the time, and stated that it was a matter that would be very much the focus of the court. He went on to note that the appellant fell to be sentenced as an adult for crimes committed as a juvenile. He said the court had a duty to protect society and that in sentencing the appellant he had to have regard to the penal objectives of punishment, deterrence, and rehabilitation. He was required, he said, to impose a proportionate sentence taking into account the seriousness of the offences, the aggravating and mitigating circumstances, and to arrive at an ultimate sentence that was not unduly harsh or lenient. He

confirmed his understanding that he was entitled to consider consecutive sentencing if he thought it appropriate and acknowledged that if he were to opt for that he would also have to have regard to the totality principle so as to ensure that any cumulative sentence was not a cruel and unusual punishment. Ultimately, he expressed the view that whilst there were two separate offences before him, their closeness in time allowed for the imposition of concurrent sentences.

33. The sentencing judge then referenced the victim impact statement, stating that he would have regard to undisputed and uncontroversial matters contained therein concerning the objective effects on the child of her age at that time of the crimes upon her.

34. He referred again to the various probation reports that the court had received and indicated that the appellant seemingly had not grasped the gravity of the offences. He stated that whilst the court had been prepared to ignore the earlier July report if necessary and consider only the later reports, their respective relevant contents did not differ to any substantial degree.

35. The sentencing judge referenced the letter received from the appellant's mother and stated that he accepted its contents. He further commented on the letter provided by the appellant himself, noting that it expressed remorse, and observed that *"it's obviously different in tenor from his engagement with the Probation Service"*. He further referenced the letter from the appellant's fiancé. He noted the appellant's personal circumstances. As the appellant had convictions which were subsequent to the present offences, he said that he would in the exercise of his discretion treat the appellant as being without previous convictions.

36. He noted that the purpose of the relevant legislative provision (i.e. s. 2(1) of the Act of 2006) was to protect young children as they go through the difficult years of dealing with their sexuality and that it was absolutely prohibited to engage in sex with a child under 15

years old. Moreover, a child could not give consent to it. He said that these were sensitive cases. Speaking of the victim, he said that:

> *"It's clear as a twelve-year-old she was undergoing difficulties herself which is quite common as young children are growing up. They have to be protected as they go through these ages and* [the victim] *obviously developed an infatuation for* [the appellant] *and wanted to meet him. Unfortunately, as well after the 21st August 2015,* [she] *agreed to meet him again on the 25th of August 2015. She did misrepresent her age to* [the appellant]*, she was 12 and a half but she told him that she was 14."*

37. The judge noted that the appellant was 16 ½ years old at the time of the offending, and that some level of maturity would be expected from a person of that age.

38. He sought to make clear that the court had to hold him responsible for knowing that to have sexual contact with a child was a serious criminal offence, bearing in mind that his exchanges with the probation officer the appellant had sought to minimize the offences, indicated that he felt he had done nothing wrong, and was concerned that he was effectively being criminalized for something that was consensual.

39. The sentencing judge stated that this encounter "*went way beyond what the Court would regard as a consensual contact which got messy or got wrong, for a number of reasons".* In recounting the facts, the sentencing judge referred with particularity to the fact that the appellant had, on the second occasion, asked the victim to perform oral sex on the co-accused under threat. He said:

> "*Now, I'm not sentencing* [the appellant] *for that at all, I'm sentencing him for the two acts that he committed himself. But it's important to set out the mind-set of* [the appellant] *at the time in terms of the attitude that he has displayed subsequently as to his minimisation, portraying it as effectively something that got out of hand or minor, and that it's not a serious offence. What really strikes me about the whole*

circumstances of it, is the actual cruelty of it. I made reference to this in dealing with the victim impact statement. There obviously is -- there are areas of controversy in relation to the victim impact statement. As I said in my ruling on the 29th July 2019, a victim impact statement is a subjective view from a victim and the Court obviously has to be careful to deal with it as sensitively as it can. But if you look at it objectively, what could be the effect on a 12-and-a-half-year-old child of this ordeal other than to be affected by it. For, like, looking at it starkly, one of the most fundamental aspects of sexual relationships even between children and adults is that they take place in private, away from other prying eyes, and this was cruelly exposed, possibly to the world. There was just a degree of cruelty surrounding the offences. I do [say] *that because I want to make quite clear that this minimisation by* [the appellant] *has caused the Court some concern. I just want to set out the record for what clearly it should be, these were very serious offences. They were also cruel offences in their particular context".*

40. In terms of aggravating factors, the sentencing judge acknowledged the nature of the offending and the young age of the victim; that the appellant had initiated the contact; and the impact on the victim. In terms of mitigation, he noted that there had been an early plea immediately upon the defilement charges being added to the indictment; the lack of previous convictions; and the young age of the appellant himself. In regard to the latter, the sentencing judge remarked:

"Really, the factor that the court takes into the most consideration even though he was 16 and a half, is that he still was a minor. He was someone who was still a child effectively himself, although going into, close to adulthood and that really is the biggest factor that the court takes into consideration on the sentence that it imposes."

41. The sentencing judge then nominated a headline sentence of 8 years' imprisonment, which he then reduced by 50% to 4 years' imprisonment to reflect the mitigating circumstances in the case. The same sentence was imposed in respect of both counts, the two sentences to run concurrently. The sentences were backdated to reflect time already spent in custody, and the court made an order for two years post-release supervision.

Grounds of Appeal

42. The appellant has rested his appeal on the following grounds:

a) The sentencing judge attached disproportionate weight to the age of the appellant in considering his age as an aggravating feature of the case.

b) The sentencing judge failed to attach adequate weight to the appellant's mitigating circumstances.

Submissions

43. The court received helpful written submissions from both parties, which were amplified in oral argument at the hearing of the appeal, and we will where necessary make specific reference to these.

Discussion and Decision

44. At the outset it should be stated that while the appeal as framed by the grounds pleaded is ostensibly narrow in its focus, the manner in which it was unfolded with regard to ground (a) revealed that in truth the appellant was not confining his complaint to a suggestion that too much weight was attributed to one single factor as representing an aggravating circumstance, namely the age of the appellant leading to an over assessment of the gravity of the case. Based on the submissions we interpret the generic reference to "age" to include not just the evidence as to his chronological age but also the issue of the age disparity between the appellant and the victim. Although the appellant's submissions certainly embraced those issues, they went further and in reality included a collateral attack on the headline sentence on

the grounds that the appellant had been sentenced as though he had committed rape, rather than s. 2 defilement, and that this was particularly invidious in circumstances where s. 2 defilement charges had in effect been substituted for charges of rape contrary to s. 4 of the Act of 1990, thereby precipitating a willingness on the part of the appellant to plead guilty.

45. That such a case was in fact being made became apparent from the appellant's reliance in his written submissions, and again in his oral submissions, on the following passage from Supreme Court's guideline judgment on sentencing for rape and serious sexual assault/abuse in *The People (Director of Public Prosecutions) v F.E.* [2020] 1 ILRM 517, where Charleton J., giving judgment for the court, stated:

> *"52. While precise numerical certainty is not possible in this exercise, the precedents in sentencing clearly establish that conviction for rape ordinarily merits a substantial sentence and, further, that consideration should commence in terms of mitigation at the headline sentence of 7 years. These cases of their nature will be ones where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence."*

46. The argument being made was that as the sentencing judge in the present case had commenced with a headline sentence of eight years imprisonment in this case; and as rape, without coercion or force or other aggravating circumstances, was said in *F.E.* to typically merit a starting point of seven years; the sentencing judge had in effect ranked the gravity of the appellant's defilement behaviour as being at least equivalent to that attributable to a non-aggravated rape and, arguably, as being slightly greater than it; and that this could not be right.

47. In further support of this argument we were referred to some supposed comparators, i.e., what were described in the appellant's written submissions as *"sentences in broadly similar cases"*. These were relied on both in support of what might be described as the 'non-

equivalence with rape argument' just described, ostensibly to illustrate that defilement cases typically attract much lower sentences, both pre and post mitigation, than rape cases; and also in support of the secondary argument, based on ground (b), suggesting that the sentencing judge had in any case failed to attach appropriate weight to the mitigating factors including the fact that the appellant was a child at the time of the offending behaviour. The comparators cited, which included *The People (Director of Public Prosecutions) v Farrelly* [2015] IECA 302, and *The People (Director of Public Prosecutions) v W.S.* [2015] IECA 220, were said to show that the sentences imposed in the instant case were excessive.

48. It bears commenting upon, however, that neither of those cases could qualify as a true comparator as they were each concerned with the entirely separate offence of defilement of a child between the age of fifteen and seventeen, contrary to s. 3 (1) of the Act of 2006. In that regard the intention of the Oireachtas in providing a maximum penalty of imprisonment for life for s. 2(1) defilement offences, and a maximum penalty of imprisonment for 7 years (or 15 years if the offender is a person in authority) for s. 3(1) defilement offences, was to differentiate between them in terms of their cardinal seriousness and it is therefore entirely misconceived to regard them as *"broadly similar cases"* for sentencing purposes.

49. Further, as the offences of defilement of a child under 15 years old contrary to s. 2(1) of the Act of 2006, and of rape contrary to s. 4 of the Act of 1990 can both potentially attract a sentence of up to life imprisonment, they have been ranked equally by the legislature in terms of how the cardinal seriousness or magnitude of each of those offences has been calibrated. The determination of cardinal seriousness, sometimes referred to as the cardinal scaling of punishment, involves the legislature deciding as a matter of policy, what overall levels of onerousness should be chosen to anchor the system of penalties that are to be applied to an offence. Put simply, it involves making a comparative judgment as to how much more or less punishment is required for the type of offence under consideration,

bearing in mind the penalties ranges provided for other offences in the criminal calendar, and creating a proportionate range of penalties to reflect this. Accordingly, when creating a new offence and providing a range of penalties for it, or when reviewing a previously set penalty range in respect of an offence, the legislature must fix a range of penalties that is appropriate to how it ranks the offence relative to other offences in the criminal calendar; and which takes account of them in determining what is required to proportionately punish the most grave potential manifestation of the offence under consideration. In that regard, the sentencing options available in respect of both s. 4 rape offences and s.2(1) defilement offences are equivalent, ranging as they do in each case from non-custodial disposals up to imprisonment for life. Accordingly, when one considers the cardinal scaling of the respective punishments provided for s. 4 rape and s. 2(1) defilement, the non-equivalence with rape argument is manifestly not well-founded.

50. However, that is not to suggest that s. 4 rape offences and s. 2(1) defilement offences necessarily bear equivalence in other respects. In some cases, they may bear considerable similarity, such as where the underlying offending conduct could (apart from the age ingredient that must also be proven in the case of defilement) found a charge for either offence. In other cases, they may be very different e.g., where both parties are teenagers and equally consenting and there is no issue of sexual predation, coercion or an unequal power relationship.

51. We are not in truth concerned in this case with the fact that the Oireachtas has determined, in setting legislative sentencing policy, that rape offences and defilement offences should rank equally in terms of their cardinal seriousness and accordingly share the same penalty ranges. The issue before us is not whether the sentencing judge could have started where he did in terms of the sentencing options that were open to him, but rather whether he was right to start where he did in the circumstances of the case. That issue is

concerned with whether the sentences imposed by sentencing judge were ordinally proportionate, i.e., whether the sentences imposed were merited by the ordinal seriousness, as opposed to the cardinal seriousness, of the type of offence in question.

52. Ensuring ordinal proportionality in sentencing, sometimes called the process of ordinal scaling, involves deciding how to appropriately punish differing manifestations of the same offence. This involves the assessor (i.e., the sentencing judge concerned) looking at relative culpability and harm done; and then determining at what point on the spectrum of available penalties that has been set by the legislature their punishment should be located after taking account of both aggravating and mitigating factors. This could be done either by instinctive synthesis, or, adopting what we have recommended as best practice, by taking a staged approach. As it happens the sentencing judge in the instance case adopted a staged approach, nominating a headline sentence in the first instance that he considered to be reflective of the gravity of the case (taking into account aggravating factors), and then discounting from that headline for mitigating factors, resulting in the post mitigation of four years imprisonment that he ultimately imposed. So, the relevant question for us is: did the ordinal seriousness of these offences require, or more correctly permit of, the nomination of a headline sentence of eight years, leading to the imposition of an ultimate sentence of four years after mitigation was taken into account? To put it another way, and more simply, we need to consider: was gravity correctly assessed?

53. Gravity was properly to be assessed by considering the scale of available penalties, by provisionally locating where that offence should fall to be punished on that scale with reference to intrinsic moral culpability and the harm done, and then adjusting the provisional figure up or down as required to take account of aggravating or mitigating factors bearing on culpability. We regard this approach as being best practice. However, not infrequently, and this is one such case, a judge at first instance will not take account of mitigating factors

bearing on culpability in this first stage of the process, but will instead do so in the second stage by discounting on an undifferentiated basis for all mitigation, whether bearing on culpability or not. It is not an error to do so, as the ultimate sentence should be the same, but we do regard it as preferable that all factors bearing on culpability, both aggravating and mitigating, should be taken into account in the first stage. This is desirable so as to produce a headline sentence that truly reflects the gravity of the offending conduct, which may be important as a reference point in future cases.

54. It is necessary to say a word at this point about intrinsic culpability and factors bearing on culpability which could aggravate or mitigate that. The assessment of intrinsic culpability is difficult where, as in this case, the legislature has provided for a very wide range of penalties to cater for the reality that there is a myriad of different circumstances in which the offence may be committed, and there is no guidance on where to start. As already alluded to, in some cases the offending conduct amounting to defilement may approximate conduct that could also found a charge for rape, while in other cases it may be very far from it and be manifestly much less culpable. Accordingly, there can be no one starting point.

55. In the context of this judgment we are not able to offer formal guidance on sentencing in s. 2(1) defilement cases, in the sense spoken about in our recent judgment in *The People (Director of Public Prosecutions) v O'Sullivan* [2020] IECA 331. We were not asked to do so, we have not flagged in advance an intention to do so, we have not invited submissions extending beyond the circumstances of the present case, and we have not arranged to hear several such cases together so as to incorporate a wider range of views than might otherwise be available. Nevertheless, while we do not feel able to promulgate a formal guideline judgment, we do feel able to offer some informal guidance as to how they might be approached.

56. In respect of certain other offences, cardinally scaled by the legislature to provide for a range of penalties running from non-custodial dispositions up to imprisonment for life we have suggested that the majority of such offences are capable of being sentenced on the basis that they fall to be located for punishment purposes at some point on an effective fifteen year spectrum, with a low range attracting a sentence ranging from a non-carceral sentence to imprisonment for five years, a mid-range involving imprisonment from five to ten years, and an upper range involving imprisonment from ten to fifteen years. To suggest this is not to ignore the fact that the legislature has provided for up to life imprisonment. Individualisation in sentencing means there will always be outliers so that for truly egregious cases a sentence above fifteen years and indeed up to life imprisonment remains possible, but such cases are anticipated to be rare. We have suggested this approach in respect of robbery offences and aggravated burglary in *The People (Director of Public Prosecutions) v Byrne* [2018] IECA 120 and we venture to suggest that it accords broadly (although not exactly) with the approach of the Supreme Court in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 219 where three categories were selected as covering most cases, i.e., a low range attracting sentences *"below the norm"* (the examples provided suggest typical headline sentences of 5 years or below), a mid-range involving what are described as *"ordinary headline sentences"* (built around a suggested starting point of a headline sentence of 7 years for a rape *"where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence"*), an upper range involving *"more serious cases"* meriting a headline sentence of 10 to 15 years, while finally acknowledging that "*very serious examples"* might require sentences above 15 years and up to life imprisonment."

57. Sub-dividing a very wide sentencing range in this way may provide a useful aid for determining upon the appropriate headline sentence, but a couple of caveats need to be borne

in mind. First, as Birmingham P. has pointed out in *The People (Director of Public Prosecutions) v Casey and Casey* [2018] IECA 121 there is never:

> *"… clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."*

58. Secondly, there are two types of aggravating factors, and indeed mitigating factors bearing on culpability. What might be labelled as "*ordinary*" such factors will cause the provisionally nominated headline sentence to be increased or decreased to only a modest degree, and unless the provisionally nominated headline sentence is already close to the boundary with another range, it will not usually result in the case moving to be sentenced within another range. The notional needle may move up or down the scale somewhat but remain within the penalty range subdivision in which the provisional headline sentence was located. However, some aggravating circumstances (and more rarely mitigating circumstances bearing on culpability) are more serious and far reaching in their effect. Such "*seriously*" aggravating or mitigating circumstances can so affect the culpability of an offence as to automatically cause the case to move in to the next range. It is a question of degree.

59. The Supreme Court's decision in *F.E.* was a formal guideline judgment and was informed by a survey of a large number of cases involving rapes of various kinds. We do not have the benefit of specific data on sentencing for s. 2 defilement offences and have not been referred to a representative sample of comparators such as might indicate a relevant trend or trends. Accordingly, we do not feel able to suggest specific starting points. Nevertheless, we

feel we can safely say that s. 2(1) defilement offences not involving force, coercion or seriously aggravating circumstances would in general merit the nomination of a headline sentence in the low range, the precise appropriate starting point necessarily depending on the circumstances of the case. By the same token, if the offending behaviour has involved force or coercion (including blackmailing type behaviour, abuse of a dominant position or exploitation of an inequality of power) or other seriously aggravating circumstances (e.g., multiple instances of the offending behaviour over a prolonged period; the causing of significant harm or suffering beyond that intrinsic to the basic violation; degradation or humiliation of the victim beyond that intrinsic to the basic violation; exploitation of a known vulnerability; a gross breach of trust, recording the crime and/or dissemination of a recording of the crime, to name but some possibilities), it will merit a headline sentence starting in the mid-range, or possibly above particularly where there are multiple such aggravating circumstances and depending on the egregiousness of them.

60. We will examine how gravity was assessed in this case later in this judgment. However, before proceeding to do so, we find it convenient at this point to consider what was the relevance of the age and age disparity factors, given that the appellant has specifically pleaded that the appellant's age was treated as an aggravating circumstance to which, it is also said, too much weight was attached. We also feel it appropriate at this point, and before considering how gravity was in fact assessed in this case, to say something about the recording of an offence as a potential aggravating factor.

The age and age disparity factors

61. Although ground (a) is framed as a complaint that *"the sentencing judge attached disproportionate weight to the age of the appellant in considering his age as an aggravating feature of the case"*, it is not all clear that the sentencing judge did in fact consider age of the appellant to be an aggravating factor. He certainly never labelled or characterised it as such.

On the contrary, he expressly said he would treat the fact that the appellant was still in his minority at the time of the offences as a mitigating factor, and indeed as the *"biggest factor"* in that regard.

62. Neither did the sentencing judge label or characterise either the true age disparity of four years between the appellant and the victim, or indeed the age disparity between them as subjectively understood by the appellant i.e., two and a half years, as being an aggravating factor.

63. However, notwithstanding how ground (a) is framed, the gravamen of the appellant's true complaints, as we have come to understand them, concerns how the sentencing judge took account of the appellant's age in assessing the gravity of his offending conduct. It has been argued that the sentencing judge attached insufficient weight to the fact that the appellant subjectively believed the victim to be 14, rather than 12 and a half; that having regard to the appellant's age the judge expected too much of the appellant in terms of maturity, and in terms of the level of appreciation expected of the appellant, who was 16 and a half years of age, concerning the inappropriateness and indeed criminality of his conduct; and further that the judge failed to adequately take account of the fact that both appellant and victim were minors at the time.

64. A significant age disparity is a matter which can represent an aggravating circumstance, not because of the disparity *per se* but because it may be indicative of dominion by the older party over the younger party or abuse of a power relationship; or of the exploitation by the older party of a vulnerability in the case of the younger party; or in some circumstances represent a breach of a relationship of trust or of a duty owed to protect the younger party. There is no evidence to suggest that the trial judge considered that the appellant's culpability was significantly aggravated by any of those mechanisms in the circumstances of this case, and we do not understand the appellant to be pressing a case that

he did. We say this notwithstanding a submission made by counsel for the respondent at the hearing of this appeal that in mathematical terms, the appellant was 33% older than the victim was; at a time in a child's life, it was submitted, when every calendar year of age difference can and almost always does have significant impact in terms of development and maturity.

65. It seems to us that the true basis upon which the appellant feels aggrieved, although it has not been articulated precisely in these terms, is a belief on his side that the sentencing judge, in assessing the gravity of the offences, not so much treated his conduct as having been aggravated by his age and the age disparity between him and his victim; but rather failed to treat his culpability as being somewhat reduced in circumstances where the appellant was 16 and a half, and his subjective belief, induced by the victim, was she was 14.

66. We think that this issue is bound up with the issue of consent. While consent provides no defence to a person charged with a defilement offence under s. 2 (1) of the Act of 2006, actual consent on the part of a protected person can be still be relied on as a mitigating factor in sentencing on the basis that it may go to culpability.

67. As Mr Thomas O'Malley points out in his work on *Sexual Offences*, 2nd edn, (at para 23-85), *"it may carry significant weight when both parties are in the same age group".* Mr O'Malley contends that such a principle may be inferred from the decision in *The People (Attorney General) v Kearns* [1949] I.R. 385. He goes on to say:

> *"Courts in other jurisdictions have accepted that the complainant's age is an important factor in deciding how much, if any, credit should be given for actual consent. Where both parties are teenagers of similar age and equally consenting, a sentence at or towards the lower end of the range will be appropriate, and all the more so in circumstances where the female party enjoys a statutory immunity towards prosecution. Absent exceptional circumstances, a custodial sentence would be very*

difficult to justify in such a case. A stricter view might be taken where there was a significant age gap, such as where the female was 13 and the male 17 years."

68. We think that the appellant's complaint might have had substance if the evidence, in addition to suggesting that the appellant may have subjectively believed that the victim was 14 based on her misrepresentation of her age, had also suggested that both parties had been equally consenting in what occurred. The difficulty in this case, however, is that the evidence does not suggest that both parties had been equally consenting. There was certainly evidence that the victim may have been infatuated by the appellant and did as she was instructed, but it is also clear that the appellant was in a dominant position vis a vis the victim, that they were not in an equal power relationship, and that aspects of what occurred, particularly on the second occasion were coercive. We do not feel that in those circumstances the fact that the appellant may have believed the victim to be 14, rather than 12 and a half, mitigates his culpability. This was not a case of two teenagers close in age sexually experimenting on a genuinely consensual basis, such as might mitigate culpability. The transaction, even if partially consented to by the victim, was culpably abusive in the circumstances in which it occurred.

The recording of a sexual offence

69. The ubiquity of mobile phone phones and tablets with cameras and video recording facilities has led to a growing trend in which sexual offenders seek to record their crimes and to create and/or distribute images/video of their offending behaviour. It is a phenomenon that is being encountered in many countries including our own. Amongst previous cases which have come before this court, or its predecessor the Court of Criminal Appeal, featuring the photography or filming of rape and sexual assault/defilement type offences, are *The People (Director of Public Prosecutions) v. Finn* [2009] IECCA 96, a rape case where the appellant had photographed his victim's naked breasts and genitals; *The People (Director of Public*

Prosecutions) v. Nagle (Court of Criminal Appeal, ex tempore, March 30, 2009, reported in The Irish Times, 31 March, 2009; and cited in O'Malley on Sexual Offences, 2nd edn, at para 23-98), which was a case in which the offender videotaped himself having sex with a fifteen-year-old female whom he had plied with alcopops and drugs; *The People (Director of Public Prosecutions) v. P.K.* [2020] IECA 94 where a sleeping woman was anally penetrated by the perpetrator who simultaneously video recorded the act on his phone; and *The People (Director of Public Prosecutions) v. D.M.* [2019] IECA 147 where an adult abuser was in Skype contact with the child he was grooming and exposed his penis on camera, masturbating himself and inviting and inducing the child to also masturbate herself on camera which she did.

70. This phenomenon is the subject of a full chapter in Dr Graham Brown's recent work on *Sentencing Rape: A Comparative Analysis* (2020: Hart Publishing) which considers rape sentencing principles as developed in various common law jurisdictions including England and Wales, Scotland, Ireland, New Zealand and South Africa. The author points out that the Court of Appeal (Criminal Division) in England first addressed this issue in the case of *Attorney General's Reference (Nos 3, 73 and 75 of 2010)* [2011] 2 Cr App R (S) 100, where the then Lord Chief Justice, Lord Judge, said this (at para [7](2) of the judgment of the court):

> *"A pernicious new habit has developed by which criminals take photographs of their victims -- often just to show off to their friends; often just to add something to the humiliation which the victim is already suffering; and sometimes, as in two of these cases, either as a form of pressure to discourage any complaint (in that sense a form of blackmail), but also possibly for the purposes of blackmail, as is revealed in one of these three cases. Anyone can understand what a powerful lever may be given to the criminal by his possession of photographs taken of the victim when, as in these cases, she has been subjected to degrading treatment. … We make it clear that from now*

onwards the taking of photographs should always be treated as an aggravating feature of any case and in particular of any sexual cases. Photography in these circumstances usually constitutes a very serious aggravating feature of the case."

71. At that time, although the then Sentencing Guidelines Council for England and Wales had promulgated, four years previously, a Definitive Guideline covering issues pertinent to sentencing for sexual offences, the guidance offered did not address the photography or filming by a perpetrator of the act of rape or sexual assault or defilement, or of the perpetrator's incitement or encouragement of an associate to do so. However, an amended Definitive Guideline on Sexual offences issued by the present Sentencing Council for England and Wales (which replaced the previous Sentencing Guidelines Council) now addresses this lacuna.

72. In this country we have a somewhat similar lacuna. Although the recently established Judicial Council (the Council) will eventually be in a position to issue guidelines on sentencing for rape and sexual assault/defilement type offences if it chooses to do so, the Council, and the Sentencing Guidelines and Information Committee established under the Judicial Council Act tasked (*inter alia*) with preparing draft guidelines for consideration by the Council, have in both cases only recently been established and so there are as yet no Council guidelines in any area of sentencing. However, notwithstanding that, and pending any such possible guidelines, the Supreme Court has published their very helpful formal guideline judgment on sentencing for rape and serious sexual assault type offences to which we have already alluded, in the case of *The People (Director of Public Prosecutions) v. F.E.* [2019] IESC 85. While the appellate guidance offered in *F.E.* is quite wide in its scope, and of very valuable assistance on that account, it also does not address the phenomenon of photography or filming by a perpetrator of the act of rape or sexual assault/defilement, or of the perpetrator's incitement or encouragement of an associate to do so.

73. In saying this it could hardly be suggested that where photography or filming of the act of rape or sexual assault/defilement is a feature of a case that it could be anything other than an aggravating circumstance. Indeed, in each of the cases from our own jurisdiction that we have mentioned it is acknowledged as being an aggravating circumstance. However, we think it important to elaborate somewhat on how and why it is aggravating, because as we have mentioned there are degrees of aggravation and part of the function of a sentencing judge is to weigh the extent to which the intrinsic gravity of the offence charged is aggravated by the existence of such a circumstance.

74. We would suggest that a perpetrator photographing or filming an act of rape or sexual abuse/defilement is always a very serious aggravating factor and must be treated as such. There are two reasons for this. First, it is indicative of significantly increased culpability on the part of the offender. Secondly it adds to the harm done to the victim by the core offending conduct.

75. With respect to the factor of increased culpability, a peer reviewed paper based on research conducted in Norway in 2017 by the criminologists Sandberg and Ugelvik ("Why do offenders tape their crimes? Crime and Punishment in the age of the Selfie", 57 *British Journal of Criminology* (5) 1023-40), and cited in Dr Brown's book, identifies three socio-cultural trends, which are not mutually exclusive and often operate simultaneously, to explain why images are recorded as part of the commission of crime: firstly, to produce what they term as "amateur pornography" (although this label is controversial and has been objected to by other commentators on the basis that the language of "porn" risks eroticising the harms of image-based sexual abuse and may encourage salacious interest in and reporting of such cases); secondly, to further hurt and humiliate the victim, and thirdly, as an impulse to document extraordinary events. The research in question is based on an examination of 51

decisions of the Norwegian higher courts in which the offender had either taken a picture or recorded footage of the offences, as they were happening.

76. However, we would suggest that quite apart from those evidence-based findings which speak to possible motivations, such behaviour self-evidently involves deliberately and consciously subjecting the victim to a further layer or level of violation and is more culpable on that account alone regardless of the motivation. However, if there is clear evidence of an expressed motivation, or concerning the basis on which a motivation can be inferred, this may add to already aggravated culpability based on the mere fact of having gratuitously subjected the victim to a further layer or level of violation.

77. Clearly a circumstance such as the active staging of abuse for the camera, rather than the passive spontaneous recording of an event, is even more culpable. We find examples of that in the case of *The People (Director of Public Prosecutions) v. P.K.* dealt with by this court and previously referred to, and indeed in the English case of *R v S* [2015] EWCA Crim 2527 where an intoxicated sleeping victim was filmed by the perpetrator as he raped her and subjected her to other sexual indignities, including penetrating her vaginally and anally with various objects and foodstuffs. A further example is provided by the Scottish case of *Ronald (Marc) v Her Majesty's Advocate* (unreported, High Court of Justiciary, 31 May 2018), where again the victim, who was unconscious through intoxication, was raped, sexually assaulted and urinated upon by the perpetrator who maintained a running commentary for the camera.

78. The use, if any, to which any recording, whether it involves still images or video, is put is also very relevant to culpability. Retention of the images by the perpetrator for his sole sexual self-gratification although very reprehensible, may be somewhat less aggravating than sharing the images with others or publishing them. The dissemination of photographs or videos of a sexual offence is, we suggest, a further form of sexual violation in and of itself.

Use of images for the intimidation or blackmailing or yet further humiliation of the victim is to be particularly deprecated and involves a high level of additional culpability.

79. There is no doubt that whenever a victim's rape or sexual assault or abuse has been recorded in some form they are severely degraded by the process to a degree over and above the degradation and violation inherent in the basic crime. In assessing the degree of additional harm caused by the further violation involved in the recording of the crime, a court needs to be conscious of, and sensitive to, typical sequalae, some or all of which may be reflected in the victim's impact statement or evidence. Synthesising extensive research findings in this area, Dr Brown in his excellent monograph, states (at p.46):

> *"Victims may also experience shame and humiliation; altered relationships with others; reputational damage; loss of employment prospects; victim blaming; withdrawal from social life; anxiety, paranoia, depression and low self-esteem [references provided]. While many of these sequelae are also evident in more conventional forms of sexual violence and abuse, it is important to recognize the unique harms that occur when technologies such as mobile phones and the Internet are used in the commission of sexual offences.*
>
> *Victims of rape and sexual assault whose ordeals are filmed or photographed by their attackers have no control over the future dissemination of the footage or images. As the Internet readily enables re-posting, it may be impossible to retract an image once it is been distributed."*

80. A similar point to the observation concerning future dissemination and reposting in the passage just quoted, was made by the Appeal Court of the High Court of Justiciary in Scotland in the case of *Her Majesty's Advocate v C.H.* [2017] HCJAC 82; 2017 SCCR 587, referencing, *inter alia*, the seminal Irish work on *Sentencing Law and Practice,* 3rd edn, by

Mr Thomas O'Malley, and also some of the material we have cited earlier in this judgment. Lord Brodie, giving the judgment of the Appeal Court, stated:

> *"Such is the prevalence of use of mobile phones and such is the ease of making, retaining and transmitting (or 'sharing') still and moving images using their associated technology that it has become increasingly common for perpetrators of sexual offences or their associates to record the commission of an offence, or to take photographs of the victim, on a mobile phone (see eg T O'Malley, Sentencing Law and Practice (3rd edn.), paragraph 7-12); also S Sandberg and T Ugelvik, 'Why Do Offenders Tape Their Crimes? Crime and Punishment in the Age of the Selfie', 2017 British Journal of Criminology, Vol. 57, pp. 1023 – 1040). While so doing may have the result that perpetrators thereby document their offending and generate evidence which may incriminate them, as in the present case, the practice has what the Court of Appeal (Criminal Division) described in Attorney General's Reference (Nos. 3, 73 and 75 of 2010), [2011] 2 Cr App R (S) 100 as 'pernicious' effects. O'Malley notes that a victim's suffering is intensified by the knowledge that such a recording or image exists and that little can be done to control the use to which it may later be put or the extent to which it may be circulated and, as the Chief Justice (Judge) observed in Attorney General's Reference (Nos. 3, 73 and 75 of 2010), retaining an image is:*
>
> > *'a form of pressure to discourage any complaint … but also possibly for the purposes of blackmail … Anyone can understand what a powerful lever may be given to the criminal by his possession of photographs taken of the victim when, as in these cases, she has been subjected to degrading treatment.'* "

81. Finally, to conclude these observations, which we hope may be of assistance to first instance sentencing judges faced with such circumstances in the future, it is noteworthy that the current Sexual Offences Definitive Guideline promulgated by the Sentencing Council in

England and Wales now treats the recording of a sexual offence as not merely one of a list of possible aggravating factors that a judge may have to take into account in assessing gravity but as a factor that is inextricably linked to the seriousness of the offence itself.

82. To explain this more clearly, the Definitive Guideline creates a grid in which appropriate starting points and sentencing ranges are identified by reference to a ranking of overall seriousness based on a consideration of the harm done by, and the intrinsic culpability of, the offending conduct. Certain factors, known as "Category A" factors, if present, are regarded as so aggravating that they go to the intrinsic culpability of the underlying offence to such an extent as to influence how that underlying offence is to be ranked in terms of its overall seriousness and will result in a higher indicative starting point and higher indicative sentencing range. Whatever indicative starting point figure is yielded by this ranking process may then be adjusted up or down (within the range indicated as being appropriate to how the underlying offence is ranked) to take account of other factors identified by the guideline as potentially having aggravating or mitigating effect, but which are not on the "Category A" list. The approach taken in the Definitive Guideline to the technology assisted recording of an underlying sexual offence is that it is a "Category A" factor raising the intrinsic culpability of the underlying offence and causing it to be attributed a higher ranking on the grid in terms of its overall seriousness.

The assessment of gravity in this case

– was a headline sentence of eight years merited?

83. We have no hesitation in expressing the view that the circumstances of this case merited the nominated headline offence of eight years (allowing for the fact that the sentencing judge elected not to take account, in the first stage of the sentencing process, of the fact that the appellant was a minor at the time of the offence, and instead gave him the

appropriate credit for that mitigating factor, notwithstanding that it bore on culpability, in the second stage of the process).

84. This, as we have already stated, was an offence where the appellant was in a dominant position vis a vis the victim, and where they were not in an equal power relationship – the victim was two and a half years younger than the appellant according to his belief, and four years younger than him in actual fact and was clearly infatuated with him. At least some level of coercion was employed, albeit that the victim did what she was instructed to do. The evidence was that she told gardai that on the first occasion she was effectively dragged and pushed over to a location some distance away from others in their group. She was made by the appellant to kneel, and the appellant manipulated her head after she had taken his penis in her mouth.

85. At the hearing of the appeal, counsel for the appellant referred, with considerable understatement, to the recording of the first incident by the appellant on his mobile phone as being *"an unpleasant aspect of the factual matrix"*. It will be recalled that the evidence was that this video was later sent to a third party. We are satisfied that the recording and dissemination of this material, which although it was not charged as such would have constituted the production and publication of child pornography, was a seriously aggravating feature of the offence, not least because of how it added to the victim's humiliation and distress. The fact that the appellant continued to violate the victim after others in the group had caught up with them, and in full view of them, thereby allowing those others to also photograph what was occurring, rendered the appellant's violation all the greater.

86. The second incident, albeit that it occurred during a meeting up requested by the victim, also involved coercion. The evidence was that the victim was pushed to the ground so that the appellant might put his penis in her mouth. When the oral sex act with the appellant was over she was then forced by the appellant, under explicit threat of dissemination of the

photographs taken on the previous occasion, to have oral sex with the co-accused. It is accepted that the appellant was neither charged with, nor was he being sentenced for, inciting or procuring the defilement of the victim by another. However, the circumstances in which the victim was defiled by the appellant, and then immediately afterwards blackmailed to perform oral sex on the co-accused, represented in effect a continuum and speaks to the coercive disposition of the appellant on the occasion.

87. We are satisfied that the combination of coercion employed on both occasions; the recording of the offence on the first occasion by the appellant himself and by others with the tacit encouragement of the appellant; and the later threat, uttered during the second occasion for blackmailing purposes, that photographs taken on the first occasion would be shown to members of the victim's boxing club unless she did as she was instructed, meant that the headline sentence in this case (using the method of assessment deployed by the sentencing judge) fell to be located in the indicative mid-range that we have suggested rather than in the low range; and indeed in the upper half of mid-range because there were multiple serious aggravating factors. While in his sentencing remarks the sentencing judge did not specifically reference the level of coercion involved and the recording/dissemination of video of the offending as being the major factors precipitating his nomination of a headline sentence of eight years, we are satisfied that he was particularly influenced by those factors. He did refer specifically to the incident as having gone *"way beyond what the Court would regard as a consensual contact which got messy or got wrong"*. Even more tellingly, having described the feature involving the recording of the first incident, and the use made of that video during the second incident, he characterised what had been done to the victim as having been *"cruel offences in their particular context"*; referencing *"the actual cruelty"* of the incident, that the victim's sexual activity with the appellant *"was cruelly exposed, possibly to the world"*, and the fact that there *"was just a degree of cruelty surrounding the offences"*. We are therefore

in no doubt that the sentencing judge did have a proper appreciation of the true culpability of the appellant's offending conduct and of the harm done by him. The nominated headline sentence of eight years imprisonment, which we are satisfied took account of all aggravating factors, falls just a bit above the mid-point in our suggested effective mid-range. We are satisfied that to have located the headline sentence there was comfortably within the sentencing judge's range of discretion.

88. There is no evidence that undue weight was given to the appellant's age. It was reasonable to expect a modicum of maturity from the appellant at 16 and a half years of age, and to expect him to know that it was wrong and a criminal offence to engage in sexual activity with a girl under 15 years of age. We are satisfied that in suggesting that, the sentencing judge was not treating the appellant's age as an aggravating factor. He was rightly of the view, however, that the fact that the appellant may have believed that the victim was 14, rather than 12 and a half, ought not to be regarded as providing mitigation in the circumstances of this case.

89. We once again re-iterate that while the sentencing judge would have been entitled to regard the fact that the appellant was a minor at the time of the offences as in fact mitigating his culpability (and indeed that was the judge's view), and on that account to have factored it in as part of the assessment of gravity, he was not obliged to do so. While it would have been preferable if he had done so for the reason we alluded to at paragraph 53 of this judgment, the failure to do so was not an error such as to justify *per se* a quashing of the sentences and a re-sentencing. He could also opt (as he in fact did) to give an appropriate discount for the fact that the appellant was a minor at the time of the offending when considering mitigation generally in the second stage of the sentencing process. Whichever approach was adopted was going to result in the same ultimate sentence.

90. In the circumstances we find no error of principle in the assessment of gravity and reject ground of appeal (a).

Was appropriate weight attached to the mitigating factors?

91. The main mitigating circumstances were the plea of guilty which, in the circumstances of a re-casting of the indictment, was properly to be treated as early; the absence of previous convictions (the sentencing judge having decided in the exercise of his discretion not to take account of convictions recorded post the offence but before the sentencing); the fact that the appellant was a minor at the time of the offences; and the appellant's family circumstances. Each of these factors was expressly referenced by the sentencing judge.

92. There was also an expression of remorse. Again, the sentencing judge expressly referenced that, although it is evident he found it difficult to reconcile the remorse expressed with the attitude exhibited by the appellant in his dealings with his Probation Officer. The sentencing judge commented in that regard that the appellant:

> *"... effectively has minimised the offences, feels that he did nothing wrong, is concerned that he's effectively being criminalised for something that was consensual*."

In the circumstances we believe that the appellant was only entitled to have very modest weight attributed to his expression of remorse.

93. The cumulative discount allowed by the sentencing judge against the headline sentence amounted to 50%. We consider that this was an appropriate level of discount. While every plea of guilty is valuable, and particularly in a sexual case, this was nevertheless a plea offered against very strong evidence. After all, the appellant had video-recorded himself committing the crime on the first occasion and the prosecution had intended to rely on that video. Accordingly, while he was entitled to some credit for his plea, particularly because it

spared the victim from having to testify at a trial, he was not entitled to the highest level of credit for it.

94. He was certainly entitled to claim significant mitigation for the fact that he was a minor at the time of the offences, and in that regard the sentencing judge singled this out as being *"the biggest factor the court takes into consideration"*. Related to this was the sentencing judge's decision to treat him as having no previous convictions, so that he was in effect treated as a first-time offender.

95. Modest weight could also be attributed to adversities in his personal background and family circumstances.

96. Although the figure of 50% allowed as a discount to reflect mitigation is the result of an instinctive synthesis of the mitigating factors just discussed, and individual weightings have not been attributed to individual mitigating factors (there being no requirement on a judge in this jurisdiction to provide them), we are satisfied to say, based on the court's collective experience, and having regard to the evidence, that we have no reason to believe that insufficient weight was attributed to the mitigating circumstances in the case as alleged by the appellant, whether individually or cumulatively. We consider that a 50% discount for this combination of mitigating factors arising in the circumstances of this appellant's case, and to be set against the headline sentences nominated for the offences charged as committed by this appellant, was an entirely appropriate and proportionate level of discount.

97. In the circumstances we also reject ground of appeal (b).

Conclusion

98. The appeal must be dismissed.