AN CHÚIRT UACHTARACH
THE SUPREME COURT

Clarke CJ
McKechnie J
Charleton J
O'Malley J
Irvine J

Supreme Court appeal number: S:AP:IE:2018:000067

[2020] IESC

Court of Appeal record number 2016/219

[2018] IECA 53

Central Criminal Court bill number: CCC 2015 no 0009

BETWEEN

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

PROSECUTOR/APPELLANT

- AND -

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(RAPE AND ASSAULT, DUBLIN)

ACCUSED/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Wednesday, 26th of February 2020

1. On December 6th 2019, this Court laid down sentencing guidance as to the proper approach by judges where the accused pleaded guilty to, or was found guilty by a jury of, rape. This judgment concerns the appropriate sentence for sexual violence relative to the guidance given by the Court in that judgment; [2019] IESC 85. Additionally, the accused has also challenged this Court's jurisdiction to review a sentence reduced, on an incorrect legal principle, as the Court has found, by the Court of Appeal in February 2018; [2018] IECA 53. To recap: the accused was the victim's husband. Apparently, it is contended, after a marriage lasting some nine years, the accused lost his job and became depressed. The extent of the contribution of that to his crimes was most properly considered by the trial judge in the High Court, Kennedy J, who sentenced the accused in June 2016, having heard the trial, at which the accused pleaded not guilty to the sexual violence count which is now the task of this Court to assess as to sentence. Hence, a considerable measure of deference to the trial judge's views is appropriate since adjudication with the parties testifying before the court yields a more real view of the situation than that of an appellate court assessing transcripts and documents in the context of legal submissions.

The crime appealed and its circumstances

2. It is important to briefly describe the facts of the various crimes. On 25 May 2014 a row occurred in the matrimonial kitchen. The husband produced a knife and threatened his wife that he would "cut open" her face. He ordered her upstairs and raped her. He had told her that if she rang the gardaí on her mobile phone that they would not arrive in time to save her. During the night, she pretended reconciliation. She was anxious to protect their child from the nasty scene. In the morning she went to the family law courts. He rang her and threatened to kill her the next day. For the events of the day of 25 May,

three charges were laid: one count of rape, one count of threat to cause serious harm, and one count of threat to kill. There were also counts of threats on other occasions. The accused pleaded not guilty but was convicted at trial of all of these. On 9 June, the husband accosted the wife at a shopping centre and told her that the next time she saw him she would not see him coming and that he would be armed with a hammer. This was subject to a separate charge and conviction. Over that time there was constant checking by the husband of the wife's movements through smartphone technology. On 6 August the husband turned up carrying a bag at the wife's parents' home and demanded entry. Naturally, this was refused. The next day there were two visits to the parents' home where he first spoke to the wife's mother. On the second occasion he came back with the bag. Claiming this was a present for their child, he gained entry. He produced a hammer and struck the wife several times on the head and also hit her mother on the head. While the injuries from an attack of that kind could have resulted in death or serious injury, the result was multiple injuries to the wife including three deep lacerations and both she and her mother were brought to hospital. That attack was the subject of two charges to which the accused pleaded guilty.

What was appealed and by whom

3. What should now be noted is that none of the sentences handed down by Kennedy J in the High Court were appealed by the Director of Public Prosecutions on the grounds of undue leniency under s 3 of the Criminal Justice Act 1993. It was the accused who first appealed the jury convictions, unsuccessfully [2018] IECA 314, and then, secondly, appealed his sentence for rape claiming it was so disproportionately high as to be an error in principle. As the prior judgment of this Court disclosed, this resulted in the Court of Appeal reducing the sentence on an incorrect legal basis. The sentencing judge had imposed imprisonment on the accused: of 14 years on the rape as a headline sentence, with 2 years reduction for mitigation and 2 years suspended; in the result 10 years in jail with post-release supervision for 5 years, included in that the 2 years of suspended imprisonment. This headline sentence was incorrectly reduced by the Court of Appeal to 12 years, being 12 years with a mitigation of 2 years. In the result the Court of Appeal imposed 10 years, with 18 months suspended, making 8 years and 6 months for this very serious rape. The trial judge had imposed a sentence of 5 years for the threat to kill on the occasion of the rape; of 3 years for the threat to kill, delivered by phone the day after; of 5 years for the threat to kill at the shopping centre on 9 June; of 7 years and 6 months for the attempt to cause serious harm at the wife's parents' home on 7 August; and of 3 years and 6 months for assault causing harm to the wife's mother on that same day. These sentences were all concurrent. Neither the prosecution nor the defence appealed these sentences. Hence what the Court is dealing with is the appeal by the accused on the rape sentence which was reduced on an incorrect legal basis by the Court of Appeal.

4. Since there is no appeal by the Director of Public Prosecutions to argue to increase either the rape sentence or the other sentences imposed by Kennedy J or to alter the concurrent sentences to consecutive sentences, the task of the Court is to reassess the sentence for rape by correcting any error by the Court of Appeal. That is not to rule that in an

appropriate case of an accused appealing a sentence that there cannot be a reassessment on the basis of error of principle either way. On this no comment is made.

Constitutional jurisdiction to reconsider sentence

5. This Court has found that the Court of Appeal erred in adjusting the sentence of the accused in consequence of his appeal. The vehicle whereby there have now been two appeals in this matter is in consequence of the Director of Public Prosecutions applying to this Court for leave to appeal the erroneous Court of Appeal decision. This Court granted leave to the have this further appeal on 15 February 2019 based on the contention by the Director of Public Prosecutions that a point of law of general public importance arose. This was reflected in the determination to grant leave on the rape sentence: "the Director's preferred proposal is that the sentence for the most serious offence should be set at a level reflecting the surrounding circumstances. It is said that this would be particularly appropriate in cases of marital rape, where there may well be a pattern of violence and abuse."

6. Prior to the enactment of the 33rd Amendment to the Constitution on 1 November 2013, all appeals from the High Court were directly to the Supreme Court. Article 34.1 then provided, and continues to state, that justice should be administered in courts "established by law by judges appointed" under the Constitution and listed these courts as courts of first instance and a single court of final appeal. Then, as now, courts could include, under Article 34.3, those of "local and limited jurisdiction with a right of appeal as determined by law." This now refers to the Circuit Court and the District Court which were subsequently established by legislation. Then, as now, courts of first instance under the Constitution included "a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." The Circuit Court and the District Court were not mentioned by name and are not now. Instead, the text prior to the 33rd Amendment stated that there should be a final court of appeal; which was then the Supreme Court. Hence Article 34.2 stated originally: "The Courts shall comprise Courts of First Instance and a Court of Final Appeal." Article 34.4 originally stated that the "Court of Final Appeal shall be called the Supreme Court." Article 34.4, post 33rd Amendment, now provides for a Court of Appeal. This Court of Appeal is now described as having "appellate jurisdiction from all decisions of the High Court and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law". But this is subject to that jurisdiction being "with such exceptions and subject to such regulations as may be prescribed by law." This means that there are High Court decisions that may not be appealed or may only be appealed subject to leave of the High Court or the Court of Appeal and the timing and manner of appeal is a matter of regulation. Decisions of the High Court on the constitutional validity of a law cannot be restricted from appeal to the Court of Appeal under Article 34.4.2°. The Court of Appeal, by law, may also hear appeals from the Circuit Court, most notably from criminal jury trials at first instance in that court. This was always the function of the Court of Criminal Appeal which heard appeals from the Central Criminal Court, the High Court under another name, and from the Circuit Criminal Court. These functions have now been taken over by the Court of Appeal.

7. The post 33rd Amendment now provides for an appeal to the Supreme Court from the Court of Appeal under Article 34.4.3°; but this is in exceptional circumstances as decisions of the Court of Appeal are expressed to be "final and conclusive, save as otherwise provided by this Article." This "final and conclusive" formula was the wording formerly, pre the 33rd Amendment, used in relation to the Supreme Court save that this was not subject to any other appeal. Instead Article 34.4.5° then stated bluntly: "The decision of the Supreme Court shall in all cases be final and conclusive." Article 35 now makes the final court of appeal the Supreme Court and now provides at Article 34.5.6°: "The decision of the Supreme Court shall in all cases be final and conclusive." The decision of the Court of Appeal, under Article 34.4.3° is also expressed to be "final and conclusive" but this is subject to being "otherwise provided for by this Article."

8. The Supreme Court's jurisdiction to hear appeals is twofold. Firstly, under Article 34.5.3° the Supreme Court has an appellate jurisdiction from decisions of the Court of Appeal, "subject to such regulations as may be prescribed by law", "if the Supreme Court is satisfied that – i) the decision involves a matter of general public importance, or ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court." Secondly, on the same two conditions, of a matter of general public importance or the interests of justice, the Supreme Court may take an appeal directly from the High Court, "subject to such regulations as may be prescribed by law" where "the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal". What is gone is the prior provision in Article 34.4.3°: "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law." That jurisdiction in relation to appellate jurisdiction directly from the High Court unconditionally, only subject to restriction and regulation, and from decisions of other courts than the High Court is now given to the Court of Appeal in Article 34.1. That Article provides for exactly that jurisdiction and also provides for taking it from the Supreme Court in these words: "The Court of Appeal shall … have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

9. Thus, on the face of the Constitution, the Supreme Court does not have a jurisdiction to hear appeals from other courts than from the Court of Appeal and, exceptionally, the High Court; and only then in accordance with the qualifying tests of general public importance or interests of justice. The jurisdiction to hear appeals from the High Court, subject to limitations, and from other courts, such as criminal cases on indictment in the Circuit Court or Special Criminal Court, is vested now in the Court of Appeal subject only to appeal to the Supreme Court on the two grounds of general importance and interests of justice.

10. As against that apparently clear wording, the accused argues that the basic proposition is that there should be only one appeal whereby the sentence of the accused may be changed, to the prejudice of the accused. That appeal is said to be limited to that granted to the accused to the Court of Appeal and since this inured to his benefit, by a reduction in his sentence, there should be no other appeal since, it is argued, the Supreme Court is not entitled to step into the role of another appellate court. What is not argued is the converse of that case: were the accused to appeal his sentence, as he did here, and for it to be left in place as what he might argue as a disproportionately excessive sentence that was wrong in principle, the contention advanced would be for the wrong Court of Appeal decision to be left in place with no right by him to appeal and seek a just sentence before the Supreme Court. This one-sided argument by the accused, that he can only have his sentence reduced or altered at all by one appeal, is strengthened, it is contended, by the existence of s 29 of the Courts of Justice Act 1924. As analysed in the separate judgment of O'Malley J, with which the analysis in this judgment agrees, this is a method whereby the Attorney General or the Court of Criminal Appeal was able to certify a point of law of "exceptional public importance" which it was desirable in the public interest be taken to a further appeal from the Court of Criminal Appeal to the Supreme Court. This is claimed by the accused to be the only route by which any appeal can be taken from the Court of Criminal Appeal, now the Court of Appeal under the Court of Appeal Act 2014, to the Supreme Court. That cannot be so.

11. In *The State (Browne) v Feran* [1967] IR 147, at issue was the former Article 34 providing for an appeal to the Supreme Court, unless excepted, from all decisions of the High Court. That case involved an order declaring, under Article 40.4, that the applicant was in lawful custody, commonly called a habeas corpus application. Unlike in other cases, civil generally since criminal appeals were to the Court of Criminal Appeal, the Oireachtas had made no provision for the appeal of an order under Article 40.4 to the Supreme Court. Walsh J commenting on the argument that this restricted the words of the Constitution giving general appellate jurisdiction to the Supreme Court, declared at p 159-160:

> Both the Constitution of Saorstát Éireann and the Constitution represented new statements of fundamental principles and of fundamental law. Both provided that the laws in force immediately prior to the date of the coming into operation of the respective Constitutions should continue to be in force "subject to this Constitution and to the extent to which they are not inconsistent therewith." If a "right" may be taken away by legislation, a fortiori it may be taken away by a constitutional provision. If the law in force prior to the coming into force of the Constitution provided that there were some matters in which no appeal lay and the Constitution states (as it does) that an appeal lies in all matters save where excepted, then since the establishment of this Court there is, on the face of it, a clear inconsistency and the constitutional provision must prevail; particularly in the case of appeals from decisions of the High Court to the Supreme Court when, as has been acknowledged in the cases already referred to, this right of appeal derives from the Constitution itself. If it depended on statute only there might be a case for applying

the canons of construction which were applied in *Cox v Hakes* [1890] 15 AC 506, but that is not the position and one must have regard to the express provision of the Constitution which provides that laws inconsistent with the Constitution are not carried over.

12. In that instance, the Supreme Court was concerned with a statute from 1961 dealing with court procedure and jurisdiction argued to limit the Court's appellate jurisdiction. That situation is again argued by the accused to prevail here. Section 29 of the 1924 Act is therefore asserted by the accused to be the only allowable form of appeal whereby there could be an appeal which theoretically could have worsened his position; that is increased his sentence it having incorrectly been reduced by the Court of Criminal Appeal. This provision, however, does not exclude the jurisdiction of the Supreme Court and nor could it limit the jurisdiction conferred by the Constitution. In addition, there is s 34(1) of the Criminal Procedure Act 1967, as substituted (1.08.2006) by s 21 of the Criminal Justice Act 2006 21, S.I. No. 390 of 2006 and as substituted (28.10.2014) by ss 47 of the Court of Appeal Act 2014, see SI No 479 of 2014 and inserted (28.10.2014) by s 47 of the Court of Appeal Act 2014 which provides that "on a question of law" where a verdict at a trial court, Circuit Criminal Court or Central Criminal Court, is entered "in favour of an accused person" the Attorney General, now the Director of Public Prosecutions, "may, without prejudice to the verdict in favour of the accused, refer the question of law to the Supreme Court for determination." Here, as there has not been argument on the matter, no comment is made on the consistency of this scheme with the 33rd Amendment. The existence of one method of appeal, however, on a point of law of exceptional public importance, or of another, on a without prejudice appeal against a verdict in favour of an accused at trial, whereby cases might have reached the Supreme Court prior to the 33rd Amendment does not mean that any principle limiting appeals has diminished the ample wording in Article 34 after that 33rd Amendment. Nor did any such argument hold before the 33rd Amendment.

13. In *The People (DPP) v O'Shea* [1982] IR 384 a direction was entered by the trial judge whereby the jury acquitted the accused, who was allegedly seen assisting the loading of packages into a lorry. The parcels turned out to be controlled drugs. The prosecution appealed this acquittal by direction in the High Court to the Supreme Court, a step then taken for the first time under the pre-33rd Amendment jurisdiction. Only ss 12 and 48 of the Courts (Supplemental Provisions) Act 1961 vested the Court of Criminal Appeal, now the Court of Appeal, with jurisdiction to determine an appeal from the Circuit Criminal Court and the Central Criminal Court, a division of the High Court, and there contemplated were only appeals by a convicted accused: not by the prosecution protesting an acquittal. By a majority, the Supreme Court held that a direction by the trial judge to a jury to acquit the accused constituted a decision of the High Court for the purposes of the then Article 34.4.3° of the Constitution. Any pre-existing rule of common law preventing an appeal was inconsistent with the jurisdiction that was mandated by the State's fundamental law. O'Higgins CJ at page 397-8 approached the text of the Constitution as being in itself a law, but one requiring literal interpretation within the context only of the other provisions of the Constitution itself:

> The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself. The Constitution brought into existence a new State, subject to its own particular and unique basic law, but absorbing into its jurisprudence such laws as were then in force to the extent to which these conformed with that basic law. It follows that existing laws, or formerly accepted legal principles or practices, cannot be invoked to alter, restrict or qualify the plain words used in the Constitution unless the authority for so doing derives from the Constitution itself. Indeed, the very existence of an inconsistency between what was formerly the law and what the words of the Constitution declare, according to their literal meaning, repeals and abrogates what had been the law.

14. It thus follows that any pre-33rd Amendment law now inconsistent with the text thereby introduced has been subject to constitutional repeal, and that in a way superior to that which the canons of construction for statutes applies. When the law is changed by the people in a constitutional amendment, the prior statutory or common law survives only to the extent that it is consistent with the people's will. The post-33rd Amendment text is not capable of being read as applicable to the Supreme Court as if it changed nothing. Nor can the law be construed as of when the Supreme Court was the only court from which appeals from the High Court could be taken. While much has been made by the accused of the maxim *expressio unius est exclusio alterius*, that the specific mention of one principle or matter is the exclusion of another, this is a canon in statutory construction that when one or more things of a class are expressly mentioned others of the same class are excluded. The ambit of that maxim, however, even if applicable to the Constitution, is itself dependent on textual analysis. What is forgotten in this argument by the accused is that the Constitution is not a statute.

15. Furthermore, the passage of legislation by the Oireachtas before the 33rd Amendment cannot affect the text of any new wording agreed by referendum by the people. After all, the point of a plebiscite under Article 46 may be, and frequently is, to do away with an existing legal order or to introduce a differing approach to legal or social issues. Even were it to be that statutory construction tenets apply to the Constitution, and it is not, the hierarchy of legal order is central. Legislation can be swept away by legislation and legislation may also sweep away secondary legislation, such as statutory instruments or by-laws, as can secondary legislation be repealed on the same level, but the Constitution is the grounding text expressing the will of the Irish people. The Constitution both demands legislative conformity and erases legislative inconsistency. Certainly, at a particular point in time, the Oireachtas provided for appeals to the Court of Criminal Appeal and for a very limited appeal to the Supreme Court on a certification of an important issue, and further provided for a without prejudice appeal to this Court from

acquittals by a trial judge of the accused but did so within a context that is entirely legislative and which operated in accordance with the state of the fundamental law as of that time.

16. That consideration is not changed by the series of decisions arising out of the murder and attack on the two elderly Willis brothers in their isolated rural farmstead in County Cork in November 1984; a crime that led to Muintir na Tuithe founding Neighbourhood Watch. In that case, the High Court directed an acquittal on the murder charge against two accused men on the basis that the arrest powers under s 30 of the Offences Against the State Act 1939 could only operate against suspected terrorists, and not against other suspected criminals. Hence, under the then interpretation of the law as to the admissibility of evidence, the very detailed confession statements made by the accused men, which were taken while they were in unlawful custody, were hence automatically excluded. The prosecution appealed this acquittal by direction, using the authority of the *O'Shea* case, and succeeded in reversing the murder acquittal by direction of the trial judge; [1986] IR 495.

17. At issue in *The People (DPP) v Quilligan (No 2)* [1989] IR 46 was whether a retrial should be ordered. The murder acquittal had been demonstrated to have been on a basis unknown to law and the prosecution asked the Supreme Court to order a retrial on the only charge then before the jury, that of murder. On this application, Hederman J stated "I still reserve my position on these important matters of substance and procedure" but said "I am of the view that such an order should not be made." Henchy and Griffin JJ were also of that view but, in contrast, expressed reasons. Essentially, Henchy J considered that it was not automatic that the reversal of an acquittal by direction, as happened in *O'Shea*, on appeal carried with it an automatic entitlement by the Supreme Court to order a retrial. The other judges, Walsh and McCarthy JJ, were of the view that inherent in an appeal was the entitlement of an appellate court to order a reconsideration of the evidence or of legal principles leading to what had been declared to be an erroneous ruling. This, according to McCarthy J, was "an essential part of the jurisdiction of this Court to hear and determine an appeal from a verdict of acquittal obtained by direction of the trial judge", where it was "proper to do so"; at page 60. Walsh J was of the view that there was a valid return for trial and the ruling on that had been set aside. Hence, the men could be tried and an error by the High Court could not stand in the way. In addition, he reasoned that a statutory provision, namely s 34 of the 1967 Act, enabled a without prejudice appeal but as an exception while the nature of the appeal enabled by the Constitution could only have force were the Supreme Court enabled to exercise its ordinary jurisdiction to then make consequential orders. The fact that there were two avenues of appeal, one under the Constitution and one by statute, did not result in inequality but pre-determined any potential result by legislation while not trammelling the clear words of the constitutional jurisdiction and what it implied. In a case where a trial was not "in accordance with law", there had been no validly recorded acquittal or conviction and the system of appeals was designed to heal legal infirmity. Reference to the 1967 Act was not limiting but conferred "an extra jurisdiction". In any event, as he said at p 51, any "any statutory provision which purports to limit or to abolish the right of

appeal to this Court must be clear and unambiguous." Henchy J considered that since s 5 of the Courts of Justice Act 1928 restricted the entitlement of the Court of Criminal Appeal to order retrial of faulty trials and which "but for such fault, might have led to a supportable conviction." Hence, he reasoned that retrial powers required specific and definite legislative intervention. These, as is apparent, now exist in s 23 of the 2010 Act as amended by the Court of Appeal Act 2014. According to Henchy J it was for the Oireachtas to choose the powers and by including without prejudice appeals, appeals carrying a retrial would be constitutionally at variance with equality; see pages 55-6.

18. As a legislative response to the 33rd Amendment of the Constitution, the Oireachtas enacted the 2014 Act. This provides essentially for the analysing and application of law to decisions of the High Court or the Central Criminal Court from which criminal appeals are taken. Section 8 provides for the amendment of the Courts (Supplemental Provisions) Act 1961 s 7 with the addition of s 7A which is itself expressly "subject to the provisions of Article 34 of the Constitution" and which vests in the Court of Appeal "all appellate jurisdiction which was … vested or capable of being exercised by the Supreme Court" and further all jurisdiction of the Court of Criminal Appeal and of the Courts-Martial Appeal Court. Section 7A(8) provides in the clearest possible terms: "The jurisdiction vested in the Court of Appeal shall include all powers, duties and authorities incidental to the jurisdiction so vested." As the statutory analysis above indicates, and as the Director of Public Prosecutions argues in her submissions, that included the jurisdiction to quash a sentence and "in place of it impose such sentence or make such order as it considers appropriate, being a sentence which could have been imposed on the convicted person for the offence at the court of trial"; see s 3(2) of the Criminal Procedure Act 1993. The full text is also on www.revisedacts.lawreform.ie but the relevant piece is referred to here.

19. The jurisdiction of the Supreme Court on appeal extends not only to the questions certified by a panel of the Court whereby leave is given under Article 34.5 but also any necessary issue central to resolution of the appeal, provided this is within the grounds of appeal thereby enabled; *The People (DPP) v O'R* [2016] IESC 64.

20. Since the 33rd Amendment of the Constitution provided for appeals to be heard both on the interests of justice ground and where a matter of general public importance is involved, it defies sense that any consideration of a just result should involve the Supreme Court in merely declaring a ruling of the High Court or Central Criminal Court, exceptionally where a direct appeal is involved, or the Court of Appeal incorrect in law while being confined into pronouncing a legal ruling in a detached, academic way with no result on the decision and order of the court appealed from. Justice as administered in the courts involves the best attempt to find fact correctly and to apply law in pursuit of a result of litigation that is directed by law in the aim of giving to parties before the courts what is due to them. Central to that principle, of "seeking to promote the common good with due observance of Prudence, Justice and Charity", as the Preamble to the Constitution sets as the means to assuring the "dignity and freedom of the individual" and attaining "true social order", must be the substitution of what is correct in law for the error made and which is successfully appealed. This is done by an order of a trial or

appellate court being substituted by the order of the court of final appeal, which is the Supreme Court. Exceptional to that is any jurisdiction, supposing it to be consistent with the constitutional architecture, which provides for an appeal not affecting a particular accused, through being without prejudice under legislation, but which requires a decision for reasons of precedent or of correcting publicly what may have gone wrong in terms of the application of law. While that may be what s 34 of the Criminal Procedure Act 1967 expressed, it is not what the Constitution provides. Similarly, that ample constitutional jurisdiction decided by the people in the 33rd Amendment cannot be confined by s 29 of the Courts of Justice Act 1924.

21. Hence, on this appeal, and on any appeal from the Court of Appeal or, exceptionally the High Court sitting as the Central Criminal Court, the Supreme Court is exercising the same powers of appeal and correction as would the Court of Appeal in a criminal case. Specifically, this Court is correcting the error of the Court of Appeal on the rape sentence and is substituting the correct sentence. In so far as the accused also advances an argument that Order 58 rule 29 of the Rules of the Superior Courts is ultra vires the Rules Committee, that too is wrong. In making that rule "subject to the provisions of the Constitution and of statute", the Rule rightly gives to the Supreme Court "all the powers and duties of the court below" and enables the Supreme Court to "give any judgment and make any order which ought to have been made" and to "make any further or other order as the case requires."

Principles of sentencing and existing sentencing guidance

22. In now approaching the sentence on the very serious rape offence committed by the accused, it is unnecessary to do more than generally state in concise form the principles upon which the courts approach any sentence. These were helpfully collected in *The People (DPP) v M* [1994] 3 IR 306 by Denham J. What is before a sentencing court is the "nature of the crime, and the personal circumstances of the appellant" since these "are the kernel issues to be considered and applied in accordance with the principles of sentencing". While sentencing is often described as discretionary, the analysis of a sentencing judge is squarely based on these principle as "the essence of the discretionary nature of sentencing". At pages 316-318, Denham J set out the principles to be taken into account:

> Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence. … However, sentences must also be proportionate to the personal circumstances of the appellant. … the general impact on victims is a factor to be considered by the court in sentencing. … Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed inter alia in a plea of guilty, which in principle reduce the sentence… In contemplating the sentences it is appropriate to consider the offences and their nature and their circumstances, but this is not done for the purpose of determining

whether the appellant should be incarcerated for the future so as to prevent him committing further offences: he is sentenced solely for the offences before the court.

23. These principles have been reiterated by this Court on several occasions as a sound basis upon which to proceed; see for instance *The People (DPP) v O'R* [2016] IESC 64 and *The People (DPP) v Mahon* [2019] IESC 24 and this case as reported as *The People (DPP) v FE* at [2019] IESC 85. The sentencing court starts with the headline sentence which the gravity of the offence, judged in the proper context of the relevant facts and the culpability of the offender, has been determined before considering any mitigating factors. It may be mentioned that in passing reference has been made of a novel principle of disappointment whereby on appeal a sentence may be increased, it seems through an appeal by the Director of Public Prosecutions, whereby what the accused expected to be his or her sentence was increased. Since there has been no proper argument on this issue, there is no basis for commenting on such decisions as *The People (DPP) v Shaun Kelly* (unreported, Court of Appeal, 16 November 2015) or *The People (DPP) v Desmond Ryan and Edward Rooney* [2015] IECA 2 whereby a very small discount was applied on a sentence being so increased. It seems that this practice may have grown up when there was a very long delay in a sentence which was increased on appeal by the prosecution, or where an accused had been released, and hence returned to custody, when a sentence was found to be unduly lenient under s 2 of the Criminal Justice Act 1993. What should be born in mind is that the aims of rehabilitation and appropriate punishment do not change. Those sentenced are now aware through proper legal advice on legal aid over nearly three decades that a lenient sentence may be increased by the Court of Appeal if it is found on appeal to be unduly lenient. Thus, sentences are subject to appeal. Further, such an appeal has a strict time limit. Perhaps there are circumstances where punishment impacts unexpectedly severely due to a long delay or to a person being recalled from liberty to custody. The matter awaits decision in an appropriate case but there is no basis for any such principle here, as O'Malley J comments in her supporting judgment.

24. Reference has already briefly been made to the central role of the trial judge in sentencing. He or she will have either heard, as opposed to an appellate court reading, the testimony of the prosecution and the defence and the trial judge also will have perhaps seen the victim giving evidence or will have observed the court during the entire process. If there had been a trial, then the sentencing judge will have a full appreciation of the impact of the crime and perhaps some especial insight into the attitude of the accused and the validity of any plea of remorse or extenuating circumstances. This is to be contrasted to the necessarily limited exercise on appeal, as an analysis of paper and legal argument. Hence, while not excusing legal error, undue leniency or a lack of balance in sentencing so severe as to amount to an error of principle, it is appropriate for an appellate court to approach every sentence at trial level with awareness of the front-line nature of the exercise and to analyse sentencing remarks on the basis of affording a measure of appreciation and respect to a judicial exercise that is both primary and is based on live testimony.

25. While sentencing is often misunderstood outside the legal sphere, it is an exercise in the application of appropriate principle and the fitting of offenders into the scheme of what has emerged through precedent, analysis and research as being a just exercise of discretion. In *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116 and *The People (DPP) v Ryan* [2014] IECCA 11, the Court of Criminal Appeal set out indicative bands in respect of assault causing serious harm and firearms offences respectively. In *The People (DPP) v Z* [2014] 1 IR 613, the focus was on the role of counsel for the prosecution in sentencing since the passing of section 2 of the Criminal Justice Act 1993, enabling a prosecution appeal of a lenient sentence. In *The People (DPP) v Fitzgibbon (No 2)* [2014] 1 IR 627, the Court of Criminal Appeal emphasised the role of the prosecution in offering assistance as to an appropriate sentence, as opposed to demanding a particular sentence. In this regard, precedent sentences are key, as are analyses of relevant bands within which it may be suggested a case might appropriately be placed. This has been reemphasised in the earlier judgment in this case. In addition, as that judgment has shown, the earlier analysis based on the *WD* case has now been revised and indications given of sentencing bands which will guide sentences in this difficult and traumatic area of sexual violence. In 2019, in *The People (DPP) v Mahon* [2019] IESC 24 and this case as reported at [2019] IESC 85, detailed guidance has been given by this Court as to manslaughter sentencing and rape sentencing. Thus, as murder carries life imprisonment, and manslaughter and rape are the next most serious crimes, these are now analysed at appellate level so as to guide judges. In addition, the detailed and exacting work of the Judicial Researchers Office has yielded a series of analyses of depth and real use for sentencing and appellate judges on child defilement, on drug supply, on aggravated burglary, on child pornography, on dangerous and careless driving, on robbery and on the use of suspended sentences and community service orders. All of these handbooks, based on the most painstaking research by devoted law graduates employed by the Courts Service through listening to digital audio recordings of hundreds of sentences at first instances and of the judgments of appellate courts, have been available to the judiciary and are widely used by judges and practitioners. This cannot be ignored. Real progress has been made in the field of sentencing with genuine results over the most serious cases in terms of predictability and of consistency.

26. Hence, it is a matter of analysis into which sentencing band culpability for a particular crime properly fits. With the measure of appreciation due to sentencing judges, it is less easy to find an error of principle once that band has been correctly identified. Clearly, since taking manslaughter or rape or other serious sexual violence as an example, there can be quite wide variations even within a sentencing band that has been correctly identified by the sentencing judge. Thus, it is also important for a trial judge to correctly analyse where within a band a crime fits. A sentencing band could stretch over a span of perhaps four or five years of imprisonment, as it does in rape and manslaughter and in other serious offences where appropriate analysis has been done, from the lower to the typical to the upper end. With that correct identification, the sentence becomes more apparent at first instance and more readily demonstrated to be correct in principle on appeal.

This case

27. Again, it is important to repeat that none of the sentences were appealed by the Director of Public Prosecutions. The appellate approach is to the correctness of the sentences actually imposed by Kennedy J in the context of the contentions of the accused that she erred in her sentencing approach. Such an exercise on appeal is not the imposition of a new sentence, as it might be where a sentence was appealed by the prosecution and found to be unduly lenient. Rather the consideration is based on where an argument is demonstrated to be correct that a sentencing error has occurred. Stepping into that role, which involves the appropriate measure of appreciation for the views of the trial judge, there is no basis for the argument advanced before the Court of Appeal that the Central Criminal Court had erred in approaching the sentencing of the accused.

28. To reiterate, sentences were imposed: of 14 years on the rape, a headline sentence reduced to 10 years through 2 years reduction in respect of mitigation and 2 years being suspended upon release; of 5 years for the threat to kill on the occasion of the rape; of 3 years for the threat to kill, delivered by phone the day after; of 5 years for the threat to kill at the shopping centre on 9 June; of 7 years and 6 months for the attempt to cause serious harm at the wife's parents' home on 7 August; and of 3 years and 6 months for assault causing harm to the wife's mother on that same day. These sentences were all concurrent but that approach was not appealed by the prosecution. Kennedy J, in her sentencing remarks, considered the aggravating factors for the offences of 25 May. These, she said, were to include "the threat of violence with a weapon, the breach of trust, the violation of the injured party in her own home while her son was asleep, the fear that he instilled in her and the severe effect on his victim." She correctly approached the sentence by arriving at a headline, that is by, firstly, identifying the severity without taking mitigation into account and then, secondly, by factoring in mitigation she found to be there in terms of reduction of time served and suspension. That approach cannot be faulted.

29. In the analysis of the circumstances of this trial, where the rape and threats to kill in the context of domestic domination were contested but where the accused was found guilty by a jury, and where the other very serious offences had been pleaded guilty to by the accused, finding the appropriate sentencing band was the first task of the Central Criminal Court. Kennedy J was clearly correct in not placing this offence in either the category of what might be regarded as a less grave form, the lowest band, or a very serious offence, the highest band, or regarding the circumstances as being of gravity that any court regrets calling typical or ordinary because rape is such a violation. Instead, on the analysis current, there is, to quote the prior judgment in this case: "a category of rape cases which merit a headline sentence of 10 to 15 years imprisonment. What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust." That is the correct band of more serious than the ordinary.

30. By reason of the circumstances of the rape, the only sentence under appeal by the accused here, of the domination of the woman who was entitled instead to repose trust in

her husband, the chilling threat of violence, the betrayal of the sanctity of the home and the incipient menace that kept the victim effectively captive overnight and worried about her responsibilities as a mother, this was a case correctly characterised by Kennedy J as being in the upper bracket of the more serious category of rape cases. On appeal, no error by the Central Criminal Court in sentencing has been identified and hence the appeal by the accused should be dismissed.

31. It follows that the original sentence should be restored. There is no basis for affording any reduction by reason of the appeal even though time has passed. In the Central Criminal Court, the sentencing judge entertained an expectation that the accused would usefully use his time in prison in the improvement of his attitude by using the educational and other rehabilitative chances on offer. It is usual, thus, on affirming a sentence to have regard to the up-to-date position. With the reception of reports and certificates, what the trial judge expected in terms of engagement has been born out on the face of the documents produced. There is therefore no basis for any reduction of the sentence. It remains correct in principle.

Result

32. Hence, in the result, the accused has not demonstrated any error in the approach to sentencing on the crime of rape by the Central Criminal Court. The alteration of that sentence by the Court of Appeal did not accord with law. The order of the Court of Appeal will be quashed and replaced with the sentence originally imposed by Kennedy J.