



THE COURT OF APPEAL

Record Number: 239/2023

Birmingham P.

Kennedy J.

Burns J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

KS

RESPONDENT

JUDGMENT of the Court delivered on the 7th day of December, 2023 by Ms. Justice Tara Burns.

- 1.** This is an application pursuant to s. 2 of the Criminal Justice Act 1993 ("the 1993 Act") seeking a review of the sentence imposed on the respondent on grounds of undue leniency.
- 2.** A trial took place before the Central Criminal Court between 18 April and 10 May 2023. The jury, by majority verdict, found the respondent guilty of a single count of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981 as amended. The respondent was found not guilty of a single count of s. 4 rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990.
- 3.** The respondent was a child within the meaning of the Children Act 2001 ('the 2001 Act') when the verdict was delivered. A nominal sentence date of 25 May 2023 was initially fixed. Sentence was adjourned to allow for the preparation of a Probation Report and for the respondent to complete his state exams.
- 4.** A sentence hearing took place on 17 July 2023 which was adjourned to 25 July 2023. On 28 July 2023, the sentencing court delivered its sentencing ruling and imposed detention on the respondent for 106 days suspended on certain terms and conditions for 106 days. The sentence imposed was structured and intended to expire on the day before the respondent's 18th birthday.

Background

- 5.** The victim was part of a group of five girls who met, by arrangement, with the respondent and two of his friends at a location in the West of Ireland on the afternoon of 26 September 2020. Both the victim and the respondent had no previous experience of drinking alcohol and were sexually inexperienced. The respondent was 14 and the victim was 15 years old. The ages of all other persons in the group ranged from 14 to 15 years of age with the respondent being the youngest person present. The respondent and his friends had brought two bottles of vodka with them. The group travelled together to a forested area located at the back of a playground beside a church where they stayed for the afternoon. On the way to this location, a joint of cannabis was smoked between the group, to include the victim and the respondent, and whilst at the location, two to three bottles of vodka were consumed by the group.
- 6.** The victim was reported to have been the person most intoxicated of the group and had been sick during the afternoon. She suffered a black out at some point and had no recollection of some of the events which occurred that afternoon.
- 7.** The victim and the respondent had been physically involved during the afternoon. When the group left the area, the victim was seen leaning on the respondent to keep her balance and they were seen kissing. Soon after, the group noticed that the victim and the respondent had disappeared, and they began to search for them. One of the group called the respondent on his mobile phone, and when he answered he told the caller he was "*having fun*" and hung up. The search continued with the victim's friends shouting her name. The victim was seen exiting from behind the church, she was crying and saying repeatedly "*he put it in*". Her friends attended to her. In the immediate aftermath of the incident, the victim had no memory of what had occurred when she was with the respondent nor of any utterances made by her during this time. However, she did remember having a stinging pain in her vagina. Sometime after these events, she recollected oral sex occurring with the respondent which she asserted she had not consented to and which had arisen as a result of force being exerted on her by the respondent. The respondent accepted that this event occurred but asserted that it was consensual. Ultimately, he was found not guilty of the s. 4 rape charge which was proffered on foot of this allegation.
- 8.** After the victim and the respondent emerged from behind the church, the respondent told the group that he had had sexual relations with the victim. One of the victim's friends called their parents to explain what had happened, which resulted in the guards being called. The respondent voluntarily remained at the scene for a number of hours until the guards arrived.
- 9.** The respondent's initial position to the guards, having been cautioned, was that nothing had happened between himself and the victim and that they were cuddling. During the course of seizing his clothes, a condom was noted to be sticking out of his underpants. At this point the respondent stated "*we had sex*", and when asked if it was consensual, he replied "*she never said no, I guess*".
- 10.** At trial, the victim was unable to give evidence of sexual intercourse occurring as she had no memory of this. The prosecution was based on the proposition that she did not consent to sexual intercourse

as she was incapable of so doing due to her intoxicated state. The respondent's defence at trial was that she had consented to sexual intercourse or if she had not, the intentional element of the offence of rape was not made out as the respondent did not know that she was not consenting to sexual intercourse and was not reckless as to whether she had consented or not.

11. At the sentence hearing, the applicant accepted that the intentional element established in this case for the purpose of sentencing was one of recklessness rather than intentional behaviour meaning that the respondent took an unjustified risk that the victim was not consenting to sexual intercourse but proceeded with that act nonetheless.
12. A delay had occurred in the prosecution of the case, in that 2 years and 7 months had passed between the time of the offence and the commencement of the trial.

The Victim Impact Report

13. The victim was 15 at the time of the incident, turning 16 the following November. She had not had previous sexual experience. She provided a victim impact report for the sentencing hearing. The sentencing judge described it as a "*compelling report*" and referred to some portions of it in the following manner:-

"She said that he has taken something from me that can never be returned. She said, "I never wanted to leave, I was afraid of facing people..." -- that is in terms of her own home after these events -- "... who knew about it, that they'd be judging me, thinking of me differently, thinking I made it up and that I was being dramatic". She said that she changed her whole life, her wardrobe, her personality, "to get rid of the thoughts of what happened and completely discard that person he ruined that day, but she will never be gone, there will always be a part of her inside me left broken, damaged, worthless, objectified and diminished."

Personal Circumstances of the Respondent

14. The respondent moved to Ireland from abroad when he was 10 years of age. His family are upstanding members of the community, as confirmed by the investigating guard and have been very supportive to the respondent throughout this process.
15. The respondent sat his Leaving Certificate after the trial concluded. He had a part-time job as a mechanic at the time of the sentence hearing. He has no previous convictions, nor had he previously come to the attention of the guards. The respondent was 17 years of age at the date of sentencing but would turn 18 three months later in November 2023.
16. The respondent was 14 years of age at the time of the rape offence in September 2020, turning 15 in November 2020. In terms of sexual education and sexual knowledge, he had partaken in the sex education programme provided in 6th class in primary school. His parents had not felt it necessary to discuss sex education and consent with him further and were satisfied that what he had received

at school was appropriate and sufficient. By the time he came to be sentenced, he had received further sex education in 5th year which was the school year after the offence occurred. This included information relating to relationships and consent.

17. The respondent had no previous experience of intimacy with a female, to include kissing or touching. Neither had he previously consumed alcohol or drugs.
18. The respondent, having engaged with the Probation Service on a number of occasions after his conviction, was noted to have come to the view that the victim was unable to give informed consent on the occasion and he now accepted the jury verdict. This was a change from his original position.
19. A Probation Report prepared in respect of the respondent for the purpose of the sentence hearing concluded:-

"[K] was fourteen years old at the time of this offence and he was not developmentally mature enough to recognise the consequence of his actions. He volunteered that he had no previous relationship experience and was influenced by the behaviours of his older peers. He had not engaged in any psychosocial sexual education and this is an area which his parents had not reinforced. [K] was familiar with the mechanics of sexual contact but not the social engagement and stages of consensual intercourse. These are areas of need that can be successfully countered through participation and educational programmes and therapeutic interventions for [K] and his parents to develop healthy attitudes and understanding of relationships.

From the analysis of the various interviews with [K] he describes what appears to be a misinformed idea of what consent looked like and described a situation where he read into affections and actions from the victim that he now knows were not indicators of consent at the time. In hindsight, he can identify that [the victim] was intoxicated to a point where consent was not possible. Therefore, this indicates to me that further education and awareness of sexual consent is an area of need in terms of any management plan and safety plan for [K] going forward.

This view is echoed by the findings of the AIM3 assessment where it states, "Both [K] and his family could be supported to engage with programmes of education and intervention around psycho-social and sexual education with a strong focus on the development of healthy respectful relationships and a clear understanding of active consent.

In keeping with the focus of the Children's Act 2001, which is detention as is a means of last resort, diversionary options are available for [K].

In considering the AIM3 assessment, information available to the author and following interviews with [K] and his family, it is my view that the Probation Service could appropriately manage [K] in the community were it to be the Court's decision. He has obvious strengths in relation to a stable family as well as prosocial past times and employment. [K] was fourteen years old when this offence occurred and he has not come to past or subsequent garda

attention for an offence of this nature. At the time of this offence, he was associating with an older peer group who had some influence on his use of alcohol and drugs, as he had not used them up to this point. I believe these are important factors to consider in the analysis of where [K] is now and how he can be best supported to reform. [K] shows motivation and an ability to comply as well as a capacity to access external services which his parents can support him with."

- 20.** The Probation Service recommended that should the court be of the view that probation supervision was appropriate, a condition of such could be that the respondent would be required to participate in a tailored therapeutic programme over a 24 month period which the Probation Service had commenced structuring.
- 21.** Ultimately, the sentencing judge did not impose the condition suggested by the probation officer that the respondent engage with them for 24 months. However, updated probation reports have been placed before the court which establish that the respondent has continued to engage with the Probation Service on a voluntary basis since the expiry of his sentence.

Sentencing of Child Offenders

- 22.** Sentencing of child offenders is a complex area of law which is governed by both legislation and case law. The sentencing judge was fully cognisant with all the principles which applied in this area and had discussed extensively the import of these principles and the options available to her with counsel.
- 23.** The 2001 Act sets out various legislative provisions applicable to sentencing a child offender. Section 96 of the 2001 Act provides *inter alia*:-

"(1) ...

(2) *Because it is desirable wherever possible—*

(a) to allow the education, training or employment of children to proceed without interruption,

(b) to preserve and strengthen the relationship between children and their parents and other family members,

(c) to foster the ability of families to develop their own means of dealing with offending by their children, and

(d) to allow children reside in their own homes,

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

(3) *A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.*

(4) *The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.*

(5) *When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."*

Section 143(1) of the 2001 Act provides:-

"The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and that a place in a children detention school is available for him or her.

Section 155 of the 2001 Act provides, in effect, that in a situation where a child who has been detained on foot of a Children Detention Order reaches his majority, he will be transferred to an adult prison where he will serve the remaining term of his detention. Section 155(5) of the 2001 Act provides for an exception to that event in the following terms:-

"Notwithstanding subsection (2), (3) and (4), if-

- (a) *a person is engaged in a course of education or training in the children detention school, or*
- (b) *the period of detention remaining to be served by a person in the children detention school on the relevant date is 6 months or less,*

the Director may, instead of making a request under subsection (2) determine that the person shall continue to be detained in the children detention school for a period not exceeding 6 months from the relevant date."

24. The considerations applicable when sentencing a child for a rape offence to include whether the sentencing guidance provisions as set out in *The People (Director of Public Prosecutions) v FE* [2021] 1 IR 217 are appropriate, was considered by the Court of Appeal in *The People (Director of Public Prosecutions) v. TD* [2021] IECA 289. Edwards J., delivering the judgment of the Court, stated at paras 31 - 33:-

"31. The starting point of seven years indicated as appropriate by Charleton J in The People (Director of Public Prosecutions) v F.E. for cases "where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence" relates to rape committed by a mature adult and not by minor. In fairness to the trial judge there is as yet

no guidance in this jurisdiction on the weight that might be afforded to the circumstance of minority. We feel that the fact of minority represents a very significant circumstance, that will in many cases, and we think this is one of them, operate to in fact reduce culpability somewhat. That is not to gainsay that rape is always a various serious offence, and one which must be punished as such. However, the Constitution requires that such punishment must not only be proportionate to the gravity of the offending conduct but also to the circumstances of the offender.

32. The approach of the Sentencing Council for England and Wales is informative in this area. The Sentencing Council has published a Definitive Guideline on the Sentencing of Children and Young People which, consistent with the ethos of our own Children Act 2001, requires a completely different approach to the sentencing of minors, based on welfare; and it recommends, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence for minors in the age bracket 15–17.

33. While we are not to be taken as adopting uncritically guidance provided by the Sentencing Council in the neighbouring jurisdiction, because it applies to a separate and distinct legal system which has different sentencing rules, structures and laws, we do take note of it and regard it as being at least a helpful indicator as to the potential significance of the fact of minority in any assessment of an offender's culpability."

Sentencing Determination

- 25.** The sentencing judge, very properly, began her analysis of the appropriate sentence to impose by referring to the sentencing guidance decision of *The People (Director of Public Prosecutions) v. FE* [2021] 1 IR 217. She acknowledged that a rape offence is a very serious offence and one that the Supreme Court has indicated inevitably attracts a custodial sentence save in very exceptional circumstances.
- 26.** The sentencing judge referred to the aggravating factors present in the case, namely the victim's age and that the victim was extremely intoxicated at the time of the offence. Having regard to the circumstances of the offence to include these aggravating matters, and taking account of the victim impact report, the sentencing judge determined, applying the sentencing guidance referred to in *The People (Director of Public Prosecutions) v. FE*, that the appropriate headline sentence for the offence, had the respondent been an adult, was one of 7 years imprisonment which is 84 months.
- 27.** The sentencing judge then proceeded to consider *The People (Director of Public Prosecutions v. TD* [2021] IECA 289, in light of the fact that she was sentencing a child. Whilst noting that *The People (Director of Public Prosecutions) v. TD* adopted, as a helpful indicator, the English Sentencing guidelines which recommend, where appropriate, a sentence reflecting half to two thirds of that which would be imposed for an adult so as to take account of a child's age and lack of maturity, the sentencing judge determined that as these guidelines related to children in the 15-17 age bracket, she was not bound by the suggested reduction. As the respondent was 14 at the time of the commission of the offence, she decided that she was not restricted in making a further reduction

from the identified headline sentence appropriate for an adult to take account of the respondent's lack of sexual knowledge and maturity. Accordingly, she discounted the adult headline sentence by two thirds leaving a headline sentence in the instant case of 28 months.

- 28.** The sentencing judge then had regard to the mitigating factors which were present in the case to include the fact that the respondent did not have any previous convictions; he accepted he had had sexual intercourse with the victim; he waited at the scene for the guards arrival; he accepted the jury verdict; a conviction for rape would be a permanent record of conviction; he sat his Leaving Certificate after the conclusion of the trial; he had a job; and most particularly, the manner in which he had co-operated with the Probation Service in a spirit of willingness and openness with a determination to avail of any form of assistance available to him. In light of these mitigating factors, the sentencing judge was of the opinion that the headline sentence applicable in this matter should be reduced by a further 25% to 21 months.
- 29.** The sentencing judge proceeded to have regard to the effect of the delay in progressing this matter to trial. The delay in the case had been from the date of the offence in September 2020 to the start of the trial in April 2023. The sentencing judge acknowledged that there was not a stand out area of delay, but rather the cumulative effect of the various processes which are undertaken in a criminal prosecution resulted in a delay of 2 years and 7 months before the trial commenced.
- 30.** It is clear that the sentencing judge was dismayed at the length of time which it took for the case to come to trial having regard to the fact that both the victim and the respondent were children and a substantial number of witnesses were children. In terms of the child witnesses, the delay which had occurred apparently had an effect on their recollection of events resulting in evidence being given at trial which differed from the statements which they had provided. In relation to the victim, the sentencing judge was of the view that it was not appropriate that she had to wait so long for this case to be finalised. With respect to the respondent, the sentencing judge was of the opinion that he had lost valuable time in which to be sentenced as a child. The sentencing judge stated:-

"This is not a case that involved a judicial review, but that does not mean that that is the end of the issue of delay. The trial process must take into account the effect of delay and the sentencing process is part of that trial. If juvenile offenders are to be prosecuted, that is to be done with the utmost expedition. A child should not suffer prejudice as a consequence of delay either in investigation or the court process. In those exceptional circumstances, I am reducing the penalty to a further amount of 18 months which brings me to the period of detention or thereabouts, I think it is just shy of 18 months, which I indicated on the last date, which is 106 days."

- 31.** This resulted in only three months remaining in terms of the headline sentence originally identified by the sentencing judge which coincided with the respondent turning 18. The sentencing judge stated the following with regard to this remaining three months, and the question as to whether the respondent should be detained:-

"I am brought back then to the central principle that was considered at the earlier stage of this lengthy ruling which is that imprisonment or detention is a sanction of last resort and why is that? The reason for that, as I said, and I am just going to repeat it, is set out at section 96. Section 96 makes it clear that: "This Court must in circumstances where it is desirable to allow education, training or employment of children to proceed..." in this case [the respondent] has a job "... to preserve and strengthen the relationship between children and their parents..."

...in this case [the respondent] has a very good strong healthy relationship with his family "... and to foster the ability of families to develop their own means of dealing with the offending of their children..." in this case the probation services have indicated a need to engage with the family and with [the respondent], and they're both willing to do so "... and to allow children to reside in their own homes..." I don't need to explain that or say why that is so -- "... Any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances, in particular a period of detention should be imposed only as a measure of last resort.

The position that I find myself in is that I have a very helpful, comprehensive, thorough probation report that sets out a structure that will assist [the respondent] to fully rehabilitate, both use of the REAL U programme, the NIAPP programme and a facilitator probation officer who is fully aware of his needs. I am told that while Oberstown may provide these services, it will take longer to commence due to the bedding in period and I have already indicated the period will be no longer than 109 days, [one] wonders and the Court would be concerned as to whether or not any meaningful can be done in that time.

In those circumstances, I have taken the view that suspension is appropriate... in accordance with the recommendations of the probation officer and I will come back to that in a moment."

Earlier in her ruling she stated in relation to the prospect of imprisonment for the respondent:-

"In my view, a route to imprisonment for [the respondent] will mean that there is a high risk that society will pay the price. Why is that; because [the probation officer] confirms that there is a history of misuse of cannabis to relief stress, a history of a poor peer group. She has worked with [the respondent] to explain to him how important it is to neutralise these influences and he understands that. He is at a place where he is not in the company of those influences and has stopped abusing cannabis.

One of the critical features of [the probation officer's] report is that he needs education in order to understand matters sexual and then in addition to that, he has a job in circumstances where with his conviction, the possibility or reasonable possibility of a job in the future is fairly

small. If he loses that job, he potentially becomes idle, losing motivation to improve himself. As I said, he is at that vulnerable stage post 17."

- 32.** The sentencing judge also determined not to suspend the sentence for a period of 24 months, as recommended by the probation officer, as the parties were agreed that should a breach of the terms of the suspension occur after the respondent turned 18, the court was powerless to re-activate the suspended portion.

Grounds of Appeal

- 33.** The applicant's grounds of appeal are as follows:

- "(1) The learned sentencing Judge erred in principle in imposing a sentence that was inadequate in all of the circumstances, including having regard to the gravity of the offence and aggravating factors, to include the effect of the offence on the victim;*
- (2) The learned sentencing Judge erred in affording an excessive discount, of 56 months (or two thirds), from the nominated headline sentence of 84 months to take account of the age and maturity of the respondent at the time of the offence and by thereby reducing the headline sentence to one of 28 months ("the adjusted headline sentence");*
- (3) With respect to factors identified as mitigating factors, other than delay ("general mitigating factors"); the learned sentencing judge erred in principle in: -*
- (a) treating the fact that that the respondent was acquitted by a jury in respect of a second charge as a mitigating factor;*
- (b) affording increased mitigation in respect of the respondent's ultimate acceptance of the jury's verdict on the basis that he was a young person;*
- (c) treating the fact that there was no legal potential for the respondent's conviction to be expunged as a mitigating factor [];*
- (4) The learned sentencing judge erred in principle in giving excessive weight to general mitigating factors and in giving a 25% discount (7 months) from the adjusted headline sentence for same [].*
- (5) The learned sentencing Judge erred in principle in affording an excessive and unexplained discount of 18 months (64% of the adjusted headline sentence or 86% of the adjusted headline sentence minus the discount for mitigation generally), for that which she categorised as the delay in investigating the case and bringing it to trial and / or in failing to properly measure the level of mitigation to be afforded for same.*

- (6) *The learned sentencing judge erred in principle in affording undue and excessive weight to the matters identified to be mitigating factors (both general and delay) which, cumulatively, culminated in an overall discount of 89% from the adjusted headline sentence (and this was prior to reducing the 11% balance of 3 months to 106 days' detention suspended for 106 days on conditions).*
- (7) *A discount of 89% from the adjusted headline sentence (and before the 11% balance of 3 months was further reduced to 106 days' detention suspended for 106 days on conditions) was a substantial departure from what would or could be considered appropriate in the circumstances and amounts to an error in principle.*
- (8) *The learned sentencing judge erred in imposing a net sentence of 106 days of detention (suspended for 106 days) on the basis that the Probation Service was providing a structure that would facilitate the respondent's rehabilitation in circumstances where the programme that was actually identified by the Probation Service recommended a 24-month commitment (in respect of its bespoke programme, and other therapeutic supports that it considered appropriate depending on such issues as might arise and also engagement with drug and addiction counselling).*
- (9) *The learned sentencing judge erred in principle in terms of constructing a sentence that omitted any immediate custodial aspect, and in practical terms places the respondent at no real or only a nominal risk of ever having to serve any portion of the sentence imposed.*
- (10) *The learned sentencing judge erred in principle in imposing a wholly suspended period of detention, having regard to the seriousness of the offence of which the respondent was convicted.*
- (11) *The learned sentencing judge erred in principle in drawing upon the account's account of events recorded in the Probation Report as a primary source of evidence concerning the nature and extent of his criminality.*
- (12) *The learned sentencing Judge erred in principle in failing to reflect or adequately reflect the principles of specific and / or general deterrence in the sentence imposed.*
- (13) *The learned sentencing Judge erred in principle in imposing a sentence which was unduly lenient in all of the circumstances being one of 106 days' detention suspended for 106 days in respect of an offence of rape contrary to section 48 of the Offences against the Person, Act, 1981 and section 2 of the Criminal Law (Rape) Act, 1981 as amended."*

Submissions of the Parties

- 34.** The applicant's position is that the sentence imposed was a substantial departure from the appropriate sentence in the circumstances of the case, such that it was unduly lenient within the meaning of the 1993 Act and having regard to the principles set out in *The People (The Director of Public Prosecutions) v. Stronge* [2011] IECCA 79.
- 35.** Counsel for the applicant submits that the sentencing judge erred in affording the respondent an excessive discount from the nominated headline sentence on the basis of his age and maturity; that excessive weight was afforded to general mitigating factors, most particularly with regard to the issue of delay; that the sentence imposed failed to reflect the sentencing principle of deterrence; and that the decision to wholly suspend the period of detention did not have regard to the seriousness of the offence of which the respondent was convicted.
- 36.** Counsel for the respondent submits that the sentence imposed was not unduly lenient in the circumstances and that the sentencing judge legitimately exercised her discretion in assessing the appropriate sentence for this offence. Further the respondent submits that the sentencing judge followed the requirements as set out in s. 96 of the Children Act 2001; was best placed to determine the culpability of the respondent having presided over a lengthy trial; and delivered a lengthy meticulous judgment which fully encapsulated the reasoning applied by the sentencing judge in pronouncing the sentence. Counsel for respondent suggests that this is a truly exceptional case so as to permit a suspended sentence be imposed within the ambit of *The Director of Public Prosecutions v. FE*. He asks the question rhetorically, if this is not such an exceptional case, then what is?

Discussion and Determination

- 37.** The principles for determining undue leniency are well established and are set out in *The People (The Director of Public Prosecutions) v. Stronge* [2011] IECCA 79 which this Court adopts. In essence, the Applicant must prove that the sentence imposed constitutes a substantial or gross departure from the appropriate sentence such that an error of principle is established before this Court will intervene.
- 38.** The starting point for sentencing in any rape case is *The Director of Public Prosecutions v. FE* [2021] 1 IR 217. The analysis by Charleton J of the seriousness of the offence of rape and the fact that a custodial sentence is almost inevitable in the absence of some truly exceptional circumstances is contained at paras 43 – 49 of the report and is worth extensively setting out:-

"43. Before any consideration should be given to any submission by defence counsel that any form of suspended sentence for rape may be appropriate in a given case, the culpability involved in the definitional elements of the crime should be foremost in the court's mind...

...

45. In awareness of the seriousness of the definitional elements of crimes of sexual violence, time and again, since *The People (D.P.P.) v. Tiernan*[1988] I.R. 250, it has been unequivocally declared by the courts that rape is a violation in the most serious way of the constitutionally protected rights of women to their bodily integrity and to their physical and mental independence. In *The People (Director of Public Prosecutions) v. Counihan*[2015] IECA 76 at para. 8, the Court of Appeal acknowledged the longstanding view of the courts that rape and other offences of sexual violence "cause suffering that is profound and long-lasting", impacting on family and children, and which "often takes years" to overcome the trauma and to report offences.

46. Accordingly, the analysis in this case and in the work referenced here into precedents elucidates that while there is no absolute rule that a custodial sentence must be imposed regardless of the plea of guilty, a custodial sentence is all but inescapable: *The People (Director of Public Prosecutions) v. R. O'D.*[2000] 4 I.R. 361 at p. 363; *The People (Director of Public Prosecutions) v. McCormack*[2000] 4 I.R. 356. Hence, rape merits a custodial sentence but the court "must not deprive itself of the possibility of identifying the exceptional case where a custodial sentence may not be warranted. A non-custodial sentence should be "wholly exceptional" on the Tiernan principles. Since the WD judgment in 2007, the research shows that the circumstances must be so completely exceptional as to "allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by the case law." That might happen, perhaps, where a victim has particular and convincing reasons to take a forgiving attitude towards the perpetrator....

47. An example of an extreme case was *The People (The Director of Public Prosecutions) v. W.C.*[1994] 1 I.L.R.M. 321 where the accused pleaded guilty to a charge of raping his then girlfriend after a night of New Year's Eve celebrations. They had what was described as a consensual and intimate encounter, however when the accused sought to have sexual intercourse with the complainant, she did not consent to this and was raped by the accused. Flood J. stated at p. 323 that while it "would appear that in the immediate aftermath" of the event that "the accused was neither fully aware, nor appreciated, the wrong he had done", he had admitted his guilt promptly thereafter and pleaded guilty to the charge of rape at his arraignment. In imposing a suspended sentence of nine years penal servitude on the accused, Flood J. discussed the factors that a judge should take into account when sentencing in rape cases. It should be noted that this case occurred prior to the introduction of victim impact statements under s. 5 of the Criminal Justice 1993 Act, and the clarification of the fault element, emphasising its gravity, by the courts. On the facts of the case, the accused was younger than the complainant and was aged 17 at the time of the commission of the offence and had no previous convictions, Flood J. stated that the evidence was that such conduct from the accused was "most unlikely to re-occur". The accused was described as having admitted his guilt "[f]rom the earliest stages of this incident" and "accepted the serious harm that was caused by his conduct", making a full written statement to gardaí expressing a "clear desire to plead guilty to any offence with which he might be charged", writing a letter to the complainant admitting his guilt, and expressing "real remorse".

48. *It should be noted that Flood J.'s sentence was not approved on appeal, since there then was no appeal against leniency. The fault element of the offence might warrant a lower than usual custodial sentence, but it is difficult to see how a wholly suspended sentence would be warranted since what was involved was a deliberate violation. Even in The People (Director of Public Prosecutions) v. N.Y.[2002] 4 I.R. 309, another case where fault was analysed as being at a low level, a suspended sentence was only allowed where the accused had spent seven months in custody. Fault might be at a low level, but that must mean a low level in the context of an offence that is very serious because of what it involves and of the fault of the accused.*

49. *Thus, while a suspended sentence for rape is possible, since the Oireachtas has enabled it, any such approach should be considered in the context of the gravity of the offence and the effect on the victim as both being very rare and requiring an especial justification. An analysis of the decisions indicates that in two cases the Court of Appeal has corrected what originally were suspended sentences imposed by the Central Criminal Court. In The People (Director of Public Prosecutions) v. Hustveit[2016] IECA 271, there was a conviction on one count of rape and one of sexual assault. The sexual violence happened while the victim was sleeping and in the context of a broken-down relationship. The original sentence of 7 years suspended was corrected on appeal to 30 months with 15 months suspended. A wholly suspended sentence was wrong in principle but this was a case regarded as equivalent to a person surrendering to police where otherwise there would be no detection or prosecution. In The People (Director of Public Prosecutions) v. Counihan[2015] IECA 59 and 76 an original sentence of 7 years suspended was corrected to a 10-year sentence on appeal with 7 years suspended; an effective sentence of 36 months. These were two counts of rape against a 13-year-old babysitter and the exceptional circumstances involved the care of two autistic children in the accused's care with no prior offending and the accused using the gap between offending and charge to rehabilitate his life. These circumstances must be regarded as wholly exceptional but as not meriting a total suspension of a term of imprisonment. In The People (Director of Public Prosecutions) v. J.J.K. (Central Criminal Court, 22 October 2018) a man of 86, clearly very ill, was given a suspended sentence for rape offences. This is the only case which research can uncover that involved a wholly suspended sentence in the last two decades. It will be noted that the accused had in fact served a sentence, albeit for a similar offence on another victim."*

Headline Sentence – Ground 2

39. Whilst the applicant suggested a headline sentence if sentencing an adult of between 7 and 10 years imprisonment, she does not take issue with the seven year headline sentence identified by the sentencing judge. However, the applicant does take issue with the reduction applied by the sentencing judge of two thirds of the identified seven year headline sentence to take account of the respondent's age, immaturity and lack of sexual knowledge on the basis that this was an excessive

reduction in light of the fact that the respondent was almost 15 years of age, being 2 months shy of his 15th birthday.

- 40.** Counsel for the respondent argues that this approach was open to the sentencing judge and that an evidential basis relating to the respondent's lack of maturity, knowledge and experience with respect to sexual matters was established which grounded the sentencing judge's approach.
- 41.** In the first instance, *The Director of Public Prosecutions v. TD* did not adopt the English Sentencing guidelines which are referred to in that judgment, rather they were referred to as a helpful indicator. While those guidelines are applicable to the age bracket of 15-17 years old, it is of importance in the instant case that the respondent was approaching his 15th birthday in two months at the time of the offence rather than having just reached 14.
- 42.** In *The Director of Public Prosecutions v. OGP* [2023] IECA 259, the Court of Appeal did not find an error in principle with the sentencing judge, in that case, applying a 50% reduction to the identified headline sentence in circumstances where the offender was 13 years old. Edwards J., delivering the judgment of the Court stated at paragraph 58 of the judgment: -

"With respect to ground no. 2, the sentencing judge committed no error of principle in having due regard to the decision of this court in the T.D. case, previously cited. She did not in any way misinterpret our decision in that case. On the contrary, she correctly noted that we had expressly stated that while we were not to be taken as uncritically adopting guidance provided by the Sentencing Council of England and Wales, we had been prepared to note it and to regard it as being at least a helpful indicator as to the potential significance of the fact of minority in any assessment of an offender's culpability. In that decision we had noted that the English guidance recommended that, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence could be applied to a minor in the age bracket 15 to 17. We neither approved nor disapproved of this level of reduction, but alluded to it merely as illustrative of the approach adopted in the neighbouring jurisdiction of significantly reducing the headline sentence that would otherwise apply in the case of a mature adult to take account of an offender's youth and immaturity. The point being made was that the general approach of affording a significant reduction in those circumstances seemed sensible to us. Counsel for the applicant rightly points out that the applicant in the present case was younger still when he committed the offences the subject matter of this appeal. The sentencing judge was alive to this. She was disposed to reduce the headline sentence that would apply in the case of mature adult by 50% to take account of the applicant's minority, and we consider that in doing so she acted entirely within her legitimate range of discretion. We are not persuaded that she committed any error of principle in doing so."

- 43.** In light of the actual age of the respondent, being 14 years and 10 months at the time of the offence, and having regard to the fact that there is no suggestion that the respondent had any form of

disability or had impaired functioning, it seems to this Court that the appropriate reduction was one of 50% rather than 66%. However, the sentencing judge is of course entitled to a margin of appreciation and this difference of view between us does not amount to a substantial departure from the appropriate headline sentence so as to amount to an error in principle.

Mitigation – Ground 3, 4, 6

44. The applicant complains that the discount given by the sentencing judge, of 7 months, for the factors which she identified as mitigatory factors was excessive. She also complains that matters were identified as mitigatory factors which should not be classed as such.
45. Dealing with the last point first, this Court does not agree that all matters which the applicant asserts the sentencing judge identified as mitigatory factors were actually considered by her as mitigation. Whilst all of the matters identified in the written submissions were mentioned by the sentencing judge, differences in the manner of interpretation of the sentencing judge's ruling could lead to a view that some of the matters have been misidentified by the applicant as matters which account was taken of as mitigatory factors.
46. Either way, there are a significant number of matters which did amount to mitigation such as the fact that the respondent did not have any previous convictions; he accepted he had had sexual intercourse with the victim; he waited at the scene for the guards arrival; he accepted the jury verdict; a conviction for rape would be a permanent record of conviction; he sat his Leaving Certificate after the conclusion of the trial; he had a job and was highly thought of by his employer who was aware of the offence he committed; and most particularly, the manner in which he had co-operated with the Probation Service in a spirit of willingness and openness with a determination to avail of any form of assistance available to him. A reduction in sentence of 7 months to take account of these matters was not excessive and most certainly was not a substantial departure from the appropriate weight to be given to such matters. Accordingly, an error in principle does not arise in this regard.

Delay – Ground 5

47. The sentencing judge determined that the delay in the matter coming on for hearing was a mitigating factor and was very significant. Although no culpable delay was identified on the part of any agency, the sentencing judge was of the view that the cumulative delay in the matter had prejudiced the respondent and that therefore she was reducing the sentence by a further 18 months to bring her to a remaining 106 days before the respondent's 18th birthday.
48. This was a significant determination by the sentencing judge and one which this Court finds difficulty with.
49. In expressing exasperation about the fact that there was a delay in prosecuting the case, the sentencing judge outlined the effect of the delay on the child witnesses in the case, the complainant and the respondent. Of course, for the purpose of sentencing, the only relevant party which the

sentencing judge should have had a focus on was the effect of the delay on respondent. The Court will interpret the sentencing judge's remarks regarding the effect of the delay on other parties involved in the trial as merely explanatory of the effect of delay on the entire trial process and not something which she took account of when sentencing.

- 50.** Trials involving juveniles should of course come on for hearing expeditiously which has been well recognised in many cases, but most particularly in *The Director of Public Prosecutions v. G* [2014] IEHC 33 and *Donoghue v. The Director of Public Prosecutions* [2014] IESC 56. However, every process takes its time, and the cogs of the criminal justice system are no different, even when accommodating a child's trial.
- 51.** The steps in the process of bringing this matter to hearing were as follows: the offence occurred on 26 September 2020; the victim was interviewed by garda specialist interviewers on 28 September 2020; the respondent was arrested for the purpose of interview on 1 November 2020; the victim was re-interviewed by garda specialist interviewers on 21 February 2021 after she recollected further matters relating to the events; arising from this recollection, forensic testing was carried out of forensic swabs already obtained and the respondent was re-arrested on 25 April 2021; the respondent was considered unsuitable for the juvenile diversion scheme on 12 August 2021 as he did not accept the allegations which were made against him; an investigation file was submitted to the applicant by An Garda Síochána on 4 April 2022 and a direction to prosecute was issued by the applicant on 21 April 2022; the respondent was arrested on 1 June 2022 for the purpose of charge; on 19 July 2022, a book of evidence was served on the respondent and he was returned for trial to the Central Criminal Court; on 28 July 2022 a trial date of 27 March 2023 was set which in reality was an early trial date for the Central Criminal Court; that trial date was adjourned to 11 April 2023, as it had initially been scheduled for a shorter period than was required.
- 52.** This short summary demonstrates that the only significant time period which passed was between August 2021 and April 2022 when the investigation file for submission to the applicant was being prepared. Obviously, preparation of this file would have taken some time in itself.
- 53.** The Court is of the opinion that the deduction of 18 months from an already reduced sentence of 21 months was a very significant reduction. This is in circumstances where there is no identified stand out delay on the part of any agency, but rather is described by the sentencing judge as the cumulative delay of the court process. While the sentencing judge was entitled to treat the delay as a mitigating factor, assess its impact on the respondent and further reduce the active sentence, we are of the view that measuring 18 months as an appropriate reduction in the circumstances of the case was without justification. We are strengthened in our view with respect to this reduction in light of what remained in the active sentence after the delay reduction, namely 106 days. This equalled the number of days to the respondent's 18th birthday. From this analysis, it would appear that the sentencing judge approached the measurement of the mitigation for delay from the perspective of subtracting what time was left to the respondent's 18th birthday from the active sentence she had

arrived at after she had initially taken account of mitigatory factors. This amounts to an error in principle in terms of the best practice approach to sentencing.

The Suspended Sentence – Ground 1, 7, 8, 9, 10, 12 and 13

- 54.** The principal issue in this matter, however, is that a suspended sentence was imposed on the applicant in circumstances where he had been convicted of a rape offence. As the dicta in *The Director of Public Prosecutions v. FE* makes clear, this is an appropriate course of action in only the most exceptional of cases.
- 55.** While the 2001 Act provides that detention is to be considered as a measure of last resort when sentencing a child, it appears to this Court that the sentencing court determined from very early in the sentencing process that the sentence she would impose would not result in the respondent being at risk of being imprisoned in an adult prison. This instructed her approach to sentencing both in relation to the length of sentence she would impose and any suspended element.
- 56.** Having come to this conclusion at an early stage, the sentencing judge appears to have approached the sentence in a manner which sought to attain that result, working backwards to achieve it, as demonstrated by her approach to the delay issue, rather than working forwards addressing each sequential matter.
- 57.** Furthermore, the sentencing judge determined that she only had 106 days available for the applicant to be detained at Oberstown. In certain circumstances, this was not correct. Section 155(5) of the 2001 Act would have permitted the respondent to stay in Oberstown had his period of detention been up to 6 months after he reached his 18th birthday. Accordingly, a term of detention of 9 months was in fact available to the sentencing judge. Furthermore, the course and treatment devised by the Probation Service for the respondent would be available to the respondent in Oberstown, although a “*bedding in*” period would have to be factored in.
- 58.** Counsel for the respondent suggests that this is a truly exceptional case as envisaged by *The Director of Public Prosecutions v. FE* having regard to the nature of the consent case; the reckless rather than intentional element involved; and the personal circumstances of the respondent which the Court will not rehearse again but are set out in the probation report already referred to. The Court does not agree. Ultimately, this is not a case where a guilty plea was entered and a trial avoided. Counsel for the respondent suggests that the existence of the s. 4 rape charge made it difficult to address the rape charge with a guilty plea. While this may have been difficult to navigate, it was not impossible. Furthermore, it transpires that a full offensive was launched on the victim in terms of the respondent’s case. The defence was not limited to an assertion that the respondent lacked the necessary mens rea but included an assertion that the victim had consented to the sexual intercourse. This takes the case out of the exceptional category theorised by Charleton J in *The Director of Public Prosecutions v. FE*, but rarely existent. Imposing a suspended sentence in the circumstances of this case was not merited and amounts to an unduly lenient sentence within the meaning of the 1993 Act.

59. The Court is further of the view that suspending the sentence imposed for only the term that would bring the respondent to his 18th birthday was also an error in principle. The probation recommendation, which the sentencing judge placed significant reliance on, was that the respondent would engage in a treatment programme with the Probation Service for a 24 month period. The sentencing judge determined not to impose this requirement as the agreed view was that the sentence could not be activated if a breach occurred after the respondent reached majority. While this is a correct interpretation of the law having regard to *The Director of Public Prosecutions v. Cian O'Leary* [2023] IECA 48, the Court is of the opinion that this was a consideration which the sentencing judge should not have had regard to in this stage of the process.

Conclusion

60. Accordingly, the Court is of the view that an error in principle has been established within the meaning of s. 2 of the 1993 Act such that the sentence which was imposed was a substantial departure from an appropriate sentence in this matter and was unduly lenient.

Re-sentence

61. Section 2(5) of the 1993 Act, as inserted by s. 61 of the Criminal Justice (Miscellaneous Provisions) Act 2023 permits this Court, having found that the sentence imposed was unduly lenient, to re-sentence the respondent as if he had been an adult at the time of his original sentence.

62. Having regard to the offending behaviour perpetrated by the respondent and considering the aggravating factors of the age of the victim and her intoxicated state, together with the victim impact report, the Court is of the view that the appropriate headline sentence had the offence been committed by an adult is one of 7 years imprisonment. Having regard to the respondent's age at the time of the offending, his level of maturity and lack of sexual understanding, and applying the dicta in *The Director of Public Prosecutions v. TD*, we are of the opinion that a reduction of 50% should apply to that headline sentence, leaving an identified headline sentence of 3.5 years. With respect to the mitigating factors in the matter to include, the fact that the respondent did not have any previous convictions; he accepted he had had sexual intercourse with the victim; he waited at the scene for the guards arrival; he accepted the jury verdict; he sat his Leaving Certificate after the conclusion of the trial; he has a job; he comes from a good family and has the full support of his parents; the manner in which he had co-operated with the Probation Service in a spirit of willingness and openness with a determination to avail of any form of assistance available to him and continues to do so despite the fact that he is under no compulsion from court; and the delay in the matter, we are of the opinion that a reduction of 18 months from the identified headline sentence is appropriate.

63. We are impressed with the fact that the respondent has continued to engage with the Probation Service since he turned 18 and at a time when he was under no court compulsion to do. We are of the view that committing the respondent to an adult prison at this stage, even though he has reached 18 would serve no useful purpose whatsoever.

64. Accordingly, we will impose a term of imprisonment of 2 years which we will suspend in its entirety for 2 years on the conditions set out in the Probation Report dated the 25 May 2023.