THE COURT OF APPEAL

Record No: 243/2021

Birmingham P.
Edwards J.
McCarthy J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

Between/

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

APPLICANT

V

R.C.

RESPONDENT

JUDGMENT of the Court delivered on the 14th day of February, 2023 by Mr. Justice Edwards.

Introduction

1. The subject of the present appeal is an application made by the Director of Public Prosecutions (i.e. "the applicant") pursuant to s. 2 of the Criminal Justice Act 1993 to the effect that the sentence imposed by McDermott J. at the Central Criminal Court on the 30th of November 2021 on R.C. (i.e. "the respondent"), he having been convicted on the 29th of June 2021 of 72 counts of different sexual offending against the complainant, who was then aged between 8 and 18 years, was unduly lenient.

2. The 72 counts of sexual offending, on which the respondent was convicted, comprised:

   (i) 48 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended) ("the Act of 1990) (Counts Nos 1 to 21 inclusive and 25 to 51 inclusive on the indictment);

   (ii) 13 counts of rape contrary to s. 4 of the Act of 1990 (Counts Nos 23, 24 and 52 to 62 inclusive on the indictment); and

   (iii) 11 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981 (as amended) as provided for by s. 48 of the Offences Against the Person Act 1861 (Count Nos 22 and 66 to 75 inclusive on the indictment).

3. The impugned sentence is one of an effective and global 7 years' imprisonment. It technically consists of two sentences, to run concurrently. The first sentence, in respect of each of the 48 counts of s. 2 sexual assault, is one of 5 years' imprisonment, with the final year thereof suspended. The second sentence, in respect of each of the counts of s. 4 and s. 2 rapes, is one of 10 years' imprisonment, with the final 3 years thereof suspended. Both sentences run from the date of conviction, the 29th of June 2021. The conditions attaching to the part suspensions, as described in the Rule of Court, are that for a period of 5 years from the date of his release from prison, the respondent shall

> *"(i) keep the peace and be of good behaviour towards all the people of Ireland;*
>
> *(ii) remain under the supervision of the Probation service and keep all appointments and comply with all lawful directions of his Probation Officer;*
>
> *(iii) have no contact with the complainant or any member of her family either directly or indirectly through third parties, or by social media, telephone, or otherwise;*
>
> *(iv) not be or remain in the company of any child under the age of eighteen years except under the supervision and company of another adult;*
>
> *(v) prior to release from prison, advise his Probation Officer of the address at which he will reside upon release and further advise his Probation Officer prior to any change of that address;*
>
> *(vi) come up if called upon to do so to serve the portion of the sentence this day imposed but suspended on his entering into this recognizance"*

Factual background as established by the complainant's evidence given at trial

4. The court has already summarised the facts of the case in its earlier judgement in relation to the appellant's appeal against his conviction - see *The People (Director of Public Prosecutions v. R.C.* [2023] IECA 4 - and this judgment may be read in conjunction with that judgment. The trial before the jury in the Central Criminal Court was presided over by Stewart J. However, the appellant was sentenced in that court by McDermott J. In circumstances where McDermott J. had not presided at the trial, a précis of the evidence at trial was provided to him at the sentencing hearing through the evidence of Garda Raymond Doyle.

5. Garda Doyle confirmed that at the date of the sentencing hearing on the 22nd of November 2021 the accused was aged 77. The victim in the case was born in 1983 (making her circa 39 years younger than the accused). The events to which the indictment related occurred between May 1991 and May 2001 during which time the victim was aged between 8 and 18 years of age. During that time the accused was in a relationship with the victim's mother.

5. The crimes giving rise to the charges occurred in three locations. As was already outlined in some detail in this court's judgment in the conviction appeal, the victim, originally from village A, moved briefly to live with her grandmother in village B before moving to an

address in village C shortly before starting primary school and there resided with her mother in a small one-story council house consisting of two bedrooms, a little kitchen, and a garage, all under one roof. She lived at this address until she was 15 years of age and started transition year at a convent secondary school, whereupon she moved to stay with her aunt and uncle, their two sons and daughter at their home, near the victim's grandmother's house, in village B for the purpose of residing close to the school. After transition year, the victim boarded at the said school until the completion of her Leaving Certificate. The victim's mother, once the victim had moved to stay with her aunt and uncle, moved to a dwelling-house in village D, ownership of which the victim's mother shared with the respondent.

6. Notwithstanding the length of the relationship between the respondent and the victim's mother, the respondent did not reside with the complainant's mother or the victim before the end of the victim's transition year, instead visiting the pair's home in village C every evening from Monday to Friday.

7. Garda Doyle related how the victim had testified before the trial court that from when she was eight or nine (after her communion) she would be left alone in the company of the respondent when her mother would have to go out. She recalled that on one occasion she was wearing a dress and he began touching her vagina over her clothes. The victim's evidence had been that she froze but knew that it wasn't right. This then began to happen on a regular basis, once or twice a week.

8. Her evidence was that the respondents abuse progressed from touching her outside her clothes to touching her inside her clothes. From that, it progressed to the respondent attempting to put his finger inside her vagina. Her evidence was that she pushed him away and for the first couple of times he attempted to do so he didn't succeed. However, he eventually did succeed. The victim's evidence was that it hurt her and she would tell him to stop but that he wouldn't.

9. Garda Doyle related that the victim went on to testify that after some time the abuse progressed from him touching her to making her touch him. He would take her hand and make her touch his penis. On other occasions he would touch her vagina, put his hand inside her vagina and also touch her breasts. This would happen in various rooms in the house in village C on occasions when her mother was out, and the respondent was minding the victim. She was abused in this way regularly and said in evidence *"any opportunity he got basically"* he would touch her in some way or another.

10. The victim told the jury that her abuse progressed from there to instances of rape and oral rape. These commenced when she was about 12 years of age. He would make her perform oral sex on him and he would have sex with her. Again, this would happen in the house in village C and she described it is happening *"a lot"*, i.e. on a regular basis.

11. The victim had respite from being abused during her transition year when she lived with her uncle and aunt. However, her evidence was that once she had become a boarder in secondary school (after her transition year) she regularly visited and stayed over with her

mother and the respondent at the house in village D at weekends, and during school holidays.

12. The victim also described how her sexual abuse was not limited to occurring at her home in village C, but rather that it resumed after her transition year at the home of the respondent and her mother in village D when she would visit and stay over all on the weekends. The victim described how the worst instances of her sexual abuse were not limited to instances of vaginal intercourse but included anal intercourse as well. The victim estimated that the instances of anal intercourse numbered *"maybe less than 10 times, but it did happen quite a few times"*. She would later recall in her testimony that if the respondent did not succeed in having sex one way, he would do it the other way.

13. The victim indicated at trial that her reaction to the respondent's behaviour was one of fear:

> *"I was afraid. I was afraid. I was scared. I –*
>
> *[...]*
>
> *I was petrified."*

14. Prosecuting counsel had asked the victim in examination-in-chief if the respondent said or did anything to increase her fear, and in response to this query, the victim replied:

> *"He had – he used to go shooting and he had guns in the bedroom in* [all village D]*, his main bedroom. And if I was crying or – crying and screaming and pleading with him to stop, he'd just point at the case and say that he had those there. In other words, like, you know, 'I'll kill you if you don't do it, what I ask you to do.'*
>
> *[...]*
>
> *And I was afraid. I knew, because I had seen them on numerous occasions and I knew that they were there."*

15. Garda Doyle described how the victim had testified that on the occasions, during the time that she was boarding at secondary school, when she would stay over at the house in village D on weekends, the respondent would drive her back to school on Monday mornings. She had recalled how they would leave the house in village D early in the morning, at around 7:30am, and he would bring her to a cream-coloured mobile home that he owned in a location near village B which was on the route to the school. There the respondent would again rape and sexually assault the victim. The abuse of the victim in this way continued until shortly before the victim did her Leaving Certificate, which in turn was just after her 18th birthday. Accordingly, the indictment ends on her 18th birthday.

16. At 19 years of age, the complainant met her future husband, whom she married in January 2005. She did not disclose to him what the respondent had done to her until she was approximately seven years married at which point she told her husband, without

divulging *"any detail"*, what had occurred in her youth, but she did disclose the respondent's identity as the perpetrator.

17. In 2015, the complainant had what was described before the jury as a *"breakdown"*. By that point, she and her husband had had several children and she explained *"I think it all just got too much and I just couldn't cope with it I think. It was the fact I had my own kids and I was looking at them and I think that's what kind of – you know, I couldn't imagine somebody doing something like that to them. And I left home and I just contemplated suicide. I just was broken at that point"*. The complainant went on to describe in her evidence to the jury how she ultimately told a counsellor about what had happened to her, and stated that this led to the making of her complaint to An Garda Síochána in the summer of 2015.

18. The sentencing court heard that the respondent was arrested in February 2016 and detained. He was interviewed while in custody. In the course of those interviews he confirmed some surrounding details concerning his relationship with the victim's mother but denied the victim's allegations that he had abused her. He continued to maintain this stance of trial. He gave evidence in his defence, during which he suggested that he had had very little involvement with the victim when she was growing up and denied all of her allegations.

19. Garda Doyle confirmed to the sentencing judge that the respondent had no previous convictions. Under cross-examination Garda Doyle indicated that there were no other investigations outstanding in relation to him. Garda Doyle also indicated that, notwithstanding his conviction, the respondent had maintained a relationship with his wife and son, who were present for the entire trial and were present at the sentence hearing. Garda Doyle accepted defence counsel's contention that since entering prison the respondent had had a number of physical health problems, i.e., that he had to be brought to hospital with gastric problems, and that there was, at the time of the sentence hearing, an inflammation of his gallbladder.

20. Garda Doyle also confirmed, in cross-examination, that he had been shown certain reports concerning the accused by defence counsel. One of these related to a *"mini mental health examination"* arising in 2020 in which the respondent scored 15 out of a possible 30 in the test, a result which had given rise to a concern about possible cognitive impairment, although not at a level which raised a question of his fitness to be tried. The transcript does not suggest that a copy of the report was tendered to the witness, and it is silent as to whether or not a copy was handed in. Be that as it may, a short report of a Dr. Costello dated the 6th of March 2020 addressed to the respondent's solicitors, has been put before the Court of Appeal, the contents of which are consistent with what was put to Garda Doyle.

21. Similarly, it was also put to Garda Doyle by defence counsel that the prison doctor, when taking the respondent's history on the 10th of August 2021 following his commitment to prison, had recorded on the notes *"query mild cognitive impairment"*. Garda Doyle responded to the question put to him in cross-examination by stating, *"I accept that"*. A

copy of the report in question has been provided to the Court of Appeal and it does contain the note in question. Whether this was properly before the court below or not, we are prepared to accept that the court below was made certainly aware at sentencing (without objection) of the existence of a level of concern about the respondent's cognitive state. Garda Doyle further agreed with defence counsel's suggestion that the respondent is hard of hearing and that *"even to the layman"* the then 77-years-old respondent appeared *"to have slowed down somewhat"*.

The Impact on the Victim.

22. In an impact statement read by the victim at the sentence hearing on the 22nd of November 2021, the victim described the legacy of the abuse she suffered at the hands of the respondent:

> *"This abuse has caused me torture and distress all of my life. It has left me isolated and alone from a very young age, feeling terrified with nowhere to turn. I've spent these years lacking in confidence, feeling ashamed, never feeling good enough. From the time the abuse started when I was eight years old, I was terrified, numb in shock, my childhood was taken away from me. Every child has the right to feel safe and secure, I was robbed of that feeling. I never felt safe or comfortable. I have had nightmares and flashbacks. I always carried that fear, never feeling fully safe. I was so broken that it affected my relationship with my husband as I didn't feel like a normal woman should. I was always held back afraid of what he would think of me. It has impacted me in the sense that I couldn't work full-time after I had the children as I never felt comfortable leaving them with anybody, apart from my husband in case the same thing happened to them that happened to me. I couldn't take that chance. As a result of what happened, I no longer have a relationship with my mother. My husband and four children are my family. I didn't do well in my leaving cert as I couldn't focus due to the upset, trauma and anxiety I was experiencing. It robbed me of the opportunity to do better and gain the career in primary teaching which I so wanted. This abuse has left no area of my life untouched. In 2015 I had a breakdown. I contemplated suicide. I was not in a good place but thankfully as a result of the love and support of my husband and children I overcame that hurdle. As a result of the trial, having to relive every minute of that torture all over again, I was traumatised even in the weeks after it. I was so upset I couldn't focus on anything at home, it was something I wasn't prepared for. I still have no self-confidence, this is always going to be issue, but I no longer feel the shame that comes with it because I now know this was not my fault. This should never have happened. I will always carry the scars of what happened to me now that this horrible abuse has been acknowledged, I can finally breathe and live my life like I should have always been able to."*

The DPP's views as to Gravity

23. Following the complainant's reading of her victim impact statement, the prosecution submitted that in respect of the degree of gravity, it was the Director's view that this case fell within the category of *"more serious cases"*, i.e., offences meriting headline sentences of between 10 and 15 years' imprisonment, as described in the Supreme Court's guideline

judgment on rape offences, delivered by Charleton J., in *The People (Director of Public Prosecutions) v. F.E.* [2019] IESC 85, and specifically that it merited location between the middle and high end of that category.

The Plea in Mitigation

24. In response to the prosecution's suggestion that the case fell at the middle to high end of the F.E. scale, counsel for the defence indicated that he could not *"gainsay"* that suggestion but nevertheless submitted that the offending for which the respondent was convicted seemed to be *"an aberration, [albeit] obviously a clearly very serious one"* and that there had been no other offending in the respondent's life to act as an aggravating factor.

25. Though counsel conceded that the court was entitled to treat the offences as *"inherently violent acts"*, he submitted that the offences did not involve additional violence beyond the violence inherent in the acts themselves, and sought to contrast this case with examples of more serious cases that had come before the courts.

26. Counsel stressed that the respondent was convicted following a delayed trial. Though counsel conceded that there was no bar to what he characterised as *"stale cases"* being tried (at the oral hearing of this appeal, the Court of Appeal expressed its unhappiness at the characterisation of such cases as being *"stale"*, preferring that they should be referred to instead as *"old cases"*), and that *"the vague nature of the allegations"* is an obvious feature at such trials, he nonetheless submitted that the consequence of a delayed trial in this case was that the respondent was being sentenced at 77 years of age, 20 years after the last offence and 30 years after the first offence, and in circumstances where his physical and mental health appeared to be in decline owing to old age. On this old age point, counsel submitted that any substantial sentence which must follow the respondent's conviction should account for the fact that *"there's not much of his life left and given the small remaining years of his life it does mean, in my respectful submission, that the sentence is something that's likely to have an added impact for that reason"*.

27. Counsel concluded by asking the court to take this added hardship into account, to take account of his declining mental and physical health, and to also take account of the impact on his family members. He alluded to the fact that his client had worked hard all his life. It was submitted that the impact of his client's imprisonment was not just felt by the respondent but also by his wider family, and that regard should be had to this in the light of the respondent's advanced years. Accordingly, counsel submitted that although the headline sentence must be a significant one, it should be appropriately adjusted in the light of those factors and in circumstances where the respondent was not part of the complainant's life anymore.

Sentencing Remarks by McDermott J.

28. McDermott J. in remarks expressed in sentencing on the 30th of November 2011, summarised the facts of the case. He acknowledged the impact on the victim as expressed in her victim impact statement. Further, he noted the personal circumstances of the respondent, namely that he was then 77 years old, that he had no previous

convictions and had led an otherwise blameless life. He noted his positive work history and that he has a supportive family with whom he continues to maintain a relationship. He also referenced and acknowledged the evidence concerning the respondent's medical problems, both physical and mental.

29. The sentencing judge then reflected on the aggravating factors in this case. He observed that the offences *"were committed on a defenceless child. They were committed in the child's family home violating every sense of warmth, security and love that the family should provide and turning it into a place of fear and trauma for her"*. McDermott J. further considered that the respondent *"repeatedly violated the trust vested in him by the child's mother in leaving her daughter in his care. He completely abused his position in the household"* and referred to the respondent's *"position of standing"* in the household as an *"effective stepfather"*.

30. The sentencing judge noted that in spite of his role of effective stepfather to the complainant the respondent regularly took full opportunity to exploit the complainant *"without hesitation and whenever he wanted"*, and that the respondent's sexual offending against the complainant was *"[a]ll done for his personal gratification, knowing that she vulnerable to his control and helpless in the situation in which she was living"*.

31. The sentencing judge observed that the offences of which the respondent had been convicted were *"of the most serious kind"*, and he noted that s. 2 and s. 4 rapes attract a penalty of up to life imprisonment and that sexual assault offences committed on a person under the age of 18 years attract a penalty of up to 14 years' imprisonment. The sentencing judge remarked *that "[t]he continuous and persistent abuse of a child, as in this case, takes the case into a high degree of seriousness because that was done. The frequency with which the offences were committed against a child and the terrible effects of such abuse upon her as well as the other factors which I've already referred."*

32. In determining the headline sentence, McDermott J. stated:

> *"I'm satisfied that the appropriate headline sentence for the rapes and section 4 offences in this case should take account of the fact of the regular and repeated offences committed. Rather than adopt the approach of imposing consecutive sentences, I'm taking into account the overall seriousness of the offending as well as the actual offences represented by each count in imposing a sentence on each count".*

33. The sentencing judge then proceeded to determine the headline sentence based upon the F.E. guidance *"as one in which lies between or overlaps the upper range of sentences for offences of the more serious kind, 10 to 15 years and the lower end of the range of penalties applicable to offences of the most serious kind which is a range of 15 years to life imprisonment"*. The sentencing judge was thus satisfied that a headline sentence of 15 years' imprisonment was applicable to each of the s. 2 and s. 4 rape counts on which the respondent was convicted.

34. In respect of the 48 counts of sexual assault on which the respondent was convicted, the sentencing judge was further satisfied that the appropriate headline sentence was one in the mid to upper range of offending, nominating a sentence of 8 years as appropriate. This was set having regard to *"the continuous and frequent nature of the offending as well as the offending represented by each count"*. Owing to this, and (implicitly) due to the related nature of the offending, the sentencing judge did not deem it appropriate to consider imposing consecutive sentences on each of the 48 counts of sexual assault.

35. As regards mitigating factors, the sentencing judge took into account the respondent's advanced age, 77 years, and the fact that his health showed signs of deterioration due to old age. The sentencing judge noted that in circumstances where the respondent is in custody at an advanced age, *"[e]ach year spent in custody is in effect a substantial portion of his remaining years given the average life expectation of the population"*. Moreover, the sentencing judge considered that, although the respondent did not suffer from any life threatening or serious illness, physical or mental disability of immediate threat or concern, it was necessary for him *"to consider whether and the extent to which a sentence appropriate to the seriousness of the offending should be reduced because of the particular hardship that would be suffered by him as an older man serving such a lengthy sentence"*.

36. The sentencing judge also took into account the absence of any previous convictions and of any convictions after the period of offending. He noted that the respondent *"has otherwise, as I said, led a blameless life and offered support to his family and children. The last of the offences committed occurred some 20 years ago and I must give credit for the fact that he has in effect lived a blameless life during that period."*

37. Nevertheless, the sentencing judge did go on to emphasise that the respondent was *"not entitled to the significant mitigation granted to an offender who pleads guilty to the charges and offers a sincere expression of remorse"*. Acknowledging the entitlement of the respondent to contest the charges against him and to continue to do so, the sentencing judge added, *"but this means that the Court in imposing sentence sees no basis upon which to extend the upmost mitigation to him that would have applied [had he pleaded guilty and accepted responsibility for his crimes]. I'm satisfied that he must serve a significant custodial sentence for these very serious crimes"*.

38. The sentencing judge then went on to discount from the headline sentences he had nominated to reflect the mitigation in the case as he saw it. He did so by combining a straight reduction with a partial suspension. In respect of each count of s. 2 and s. 4 rape, he gave a straight reduction of 5 years from the headline sentence of 15 years, and then suspended the final 3 years of the remaining 10 year period for a period of five years following the respondent's release from custody. He noted that *"[n]ormally an offender in his position would be obliged to serve a much greater period in custody"* for these types of offences. The sentencing judge stressed that the part suspensions, (which were upon the conditions outlined at para. 3 of this judgment) were wholly age-related, and that the respondent would not otherwise have received the benefit of them in circumstances

where he had, by his stance, not given the court *"any basis upon which to conclude that he would commit to any sexual offender rehabilitative programme"*.

39. In respect of each of the counts of sexual assault, the sentencing judge imposed a sentence of five years' imprisonment and suspended the final year in respect of each count, for a period of five years from the date of release, again upon the conditions previously mentioned. All sentences, both for the s. 2 and s. 4 rapes, and for the sexual assaults, were to run concurrently and all sentences were backdated to the date upon which he went into custody, being the date of conviction, the 29th of June 2021.

Grounds of Application:

40. The applicant has submitted, in a Notice of Application for Review of Sentence pursuant to s. 2 of the Criminal Justice Act 1993, two grounds underpinning her application to the Court of Appeal. Those grounds are as follows:

> *"1. That the learned sentencing judge failed to give appropriate weight / gave insufficient weight to the aggravating factors in the case (including the period of the offending behaviour, the breach of trust involved and the age of the victim at the time of the offences) and attached undue weight to the mitigating factors of the respondent's age and previous good character and thus erred in law and in fact in failing to impose a sentence which reflected the gravity of the offence, and;*
>
> *2. that the learned sentencing judge erred in law in double-counting the mitigating factors to reduce the headline sentence and using the same factors to suspend a portion of the sentence imposed."*

Applicant's Submissions to the Court of Appeal:

41. In relation to the first ground, the applicant submitted in essence that the sentencing judge discounted too much from the headline sentence. This alleged error was said to be symptomatic of the sentencing judge attaching inappropriate weight to limited mitigating factors, and specifically to the facts that the respondent was of advanced age and had deteriorating health. The applicant submits that there was not a plea of guilty or expression of remorse, or indeed any evidence of acknowledgement by the respondent of the trial verdict such as would entitle him to significant mitigation, and contends that while the court below took the advanced age of the respondent into consideration, there was no evidence that the respondent's medical condition was so adverse as to render imprisonment in his case *"unduly oppressive"* within the meaning of the authorities upon which the applicant relies in this appeal.

42. The applicant placed reliance on *The People (DPP) v. O'Brien* [2015] IECA 1 in which this Court retained a 12-year headline sentence, nominated at first instance, but reduced the part suspension of 9 years of it to 3 years, in circumstances where a 74-year-old accused had perpetrated repeated sexual abuse towards his daughter over a nine-year period. The accused in that case had pleaded guilty. He also suffered from an extensive range of medical conditions for which he required regular hospital admission. He was on 13 different kinds of medication and had an oxygen tank at night. The accused had also

suffered cracked ribs owing to a fall, for which he was also admitted to hospital. The Court of Appeal (Ryan P.) held, at paras. 42 – 43:

> *"It is legitimate and proper for a judge to take into account a guilty person's age and state of health and other personal characteristics when deciding on sentence. Old age and ill-health are generally to be considered as mitigating factors. But that is to be distinguished from circumstances of such infirmity of body or mind that would make it exceptionally oppressive and unjust for the person to undergo a term of imprisonment.*
>
> *In this case the respondent is and has been suffering from a number of serious illnesses with painful and unpleasant symptoms and with significant disabilities. But the evidence before the trial court was that he would be as well treated in prison as in the community. The point therefore is that he is entitled to such mitigation as his health condition warrants but he cannot be treated as a person for whom a prison sentence would be impossible to tolerate. His illness is persistent, causing pain and discomfort and disability but it is not worse for being in prison rather than living in community."*

43. The applicant also relied on *The People (DPP) v. D.W.* [2018] IECA 143 in which this Court upheld an 18-year sentence, 6 years of which were suspended, in circumstances where an accused had pleaded guilty to 18 counts of rape on his stepdaughter committed over number of years running from when the complainant was 11 years of age. The sentencing judge had identified a headline sentence of 18 years' imprisonment but indicated he was prepared to discount from that by 4 years to account for certain mitigating factors, namely the accused's guilty pleas, his admissions to gardaí and his expressions of remorse. The intended discount was ultimately given effect to by the suspension of 4 years of the 18-year sentence. However, having indicated that he would discount by 4 years for the factors mentioned, the sentencing judge had then gone on to suspend a further 2 years of the sentence, specifically on account of the accused's age and state of health. At the time of sentencing, the accused was 70 years of age and was suffering from alcohol-related hepatitis, peptic ulcer disease and hypertension. The accused had previous convictions for the indecent assault of the complainant's siblings. In dismissing the appeal against severity of sentence, the Court (Edwards J.) held at para. 59:

> *"There was no evidence before the sentencing court to suggest that either his age and/or his state of health were such as would make it unduly oppressive and unjust that he should have to serve a substantial prison sentence. The appellant may find prison somewhat harder to cope with given his age and state of health, but this was adequately recognised by the suspension of two years of the sentence by the court below. The appellant has committed grave crimes which require that he serve a substantial custodial sentence."*

44. In the light of the foregoing authorities, the applicant respectfully submits that the learned sentencing judge had afforded the mitigating factors of advanced age and

deteriorating health too much weight and this is demonstrative of an error in principle *"in failing to impose a sentence which reflected the gravity of the offence herein and the aggravating factors"*.

45. In respect of the second ground, the applicant submitted that the sentencing judge erred in law by taking into account for the same mitigating factors both in reducing the headline sentences and in determining the periods of part suspension. The applicant described this phenomenon as a *"double deduction"* and again placed emphasis on the fact that it had occurred in the context of limited mitigation and in the absence of a guilty plea or expression of remorse. The applicant pointed to the effective sentence of 7 years' imprisonment, equating to a reduction of 53% from the headline sentence of 15 years' imprisonment, which she submitted was not proportionate having regard to the limited mitigating factors at play in this case.

46. By way of comparison, our attention was drawn by the applicant to the decision in *The People (DPP) v. J.M.* [2020] IECA 285, a case in which an accused who had been convicted of several counts involving rape contrary to s. 4, indecent assault, and sexual assault, had been sentenced to 10 years' imprisonment, the final two years of which were suspended. The Court (Ní Raifeartaigh J.), in dismissing the appeal against severity of sentence, noted (at paras. 25 – 26 of the judgment) that there was a 38% reduction of the custodial aspect of a headline sentence of 13 years, to take account of the mitigating factors in that case which included inter alia an early plea, an acknowledgement of the harm done and the accused's youth at the time of offending (the offending commenced when the accused was 14 years). This discount was regarded by the Court as *"a significant discount from the headline sentence of 13 years"*. The applicant invited us to contrast with this the substantial effective 53% reduction that the sentencing judge in the present case made to the headline sentence, and submitted that in the present case, the available mitigation simply did not justify the level of discount afforded.

Respondent's Submissions to the Court of Appeal:

47. In reply to the applicant's first ground, the respondent submitted that the sentencing judge appropriately accounted for the aggravating factors present in this case. Further, it was submitted, he did not afford undue weight to certain mitigating factors, principally the respondent's advanced age. Counsel for the respondent has drawn the Court's attention to remarks by the sentencing judge which, on the one hand, acknowledged that the respondent *"is not entitled to the significant mitigation granted to an offender who pleads guilty to the charges and offers a sincere expression of remorse"*, but which, on the other hand, accepted that owing to the respondent's advanced age *"each year spent in custody is in effect a substantial portion of his remaining years given the average life expectation of the population"*.

48. Counsel for the respondent has sought to distinguish the present appeal from O'Brien, supra on the facts. He submitted that the *O'Brien* case was *"comparable (if not worse) in terms of the gravity of offending"* than the present case, involving, as it did, the use of violence. The point was made that the headline sentence nominated in *O'Brien* was considered to be in harmony with the jurisprudence of this Court, and that given the

absence of the aggravating factor of violence in the present case, a headline sentence of 10 years' imprisonment, albeit undoubtedly at the lenient end of what might have been nominated in the overall circumstances of the case, cannot be said to have been so out of kilter with precedent as to represent a significant departure from the norm.

49. In this regard, the respondent submitted that the Court, in assessing whether the 53% reduction from the headline sentence of 15 years' imprisonment could be justified, should take account of the possibility that it was open to the learned sentencing judge to have set the headline at 12 ½years' imprisonment, without any grounds for complaint arising. The respondent relies on *The People (DPP) v. O'Connor* (unreported *ex tempore* judgment, Court of Criminal Appeal, 28th of May 2003) in which the late Hardiman J. observed that a post-offending period of three decades was *"an immense fraction"* of the lifetime of the defendant, and the respondent submits that this authority is relevant insofar as the potency as a mitigating factor of the 20-year period following cessation of offending, in which the respondent did not commit any offences, is concerned.

50. In reply to the applicant's second ground, the respondent submitted that no error of law necessarily arises where a sentencing judge ostensibly *"double counts"*, or relies upon the same factors, as justifying both a straight discount from a headline sentence and the further suspension of a portion of the resultant sentence. Any ultimate effective discount is not necessarily required to be arrived at by the summation of discrete discounts attributable to individual component mitigating factors, or groups of such factors, but rather can be the result of a synthesis of all mitigating factors with due allowance for proportionality. The respondent submits that J.M., upon which the applicant relies in support of this application, supports this proposition.

51. The respondent submits that prison medical reports were furnished to the court below (we have alluded to this already) which detailed *inter alia* gastric issues necessitating hospital visits, cognitive impairment, and that Garda Doyle at the sentence hearing agreed that the respondent was hard of hearing. Counsel for the respondent emphasises that at the time of sentencing his client was 77 years of age and that by the time his sentence, including the probation period, expires, he will be of nearly 90 years of age; and submits that whatever about the existing sentence anything greater would represent a crushing sentence and disproportionate on that account.

52. Finally, the respondent submits that the applicant has conflated a 10-year sentence of imprisonment with 3 years suspended with a 7-year sentence of imprisonment simpliciter and says that her submissions fail to engage with the fact that a sentence suspended in whole or in part is still a sentence and represents both legally, and as a matter of reality, a significant criminal sanction. In the present case there were detailed conditions attaching to the suspension and the imposition of these was informed by clear and appropriate objectives. The respondent submits that there can be no error in principle where the headline sentence was fixed as belonging in the more serious cases category according to the *F.E.* guidance. In failing to appreciate that the part suspension is subject to compliance with certain conditions and in instead focusing on the custodial aspect as

the supposed true measure of the sentence, the applicant has failed to recognise that a suspended sentence is still very much a sanction that expresses the deprecation and censure of society, and which also serves to mark the gravity of the offending by providing that the respondent will ultimately potentially have to serve, if he breaches certain conditions, the full unsuspended sentence in prison.

53. The respondent, in this regard, relies on *The People (DPP) v. C.W* [2020] IECA 145 in which the Court (Edwards J.) emphasised that a suspended sentence is still a sentence, and an important tool in a sentencing judge's toolbox to be appropriately deployed, at the discretion of the judge, in furtherance of sentencing objectives. In the present application, the respondent submits that the conditions imposed on the part suspension are not merely generic but are particularly tailored to operate as a *"crime prevention strategy"* and he draws the Court's attention *inter alia* to the condition that the respondent during the probation period can only have supervised access to children. This is indicative, the respondent submits, of the part suspension being directed at *"appropriate penal objectives"*.

54. The respondent in conclusion submits that undue leniency arises only where there has been a substantial *"departure from the norm"* and that in the circumstances of the present application where, at first instance, the sentencing judge placed the headline sentence in the correct category and correctly identified the aggravating and mitigating factors, mere dissatisfaction on the part of the applicant with the end result is insufficient to reach that threshold and that accordingly the application should be dismissed.

The Court's Analysis and Decision

55. Ground of Appeal No 1 complains that the sentencing judge failed to impose a sentence which reflected the gravity of the offence. However, in doing so, the complaint is particularised as being comprised of two components: (i) that the sentencing judge failed to give appropriate weight / gave insufficient weight to the aggravating factors in the case (including the period of the offending behaviour, the breach of trust involved and the age of the victim at the time of the offences); and (ii) that the sentencing judge attached undue weight to the mitigating factors of the respondent's age and previous good character.

56. There is an ostensible conflation of concepts here. The affording of appropriate or due mitigation (not going to culpability) has nothing to do with the assessment of gravity.

57. It is also important to make the point that, conversely, aggravating circumstances only operate to influence the assessment of gravity. In other words, their existence, and the degree to which they exist, may result in an increased headline sentence. However, that is the extent of their influence. Assuming that a determinate headline sentence has been nominated, the existence of aggravating circumstances cannot then operate to negatively influence the amount of allowance for mitigation (not going to culpability) to which an accused may be entitled. For example, if the circumstances in which an accused pleads guilty are such that a reduction of, say, 20% from the headline sentence is appropriate, it matters not whether the headline sentence under consideration is 12 months for burglary

or 12 years for robbery. The accused is still entitled to a discount of 20%. Aggravating circumstances therefore have nothing to do with the affording of appropriate mitigation. The factoring in of the influence of aggravating factors on the one hand, and mitigating factors (not going to culpability) on the other hand, takes place in different stages of the sentencing process and the existence of one does directly operate to negative or reduce the influence of the other. They are not to be balanced against each other or set off against each other. We mention this because the way in which Ground of Appeal No 1 is cast suggests that weight attaching to mitigating factors can influence the assessment of gravity, which is simply not correct.

58. Ground of Appeal No 1, broken into its component parts, ostensibly challenges the appropriateness of both the headline sentence and the post-mitigation sentence. However, for reasons which will become apparent, we suspect that in truth the real complaint is with respect to the post-mitigation sentence.

59. The headline sentence is challenged in the contention that the sentencing judge failed to give appropriate weight / gave insufficient weight to the aggravating factors in the case (including the period of the offending behaviour, the breach of trust involved and the age of the victim at the time of the offences).

60. The post mitigation sentence is challenged by the contention that the sentencing judge attached undue weight to the mitigating factors of the respondent's age and previous good character.

61. Ground of Appeal No 2 then further challenges the post mitigation sentence by contending that the sentencing judge, in seeking to reflect the mitigating circumstances in the case by combining a straight reduction from the headline sentence with a part suspension, engaged in the double counting of mitigating circumstances.

62. We will consider each of these complaints in turn.

The appropriateness of the headline sentences

63. The focus of counsel for the applicant's submissions was on the sentences imposed for the s. 2 and s. 4 rape offences, rather than on the sentences imposed for the sexual assaults. Accordingly, we will also approach her application in that way.

64. This was offending to which the Supreme Court's sentencing guidance in *The People (Director of Public Prosecutions) v. F.E.* [2019] IESC 85 potentially applied. As noted, counsel for the DPP informed the court below that it was the Director's view that the case merited location between the middle and high end of the range of sentences applicable to "more serious cases". In *F.E.*, Charleton J., giving judgment for the Supreme Court, emphasised the culpability involved in the definitional elements of the crime of rape and stated that they should be foremost in the courts mind. Four categories of cases were considered, namely cases *"below the norm"*, cases attracting an *"ordinary headline sentence"*, *"more serious cases"* and *"cases requiring up to life imprisonment."*

65. It is not necessary to say much in the context of the present case about cases below the norm. No one has suggested that the present case would fall into that category. Briefly, it may be stated that cases coming within that category are those meriting the nomination of a headline sentence of less than seven years' imprisonment. As Charleton J.'s judgment illustrates, in some rare cases coming within this category sentences have been wholly suspended. Such cases are rare because, as Charleton J. put it at para. 44 of his judgment, *"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".* This statement resonates harmoniously with the Supreme Court's previously expressed view (in the earlier case of *The People (Director of Public Prosecutions) v. Tiernan* [1988] 1 IR 250) that the character of rape was such, even when committed without any aggravating circumstance, as to make the appropriate sentence, in the absence of wholly exceptional circumstances, a substantial immediate period of detention or imprisonment. As Finlay CJ. put it in the *Tiernan* case, at p. 253 of the case as reported*,"[w]hilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional."*

66. That having been said, a court must not deprive itself of the possibility of identifying the exceptional case where a custodial sentence may not be warranted. Thus, as Charleton J. explained at para. 47 of his judgment in F.E., 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."*

67. The next category up involves cases attracting an *"ordinary headline sentence"*. This can also be dealt with briefly as, again, no one in the present case is suggesting that it falls into this category. However, as the category of *"more serious cases"* is to some extent defined by comparison with cases attracting an ordinary headline sentence, it does merit some discussion. Reiterating that *"the precedents in sentencing clearly establish that conviction for rape ordinarily merits a substantial sentence"*, the Supreme Court in *F.E.*, commends that for cases where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence, *"consideration should commence in terms of mitigation at a headline sentence of 7 years."* While the upper limit of the category is not explicitly stated, it may be inferred to be 10 years' imprisonment in circumstances where the next category up is stated to run from 10 to 15 years' imprisonment. Indicative examples, based on precedent, of cases that have attracted an ordinary headline sentence are then provided, with the Supreme Court concluding that the pattern that emerges accords with the original analysis in *The People (Director of Public Prosecutions) v. W.D.* [2008] 1 I.R. 308. In that case, a judgment of the Central Criminal Court, Charleton J. had said at para. 36:

> *"The reports tend to indicate that where a perpetrator pleads guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. The substantial mitigating factor of a guilty plea, present in such a case, suggests that such cases will attract around six to seven years imprisonment where the factors of early admission and remorse coupled with the early entry of a plea of guilty, are absent."*

68. At para. 56 of his judgment in *F.E.*, Charleton J. seemingly excludes cases involving the abuse of children or of multiple counts, perhaps over years, (all features of the present case) from the category of cases that would typically attract an ordinary headline sentence. He observes, *"[t]hese tend to be more difficult to properly analyse and also are cases where the totality principle comes into play. These are considered in the more serious categories analysed below."* While Charleton J. may not have intended to imply an absolute exclusion, and there will of course be borderline cases, it does seem to us to be beyond argument that the present case is not one that on any view of it could attract an ordinary headline sentence.

69. As previously mentioned the category *of "more serious cases"* involves those that would attract sentences of 10 to 15 years' imprisonment. According to Charleton J. at para. 57 of his judgment in F.E., *"[w]hat 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."* Again, it might be observed that all three of these factors feature in the present case. The victim here was subjected to all three forms of potential rape by the respondent, namely vaginal rape, oral rape and anal rape, the latter being a particularly degrading violation of a child. Intimidation was also used by the respondent, as described at para. 14 of this judgment, in pointing to his gun and implying to the victim that she would be killed if she did not desist from crying and screaming and pleading with him to stop. In addition, the respondent committed his crimes in gross breach of the trust reposed in him both by the victim and by the victim's mother. A feature of that breach of trust was his abuse of the age disparity between them and exploitation of the inequality of power inherent in the adult/child relationship.

70. Once again, the type of cases falling into the more serious cases category is illustrated in the *F.E.* judgment by indicative examples drawn from precedents. Charleton J. comments that:

> *"62. … It remains the situation, on the run of precedents since the WD analysis, that a series of offences is not an ordinary rape and, on the headline sentence, is not to be punished as if such offences were in that lower band of seriousness. Where there is unusual violence or humiliation or cynical planning, the ordinary category of rape cases is passed and consideration of this higher band should be where the sentencing court starts."*

71. For completeness, the final category discussed in *F.E.* are those *"cases requiring up to life imprisonment."* Charlton J. suggests that remarks made by him at para. 49 of his judgement in the *WD* case remain apposite. He had said in *WD*:

> *"Reading the reports of these cases indicates that a number of factors are regarded by the courts as aggravating the offence of rape. The courts have placed particular emphasis on the harm that rape does to the victim and where there is a special violence, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions, these will have a serious effect on the eventual sentence. Abusing a position of trust, as with a person in authority, misusing a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrator or victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape. Coldly engaging in a campaign of rape, shows a particularly remorseless attitude which is not necessarily mitigated by later claims of repentance. Participating in a gang rape involves a terrifying experience for the victim and using death threats and implements of violence for the purpose of wielding authority or sexual perversion are also serious aggravating factors. Attacking the very young or the very old also emerges as an important aggravating factor from these cases."*

72. Again, it is not suggested by the DPP that the present case falls into the category of cases requiring up to life imprisonment.

73. That being so, and in circumstances where the headline sentence was set at the highest point within the category appropriate to *"more serious cases"*, it is not apparent what precisely is the Director's basis for complaint about the headline sentence. The trial judge ostensibly took due note of the Director's view as expressed by his counsel, that the case merited location between the middle and high end of the range of sentences applicable to more serious cases. The headline sentence nominated was at the highest end of that range, which reflected the Director's view. Despite this, it is now complained that the sentencing judge failed to give appropriate weight / gave insufficient weight to the aggravating factors in the case. We do not see how in the circumstances that can be said to be so, and it is for this reason that we are of the view that the applicant's real complaint must be deemed to relate to the post mitigation sentence rather than to the headline sentence.

74. In our assessment the headline sentence nominated of 15 years, while within the range of the sentencing judge's discretion and margin of appreciation, was probably at the severe end of what was appropriate having regard to comparators. The case has been made by counsel for the respondent that there could hardly have been complaint if the sentencing judge had started at 12 ½ years, and we agree with him on that, although it requires to be stated that such a headline sentence would equally have been at the lenient end of the sentencing judge's discretion and margin of appreciation.

75. We have carefully considered the remarks of the sentencing judge with respect to his assessment of gravity and can find no error. He had appropriate regard to the range of penalties open to him. He explicitly references, and can be seen to have had regard to, the Supreme Court's guidance in *F.E.* He explicitly references the main aggravating features of the case, being

(i) that the offences involved a defenceless child;

(ii) that much of the offending was committed in the child's family home violating every sense of warmth, security and love that the family should provide and turning it into a place of fear and trauma for her;

(iii) the violation of trust both qua the victim's mother and the victim herself inasmuch as he was in the role of an effective stepfather;

(iv) the degrading nature of the offending involving as it did not just indecent touching of the victim's breasts and genitals and vaginal sexual intercourse but also digital penetration of the victim, and oral and anal penetration of the victim;

(v) the age disparity between them, inasmuch as the victim was aged between 8 and 18 years during the offending, while the respondent correspondingly was aged between 47 and 57 years; and

(vi) the length of time over which the offending occurred (10 years) and the continuous and persistent nature of it.

76. The sentencing judge also appropriately referenced and took account of the harm done to the victim and the impact on her. The only specific aggravating factor not referenced was the intimidation of the victim involving the gun. This was in circumstances where evidence of that was not given before the sentencing judge when evidence relevant to sentencing was heard on the 22nd November 2021, although evidence of it had been given by the victim before the jury at the accused's trial which, as mentioned, had been presided over by a different judge. The sentencing judge could only act upon the evidence that was before him and he is not to be criticised for not referencing an aggravating feature of the case which was not led in evidence before him.

77. In our assessment a headline sentence falling within the upper half of the range appropriate to those cases characterised as being more serious cases in the Supreme Court's judgement in *F.E.*, required to be nominated in this case, i.e. a headline sentence of between 12 ½ years and 15 years' imprisonment. The sentencing judge opted to nominate a headline sentence of 15 years' imprisonment. While perhaps at the severe end of his margin of appreciation, we find no error of principle on that account. However, it certainly has not been demonstrated that the headline sentence failed to give appropriate weight / gave insufficient weight to the aggravating factors in the case.

The appropriateness of the reduction in mitigation

78. The second part of Ground of Appeal No 1 complains that the sentencing judge attached undue weight to the mitigating factors in the case, and specifically references the respondent's age and previous good character. Before expressing the view on this, it may be appropriate to offer some general commentary on advanced age as a mitigating factor in sentencing.

79. The has been no detailed study in this jurisdiction, or research into, the influence of advanced age on sentencing. However, based on this Court's own experience in reviewing sentences, on how the issue has been previously treated by us and by the Court of Criminal Appeal, and also based on case reports from other courts, it must be acknowledged as being a potentially relevant factor. It is also recognised as such in the leading academic commentary on sentencing in this jurisdiction – see O'Malley "Sentencing Law and Practice", 3rd ed, 2016, at para 6-53.

80. Cases from this jurisdiction (in which there are written judgments / recorded ex tempore judgments) in which advanced age as a relevant factor in sentencing has featured, or has been alluded to at least to some extent, include:

The People (DPP) v. M. (J.) [2002] 1 I.R. 363;

The People (DPP) v. P.H. [2007] IEHC 335

The People (DPP) v. L.D. [2014] IECA 53

The People (DPP) v. O'Brien [2015] IECA 1;

The People (DPP) v. P.G. [2016] IECA 352;

The People (DPP) v. Daniel Mullan [2017] IECA 188

The People (DPP) v. P.C. [2017] IECA 328;

The People (DPP) v. D.W. [2018] IECA 143

The People (DPP) v. Jerry O'Keeffe [2018] IECA 248

The People (DPP) v. W.M [2018] IECA 226

The People (DPP) v. M O'N [2018] IECA 305;

The People (DPP) v. K (Ex tempore, Central Criminal Court, White J., 22 October 2018); ;

The People (DPP) v. Crilly [2019] IECA 143;

The People (DPP) v. D.F. [2020] IECA 40; and

The People (DPP) v. C.A. [2022] IECA 312;

This does not purport to be an exhaustive list. It should also be mentioned that guidance concerning how an offender's advanced age should be approached in sentencing has been produced in some other jurisdictions. The Court notes that The Sentencing Advisory Council of the State of Victoria in Australia has recently examined this issue in depth. See: *"Sentencing Older Offenders in Victoria"*, SAC, Victoria, September 2021, https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-09/Sentencing_Older_Offenders_in_Victoria_0.pdf . The issue is also addressed in the Sentencing Bench book of the Judicial Commission of New South Wales. See https://www.judcom.nsw.gov.au/sentencing/ at 10-430. Further, the Sentencing Council of England and Wales (the Sentencing Council) in its (Crown Court) Guideline on Overarching Principles in Sentencing, identifies age, having a physical disability or serious medical condition requiring urgent, intensive or long-term treatment, or being the sole or primary carer for dependent relatives, as being amongst factors that may reflect personal mitigation. See: https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/ . In addition, an explanatory note on the Sentencing Council's website concerning *"How sentencing of historic offenders works"*, states that:

> *"In some cases, in particular if there has been a long period between the offence taking place and a conviction and sentence, the offender may be quite elderly. Judges are not obliged to take that into account when sentencing but may do so, depending on the circumstances, for example if they are very ill or frail."*

See: https://www.sentencingcouncil.org.uk/blog/post/how-sentencing-of-historic-offenders-works .

81. Such guidance will often be helpful, but as with all guidance, and indeed case law, from other jurisdictions it should be approached with caution having regard to the existence of different constitutional infrastructures, statute law and procedural rules in those jurisdictions.

82. The case law from both here and abroad indicates that advanced age may be relevant to sentencing in several respects. Although it arises relatively rarely it can bear on culpability where the offender's judgment or self-control was affected by an age-related disorder such as dementia. Much more commonly, however, a court is faced with the contention that an elderly offender should be sentenced more leniently, or have greater mercy shown to them, because of their physical and mental frailty. The case of *The People (DPP) v. D.F.* [2020] IECA 40 provides a recent example of that in the Irish context. Such physical and mental frailty represents part of the personal circumstances of the offender, and it has long been the law in this jurisdiction that an accused is entitled to have his or her personal circumstances taken into account. The basis for this is compassion and mercy, and proportionality.

83. Where advanced age is put forward as a mitigating factor it is not the offender's age *per se* that is potentially relevant but the fact that it may be (and frequently is) accompanied by other sentencing considerations, particularly concurrent ill health, reduced life

expectancy, reduced risk of re-offending, the fact that incarceration may be more onerous for the elderly due to physical challenges or cognitive issues or mental health issues, vulnerability, risk of intimidation / fears of victimisation by younger stronger prisoners, and sometimes concern about an elderly partner for whom the offender might have been the primary carer. The latter consideration featured in *The People (DPP) v. M O'N* [2018] IECA 305.

84. While a court must impose a proportionate sentence which takes account of an offender's personal circumstances, including advanced age and associated circumstances, it requires to be stated that advanced age (and related circumstances such as ill-health) cannot dominate the sentencing exercise to the exclusion of other considerations and in particular it ought not to override the appropriate reflection of offence seriousness or gravity and the pursuit of appropriate sentencing objectives. See *The People (DPP) v. D.W.* [2018] IECA 143 where a sentence appeal, based in part on alleged insufficient allowance for the offender's advanced age, was rejected in these terms:

"59. There was no evidence before the sentencing court to suggest that either his age and/or his state of health were such as would make it unduly oppressive and unjust that he should have to serve a substantial prison sentence. The appellant may find prison somewhat harder to cope with given his age and state of health, but this was adequately recognised by the suspension of two years of the sentence by the court below. The appellant has committed grave crimes which require that he serve a substantial custodial sentence."

85. However, depending on the circumstances of the case, advanced age may be relevant to proportionality, to sentence type, to what sentencing objectives it is fact appropriate to pursue, and to sentence structuring. Although age will not justify an inappropriate sentence, the dual proportionality requirements of our sentencing system require that any sentence should be proportionate not just to the gravity of the offending conduct but also to the circumstances of the offender. As one South African judge has put it, *"justice must be done, but mercy, not a sledgehammer is its concomitant" – S v. Harrison* [1970] 3 SA 684 (AD) 686A. The case of *The People (DPP) v. D.F.*, cited already, provides a good illustration of a case in which the factor of advanced age and ill-health appropriately influenced sentencing, but not to the extent of dominating it. This was an egregious rape case involving an offender who was 76 at the date of his sentencing and in chronic ill-health. The offending, in 1979, had involved the vaginal and oral rape of a six-year old child by the respondent who was 36 years of age at the time. The offence was accompanied by degradation and humiliation of the victim. He had not further offended between 1979 and 2020 when he was sentenced. Having pleaded guilty, he had been sentenced at first instance to 6 years' imprisonment with the final 4 years suspended. The DPP sought a review of the sentence on the grounds of undue leniency. The Court of Appeal considered it appropriate to intervene and increased the sentence, but in doing so stated at para. 20:

> *"It is the view of this Court that, having regard to all the features of this case, an appropriate headline sentence is twelve years with a reduction to nine years on account of the guilty plea, albeit late in the day. The Court is of the view that the sentence should be further reduced to five years taking into account the age and health issues of the respondent and the hardship to him in having to face, at a late stage in his life, an increase in the effective sentence already imposed on him. In arriving at this sentence, the Court has regard to the evidence that his medical and nursing needs are being well managed in the prison environment which has the resources to deal with dependant elderly prisoners. Having regard to all the circumstances of this case the Court does not consider it appropriate to suspend any portion of the adjusted sentence."*

86. The reference by McGovern J. in *D.F.* to the Court having received evidence as to the offender's medical and nursing needs, and the Court's reliance on such evidence, is important. A case presented in mitigation on the grounds that a custodial sentence may be more physically and/or mentally onerous for an older person requires to be based on concrete evidence. Assertions that an older prisoner may have difficulties in meeting basic activities of daily living such as eating, dressing and washing, difficulty in showering themselves, toileting themselves and managing issues like continence, require to be supported by appropriate evidence. Further, when faced with such evidence, it may be necessary for a sentencing court to enquire of its own motion of the State's representatives as to whether the offender's identified needs can be met within the custodial setting and take account of information received in response. If reliance is being placed on an apprehension that the offender, if incarcerated, will be unable to participate in prison work, or activities (including exercise) due to physical challenges such as mobility, then there requires to be medical evidence to support that. The same is true of claims based upon cognitive or mental health issues, or assertions of likely isolation and despair. Where there is cogent evidence tending to support a claim that a sentence will be more physically and/or mentally onerous for a person of advanced age, a court may (if it accepts the evidence) make some allowance for that. However, claims for mitigation under this heading that are put forward without an evidential foundation can expect to be rejected in limine.

87. Unlike in the case of the concept of minority which is defined by statute for the purposes of the criminal law (s. 3 of the Children Act 2001 defines a child as being a person under the age of 18 years), there is no corresponding definition as to what constitutes old age or advanced years. Advancing age affects different people differently. As previously mentioned, the Sentencing Advisory Council of the State of Victoria in Australia has examined this issue. In their September 2021 report entitled *"Sentencing Older Offenders in Victoria"*, they note that most cases where it may be relevant will involve offenders aged 70 or older but state that in one case in that jurisdiction age was found to be relevant to an offender as young as 46 with a reduced life expectancy.

88. In the case of *R v. RLP*, [2009] VSCA 271, the Court of Appeal of Victoria identified several principles concerning how an offender's advanced age (and ill health) might be taken into account at sentencing. The approach taken there was that:

1. The age and health of an offender are relevant to the exercise of the sentencing discretion;

2. Old age or ill health are not determinative of the quantum of sentence;

3. Depending upon the circumstances, it may be appropriate to impose a minimum term which will have the effect that the offender may well spend the whole of his remaining life in custody;

4. It is a weighty consideration that the offender is likely to spend the whole or a very substantial portion of the remainder of their life in custody;

5. Other sentencing considerations may be required to surrender some ground to the need to exercise compassion to take account of the real prospect that the offender may not live to be released and that the offender's ill health will make his or her period of incarceration particularly onerous;

6. Just punishment, proportionality and general and specific deterrence remain primary sentencing considerations in the sentencing disposition notwithstanding the age and ill health of the offender.

7. Old age and ill health do not justify the imposition of an unacceptably inappropriate sentence.

89. The issues identified at points 3 and 4 above, require to be addressed with some specificity in the Irish context, not least because in the present case the sentencing judge was faced with a situation where a substantial sentence was undoubtedly merited, which meant that the respondent could be expected to be imprisoned for, as the judge put it, *"a substantial portion of his remaining years, given the average life expectation of the population"*. It should be stated in passing that there was no actuarial evidence before the sentencing court concerning *"the average life expectation of the population"*, and so the sentencing judge was perhaps doing no more than applying what is common general knowledge that persons in their late 70s have reached the twilight of their lives. A few may live to achieve a very great age, but it is common general knowledge that, regardless of overall health status, many people in their 80s, and particularly the further they get into their 80s, can be expected to reach the end point of their lives during that, their ninth, decade. Moreover, ill-health in advanced age, depending on its severity and degree, will often accelerate the point at which a person succumbs.

90. As a general proposition, and matter of common sense, it can be stated that the older a person is, the more likely it is that even a short prison term could constitute the rest of their life and that they could die in prison. Where a person is of advanced years and is potentially facing a sentence giving rise to this risk, the approach has been taken in many

jurisdictions of treating each year of the sentence in contemplation as representing a greater proportion of the offender's remaining life than would be true in the case of a younger offender. The thinking is that an elderly offender should not be sentenced to what may amount to a life sentence if the legislature had intended that a significantly lesser penalty should be imposed for the crime committed. Practical proportionality, the argument goes, requires that the elderly be viewed as suffering more for each year of imprisonment than their younger counterparts. This represents the approach taken in several Australian States, e.g., Victoria, and New South Wales, and it was the approach adopted by the sentencing judge in the present case. It has been rationalised by Von Hirsch and Ashworth in *"Proportionate sentencing. Exploring the principles"* (2005: Oxford University Press) on the basis that *"the aim would not be equity mitigation based on compassion and quasi-retributive reasons, but rather making adjustments in sentence to deal with certain foreseeable differential impacts."* However, the approach is not uncontroversial, with, for example, criticisms by Easton in "Dangerous Waters: Taking Account of Impact in Sentencing" (2008) *Criminal Law Review* 105; and by Piper in "Should Impact Constitute Mitigation: Structured Discretion versus Mercy" (2007) *Criminal Law Review* 141.

91. The point also requires to be made that in the case of rape offences the Oireachtas has provided for up to life imprisonment, so it cannot be said that it had intended that a significantly lesser penalty should be imposed for such offending. That having been said, not every rape offence merits a life sentence. In fact, life sentences for rape are comparatively rare in Ireland. However, as Charleton J.'s judgment in *F.E.* demonstrates, rapes offences here do routinely attract high determinate sentences, frequently in the high single digit range or in the first decade of the double-digit range.

92. Needless to say, even where advanced age features significantly and there is a need to take it into account, it may still be necessary to impose a lengthy sentence, particularly in the case of serious offending. It has been said many times, in jurisprudence from many jurisdictions, that old age in itself does not justify the imposition of what would otherwise be an unacceptably low sentence. It may unavoidably be the case that the sentence which faithful application of sentencing principles requires should be imposed upon an offender, may mean that he or she may die in prison. This could well arise where, for example, an elderly person is being sentenced for multiple serious offences, perhaps also involving multiple victims. Notwithstanding a need to bring to bear the principle of totality it may still be necessary to impose a global sentence which will have the effect that the offender may well spend the rest of their remaining life in custody. That having been said, a court should where possible, i.e., where the exigencies of the case permit of it without recourse to an unacceptably low sentence, afford a chance or opportunity to the offender that they may be released in the future. In the interests of proportionality, some reduction in the sentence that would otherwise be merited may be appropriate to avoid a crushing sentence. The offender should not, where possible, be left without hope. Even prisoners on whom life sentences are imposed do not often die in prison. Most, perhaps because the majority of persons sentenced to life imprisonment offend and are sentenced in younger life, are eventually released by the executive on licence. This is, of course, a privilege

which can be revoked and not something a sentenced person is entitled to as of right. However, it is a reality. There is a risk that any sentence which, by virtue of circumstances such as the offender's advanced age and/or poor health, is likely to eliminate, or virtually eliminate, the hope of eventual release could be perceived objectively, and/or subjectively by the offender, as crushing, such that it could potentially precipitate despair. The sentencing process should endeavour to avoid this. In pursuit of ensuring proportionality in this sense, some reduction or amelioration of sentence on account of advanced age may be required. Advanced age is therefore potentially relevant to the type and length of sentence to be imposed, and the way in which any sentence is structured.

93. In terms of the appropriateness of a particular sanction, there may be less need for specific deterrence in the case of an elderly offender. It is frequently the case that elderly offenders represent a low risk of reoffending. In the case of historic offending it is often true, and indeed it is true in the present case, that the offender may have gone on, post the offending, to live a crime free and pro social life for a considerable time before the offending for which he (and sometimes she) is detected and prosecuted. While a need for general deterrence will remain, the need for specific deterrence will often have diminished, sometimes to the point of being negligible.

94. General deterrence can arguably be achieved by the very fact of a person, regardless of their age, having to spend time in custody, rather than on the basis of some irreducible minimum period having to be spent in custody. In this regard the appropriate headline sentence communicates the important message of censure and the deprecation by society of the offender's conduct. If, due to the offender's age and state of health, there is some amelioration of the hard treatment that the offender would otherwise have to endure, by reduction of the term or recourse to alternative sentencing options, or a combination of those things, this will not necessarily impact in our belief on the general deterrent effect of the sentence. Research has shown that severity effects in sentencing (i.e, the harshness with which an offender is treated) have much less impact on general deterrence than certainty effects (i.e., increasing the likelihood than an offender will be caught, successfully prosecuted and have to face a sentence).

95. There will often be little need in the case of a very elderly offender to consider rehabilitation, again for the reason that the propensity to offend in the matter concerned has dissipated due to circumstances, not least of which may be the physical effects of the ageing process. The sentencing judge in the present case reached that conclusion, and we think he was correct.

96. However, in the case of serious offending committed by an offender who has reached an advanced age at the date of sentencing, the sentencing objective of retribution will in many, if not most, cases remain strongly in focus. An imperative to impose a sentence involving significant censure, denunciation and justly deserved hard treatment involving deprivation of liberty for a considerable period, may remain notwithstanding the age of the offender. In the case of less serious offending there may be greater scope for the

amelioration of the hard treatment component of a sentence imposed, inter alia, for primarily retributive purposes, and in such cases the sentencer may seek, to the extent permitted in law, to have recourse to, and make imaginative use of, alternative sentencing options such as suspension, fine, or community service (to name but some), or a combination of them, as an alternative to, or in addition to, a carceral sentence.

97. Turning then to the circumstances of the present case. The offender was age 77 at the date of his sentencing. If we were to re-sentence him today, he would be just shy of his 79th birthday. As will have been apparent from the discussion of the appropriate headline sentence in this case, his offending was at the upper end of the category of more serious offending discussed in the *F.E.* jurisprudence. The victim impact statement makes it clear that he caused profound psychological harm and distress to the victim by his molestation of her, and she carries that with her to this day. Moreover, aside from the age and health factors there was not much to avail him in terms of mitigating circumstances. It was true that he had no previous convictions, but in cases involving long undetected offending committed over many years, as was the case here, previous good character carries little weight. It is also the case that in the interval since the offending ceased he has not further offended. Further, as the sentencing judge identified, he had further offered support to his family and children. However, that factor can be afforded only very modest weight. The same is true with respect to his work record. In regard to such matters it should be recalled that in *The People (Director of Public Prosecutions) v. C.A.* [2022] IECA 312 we stated at para. 34:

> *"While it is the law that an accused is entitled to have his personal circumstances taken into account at sentencing, not every personal circumstance will provide substantial mitigation. Indeed, it will often be the case that where an accused faces sentencing for multiple serious offences committed over a lengthy period of time that factors such as previous good conduct, and a good work record, will offer only slight mitigation. In the case of rape offences, such matters (where there is no suggestion that what occurred was a once off incident, or an aberration, or that it occurred in some exceptional circumstances tending otherwise to diminish responsibility), cannot it seems to us serve to significantly mitigate the offender's culpability. That is not to say that such circumstances can provide absolutely no mitigation, or that they are not to be taken into account. However, in most cases their mitigating effect will only be slight."*

98. What can be said with certainty is that the respondent did not have available to him the potentially most potent mitigating factor that might have influenced the sentencing court, namely a plea of guilty. If he had pleaded guilty the court might well have viewed him as prepared to take responsibility for his actions, and as being remorseful. He would also have been seen to have spared the victim the undoubted stress and trauma of having to testify at trial and submit to cross examination. The respondent was of course entitled to plead not guilty, and he is not to be penalised for having done so. However, by virtue of contesting the trial he could not avail of the substantial mitigation that would otherwise have been available to him.

99. The only other mitigation in the case was his advanced age and state of health.

100. On any view of it, his offending conduct merited a substantial custodial sentence notwithstanding the mitigating circumstances outlined. We have already indicated our view as to the appropriate headline sentence. In our assessment his advanced age and state of health required to be taken into account in circumstances where the case was being made that prison would be more onerous for him than for a younger person by virtue of his age and state of health, and where there was at least some evidence (albeit that it was a little thin) of physical and mental deterioration on his part.

101. The sentencing judge having nominated a headline sentence of 15 years for the rape offences, gave a straight discount of five years from the headline sentence coupled with the suspension of three years of the remaining 10 year period of imprisonment, leaving a net effective carceral sentence of 7 years' duration.

102. The by now well-established jurisprudence on the correct approach to undue leniency appeals (about which there is no controversy in this case) emphasises that great weight must be afforded to the stated reasons of the sentencing judge at first instance. So, what then were the sentencing judge's stated reasons for giving the level of effective discount that he did? He said:

> *"These reductions and part suspensions combined are made because of the mitigating factors identified and which I'm obliged to consider and apply as a matter of law. Normally an offender in his position would be obliged to serve a much greater period in custody."*

103. He subsequently added:

> *"He has by the stance taken these proceedings, not given the court any basis upon which to conclude he would commit to any sexual offender rehabilitative programme and so the part suspensions are wholly age-related and would not have been imposed otherwise since there'd be little or nothing to be achieved by it."*

104. We do not interpret the additional comment as indicating that the "age factor" (for convenience we are treating his associated health difficulties as being encompassed in that) was reflected solely in the part suspensions, and that the straight discount of five years from the headline sentence requires to be reviewed separately as reflecting the discount afforded for the other (in our view minimal) mitigating circumstances in the case. Rather, the sentencing judge was simply explaining that the part suspensions were not imposed in pursuit of the objective of rehabilitation, but rather were one component of a combined measure directed towards adequately reflecting what the sentencing judge saw as the mitigating circumstances in the case, the major one in the judge's view being the age factor. The question for us is, whether he went too far? The applicant makes the case that there was undue weight was attached to the age factor, and that an excessive discount was allowed on account of it, resulting in a post mitigation sentence that was substantially outside the norm, notwithstanding the respondent's advanced age and state

of health. Put simply, the applicant's case is that the sentencing judge unjustifiably imposed an inappropriately low sentence on account of the age factor. We are inclined to agree with the applicant, notwithstanding the reasoning offered by the sentencing judge. We are satisfied that the sentencing judge erred in affording, by means of the combined straight reduction and partial suspension, an inappropriately large reduction for mitigation from the headline sentence. This resulted in a post-mitigation sentence that was substantially outside the norm, and one that was unduly lenient. We will therefore quash the sentence imposed by the court below and proceed to a re-sentencing of the respondent.

105. However, before doing so we should also briefly address Ground of Appeal No 2, which, it will be recalled, was based on an alleged double counting of the age factor. We do not think this can be sustained in light of our finding that the straight discounting of 5 years from the headline sentence and the partial suspension of 3 years of the remaining 10 years, was not something done in sequential steps, but rather was a combined measure, adopted effectively in a single step, to reflect what the sentencing judge regarded as relevant mitigating circumstances in the case, the major one being the age factor.

Re-sentencing

106. While we have already expressed the view that the headline sentence nominated by the sentencing judge at first instance was within the appropriate range, we are not bound by his figure. We have expressed the view that his figure was perhaps at the severe end of his scope for action and, in the circumstances, we will nominate a headline sentence of 14 years.

107. For clarity, we will depart from the approach adopted by the sentencing judge at first instance and will not reflect all mitigation at once in a combined measure consisting of a straight discount coupled with a partially suspended sentence. Rather, we think that the respondent's absence of previous convictions, his desistence from crime and prosocial life for a lengthy period prior to his sentencing, the fact that he was a supportive family man following his marriage, and his hard work during his life, cumulatively should be reflected in a discount of one year from the nominated headline sentence of 14 years, leaving an indicative sentence of 13 years before taking account of his age and state of health.

108. The case was made during the plea in mitigation at first instance, but was not pressed on the appeal, that the appellant will suffer hardship due to the passage of time, characterised by him as *"delay"* rendering the case a *"stale"* one, between the commission of his offending and his eventual prosecution, ultimately leading to his conviction and sentencing late in life. We are not satisfied that the evidence establishes that such delay as may have occurred was unconnected to the circumstances of his abuse, and in particular the trauma suffered by the victim and his intimidation of her. While we will make further allowance for his age and ill-health, we will do so on the basis that they are stand-alone circumstances and not on the basis that they are linked to, or fall to be considered against a backdrop of delay, between the commission of his offending and his prosecution.

109. We accept that it is harder for the appellant to have to serve his prison sentence in the latter half of his eighth decade and into his ninth decade of life. We have received evidence concerning his medical circumstances. Compared to many of his age he is in reasonable health but we do accept that he has some physical ailments, and cognitive difficulties, which will make serving his sentence more difficult. His cognitive difficulties may reduce his ability to socialise with other prisoners and receive visitors, and therefore he may experience increased isolation. We also take account of the fact that he is at an age where there is an increased possibility that he could die in prison while serving a substantial determinative sentence. We can readily accept that this may be a source of anxiety for him. We agree with the sentencing judge that at this offender's time of life there is little need to put in place a rehabilitative regime. Accordingly, to reflect his age and state of health we consider it appropriate to suspend the final 4 years of the indicative 13-year sentence previously mentioned for a period of 4 years from his release. Although we do not criticise the sentencing judge at first instance for having approaching the matter on the basis that *"[e]ach year spent in custody is in effect a substantial portion of his remaining years given the average life expectation of the population"*, and have confined our criticism to the extent or degree of allowance made, we prefer as a rationale for the allowance which we feel it necessary to make for the age factor in re-sentencing, to rely simply on the need to ensure proportionality with regard to the respondent's circumstances as established in evidence, and of avoiding the creation of a perception in the mind of the respondent that his sentence is a crushing one, one indeed that leaves him with no hope and liable to descent into despair. The resulting net sentence remains a significant one, but with good behaviour he can, subject to his health holding up, view the prospect of being released well before the mid-point of his 80's as a realistic possibility.

110. The conditions attaching to that suspension will be the same as those attaching to the suspended portion of the sentence imposed in the court below.

111. In summary therefore, the respondent is re-sentenced to 13 years' imprisonment with the final 4 years of that sentence suspended on the terms indicated. The revised sentence is to date from the same date as the original sentence.