THE COURT OF APPEAL

Neutral Citation: [2024] IECA 312
Record No: 277/2023

Edwards J.
McCarthy J.
MacGrath J.

BETWEEN/

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

RESPONDENT

V

D.N.

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 10th of December, 2024.

Introduction

1. This is the appellant's appeal against the severity of the sentence imposed on him by the Central Criminal Court in respect of his conviction for two counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, and thirty-six counts of sexual assault contrary to common law and as provided for by s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (i.e., "the Act of 1990").

2. On the 28th of July 2023 the appellant was arraigned and pleaded guilty to count no. 1. (a count of sexual assault), and count no. 23. (a count of s. 4 rape), respectively.

3. On the 6th of November 2023, the appellant was further arraigned on counts nos. 2 to 22 inclusive and counts nos. 24 to 38 inclusive and pleaded guilty. With the exception of count no. 24, all were counts of sexual assault. Count no. 24 was a further count of s. 4 rape.

4. On the 13th of November 2023, the Central Criminal Court passed sentence, ordering that the appellant serve 5 years imprisonment for the s. 4 rape comprising count no. 23, with count no. 24 being taken into consideration; and 3 years imprisonment in respect of the each of the sexual assault counts. All sentences were to run concurrently but to commence on the lawful expiration of a sentence imposed on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23) on the 8th of June 2023.

5. As the sentences on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23) had in turn been made consecutive to an earlier sentence of six years imprisonment imposed on him on Bill No. CC0088/15 in the Central Criminal Court (Court of Appeal Reference CCACJ0145/17) for similar type offending on the 15th of May 2017, which earlier sentence had in turn had been made consecutive to an even earlier sentence of seven

years imprisonment imposed on him on Bill No. WWWDP46/13 by Wicklow Circuit Criminal Court on the 21st of March 2014, the appellant was already serving an effective 19 year sentence before the imposition of the sentences of 5 years imprisonment and 3 years imprisonment, respectively, which are the subject matter of the present appeal. His anticipated release date prior to the imposition of the sentences the subject matter of this appeal was the 19th of June 2028.

6. The net effect of the imposition of the consecutive sentences the subject matter of this appeal is that the appellant faces having to serve a cumulative 24 years in prison before remission for the totality of his offending, meaning that his new anticipated release date is now the 19th of March 2032.

Factual Background

7. At the sentencing hearing in this matter on the 6th of November 2023, the Central Criminal Court heard evidence from a Detective Garda James McDonagh in respect of the rape and sexual assault offences.

8. The victim in this case, "W", lived and went to school in a Dublin City suburb. He was in 6th class in school in 1994. He was known for being willing and available to perform odd jobs and menial tasks for persons in his locality in order to earn pocket money.

9. In the summer of 1994, or shortly after, the victim encountered the appellant who was an ordained priest of the Roman Catholic Church, assigned at the time to the parish in which the victim lived. The appellant was wearing a priest's outfit at the time of this encounter. W was asked if he was interested in doing some work for the appellant, mainly gardening, in or about the parochial house where the appellant was then living. W went there within a few days of this first meeting, and on the first two occasions of his attendance at the parochial house, he did the work that he was asked to do, which was mostly gardening tasks. The evidence was that W was "*paid money, cash, and nothing untoward happened on those two occasions*". However, on subsequent occasions W was subjected to sexual abuse by the appellant.

10. The abuse was divided into seven categories by D. Garda McDonagh.

Counts nos 1 to 3

11. Firstly, evidence was given of three specific sexual assaults (count nos 1 to 3), which occurred at the aforementioned parochial house in a three-month period in the summer of 1994. W was 11 to 12 years of age at that point and the appellant was 41 to 42 years of age.

12. In terms of count 1, the appellant got the victim to join him on his couch in the living room in the parochial house and touched his thigh, telling him: "*There's no point in telling the grownups because it's sometimes what the grownups do*".

13. The second offence took place approximately a week to 10 days later. The appellant and the victim were again on the couch in the living room of the parochial house and the appellant put his hands around W's groin, put his hands over and under W's clothes, opened the zipper of W's trousers and "*fondled*" his penis.

14. The third count refers to an occasion where again the appellant and the victim were in the living room of the parochial house, and both were lying on the couch. The appellant undressed himself, told the victim to undress himself, which he did, and the appellant attempted to masturbate the victim while he, the appellant, was erect and ultimately ejaculated and cleaned himself in the presence of W.

Count no 4

15. This count refers to a specific sexual assault committed in November 1994 at the aforementioned parochial house, when the victim was 12 years of age. On this occasion, the appellant took the victim's penis in his mouth, and he asked him if he could give him a blowjob. In his statement to gardaí W stated that he "*probably didn't even know what that meant at the time*". They were both naked and while this was happening, the appellant masturbated himself.

Counts nos 5 to 22

16. These comprise 18 sample counts of sexual assault committed at the aforementioned parochial house over a period of four-years and four-months between 1994 and 1998. At the time, the victim was between 11 and 16 years of age and the appellant was between 41 and 46 years of age. For this period, the sexual assaults took place on a weekly basis, and concerned the progression from the appellant masturbating the victim to the appellant putting the victim's penis into his mouth.

Count nos 23 and 24

17. These comprise two s. 4 rapes committed within the same period, when the victim was made to take the appellant's penis into his mouth. The victim described this offence as " [The appellant] *made me suck his penis*".

18. These offences were again committed at the aforementioned parochial house during the previously mentioned four-year and four-month window between dates in 1994 and 1998. Again, the victim was between 11 and 16 years of age and the appellant was between 41 and 46 years of age.

Count no 25

19. This count relates to a specific sexual assault which was committed at an unknown place in a Dublin suburb other than that in which the victim resided, in a three-month period between January and March of 1999. At this point the victim was 16 years of age, and the appellant was 46 years old.

20. In this instance, the victim had been collected outside an AIB branch in the suburb in question by the appellant and was driven to a location, which he could not specifically

identify beyond indicating an awareness that it was in the suburb in question, whereupon the appellant took the victim's penis in his mouth.

Counts nos 26 to 31

21. These comprise seven sample counts of sexual assault that occurred at unknown locations in two Dublin suburban areas in a 15-month period between 1999 and 2000. At the time of these offences the victim was 16 or 17 years of age and the appellant was between 46 and 47/48 years of age.

22. The victim stated that the appellant would collect him monthly and take him to various locations and perform oral sex on him.

Counts nos 32 to 38

23. The final category comprised seven sample counts of sexual assaults committed over a 19-month period between 1999 to 2000 at a presbytery in a different parish to that in which W resided. This was in circumstances where the appellant had moved to serve in a new parish in a different county. Again, the victim was 16 to 17 years of age, and the appellant was 46 to 47/48 years of age.

24. The appellant would carry out acts similar to those that he had previously performed at the aforementioned parochial house in the victim's parish, and involved them "*getting naked*", and the appellant performing oral sex on the victim while kissing him and "*sticking his tongue down his throat*".

Disclosure of Offending Conduct

25. On the 2nd of May 2022, the victim travelled from the UK and made a statement at a named Garda Station. He had previously made arrangements to do so with An Garda Síochána but had not followed through as he "*wasn't strong enough at the time*". D. Garda McDonagh stated that Mr. W was in a position to provide detail in respect of the appellant that "*one might only be aware of if one had seen* [the appellant] *naked*".

26. On the 3rd of June 2022, the appellant, who was by that stage serving a cumulative 19-year sentence, was interviewed by D. Garda McDonagh and a D. Sergeant O'Neill on foot of a warrant obtained pursuant to s. 42 of the Criminal Justice Act 1999. During the course of the interview, the appellant spoke openly in terms of his having been ordained in 1979, travelling to Brazil to work, and his various appointments in Ireland, including in the parish where the victim had resided, between 1991 and 1998 and subsequently in a different parish. He confirmed living in the aforementioned parochial house at relevant times, and that he did engage one or two people "*in a friendly way*" to help with gardening. The appellant said he paid cash but did not pay much attention to whom it was that had done the work for him. When asked, he did recall a [Mr. W] living in the parish to which he was assigned but could not recall how he knew his name.

Victim Impact Statement

27. A victim impact statement was prepared by Mr. W and was read to the Court by D. Garda McDonagh. In it, the victim stated:

> *"'Don't tell the grownups, they won't understand. It's sometimes what grownups do.' Not something a grown man would usually say to an 11-year-old boy but we are in 1994 and my world was about to come falling apart at the hands of* [the appellant] *in his parochial house on the grounds of* [address specified]. *It started with some gardening once a week. I was in the garden at least twice doing odd jobs. The rest of my visits to that place were spent in his front room, where he proceeded to basically put his hands where he felt like putting them. After a number of years of him arranging the gardening, he relocated to* [a further specified place] *and for a second I thought I'd never see him again. How incorrect was I? He kept up what he was doing to me, sometimes travelling to* [one named place to another named place]. *In time and as I got older, he managed to get me to meet him at different areas, like* [series of named places specified], *where he would find a secluded place for us both for him to satisfy himself. On a number of occasions I'd take the [specified number] bus as far as* [a further named place]. *He would get clever and have me get the later bus down so I'd have no way back that day and have to spend the night, where he would pick me up and drive us both to the house in* [the parish to which the appellant had moved]. *On the drive to the house he would be telling me what he was getting up to and who else he had met and things they had done. Turns out it wasn't just me on the go by then. I had a relationship in 2005 with a woman in* [a specified town and county]*, which resulted in a daughter. At about 5 am on the morning of October 3rd, 2006 I left the house we shared and I walked away for two reasons. I couldn't tell the grownups and* [appellant's surname] *was coming back and picking me up in* [specified town] *and taking me back to* [the parish to which the appellant had moved]. *My fear was he would come to my house at some point and I couldn't risk that. I knew by then if I left that he would follow, and I was correct. It was on a day in 2009 that I suddenly realised he hadn't texted or been in contact for a while. I didn't pursue it, didn't question it, I just moved on with my life. A few years passed and by this time I was happily married. I was lying awake in the middle of the night. I don't sleep full nights and haven't done in years due to nightmares. For whatever reason I googled his name. The search results had me sobbing relentlessly into my wife's arms at about 3 in the morning. He'd finally been caught. Fast-forward to July 30th, 2023. I'm currently sitting at my laptop typing this, trying to accept that I can never get back with my ex-wife. I walked out on both my ex and my son in 2021 and I did it because I couldn't tell the grownups because they wouldn't believe me. Eventually I did tell the grownups and it turns out they did believe me but by this stage the damage was too great. So how has what [the appellant] did to me affected me? Well, I'm actively suicidal and thinking of ways out on a near-daily basis because I can't get over the issue that if I had spoken out years ago I could have saved other victims from hell. Don't worry, the thoughts are there but*

I've too much to live for to action them. As mentioned above, I don't sleep during the night until after 5 am due to nightmares. I have people smoking pipes. I don't like [specified colour] vehicles of any description. I will not drive or be a passenger in a [named brand] *motor vehicle. I won't use the urinal in a public restroom, it must be a cubicle and the door must be locked properly. I avoid public transport as much as is possible. In the event I have to use public transport, it must be an aisle seat or I'll stand for the duration of the journey. I don't like showering or having a bath. In* [the parish to which the appellant had moved] *I used to shower myself after he had done with me, but I would scrub myself to the point I would bleed. But I know I have to. Personal hygiene has gone out the window to the point I'm having to have what's left of my teeth replaced. I'm 41 years old and I'm trying to rediscover what it is to love someone, what it is to care, what it's like to actually give a damn. What that man has done to me meant I left my family in* [a specified county] *in 2006. I've never seen my daughter since she was 10 months old. Add that to the list, where your own daughter thinks you don't care but doesn't know why Dad hasn't called in years. Also, my walking out meant I lost contact with a large number of members of my family, including my mother, because I assumed they didn't want to know me because I walked out. In reality, they didn't have a clue until March '22, when I opened up to a select few family members, including my immediate family. I do judge people but I only judge them based on whether or not I can trust that person. These days trust is the most important thing to me and I'm fortunate enough to have been able to trust a number of people to assist me in bringing 30 years of hell to an end. Basically put, I'm an 11-year-old boy in the body of a 41-year-old man who is trying to find his way after long, who finally told the grownups. Can I ever recover? I know I can't. Will I ever be free? No. But, to be honest, I realised that years ago. It's been 30 years of wandering around this world in an empty shell of a body with a heavy weight chained around my waist so I can't escape. I'm just waiting for someone to unlock my shackles.* [name redacted]*."*

28. D. Garda McDonagh stated that "*so the victim impact might be understood, I think there are occasions when, as a child, that* [name redacted] *would travel by bus, for example, to meet* [the appellant] *at a location where he would be collected and then taken off by [the appellant] in his car*". D. Garda McDonagh also outlined that the appellant's car happened to be red by times and he also smoked a pipe.

Personal Circumstances of the Appellant

29. The appellant was born on the 30th of May 1952, and he is now 71 years old and was aged between 42 and 48 years when he committed the offences in question. He was an ordained priest of the Roman Catholic Church at the time he committed these offences.

30. The appellant has a number of previous convictions, resulting in the consecutive sentences previously referenced being imposed on him. The relevant particulars were as set out in evidence, and as further elaborated upon in this Court's earlier judgments

concerning the appellant, i.e., in *People (DPP) v. D.N.* [2018] IECA 344 and in *People (DPP) v. D.N.* [2023] IECA 147. The pertinent details for present purposes were:

(i) Bill No. WWWDP46/13: The appellant had pleaded guilty at Wicklow Circuit Court to a cumulative 20 offences involving defilement of a child under 15 years, and defilement of a child aged between 15 years and 17 years. On the 21st of March 2014 he received sentences of seven years imprisonment for the offences involving a child under 15 years, and three and a half years' imprisonment for the offences involving a child aged between 15 years and 17 years. All sentences imposed were concurrent and were to date from the 21st of March 2014.

(ii) Bill No. CC0088/15 (Court of Appeal Reference CCACJ0145/17): In March 2017 the appellant was convicted by a jury on two counts of s. 4 rape and four counts of sexual assault. He was sentenced at first instance to eight years imprisonment for the rape offences and to concurrent lesser sentences for the sexual assaults, with all sentences being made consecutive to those on Bill No. WWWDP46/13. On appeal on the 22nd of October 2018, this Court quashed the sentence imposed at first instance for the rape offences and imposed reduced sentences of six years imprisonment. These sentences were again made consecutive to the seven-year sentences imposed in Wicklow Circuit Criminal Court on the 21st of March 2014.

(iii) Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23): In this matter the appellant entered pleas of guilty at the Central Criminal Court to five counts of s. 4 rape and four counts of sexual assault. On the 6th of June 2023, following an undue leniency appeal, this Court imposed sentences of six years in respect of the above-mentioned counts. This Court ordered that the sentences be consecutive to the sentences imposed by the Court of Appeal in October 2018 on Bill No. CC0088/15 (Court of Appeal Reference CCACJ0145/17).

31. D. Garda McDonagh indicated to the Court that the offending which is the subject matter of the present case was chronologically the first in time and that it just so happened that it is the fourth case involving this offending by the appellant to be dealt with by the courts.

32. While being interviewed by gardaí, the appellant indicated that he had a somewhat troubled family background, having left school after the leaving certificate. He entered the seminary in 1971, from which he emerged in 1979 and was said to be well educated and hard working. The appellant acknowledged he was struggling at that time with issues concerning his sexuality.

Sentencing Judge's Remarks

33. On the 13th of November 2023, the judge in the court below passed sentence on the appellant. The sentencing judge noted the factual background of the case as described by D. Garda McDonagh.

34. The sentencing judge then identified the relevant aggravating factors at play in this case as follows:

> *"They are repeated offences committed against a child. They were committed by a person who was, at the time, in a position of respect, of trust, of authority in his community by virtue of his priestly functions. He was, therefore, a person whom parents of the children of his parish and those children who might encounter him would trust and reply upon in various ways. This was an egregious betrayal of that trust and status that demonstrated rank hypocrisy. It was the very opposite of his duty and the Christian faith and tenets which he supposedly espoused. He destroyed this young boy's life and his prospects for the future. He sought to silence him with suggestions that this is what grown-ups do -- essentially, there's no point in telling anyone.*
>
> *Mr* [W] *has not been silenced. He was come forward in a very courageous way and engaged with the court, with the investigating authorities in explaining what happened to him and how it happened. He was sexually exploited as a child over an extensive period of time, and at the same time as the offender was doing this to others, for which he has been separately sentenced and which doesn't enter into the consideration of sentencing in this case, save in respect of matters which I'll deal with towards the end. The offender had no regard and cared nothing for the crippling damage that he was inflicting at this time on this young boy's development and life. The offences overshadowed his life, deeply affecting his personal relationships. This terrible toll on Mr* [W] *has been set out for the Court in a very open and moving statement that chronicles how these awful offences have dominated his life now for 30 years.*
>
> *… It's a shocking aspect of this case that [the appellant] is serving consecutive sentences of 19 years imprisonment for similar types of offences committed against other children in similar circumstances."*

35. The sentencing judge went on to note the appellant's previous convictions, which have been outlined above in para. 30.

36. The sentencing judge identified a headline sentence of 12 years imprisonment in relation to the s. 4 rapes, and a headline sentence of 4 years imprisonment for each of the sexual assault offences.

37. In relation to mitigation, the sentencing judge made the following remarks:

> *"There is substantial mitigation in cases of this kind for the entering of a plea of guilty, and in particular, if a plea of guilty is entered at the first available opportunity, that counts significantly. The offender was sent forward for trial on*

the 16th of March 2023. The case entered the list to fix dates on the 30th of March. The first pleas were entered on the 28th of July, and this was signalled well in advance to the prosecution. The second matter that I'm asked to take into account is the report furnished by Dr Lambe. There are a number of features which have emerged. He now, it is said, has insight into his offending and how it has affected others, and has engaged in some therapy in respect of his offending behaviour and in respect of the recognition of the damage that he has inflicted. He has expressed his remorse to Dr Lambe and to the victim in this case through his counsel. I have to factor in the reality of the offender's age. He won't be released from serving his present sentences until 76 years old, and he's been in custody since March 2014. His earliest release date is likely to be June 2028. By reason of his offending, he has very little contact with any family members, and has one friend of his that's in the prison. He has completed part one of the Building Better Lives programme, with two further modules which are spread out over 12 to 18 months. He's entitled to very substantial mitigation for the very early plea, which I will allow, together taking into account with that, the remorse expressed and his engagement in the programme and the therapy offered in respect of which he's made some progress. The Governor's report is positive. I'm also satisfied that a lengthy sentence of imprisonment at this stage of his life will mean that the remainder of his life will be dominated by these sentences and indeed that he could well end his life in custody. And more especially, I have to take that into account if the sentence in this case is made to turn consecutive to those he's already serving, a matter I'll address in a moment. Age is a significant mitigating factor in these circumstances, and the Court must have proper regard to it."

38. The sentencing judge identified that in principle the appropriate post mitigation sentence for the s. 4 rapes was one of eight years imprisonment (before consideration of possible consecutivity, and in that event consideration of totality). Practical effect would ultimately be given to this by imposing a sentence for the rape offence on count no. 23 alone, but with count no. 24 (also a rape offence) being taken into consideration. In respect of the sexual assaults, post mitigation sentences of three years imprisonment were proposed, the latter to be concurrent *inter se*. The sentencing judge then remarked:

> *"I'm satisfied that this awful offending against yet another victim, Mr [W], has to be marked separately. If a person decides to commit serious criminal offences against different individuals who are individually targeted, each victim requires separate and distinct consideration. Each victim has been the subject of separate and distinct offences. Each victim is another life purposefully disrupted and damaged. Justice requires nothing less."*

39. The sentencing judge then determined that the sentence he had proposed for the rape offences should be made consecutive to the sentence imposed on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23) on the 8th of June 2023. However, in doing so he took account of the totality principle, and consequently adjusted the eight-year sentence that he had earlier nominated downwards to a sentence of five years'

imprisonment, said five-year sentence to run consecutively with the 19-year term that the appellant was already serving. He further confirmed that the three-year sentences that he had previously nominated for the sexual assault offences should also run consecutively with the 19-year term that the appellant was already serving, but should be concurrent *inter se* and with the five year sentence imposed for the rape offences.

40. The sentencing judge also imposed a post release supervision order for the period of five years following the appellant's release from custody on the same terms as those imposed in that regard by this Court (i.e., the Court of Appeal) on the previous sentence, i.e., that on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23). The sentencing judge highlighted that any breach of those terms could potentially involve a further custodial sentence of up to 12 months imprisonment in respect of any such breach.

Notice of Appeal

41. By a Notice of Appeal lodged the 30th of November 2023, the appellant now appeals to this Court against the severity of the sentence imposed by the Central Criminal Court. In support of this application, the appellant has advanced one ground of appeal as follows:

    (i) The sentencing Judge erred in law and/or in fact in imposing a disproportionate and excessive consecutive sentence.

Submissions on Appeal

Appellant's Submissions

42. The appellant submits that the sentencing judge failed to apply the principle of proportionality when fixing a sentence, in light of the law in relation to the totality principle, the law in relation to consecutive sentencing, and the relevant facts of the case.

43. The appellant refers the Court to the totality principle as set out in *DPP v. S.C.* [2019] IECA 348, and submits that the sentencing judge, by imposing a consecutive sentence, failed to ensure that the appellant avoided a crushing sentence. Further, the appellant refers the Court to *Gilligan v. Ireland and Ors* [2014] 1 ILRM 153, per MacMenamin J., and submits that the sentencing judge failed to adjust the appellant's overall sentence in order to achieve proportionality and overall fairness.

44. The appellant refers to the definition of a crushing sentence in *Friday v. The Queen* [2014] VS CA 271, i.e., as one where:

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

and submits that the sentence imposed in this case is a crushing one and not proportionate.

45. The appellant relies on *DPP v. F.E.* [2019] IECA 85, at para [53], submitting that the sentencing judge failed to assess the realistic and relevant personal circumstances of the appellant when imposing a consecutive sentence. In addition, it is said that the

sentencing judge failed to engage with the personal circumstances of the appellant, wherein the majority of the limited remaining years of the appellant's life will now be spent in prison.

46. In addition, the appellant submits that the sentencing judge imposed a sentence that *"forwarded justice firstly and primarily to the individual victim of the appellant's offences and not that of the public at large".* The appellant contends that the consecutive element of the sentence advanced no justice to the public due to the significant age that the appellant will have achieved upon his release. We were referred to the judgement in *The People (DPP) v. Crowley* [2021] IECA 178, at para [54], in support of this argument.

47. The appellant submits that the consecutive sentence imposed by the sentencing judge was crafted solely to provide individual justice to the victim and therefore in opposition to the principles set down in *Crowley*. It is said that the sentencing judge failed to impose a distributively proportionate sentence on the appellant.

48. Ultimately, it was counsel for the appellant's submission that the consecutive sentence imposed by the sentencing judge on the 13th of November 2023 was not a proportionate one, but a crushing one.

Respondent's Submissions

49. The respondent notes that:

> *"While the foregoing ground of appeal would appear to accept that a consecutive sentence was appropriate (but was a disproportionate and excessive consecutive sentence), it would be remiss not to observe that the appellant appears to submit … that the imposition of a consecutive sentence failed to ensure that the appellant avoided a crushing sentence."*

50. The respondent submits that the sentencing judge did consider all relevant matters, to which he referred when he delivered his sentence. The sentencing judge "*could not have been clearer*" in his application of the appropriate sentencing principles when, after identifying 12 years and 4 years as the appropriate headline sentences, in respect of the rape offences and sexual assault offences respectively, he proceeded to consider the "*substantial mitigation*" available, which he detailed, including that the appellant was facing a release date when he would be 76 years of age before being sentenced in respect of the present matter. In addition, the respondent quotes the sentencing judge where he expressed that he was:

> *"… also satisfied that a lengthy sentence of imprisonment at this stage of [the appellant's life] will mean that the remainder of his life will be dominated by these sentences and indeed that he could well end his life in custody. And more especially, I have to take that into account if the sentence in this case is made to turn consecutive to those he's already serving, a matter I'll address in a moment. Age is a significant mitigating factor in these circumstances, and the Court must have proper regard to it".*

51. The respondent submits that the sentencing judge's remark, that the offending in the present case involved yet another victim and had to be marked separately, should not be considered in isolation from the facts as they were presented to the sentencing judge. The respondent maintained that it is a case in which, by virtue of the fact that separate prosecutions were brought, and this prosecution pertained to one victim, this prosecution and this one victim were required to be considered separately.

52. The respondent referred us to *The People (DPP) v. R.C.* [2023] IECA 33 and submits that the sentencing judge adopted the approach that was commended in that case, in terms of giving consideration to the appellant's advanced age. In addition, the respondent submits that while the estimated age at date of release is certainly not insignificant, age of itself cannot be a rationale for not imposing a sentence when the imposition of such a sentence is appropriate. The offences, which gave rise to the overall sentences being served by the appellant, were committed over two decades and against several child victims. The most recent offending was committed when the appellant was 60 years of age. The respondent contends that it may be (and is in the present case) that the nature of the offending behaviour, to include grooming of a child victim by a significantly older person, will give rise to the passage of time between the end of the offending behaviour and the victim coming forward with the consequence that the offender will have advanced in years. The respondent submits that this fact of itself cannot provide a basis for ignoring established sentencing principles.

53. The respondent submits that anything less than extending the appellant's prison sentence by (in practical terms) 3 years and 9 months would have resulted in the imposition of an "*unacceptably low sentence*".

54. In addition, the respondent submits that the principles set down by the Supreme Court in *People (DPP) v. F.E.* [2021] IR 217 were appropriately observed by the sentencing judge in the present case.

55. Concerning the appellant's submission relying on People (DPP) v. Crowley [2021] IECA 178, that the sentencing judge placed emphasis on the individual victim, rather than the public at large, the respondent submits that the remark made by the sentencing judge that "*I'm satisfied that this awful offending against yet another victim* [name of victim] *has to be marked separately*" is justified and was merely a proper identification for the record, that the particular victim was offended against in addition to those in the earlier prosecutions of the appellant.

56. In conclusion, the respondent submitted that the imposition of a consecutive sentence, was neither *per se* (as had been asserted), nor in the circumstances of this particular case, evidence of a failure to avoid a "*crushing sentence*".

Court's Analysis & Decision

57. It seems to us that the legal issue for determination in the present case boils down to a net question as to whether the sentencing judge, having opted to impose a consecutive sentence, as was his entitlement, erred in law in failing to then make a sufficient adjustment for totality, with the result that the ultimate sentence that was imposed was a manifestly disproportionate one in the distributive sense.

58. In arguing that it was disproportionate the appellant's counsel has chosen to characterise the aggregate total of the sentences required to be served by the appellant, which unless this Court intervenes, will see him serve a total of 24 years in prison, and not see him released back into the community until March 2032, when he will be close to 80 years of age, as a "*crushing sentence*".

59. The expression a "*crushing sentence*" is a somewhat emotive one, and is not a legal term of art. That said, it is a phrase that appears in the sentencing jurisprudence of courts in many common law jurisdictions, and in most instances it tends to be used, as we ourselves have used it in the past, to connote a cumulative or aggregate sentence that is manifestly disproportionate in the distributive sense, both with respect to the gravity of the overall offending and having regard to the offender's personal circumstances. In *People (DPP) v. S.C.* [2019] IECA 348 we alluded, but without expressly indicating either approval or disapproval, to the definition of a crushing sentence offered by the Supreme Court of Victoria in *Friday v. The Queen* [2014] VSCA 271. Our intention in doing so was to illustrate some circumstances that had been accepted elsewhere as potentially qualifying as being of "crushing" effect. However, we have not sought to firmly adopt the *Friday* formulation, or indeed any other, as a precise or comprehensive definition to be always applied in this jurisdiction, and we do not consider that it is necessary, in the context of this case, to do so. It is better, we think, to approach the matter simply from the perspective that a judge who is minded to have recourse to consecutive sentencing must ensure that the cumulative or aggregate of any sentences that have been, and which are then to be, imposed are proportionate (in the dual sense we have spoken about) to the overall offending in the distributive sense, and no more than that. To achieve this, it may in some instances be necessary, although it will not always be the case, to adjust downwards somewhat the sentence(s) then to be imposed and to be made consecutive to an existing sentence or sentences.

60. Issues of proportionality are very circumstance dependent, but we think that in respect of historical sexual offending, where a new case has emerged that was not included in an initial prosecution or set of prosecutions, a useful way of approaching what at that point might represent a distributively proportionate sentence for the new matter, where the Court is minded to have recourse to consecutive sentencing, is to consider whether, if the sentencing for the new case had taken place at the same time as the sentencing(s) for the earlier case or cases, it would have resulted in any higher cumulative or aggregate sentence, and if so how much higher.

61. In that regard, we do not disagree with the sentencing judge that, as a general proposition, if a person decides to commit serious criminal offences against different

individuals who are individually targeted, each victim requires separate and distinct consideration. The sentencing judge was of the view that because each victim is another life purposefully disrupted and damaged, justice requires nothing less. We are satisfied that in saying that the sentencing judge did not have in mind considerations of vengeance or any such thing, but rather that there should be deserved retribution and punishment for the full panoply of the offender's criminal conduct, that society should appropriately censure the offender and deprecate his conduct, and that he should not receive what might be perceived as a "free pass" in respect of any of it.

62. That having been said, if there has been very prolific offending, and there are very many offences for which the offender must be sentenced, and sentencing does not occur all at once, there may be limits to the extent to which this desideratum can be achieved, particularly if the offender has lengthy cumulative existing sentences, and will have reached his twilight years before he is likely to be released. This is particularly so if there is concurrent bad physical or mental health, although it requires to be stated that there are no such considerations in the present case. The principal concern in the present case relates to the fact that the appellant will already be at an advanced age before he is due for release in respect of his previous sentences. Anything added to those will take him yet further into advanced age. A point has to come in every case where nothing further can be proportionately added. That is not to say that an offender can never be expected to die in prison. This Court has previously considered the issues of the relevance of advanced age, both with and without concurrent health problems, in the *People (DPP) v R.C.* [2023] IECA 33, and has offered some guidance on these issues.

63. We said in R.C., at para [92]:

> *" … 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 … ."*

64. In the present case, no issue is taken by the appellant with the headline sentence of 12 years imprisonment nominated by the sentencing judge for the s. 4 rapes. He then adjusted that downwards by one third to take account of mitigation, including the guilty pleas, his expression of remorse, the age factor, his isolation in prison and completion of part one of the Building Better Lives program, and reduced the headline sentence from

one of 12 years to a post mitigation sentence of 8 years. Again, no issue is taken by the appellant with this reduction. Accordingly, the central and indeed only controversy which we are required to address is focussed on the extent to which the sentencing judge, having determined to have recourse to consecutive sentencing (again a discretionary decision that the appellant does not seek to challenge) then made a further reduction to take account of totality.

65. The starting point in our consideration has to be that we are concerned with really egregious offending. It was highly culpable, and it is no exaggeration to say that the appellant had a highly destructive impact on the life of the victim in this case W. In the circumstances, we agree with the trial judge that justice demands that his offending against W should be separately and individually marked, and that there can be no question of the appellant receiving a "free pass" in respect of it. We consider that to make any sentence to be imposed on him for this offending wholly concurrent with a previous sentence or sentences, would not adequately express the censure and deprecation of society and further it would undesirably see the appellant avoiding any additional deserved hard treatment component to the punishment imposed. We consider that the sentencing judge was right in concluding that there had to be, what we might characterise as, an "add-on", to his existing punishments in the circumstances of this case.

66. The only question therefore is, was the "add-on" of five years imprisonment that the sentencing judge deemed appropriate a proportionate one in the overall circumstances of the case? The appellant is certainly of advanced years. However, no evidence was adduced to suggest that he has any significant concurrent health problems at present. While it cannot be said with certainty, there is at this time no especial reason to believe that he could not serve the further five years (less with remission) determined upon by the sentencing judge as appropriate, and upon eventual release have some time at liberty before he succumbs and departs this life whether through old age or for some other reason. He will, however, be on the cusp of entering his ninth decade.

67. A significant factor for us is a view that we have arrived at that if the appellant were being sentenced all at the one time for this matter and for the matters for which he has already been sentenced, it is unlikely that the aggregate or cumulative sentence would have been 5 years greater than the 19-year aggregate sentence that he is currently serving. We think that while there would have been some uplift in the overall sentence, the ultimate aggregate sentence, however structured, would not have been as high as 24 years, but rather would have been somewhat lower at 21 or perhaps 22 years. In the circumstances, we are of the view that the sentencing judge's adjustment for proportionality in application of the totality principle was somewhat insufficient, and that that was an error in the circumstances of the case. We will therefore quash the sentence imposed by the Court below and proceed to re-sentence the appellant.

Re-sentencing

68. We will again nominate a headline sentence of 12 years for the s.4 rape offences and discount from that by one third to reflect the mitigating circumstances in the case, leaving

a post-mitigation sentence of 8 years imprisonment. We agree with the sentencing judge that it is appropriate to have recourse to consecutive sentencing, and accordingly our sentence will be added on to the 19 years cumulatively that the appellant is currently serving. However, having decided to do so, the totality principle is engaged, and we must ensure that any ultimate overall sentence is distributively proportionate. To achieve this, and also showing some modest mercy towards the appellant in the exercise of our discretion as we are entitled to do (although he showed little enough to his victims), we will adjust the 8 year post mitigation sentence for the s.4 rape offences downwards by 5½ years so that, when the adjusted sentence is aggregated with his existing 19 year cumulative sentence, he will be required to serve a further 2½ years in prison. His new aggregate sentence will therefore be one of 21½ years' imprisonment, the 2½ year "add on" to date from the lawful expiration of his sentence(s) on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23) which was imposed on the 8th of June 2023.

69. We will again take Count No 24 into consideration.

70. In re-sentencing for the sexual assault offences we approve of the three years' post mitigation sentences on each offence nominated by the sentencing judge at first instance as being appropriate before any adjustment for totality. However, to take account of totality, we will adjust each one downwards by six months, leaving adjusted individual sentences of 2½ years in prison. Once again these will be concurrent *inter se*, but consecutive to the sentence(s) imposed on Bill No. CCDP42/21 (Court of Appeal Reference CCACJ0011/23) which was imposed on the 8th of June 2023.