



THE COURT OF APPEAL

Record Number: 163CJA/19 & 150/19

**Birmingham P.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT/RESPONDENT

- AND -

PATRICK NEVIN

RESPONDENT/APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 31st day of July 2020 by Ms. Justice Kennedy.

1. On the 24th June 2019, the accused was sentenced in respect of a count of rape and a count of sexual assault. The accused received a sentence of fourteen years' imprisonment on the rape offence and eight years on the sexual assault offence with the final two years suspended on terms. The sentences were imposed on a concurrent basis. The accused lodged an appeal against sentence, and in turn, the Director of Public Prosecutions has sought to review the sentence imposed on grounds of undue leniency.

Background

2. The offences in question occurred within four days of each other in respect of two different complainants.
3. In respect of RB, the parties had made contact on Tinder and arranged to meet up on the 12th July 2014. The accused picked the complainant up from her address in his car and they went for a drive. The accused then stopped the car down a narrow country road with a graveyard at the end of it. The accused mentioned the IRA and Dundalk and said he was known in Dundalk but not in a good way. He said, "Don't worry, I'm not going to kill you here". He stopped the car and immediately put his seat and then her seat back. Some consensual kissing occurred and he then pulled down his trousers requesting oral sex and started to pull her trousers down. She said everything was happening very quickly and she performed oral sex and then matters became non-consensual when he digitally penetrated her, then raped her and digitally penetrated her again and then masturbated and ejaculated on her. He did not use a condom. RB described being numb,

afraid for her safety and in shock. She described how he spat on her and how she told him to stop when he started to rape her. He cleaned up using tissues which she said he brought because he knew he would get sex. He then changed mood, drove back towards her home, stopping in a garage on the way home.

4. In respect of LW, the Court heard that the accused and the complainant initially made contact on Tinder on the 2nd July 2014. They arranged to meet up on the 16th July 2014. On the evening in question the accused picked the complainant up from her address and they went on a drive to a rural location, stopping near a graveyard. The encounter began consensually with the accused kissing the complainant. However, the accused then proceeded to move from his seat and lay on top of her. The complainant asked him to stop but he proceeded, kissing her and feeling her breasts. The complainant continued to ask the accused to stop. The accused pinned her down and the complainant used her hands to try and push him off. At this point, the accused stopped and became extremely angry and abusive. The accused told her to get out of the car. When the complainant got out of the car and began to walk down the road, the accused then drove up beside her and said that he would drop her home. She felt she had no choice and she got back into the car to go home. However, he pulled the car in again, took out his penis and began feeling her breasts and nipples and put his fingers down her pants. He asked her to remove her trousers. At this point the complainant had a panic attack and she tried to exit the car. He agreed again to bring her home but instead again pinned her down, sexually assaulted her by groping her and forced her to masturbate him. The event ceased once he ejaculated. He then completely changed in attitude, apologised, brought her home and sent her messages afterwards on WhatsApp. The offender had recorded this sexual assault on his phone.

Personal circumstances of Patrick Nevin

5. The accused was 33 years old at the time of offending. In terms of previous offending the sentencing court heard that the accused had already been convicted and sentenced in respect of the sexual assault of a third woman he met on Tinder. The accused received a sentence of five years and six months. This assault occurred five days after the sexual assault of LW.
6. In 2012, the accused was convicted in respect of unauthorised possession of a firearm contrary to section 2 of the Firearms Act 1925 and possession of a firearm in suspicious circumstances contrary to section 27A (1) of the Firearms Act 1964. He was sentenced to four years' imprisonment suspended for four years and was bound to the peace for four years. The offending at issue in this case occurred during that period of suspension.
7. On December 6th, 2001, Mr Nevin was convicted of assault causing serious harm, contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997. He was sentenced to seven years' imprisonment. On that date, he was also convicted of threatening to kill or cause serious harm, contrary to section 5 of the Non-Fatal Offences Against the Person Act 1997. He received a concurrent seven-year sentence of imprisonment.

8. The Court had the benefit of a presanction report from the Probation Service. It appears that the accused was cooperative and accepted responsibility for the offences and he agrees with the victims' account of events and agrees that he subjected them to horrendous ordeals. Letters of apology were furnished to the complainants. With regard to the risk of reoffending, the report suggested that the accused presents a medium risk of reoffending.

The Sentence

9. The sentencing judge characterised the rape as premeditated and callous, with the accused using threatening behaviour and aggression. There were elements of degradation and it was predatory in nature; the complainant having been chosen at random from the Tinder app. The Court observed the context of the rape, occurring as it did four days before the sexual assault of a second complainant and eleven days before the sexual assault of a third complainant. It was also committed while the accused was under a suspended sentence for a different matter.
10. The sentencing judge stated that similarly, the sexual assault of LW was carried out in a predatory, premeditated and callous manner with a serious effect on the complainant.
11. The Court observed that there was little by way of mitigating factors in the present case. The Court accepted that there was a plea of guilty, although of little benefit to RB, whose trial had already commenced but of more benefit to LW whose trial was due to start in four months. The Court also referred to the letters of apology proffered to the complainants. The Court noted the previous convictions of the accused and remarked that this meant that he could not benefit from the same level of mitigation had he no relevant previous convictions. The Court noted the accused's intention to address his behaviour.
12. The Court set a headline sentence of fifteen years in respect of the rape offence and in recognition of the late plea of guilty and letter of apology, this was reduced by one year. In order to facilitate rehabilitation, the final two years of the sentence were suspended on terms. In respect of the sexual assault, a sentence of eight years was imposed, to run concurrently. These sentences were backdated to the 12th June 2015, when the accused first went into custody.

Grounds of appeal in relation to undue leniency

13. The DPP puts forward the following grounds of appeal:-

- "1. The sentences imposed by the learned sentencing judge were unduly lenient having regard to the circumstances and gravity of the offences and, in particular, the learned sentencing judge erred in principle in:
 - (a) failing to identify an appropriate starting point at a sufficiently high level to reflect the nature of the said offences and the aggravating factors in the case;
 - (b) failing to treat the following as aggravating factors:

- (i) the fact that the Respondent participated in a campaign of offences on multiple females;
 - (ii) the fact that the Respondent had tricked his female victims into a position of vulnerability;
 - (iii) the fact that the offences were committed while the Respondent was the subject of a suspended sentence;
 - (iv) the fact that the offences were premeditated;
 - (v) the fact that the Respondent had previous convictions for serious offences, including for causing serious harm and threatening to kill his female partner contrary to sections 4 and 5 of the Non-Fatal Offences Against the Person Act 1997;
- (c) failing to impose a sentence(s) that reflected the actual aggravating factors in the case;
 - (d) in circumstances where the learned sentencing judge was imposing sentence for offences committed on different occasions, failing to either
 - (i) impose proportionately higher sentences for each offence and make them concurrent or
 - (ii) assess the gravity of each offence without reference to the other and then, having done so, reflect the aggravating circumstance of the offences by having recourse to at least some degree of consecutive sentencing, and subject to the principles of proportionality and totality;
2. The learned sentencing judge erred in principle in circumstances where she failed to consider and / or the sentences imposed failed to reflect or adequately reflect the principles of specific and/or general deterrence.
 3. In all of the circumstances, the sentences imposed by the learned sentencing judge, when viewed individually or cumulatively, were inadequate and unduly lenient."

Submissions of the DPP

14. The DPP submits that the headline sentence of fifteen years was too low taking into account the following: the campaign of offence, the fact that the complainants were tricked into a position of vulnerability, that the accused only pleaded guilty after the trial judge made a ruling adverse to him, that the offending was carried out while the accused was serving a suspended sentence, that the offences were premeditated, the nature of the previous convictions of the accused, the effect on the complainants, the initial remorseless attitude of the accused and the persistence of the offending.
15. The DPP submits that the sentence does not reflect the overall criminality of the accused and the harm suffered by the complainants. This is partially due to the failure of the sentencing judge to imposed consecutive sentences. The DPP refers to *The People (DPP) v. FE* [2019] IESC 85 at para 35 where Charleton J. considered the imposition of consecutive sentences in the context of sexual offending:-

“While there is no obligation to impose consecutive sentences, it may be appropriate to do so by reason of a gap in offending, there being more than one victim, or where the facts are not related. All of this is a matter of good sense and it would not reflect good sense to consider a series of offences over years against the same victim of the same seriousness to each carry a sentence as if that crime were isolated from what came before or after. This might result in a series of offences against the same victim receiving an inappropriate sentence where the human reality was that each offence made recovery from the others increasingly difficult.”

16. The DPP takes issue with the backdating of the sentence. The accused went into custody in respect of the sexual assault of LW on the 12th June 2015 and into custody in respect of the rape of RB on the 28th January 2016. The Court backdated the sentence to the 12th June 2015, notwithstanding that the accused had already received the benefit of having the sentence of five years and six months imposed in respect of the sexual assault of GC backdated to the 17th September 2014 and was not even in custody in respect of the offence against RB until the 28th January 2016.
17. The significance of this is that the Director says that the sentence of fourteen years’ imprisonment with two suspended was not, in fact, the sentence that at first blush it might appear to be. That, in fact, the additional sentence that was imposed over and above that which had been imposed in the Circuit Court in relation to the sexual assault of GC was ‘only’ seven years and three months, and that seven years and three months was in respect of both the rape of RB and the sexual assault of LW.
18. The DPP submits that committing a further offence while subject to a suspended sentence is an aggravating factor. In *The People (DPP) v. Culhane* [2017] IECA 59, the DPP appealed a sentence imposed in respect of eight burglary offences on the grounds of undue leniency and contended, *inter alia*, that having regard to the very significant disregard by the respondent for the terms of the suspended sentences imposed upon him for offences of a similar nature it was not appropriate for the sentencing judge to impose a further series of suspended sentences in respect of two of the counts.

Submissions of the accused

19. The accused argues that there are a number of factors in the present case which distinguish it from warranting a sentence in the uppermost band, as per *The People (DPP) v. FE* [2019] IESC 85. These factors include: that it was not a gang rape, it lasted a relatively short amount of time, there was no weapon used, there was no violence used beyond the inherent violence of the offence itself, it did not take place in the complainant’s home, the accused did not threaten the complainant, RB was not a vulnerable victim by virtue of age or mental or physical impediments, the accused was not in a position of authority, dominance or responsibility over RB, the accused did not exhibit especially cruel, depraved or perverse behaviour, there was no evidence of grooming, there was no alcohol involved and there was no behaviour exhibited by the accused after the rape which may have aggravated its effect upon RB. In light of the

absence of these factors, it is submitted that the offending in question is not among the most serious to come before this Court

20. The accused submits that the sentencing judge treated the previous convictions not as aggravating factors but rather leading to the progressive loss of mitigation. Even if the Court had chosen to treat his previous convictions as aggravating factors rather than as being reductive of mitigation, the convictions would not have been sufficiently relevant to elevate the headline sentence to the uppermost band, as per *The People (DPP) v. FE* [2019] IESC 85
21. The accused argues that the sentencing judge's decision to backdate the sentences so that they would overlap in part with the sentence in respect of GC was a decision that appropriately reflected the temporal nexus between the three offences and if the sentencing judge had done otherwise, this would have offended the totality principle.

Grounds of appeal relating to severity of sentence

22. The accused puts forward the following grounds of appeal relating to sentence:-

- (1) The Court did not place appropriate weight by way of mitigation upon the contents of the probation report prepared for sentencing hearing.
- (2) The Court did not provide appropriate mitigation for the guilty plea entered.
- (3) The Court did not provide appropriate mitigation in respect of the significant difficulties arising in the background of the defendant and as identified in the probation report submitted to the Court.
- (4) The Court applied a headline sentence of 15 years which in all the circumstances of the case and particularly the consensual nature of the meeting and physical engagement between the complainant and the defendant was too high.

Submissions of the accused relating to severity of sentence

23. The accused offers a number of comparator cases in which the offenders received sentences of similar duration. The first of these is *The People (DPP) v. FG* [2014] IECA 42. Three days before his trial was due to commence, FG had entered a guilty plea to fifteen rape offences and five sexual assaults committed over a three-year period against the young daughter of a neighbour, starting when she was just five years of age and continuing for a long period, in her family home. This Court found that the case stood "at the most heinous level or point on the scale of gravity". It intervened to impose a sentence of fourteen years for each of the rape offences, all running concurrently.
24. The accused also refers to *The People (DPP) v. SC* [2020] IECA 43. SC committed multiple sexual offences against three young girls over a period of several years. In respect of one girl, victim B, he was convicted of two rape offences, one s.4 rape, and three offences of attempted oral rape. He then entered a guilty plea to four sample counts of sexual assault against two other girls, victims A and C. He was found to have

abused his trust as a father and father figure. He received a total sentence of fourteen years.

25. The accused further refers to *The People (DPP) v. PP (No 2)* [2015] IECA 316. PP was convicted of one rape offence, three sexual assaults, and sexual exploitation of a child, all in respect of his own seven-year old daughter, committed while over a twelve-month period while on access visits with PP. He was required to serve a total of twelve years. The accused argues that these cases demonstrate elements of perversion and degradation which are not present in the case at hand.
26. The accused argues that sufficient weight was not attached to the pleas of guilty. While it is accepted that they were not early pleas, they were entered before RB had to give evidence at trial and four months before the trial in respect of LW was due to commence. The pleas also functioned as evidence of the accused's remorse.
27. The accused further submits that the expressions of remorse through the pleas of guilty and the letters of apology cannot be minimised
28. The accused submits that account should be taken of the fact that he has been the subject of considerable, prolonged adverse publicity in the mainstream media and in social media and is unlikely to escape scrutiny after he completes his sentence.
29. In addition, the Court is asked to take account of the impact that the coronavirus pandemic has had on the prison population. The World Health Organisation has warned that people in prisons are especially vulnerable to the virus and more susceptible to infections because they live in close proximity to one another; they have a greater underlying burden of disease and worse health conditions than the general population, and they frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition and existing diseases

Submissions of the DPP relating to severity of sentence

30. The DPP accepts that there are differences between the accused's circumstances of offending and the cases referred to by the accused in that those cases relate primarily to abuse of very young girls. While it is accepted that the complainants in this case were neither very young or related to the accused, there were other significant aggravating factors in this case including the campaign of offence, the fact that the complainants were tricked into a position of vulnerability, that the accused only pleaded guilty after the trial judge made a ruling adverse to him, that the offending was carried out while the accused was serving a suspended sentence, that the offences were premeditated, the nature of the previous convictions of the accused, the effect on the complainants, the initial remorseless attitude of the accused and the persistence of the offending.
31. The DPP argues that it is of particular note that there was no prompt plea of guilty in this case. In relation to the apologies proffered by the accused, the DPP submits that the timing of the apologies undermines their value and can be properly regarded as self-

serving, an attempt to minimise punishment rather than deriving from any genuine contrition.

32. The DPP further argues that when considering any public opprobrium which the accused may encounter, it must be borne in mind that such arises by reason of the nature and pattern of the offending in which the accused engaged.
33. In relation to the conditions of the prison due to the current pandemic, the DPP submits that no evidence has been placed before the Court demonstrating any particular hardship being visited upon the accused.

The Undue Leniency Appeal

33. The defendant has lodged an appeal against severity of sentence and in summary seeks to argue that the trial judge erred in failing to give sufficient or appropriate weight to the mitigating factors and incorrectly identified the headline sentence at too great a level.
34. We first consider the application for a review of sentence on behalf of the Director. Ms. Noctor SC on behalf of the Director argues that the sentences imposed were unduly lenient as the judge failed take sufficient account of the aggravating factors and/or failed to have regard to certain aggravating factors, thus erred in nominating fifteen years as the headline sentence on the rape count. She argues that the offending involved a campaign of offending against women, that the victims were tricked into a position of vulnerability, that the accused only pleaded guilty after the trial judge made a ruling adverse to him, that the offending was carried out while the accused was serving a suspended sentence, that the offences were premeditated, the nature of the previous convictions of the accused, the effect on the complainants, the initial remorseless attitude of the accused and the persistence of the offending.
35. Thus, it is said that the sentence does not reflect the overall criminality on the part of Mr Nevin and the harm suffered by the complainants. This, she argues, is partially due to the failure to impose consecutive sentences, and in effect, says that the judge ought to have structured the sentences in this way or to have imposed proportionately higher sentences for each offence if the sentences were on a concurrent basis.
36. The jurisprudence in s.2 appeals by the Director is well known commencing with *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279. The principles were summarised in *The People (Director of Public Prosecutions) v. Stronge* [2011] IECCA 79 where McKechnie J stated: –
 - “(i) the onus of proving undue leniency is on the DPP;
 - (ii) to establish undue leniency must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence circumstances. There must be a clear divergence and discernible difference between the latter and the former;

- (iii) in the absence of guidelines or specified tariffs for individual offences, such a departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structure and the trial judge must have a margin within which to operate;
- (iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under section 2 is not the converse to the test on such appeal;
- (v) the fact that the appellant court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of the review and not otherwise;
- (vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified finally;
- (vii) due and proper regard must be recorded with the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers first-hand evidence and submissions so made."

Discussion

37. In relation to the rape and sexual assault offences, it is to be noted that there was an overlap between the nature of the offending and the methodology employed by the then accused. He had been in contact with injured parties *via* the Tinder app, had arranged to collect them in his car, then driven to a somewhat isolated location, and there, carried out the offences in question.
38. Victim impact statements from each of the injured parties were presented to the Court and these made clear that in both cases, the effect on the injured parties were very severe and were, indeed, life-changing. This is not unexpected when one examines the nature of the ordeal that each endured.
39. In the case of RB, the accused brought her to an isolated location, there then followed some consensual activity. He then digitally penetrated her and raped her, digitally penetrated her again, masturbated and ejaculated onto her.
40. In the case of LW her ordeal was audio recorded by the appellant, disclosing the accused' intimidatory behaviour. The recording lasts for 44 minutes. The evidence reveals that he touched her sexually and continued to do so despite repeated requests to stop. He became angry and told her to get out of the car. She pleaded with him to drive her home, as they were in a rural location. She got out of the car and he then appeared to change his mind and said he would drop her home. At this point, he persisted with his unwanted attention towards her, and sexually assaulted her. She tried to get out of the car and he

attacked her again, pinning her down in a sustained assault, groping her, putting her hands on his penis, forcing her to masturbate him and then ejaculating on her.

41. It is evident from the transcript of the evidence in the court below, that he verbally abused his victim in the confines of his car in an location with which she was unfamiliar. Evidence of the transcript of that recording was presented to the court below, which we have read. It is chilling to read what the accused said to his victim, his abusive language and distorted thinking, we can only imagine how terrifying it must have been for her to witness his vitriol.
42. These are very serious offences. The aggravating factors are many; the offences were part of an evolving pattern, the attacks were degrading and humiliating, the victims were taken to isolated locations and rendered vulnerable and terrified. The impact on each was enormous and life changing. The accused, in our view, has relevant previous convictions; those being, for violence against a woman; his ex-partner. While he did not have a previous conviction at the time of the commission of these offences for sexual offending, he was convicted of sexual assault in similar circumstances on the 27th November 2018, which means that at the time of sentence, he was not of good character in terms of sexual offending.
43. In terms of the respondent's background and personal circumstances, he was 33 years of age at the time of the offending behaviour. At the time of the offences, he was subject to a suspended sentence of four years' imprisonment which had been imposed on 19th April 2012 in respect of possession of firearms in suspicious circumstances, the firearm being a stun gun. The accused had significant previous convictions, including offences of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997, and the offence of making threats to kill or cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997 for which he received a seven-year sentence on 6th December 2001. These offences related to a former girlfriend of the accused and they involved him attacking her by hitting her on the head with a brick and threatening her with a knife.
44. We consider there is merit in the Director's submission that the offences are rendered more egregious by virtue of the methodology adopted by the then accused in ensuring the isolation of his victims, thus rendering each vulnerable. The victims endured a horrendous and terrifying ordeal, the impact on each is nothing short of devastating.
45. In this Court's view, the conduct of the accused in contacting the women on Tinder and sexually abusing them in the manner he did, could certainly be termed as a pattern or a campaign of sexual offending perpetrated in an identical modus operandi designed to ensure the isolation and vulnerability of his victims for his sexual gratification.
46. We are not persuaded by the submission on his behalf that the fact of numerous consensual sexual encounters (according to him) via Tinder negatives the suggestion that he was engaged in a campaign of sexual violence using this modus operandi; whatever the merits of that point where there had only been one incident of sexual violence in July

2014, it loses its force entirely when one considers that he perpetrated three entirely different sexual assaults on three different women within that single month.

47. The accused's previous convictions for assault causing serious harm and threats to kill or cause serious harm concerned the accused's then partner where he violently assaulted her in horrific circumstances which included the killing of two dogs in the house he shared with her. This assault continued for quite a period of time. In circumstances where rape is by its nature a violent crime, albeit of a sexual nature, we are satisfied that those previous convictions are relevant convictions and thus aggravate the present offences.

Consecutive Sentences.

48. As this Court stated in *The People (DPP) v. SC* [2019] IECA 348:-

"The overarching objective is that the sentence imposed must meet the extent of the offending conduct. This may be achieved by the imposition of carefully constructed concurrent sentences, but it seems to us that it is best achieved by the imposition of consecutive sentences where there is more than one victim."

49. Clearly the manner of construction of a proportionate sentence is a matter within the discretion of the trial judge. The issue for this Court is, whether the concurrent sentences imposed reflect the offending conduct; a sentence must be proportionate to the gravity of the offending conduct and to the circumstances of the offender. Where sentences are imposed on a concurrent basis, the sentence imposed may be proportionately higher where there is more than one victim.
50. While there was certainly scope for the sentences to be imposed on a consecutive basis, it is apparent that the judge, in imposing concurrent sentences nominated a headline sentence to take account of the evolving pattern of offending.

Effect of Backdating the Sentence

51. The accused was lodged in custody on foot of the sexual assault offence on the 12th June 2015 and on the 28th January 2016 on the rape offence. The sentence imposed on the sexual assault offence which was dealt with in the Circuit Court was backdated to the 17th September 2014. Ms Noctor says that the accused has gained benefit from this, in that if one calculates the possible expiry date of the sentences imposed on the sexual assault offence in the Circuit Court, without remissions, being the 17th March 2020 and the possible expiry date of the sentence imposed on the rape offence, being the 12th June 2027, thus resulting in an effective sentence of seven years and three months in total. This, Ms. Noctor says, demonstrates the practical consequences of the failure to impose the sentences on a consecutive basis. However, she stresses that an appropriate sentence could have been achieved by the imposition of a proportionately higher sentence on each offence on a concurrent basis or by imposition of consecutive sentences.
52. While we appreciate that the sentence in the case of GC is not under appeal, it is perhaps a procedural happenstance that it was dealt with separately from the two cases under appeal; all three offences were committed with the same modus operandi in July 2014 over a period of eleven days. One way of looking at matters is to consider that by

backdating the sentence, the accused's combined sentence on all three sexual offences is one of approximately thirteen years (adding together (a) five years six months for the offence in respect of GC, (which is not the subject of appeal) and (b) an 'effective' sentence of seven years three months for the rape offence in respect of RB, and (c) the concurrent sentence of eight years for the sexual assault in respect of LW.)

53. The Director contends that the judge erred in her nomination of the headline sentence and in effect arrived at the fifteen years through a failure to identify certain aggravating factors.
54. She specifically refers to four factors; first, that this was a campaign of offending, second, that the accused tricked his victims to a position of vulnerability, third, that she did not have regard to the fact that the offences were committed in the currency of a suspended sentence and fourth, that the accused had previous convictions, specifically an offence contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997; assault causing serious harm.

Conclusion

55. In the present case it seems to us that the judge erred in identifying the pre-mitigation sentence of fifteen years on the rape offence. Where the judge took account of the evolving pattern of offending, we believe that she ought to have imposed a higher sentence in that circumstance *where* the sentences were imposed on a concurrent basis. However, it is our view that the offending conduct called for the imposition of sentences on a consecutive basis.
56. A rape offence is always a serious offence, however, there is merit in Mr Bowman SC's argument that a headline sentence of fifteen years would not have been nominated if this was a stand-alone offence. That as may be, but where it was not a stand-alone offence and where the sentences were imposed concurrently, the sentence ought to have been greater. Ultimately, we conclude that the net sentence of twelve years for both offences was simply too low and did not adequately reflect the gravity of the offending conduct.
57. As we have said, the isolation of the victims, thus rendering them vulnerable, makes these offences very serious indeed. Moreover, the impact on the victims is, understandably very severe. In addition, the accused's previous conviction pursuant to s.4 of the 1997 Act, which involved a serious attack on another woman is an aggravating factor, as is the fact that these offences were committed in the currency of a suspended sentence.
58. It appears to us that the headline sentence nominated for the rape offence was designed to reflect that this was not a stand-alone offence but part of an evolving pattern or campaign of sexual misconduct. Assuming that was the approach adopted by the judge, we believe that the nominated headline sentence was inadequate and the net sentence of fourteen years with two years suspended was simply too low.

59. We are satisfied that that the judge, while not identifying a headline sentence in the instance of the sexual assault, properly came to an actual sentence of eight years, thus placing the sexual assault at the upper range of sentence, where the maximum sentence is one of ten years and allowing the appropriate discount for the mitigating factors, in particular the plea of guilty which was in advance of the trial.
60. As we have said, it was certainly open to the judge to impose concurrent sentences, however, in so doing, a higher sentence ought to have been nominated. Equally, it was of course open to the judge to impose sentences on a consecutive basis with the appropriate adjustment having regard to the totality principle. We believe the accused' offending conduct would have been best met in the circumstances by consecutive sentences.
61. A proportionate sentence may be achieved by either concurrent or consecutive sentences but having opted for the concurrent approach we are persuaded that the judge erred in the overall sentence she imposed.
62. In those circumstances, we are persuaded that the overall sentence is unduly lenient and thus is a substantial departure from the appropriate sentence. We now propose to proceed to re- sentence Mr Nevin.

The Re-Sentence

63. We have received additional materials for this purpose, these documents include a report from the Irish Prison Service; which indicates that Mr Nevin is on the waitlist for the psychology services, a letter from the prison chaplain and from the CEO of Release which shows that he is willing to address the triggers for his offending conduct. It is promising that the accused wishes to address his offending conduct. We have also taken into account the mitigating factors, including the late plea of guilty concerning the rape offence and the more beneficial plea of guilty on the sexual assault offence, We have considered the probation report and the accused difficult background.
64. We are of the view that the net sentence of twelve years for the offences of rape and sexual assault as part of a pattern of sexual offending is too low. We will not adjust each sentence by increasing each, reducing for mitigation and then imposing the sentences on a concurrent basis. Instead we consider a consecutive sentence is necessary in order to properly reflect the extent of the offending conduct.
65. Consequently, we will quash the sentences imposed and substitute a post-mitigation sentence of ten years' imprisonment on the rape offence. We are reducing this sentence in circumstances where the judge imposed a higher sentence on this offence due to the fact that she imposed the sentences on a concurrent basis. We will not intervene in the post-mitigation sentence of eight years on the sexual assault count. In arriving at those sentences, we have considered the mitigating factors. The sentences are imposed on a consecutive basis, resulting in an indicative sentence of eighteen years' imprisonment.

66. We must then adjust the sentence in light of the totality principle to ensure a proportionate sentence and to incentivise rehabilitation and in order to do so, we will suspend the final three and a half years of the sentence on terms which we set out hereunder.
67. We acknowledge that the sentence imposed by the sentencing judge on the rape offence was higher than if this were a stand-alone offence and cognisant of that fact, we have applied a greater reduction than might otherwise be appropriate for the rape offence.
68. The sentence is therefore increased from a net sentence of twelve years to one of fourteen and a half years. The rape sentence will be backdated to the 12th June 2015.
69. The final three and a half years are suspended on the accused entering into a bond before the Governor or Assistant Governor of the prison, in the sum of €100.00 to be of good behaviour for a period of five years and on the condition that he remain under probation supervision for that time and comply with all directions from that service.
70. The post release supervision order to remain as imposed by the court below and the accused is subject to the sex offenders register.
71. Liberty to re-enter in the event of any difficulty with the bond.